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To the Point!

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Deposit Account Agreements

Ninety percent of Americans have a deposit account, and banks are facing criticism about the lack of transparency in their account disclosures. The Pew Charitable Trust recently conducted a study of the checking account agreements offered by the 10 largest banks in the US and found that the median length of the terms and conditions and fee information is 111 pages and that key information is not consolidated in one document or on the banks' web pages. The CFPB began accepting consumer complaints about deposit accounts on March 1, 2012, and has broad rulemaking authority to ensure that consumers have the information they need to make informed decisions and to restrict unfair, deceptive, or abusive practices. Banks should review both the content of their consumer deposit account agreements and fee disclosures and how those terms and conditions are provided to their customers and revise them as appropriate to increase clarity for their customers.

Regulatory Enforcement Landscape Has Changed

With the arrival of the Consumer Financial Protection Bureau (CFPB), the regulatory landscape has changed. The CFPB supervises banks with over $10 billion in assets as well as other non-bank financial companies and credit unions. The CFPB must conduct simultaneous on-site examinations with a bank's prudential regulator and coordinate with state regulators, which will change the exam process for these institutions and may influence the collective scope of such exams and exam findings. The CFPB has declared its intention to focus on the enforcement of consumer financial laws and currently has hired more than 100 litigators to pursue enforcement. In addition, state Attorneys General are more active in consumer financial protection and now have the authority to enforce CFPB regulations.

Dispute Resolution

Both Regulation E (Electronic Funds Transfer) and Regulation Z (Truth in Lending) impose billing error resolution requirements on banks and prohibit the assessment of a fee when the bank's investigation reveals that a billing error has occurred. If a billing error has not occurred, banks are discouraged but not explicitly prohibited from charging a fee. Regulators have noted the requirement that a customer file a police report before the bank will pursue a billing dispute as an area of concern, especially when a smaller dollar amount is at stake. Regulators have advised that these practices may have a chilling effect on the consumer exercising his/her right to assert a billing error. In its interim report to Congress on credit card complaints, the CFPB reported that it received more complaints about billing disputes than any other issue. These complaints are subject to the new CFPB complaint process that requires a 15-day response from the bank, which will place additional burdens on the bank. In addition, a significant volume of consumer complaints in one area can lead to heightened regulatory scrutiny and can influence the scope of bank examinations. Banks should review and revise their policies for handling billing error resolution as needed, taking these factors into consideration.

Holder in Due Course Rule

In response to a request by consumer groups, the Federal Trade Commission (FTC) recently issued an advisory opinion that clarified that consumers are not limited in their right to assert claims under the Preservation of Consumer Claims and Defenses ("Holder in Due Course Rule") to circumstances where the consumer would have a right of rescission under state law or the goods sold are worthless. The FTC noted that a number of courts have misinterpreted the Statement of Basis and Purpose issued by the FTC when adopting the Holder in Due Course Rule in 1976. The Holder in Due Course Rule applies to sellers of goods to consumers who provide for or arrange financing for their customers. Such sellers are required to include a disclosure in their consumer credit contracts to prevent any future holder of the note from becoming a "holder in due course." The Holder in Due Course Rule applies to banks that are assignees of consumer credit contracts and permits a consumer to assert claims against the bank that they have against the seller, such as failure to deliver the goods purchased, the goods conforming to what was represented, or the goods having flaws. Financial institutions should take this third-party risk into consideration when acquiring consumer paper.

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