community BANKER

July/August, 2014

Welcome to the July/ August issue of COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

CREDIT CARD ADD-ON PRODUCTS

In April of this year, under its authority through the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (CFPB) ordered Bank of America and subsidiary FIA Card Services to pay a $727 million settlement for deceptively marketing credit card add-on products, along with a $20 million civil penalty to the CFPB. Federal law requires that consumers provide authorization for banks to obtain consumer credit information; the CFPB alleged that Bank of America billed customers for add-on products either before obtaining approval or without the necessary consent.

What happened: Over a two-year period, Bank of America marketed its "Credit Protection Plus" and "Credit Protection Deluxe," which were to allow cardholders to cancel some or all of their credit card debt upon the occurrence of certain circumstances such as unemployment, disability, hospitalization and death. However, the agency said more than 1.4 million card members were misled about the enrollment process (some customers were signed up even though they thought they were only agreeing to receive additional information), the coverage of the products (customers were led to believe that the first 30 days were free of charge) and the benefits of the products (such as the need to submit a request and be approved (some customers understood that the benefits were automatic). The bank will pay out $268

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million to those customers for the alleged misrepresentations.

The bank also offered "Privacy Guard," "Privacy Source" and "Privacy Assist," identity protection products that were supposed to provide monitoring to detect fraud and identity theft. According to the CFPB, for some customers the fraud and identity theft services were either only partially performed or not performed at all. In many cases Bank of America was charging fees and interest on the fees without actually providing monitoring services; because of those fees, cardholders sometimes found themselves exceeding their credit limits, thereby incurring additional fees.

For the nearly two million accounts affected by the alleged illegal practices between October 2000 and September 2011, the bank will pay $459 million to customers. The bank has stopped marketing the add-on products and agreed to hold off on any marketing of such products until a compliance plan has been submitted to the agency.

Why are we telling you this: If you offer credit card add-ons, do you know what your customer service providers or telemarketers are promising? These add-on products were mostly marketed to cardholders by telephone solicitations. For the credit protection products, the telemarketers actually lied to some customers, telling them that the first 30 days of coverage were free when charges actually were collected immediately. Only if a consumer took steps to cancel the coverage within 30 days would there be a reimbursement of previously paid charges.

The Bank of America settlement is the largest yet over credit card add-ons with federal regulators and is the biggest refund amount ordered by the CFPB. Because of the stepped-up review by regulators of credit card add-ons, some banks have decided to discontinue these products. "We have consistently warned companies about illegal practices related to credit card add-on products," said Richard Cordray, CFPB Director. "Bank of America both deceived consumers and unfairly billed consumers for services not performed. We will not tolerate such practices and will continue to be vigilant in our pursuit of companies who wrong consumers in this market." If the CFPB is being vigilant, your bank should be, too.

YOU ARE ASKING:

Q: Our customer came in and asked to add a joint owner on her solely-owned individual account. However, she does not want this person to be a signer on the account or to have any access to the funds while she is alive. The idea to add another "owner" comes from her daughter, by the way. We told her that this can be accomplished by a POD designation. Your thoughts?
A: You are correct. If that person is made a joint owner, then he or she is an owner in a "multiple party account" with all the rights to the account. Because the customer wants this person to get the money in the account upon her death, but *not* have access to the account while the owner is living, she should make a "pay on death" designation for this person. N.D.C.C.§ 30.1-31-16.

Q: We have a note that references a Security Agreement securing a business's inventory. I cannot find a Security Agreement in the file; it looks like there's a UCC filing that is being treated as a Security Agreement.
A: A Security Agreement is the agreement between the parties and is the agreement that creates the security interest. The filed UCC is how a security interest is perfected - the filed UCC form gives notice to the world that so-and-so has a security interest in the collateral. The UCC is *not* a Security Agreement. Without seeing your documents, it seems that you should look for the missing Security Agreement, or, if necessary, get one from the borrower. If you ever need to foreclose upon the collateral, that will be a key piece of paper. If someone else has a security interest on the same collateral, he may have priority because you weren't secured when you filed your UCC.

Q: We missed the midnight deadline for a check with an improper endorsement. Now what?

A: If the return is being made for an anomalous endorsement (like a check payable to Archie Andrews but endorsed by Jughead Jones - N.D.C.C. § 41-03-24(4), you can return it without any sort of affidavit by midnight of the business day following the date of presentment.

However, if the midnight deadline has already passed, as it usually has in these cases, and your bank is processing a claim that the endorsement is forged, fraudulent, unauthorized, or missing (and the payee has provided an affidavit to that effect that states payee received no benefit for the check), rather than returning the check, your bank should file a claim with the depositary bank for breach of its presentment and/or transfer warranties under the UCC (N.D.C.C. § 41-04-20/N.D.C.C. § 41-03-54 and N.D.C.C. § 41-04-19/N.D.C.C. § 41-03-53), because the depositary bank warrants that its customer received credit for the check and, if it's endorsed, that all endorsements are genuine and authorized.

Q: What sort of documentation are we required to get from a customer when he informs us of a change of address?

A: This is not controlled by federal or state regulations - it falls in the area of risk management and your bank's internal procedures. Under identity Theft Red Flags regulations, a bank is required to identify factors that might indicate identity theft and put in place appropriate procedures to resolve that risk. How you do that is generally up to your bank. Your bank might have specific documentation requirements, such as a *signed* request for change of address. (We like this.) It might also use other procedures, such as sending notices to both the old *and* the new addresses confirming the address change and thanking the customer for his business.

Q: Mom receives child support each month. She doesn't use the money for herself, but endorses the check and it is deposited into her daughter's UTMA account. Because the child support is court ordered and the check is payable to Mom, is it appropriate for Mom to deposit this into a minor's account?

A: Yes. The Uniform Transfers to Minors Act, found at N.D.C.C.Ch. 47-24.1, has no law limiting the *source* of funds that can be deposited into a UTMA account. Under N.D.C.C. § 47-24.1-11, this transfer is a valid, irrevocable transfer to the minor.

Q: Do you have any suggestions for a simple procedure we can implement as an *additional* protection from fraud involving a corporate account?

A: When your bank opens an account for a corporation, send a letter to the registered service agent listed on the documents filed with the North Dakota Secretary of State. Mention that an account has been opened in the name of the corporation, by whom, and the date it was opened. Thank the corporation for its business and note who to call if it has questions. If the account was opened fraudulently, you have alerted the proper party in time to prevent damage without suggesting that the officer who opened the account is a crook. If the account is legitimate, your letter will simply be a friendly marketing communication. As far as that goes, friendly welcoming letters are a good tool to use with new customers of all types.
