



**Impact of CFPB
Consent Orders
on the
Consumers & Lenders**

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Presented by Tom Ostenson




Impact of CFPB Consent Orders

1. CFPB Director Richard Cordray indicated he was most surprised by larger financial institutions “marketing a **product that isn't worth a whole lot to consumers**, so there is a pressure to be somewhat deceptive or even **very deceptive and misleading about how you market it** because the **benefits really aren't there for consumers.**” The Washington Post, May 22, 2013
 - “**Product**”: likely debt cancellation products, based on the Capital One Bank and Discover Bank Consent Orders (COs)
 - “**isn't worth a whole lot to consumers – benefits really aren't there for consumers**”:
 - No analysis in CFPB's COs of product pricing/loss ratios/paid benefits/product protections, and variations among financial institutions
 - No quantification by the CFPB in its COs of the number of Capital One or Discover bank customers who believed the product had little or no value

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- Debt cancellation products are loan products sold under the loan powers of the National Bank Act, and prudential financial institution regulators, not the CFPB, have primary jurisdiction over the products themselves. The CFPB has jurisdiction over the marketing and sale of debt cancellation products. Director Cordray's observations about the value of debt cancellation products to consumers is jurisdictionally inappropriate.
- Recent consumer surveys support the conclusion that a majority of consumers see value in debt cancellation/credit insurance products, and the overwhelming majority of consumers who purchase those products would purchase them again. See "Consumers and Debt Protection Products: Results of a New Consumer Survey" Federal Reserve Bulletin, Dec. 2012, Vol. 98, No. 9: Thomas A. Durkin and Gregory Elliehausen:
 - Consumers see value in the products: "Experience in 2012 confirms prior findings that the overwhelming majority [85%] of purchasers of debt protection on closed-end consumer credit consider the purchase to be a good idea." (Pages 7-8 and Table 3)
 - Buyers' opinions need to be considered: "[T]he views of [purchasers] should be considered in assessing the value of these products. It seems unreasonable to give undue weight to the views of those not using the products." (Page 8)
 - Consumers do not want their debt to burden others: "It seems likely that many consumers entering into credit arrangements may well feel that their underinsured condition leaves them and their families vulnerable to unfortunate life events." (Page 10)
 - Punish the bad actors, not the entire industry: "[I]f widespread aggressive sales are being attempted, they are not very successful." (Page 5)



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- **"very deceptive and misleading about how you market it":**
 - No quantification in CFPB's COs of Capital One or Discover customers who were allegedly deceived or misled into buying debt cancellation products
 - Unfair to assume that allegedly deceptive/misleading marketing and sales practices identified at Capital One and Discover are followed at all banks
 - A number of marketing and sales practices characterized by the CFPB in the COs as deceptive and misleading are neither, e.g.:
 - sales practices that are in accordance with procedures sanctioned by the OCC Debt Cancellation Regulation
 - selling a bundled protection product to a customer who is not eligible for 100% of the protections

2. Director Cordray has based his opinion of the entire debt cancellation industry on the limited CFPB examinations of Capital One and Discover, as well as, multiple incorrect legal and factual conclusions in its COs





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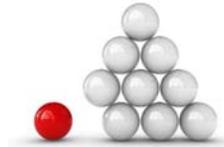
3. Violations of Consumer Protection laws should result in reasonable refunds and penalties
4. Lenders have responded to COs in one of 3 ways:
 - Cancelled debt cancellation agreements (DCAs) with all existing customers
 - American Express Bank (12/31/12)
 - Bank of America (9/1/13)
 - Capital One Bank (eff. date not announced)
 - Barclays Bank has cancelled all DCAs and offered an option to re-enroll
 - Another major bank plans to cancel all DCAs but has not announced publicly
 - Stopped all sales of DCAs to their customers
 - A major bank that has not publicly announced its action
 - Stopped all telemarketing sales of DCAs (accounts for approx. 30% of new enrollments)
 - All lenders



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- Citibank's 10K/10Q report that it has posted \$500,000,000 in reserves to cover "areas scrutinized by the CFPB" (Citibank Annual Report/10-K (Period ending December 31, 2012); SEC - Form 10-Q (September 30, 2012))
 - Lenders are not replacing DCAs with alternative credit or debt protection products
5. Projected impact on consumers in 2013¹:
 - 4,780,000 fewer consumers will enroll in a credit card-related DCA in 2013 than enrolled in 2012
 - \$201,000,000 less consumer debt will be cancelled during 2013 for 331,000 consumers than was cancelled during 2012 as benefits under the terms of DCAs due primarily to loss of life, job loss and disability

¹ Projections are based on data contained in the GAO Report to Congressional Committees on CREDIT CARDS released 3/2011 and current industry statistics.





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6. Reasons that the COs have had a 'chilling' effect on lender sales of DCAs:

- Amounts of the refunds and penalties
 - \$340,000,000 in DCA fee refunds to 5,500,000 customers
 - Implies that 100% of customers were deceived in some manner. No quantification of customers apportioned to the various alleged acts of deception
 - Difference in refund periods of 17 months (Capital One) and 47 months (Discover) is not explained
 - Incongruent with numbers of consumer complaints:
 - 245 consumer complaints re. credit card protection products reported to the FDIC, FRB, FTC, OCC and OTS collectively in 2009 (GAO Report to Congressional Committees CREDIT CARDS, 3/2011; 0.3% of credit card complaints received)
 - 1,224 consumer complaints about credit card debt protection products submitted to CFPB between 7/1/2011-2/28/2013 (p.8 of CFPB publication Consumer Response: A Snapshot of Complaints Received, 3/2013 (4% of total credit card complaints received))
 - Solution looking for a problem

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- \$94,000,000 in penalties levied by the CFPB, OCC and FDIC
 - No classification of penalty under The Administrative Procedure Act/Dodd-Frank (violation of the law, reckless violation of the law, knowing violation of the law -12 USC Section 5565(c))
 - No apportionment of penalty among the various alleged violations of consumer law
 - No detail supporting the calculation of penalties
 - "Nothing shall be construed as authorizing the imposition of exemplary or punitive damages." 12 USC Section 5565(a)(3) (Dodd-Frank Act)
- Risk of reputational damage based on a non-core lender product



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- Lender uncertainty about the applicability, legal basis and interpretation of the CO findings and remediation
 - Applicability?
 - Lenders assume if certain marketing practices and/or failures to act by Credit One and Discover are deemed by CFPB to be deceptive under the Dodd-Frank UDAP provisions, then those practices/failures to act are deceptive for all lenders
 - Lenders interpret CFPB-required remediation under COs as regulatory best practices and safe harbor
 - No language in COs or CFPB Guidance 2012-06 limits COs to Capital One and Discover
 - Legal basis?
 - No citation of specific consumer protection laws were violated other than UDAP
 - No analysis of findings of deception or remediation activities under existing regulations, e.g. TILA, Regulation Z, OCC Debt Cancellation Regulation or the Telemarketing Sales Rule
 - There are apparent contradictions with existing law, as well as, the addition of requirements to existing law

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as of 6/4/13	TM Script: Eligibility	TM Script: Timing of Enrollment	POE	Billing Statement	Benefit Denial Procedure
Bulletin 2012-06	Telemarketers and COs are to accurately state terms and conditions including material eligibility criteria.	A consumer's affirmative consent to purchase must be preceded by information about the terms and conditions.			
CapOne Consent Order	Before selling the product to the customer, the sales agent should obtain verbal confirmation from the customer that they are not disabled or unemployed before charging a DCA fee.	(1) Confirm that the customer is buying the product and the date; (2) Explain how and when the customer is going to be charged for the product (e.g., on their credit card account the same day as the purchase and on the 23rd of every month thereafter) (3) An explanation of how the customer may cancel and how the customer may obtain a refund.	If customer indicates that they did not purchase a DCA, Bank must provide a POE. If a bank to produce a customer POE is evidence that the customer did not purchase the product and/or intended a full refund of DCA fees.	First billing statement on which a DCA fee appears is to include a message in 12 point font that highlights the charge, and notifies customer of right to cancel.	
Discover Consent Order	TM script must include explanation of eligibility restrictions including employment/presenting medical conditions that may prevent a benefit.	It is a misrepresentation to script that a customer (1) is enrolled in a program before a consumer has reviewed the DCA price and material terms/conditions or, (2) is not required to pay a DCA fee until after receipt of the fulfillment kit when the customer's account is charged a DCA fee on the date of the telephone sale.	(1) Provide call recording to requesting customer; (2) Refund cannot/Full refund if cannot produce POE	Highlight DCA fees on first 3 billing statements following telephone purchase.	Can Benefit Denial be Affirmation? (1) customer must acknowledge that the DCA is optional and voluntary, and (2) customer must affirmatively request or consent to remain enrolled.
Billing Law/Issue/Comments	(1) Bulletin: (a) Eligibility screening is not required under the OCC DC Reg. disclosure requirements for telephone sales, OCC DC Reg. 37.703 and to Short-Term Disclosures permit TM scripting that directs a customer to the Terms & Conditions that are included in the fulfillment kit. (b) Disclosures to eliminate the disclosure option under the OCC DC Long-Form to refer a customer to the eligibility requirements in the DCA is the fulfillment kit. (c) What is the CFPB's definition of "material eligibility criteria"? (d) Is it sufficient to inform a consumer that "if you are presently unemployed or disabled, you would not be eligible for any benefit that is based upon that current unemployment or disability" or similar wording? (2) COs: (a) There is no legislative support for a CFPB requirement that a customer be eligible for all protections as a prerequisite to enrollment in a bundled product. (b) Pricing is reduced by paying high and low risk customers. (c) A customer who is ineligible at enrollment for a certain protection may become eligible for that protection post-enrollment. (d) CapOne COs eligibility restrictions/eligibility misrepresented that there were no eligibility requirements. CFPB directs CapOne to assess a customer's eligibility, a non-equivalent to requiring that CapOne make a customer aware that there are eligibility requirements per the OCC DC Reg. (e) Is this a disclosure requirement or a prohibition against enrolling a customer?	(1) Bulletin: (a) CFPB should identify the info. from terms and conditions that most precede an affirmative consent. (b) OCC DC Reg. requires permits short form disclosures via telephone sale as prerequisite to sale. (37.86)(3); 37.703(2) COs: (a) Disclose to contrast the historic and current OCC 3-step process of providing (1) short- and long-form disclosures that offer a customer the opportunity to provide conditional consumer affirmative consent and set up of DCA fee on the account of purchasing product, and (3) provision of the Terms & Conditions via fulfillment and a free look period during which a customer may cancel enrollment and receive a full credit for DCA fees. (b) CapOne CO creates a requirement to provide the customer the toll-free number for cancellation, and disclosure of the length of the free-look period.	(a) Equally, an extension of anti-predatory law/anti-fraud provisions under Dodd-Frank Section 1086(a)(1)(B) and FTC Act Section 5. (b) However, 12 CFR Section 1026.15(b)(1) requires a card customer to notify the card issuer of a billing error/abuse within 60 days of receipt of a billing statement. (c) A bank has borne the financial risk of a substitution benefit request for that customer for whom it cannot locate a POE. (d) The requirement of a full refund for a customer assumes a wrongful enrollment by the lender when that may not be the case.	(a) There is no such requirement in the OCC DC Reg. or Reg. Z. (b) CapOne CO requires DCA fee highlight on first billing statement. Discover CO requires no message but highlighting the fee on 3 billing statements; why is there a difference? (c) This presents technical process issues plus expense. (d) Not aware of any other products/services that have similar requirements? (e) Banks not required to highlight fees.	(a) There is no such requirement under current law; (b) Encourages customer cancellation at a time when a customer may be eligible for other benefits; (c) Not aware of any other products/services that have a similar requirement.

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- Recommendations for making debt cancellation/credit protection products more accessible to consumers:
 - CFPB and prudential regulators should provide clarity around a compliant sale of a DCA, preferably through the creation of an interagency DCA sales regulation
 - CFPB should issue a Bulletin/Guidance that expressly limits the findings and remediation of the COs to Capital One and Discover
 - CFPB should include citation to legal authorities, analysis under existing law and refund/penalty calculations in future COs
 - CFPB should follow the procedures required by The Administrative Procedure Act for creating new regulations, particularly involving current and future CFPB definitions of deceptive practices



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*"So far you've seen institutions almost in a reflexive defensiveness — it's as though the entire industry decides to get into the fetal position because things are changing. That's not smart," says Raj Date, the former deputy director of the Consumer Financial Protection Bureau and founder of the consumer banking advisory firm Fenway Summer LLC. "Anything that changes the status quo is an opportunity, and **someone's going to see that opportunity and drive a truck through it.**"*

