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CFPB Sues Bank Over Overdraft Sales Pitch

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The CFPB's concern with incentives and overdrafts continues and has resulted in a lawsuit filed against a Minnesota-based TCF National Bank. In the lawsuit, the CFPB alleges that TCF National Bank violated the UDAAP provisions of the Consumer Financial Protection Act and the Electronic Funds Transfers Act ("EFTA"). In 2010, EFTA was amended to require consumers "opt in" to overdraft coverage for ATM and one-time debit card transactions.

The complaint which appears to be based upon statements taken from former employees (rather than from customer complaints) is filed in the United States District Court for the District of Minnesota. *See generally, Consumer Financial Protection Bureau v. TCF National Bank,* 17-cv-00166, Dkt No. 1 (D. Minn. Jan. 19, 2017). According to the complaint, TCF utilized consumer testing to determine the best strategy for gaining maximum opt-in consent from account holders. The bank then designed its opt-in program in a manner that did not provide consumers with the ability to provide informed consent. According to the complaint, employees were provided scripts and strategies which were designed to achieve opt-in by the customer. According to the CFPB, TCF's explanation was so short that "consumers tended not to pay attention to the decision" and were left with the impression that opting in was mandatory. Moreover, the CFPB alleged that the script characterized opting in as a choice to allow the Bank to provide a benefit. The complaint further alleges that the bank incentivized its employees through 2010 by offering "substantial financial incentives" of up to $7,000.00/year for managers of large branches for achieving performance goals related to opt-ins. After incentives were phased out, the CFPB alleges the bank set performance goals which required branch employees to maintain an opt-in rate of 80% or higher on all new accounts they opened. The complaint additionally alleges that TCF's opt-in rates were significantly higher than those of other similarly situated banks.

TCF's press release indicates that it intends to defend the lawsuit and "rejects the claims made by the CFPB". "We believe we have strong, principled defenses to the CFPB's complaint. We also believe the CFPB's claims are based on data not representative of TCF's customers and mischaracterize our opt-in practices and disclosures, which we believe clearly informed customers about their choice before, during, and after their opt-in decision." TCF further asserts that the complaint is contradicted by two key facts. "First, TCF customers who opened accounts online between 2010 and 2016, with no face-to-face interaction with TCF employees, opted into TCF's overdraft protection at a consistent rate of over 60%. Second, there were virtually no complaints from customers stating that they did not understand they had opted into overdraft protection. From 2010 to 2015, there were a total of only 341 complaints from our 2.6 million customers related to their decision to opt-in."

The law suit bears watching for several reasons. First, it raises the issue as to what constitutes informed consent. Regulation E requires that financial institutions provide consumers with a written statutory notice which contains specific disclosures and that consumers be given a reasonable opportunity to opt in. *See* 12 CFR 1005.17. The Complaint does not appear to take issue with the form or content of the notice but rather takes issue with the sales pitch. Secondly, the complaint once again takes up the issue of the relationship between consumer protection and sales, focusing on incentivizing employees and the establishment of aggressive performance goals. Thirdly, it appears the CFPB takes issue with the fact TCF was obtaining a 66% opt-in rate – "a rate more than triple the average opt-in rate at other banks." *CFPB Prepared Remarks of Richard Cordray* (January 19, 2017). This is likely one of the reasons the CFPB has focused on TCF's opt-in procedures.Financial institutions should continue to follow this matter and examine their own opt-in provisions as this has been a point of discussion in multiple CFPB enforcement actions and reports over the past two years. Additionally, the complaint re-emphasizes the CFPB's concerns with employee incentives and the importance of ensuring performance goals are

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