

# Non-Prime Times

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A red microscope is the central focus of the cover. It is a classic compound microscope with a red body and black accents. The eyepiece is at the top left, and the objective lenses are in the center. The stage is below the lenses, and the base is at the bottom. The microscope is resting on a light-colored wooden surface. The background is a dark, solid color.

## UNDER THE MICROSCOPE

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Legal Committee Chair



## Precedent Setting: The CFPB Takes Action

A few weeks ago, I was in my hometown to attend a high school class reunion. I won't tell you how many years it's been since I graduated from high school, but suffice it to say the DJ spun a lot of '80s hair band music that night. We had a very small graduating class, and about a third showed up for the reunion.

After the initial excitement of catching up with classmates—some I hadn't seen in a while and others I kept in contact with through Facebook—I noticed that while some of us had gained weight or lost hair since the prior reunion, some things had not changed. For example, class clown Rodney—the fun-loving, outgoing, gregarious one—was still the life of the party; my side hurt from laughing so much. Another classmate Lynette—the shy and quiet girl who hardly ever spoke in class—was still shy and hardly said a word at our reunion. Even though I hadn't seen some of my classmates since graduating, I knew who these people were because we had history together. I started kindergarten with a lot of my classmates and most of us were thick-as-thieves growing up, playing t-ball together, little league baseball, and then finally high school sports.

We had learned together, competed together and grew together. I knew what to expect of certain classmates because of this history, this precedent that had been set for the years we'd known each other.

But when I reflect on the Consumer Financial Protection Bureau (CFPB), I think that's what is so concerning—we don't have any history together; it's still a relatively new agency, and we really don't have any precedent

to view and learn from to predict future actions.

Well, that all changed recently when the CFPB announced its first public enforcement action—a consent order against Capital One Bank to the tune of \$210 million in consumer reimbursements and fines. The CFPB and the Office of the Comptroller of Currency alleged the bank committed certain violations of federal consumer protection laws for deceptive marketing of payment protection and credit monitoring products in connection with credit cards.

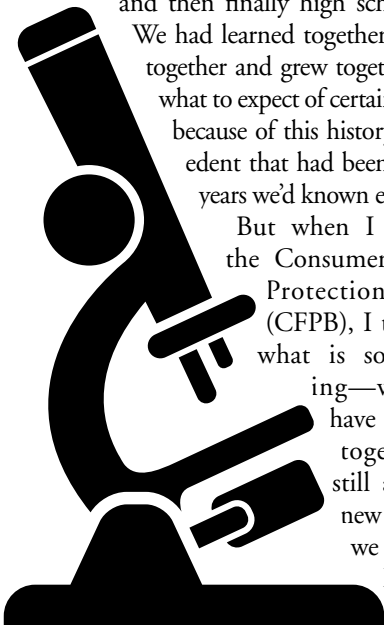
According to the consent order, the bank's third-party service provider engaged in improper sales practices. The consent order called for civil money penalties of \$25 million to be deposited in the CFPB's civil penalty fund—essentially an enforcement war chest—and millions in restitution to consumers. The consent order also required the bank to develop a compliance plan that would (1) address the manner in which marketing and solicitation of the products may occur; (2) develop scripts that clearly and prominently explain and accurately assess a customer's eligibility for the products; (3) provide certain disclosures (i.e., charges for the product and cancellation policy); (4) mail a disclosure within three business days after the customer purchases the product; and (5) submit periodic statements and disclosures to the CFPB for review prior to implementation.

The CFPB also issued a new compliance bulletin, CFPB Bulletin 2012-06, which addresses the subject of "Marketing of Credit Card Add-on Products." Though the bulletin is directed at the marketing of credit card add-on products, I believe the bulletin can—and should—be read more broadly, as its guidance can apply to the marketing of all consumer financial products and services, including those marketed in auto finance transactions, such as GAP and credit insurance. The bulletin provides the following CFPB "expectations" or guidelines for the

marketing of certain products:

**Institutions supervised by the CFPB must take steps to ensure they market and sell products [or services] in a manner that limits the potential for statutory or regulatory violations and related consumer harm. These steps should include, but are not limited to, ensuring that:**

- Marketing materials, including direct mail promotions, telemarketing scripts, Internet and print ads, radio recordings, and television commercials, reflect the actual terms and conditions of [the product or service] and are not deceptive or misleading to consumers;
- Employee incentive or compensation programs tied to the sale and marketing of [consumer financial products or services] require adherence to institution-specific program guidelines and do not create incentives for employees to provide inaccurate information about the products [or services];
- Scripts and manuals used by the institution's telemarketing and customer service centers:
  - Direct the telemarketers and customer service representatives to accurately state the terms and conditions of the various products [or services], including material limitations on eligibility for benefits;
  - Prohibit enrolling consumers in programs without clear affirmative consent to purchase the product [or service], obtained after the consumer has been informed of the terms and conditions;
  - Provide clear guidance as to the wording and appropriate use of rebuttal language and any limits on the number of times that the telemarketer or customer service representative may attempt to rebut the consumer's request for additional information or to decline the product [or service]; and
  - Where applicable, make clear to consumers that the purchase of the product [or service] is not required as a condition of obtaining credit, unless there is such a requirement.
- To the maximum extent practicable, telemarketers and customer service representatives





do not deviate from approved scripts;

- Applicants are not required on a prohibited basis to purchase [products or services] as a condition of obtaining credit; and
- Cancellation requests are handled in a manner that is consistent with the product's actual terms and conditions and that does not mislead the consumer.

**In addition, institutions that offer products [or services] should employ compliance management programs that include:**

- Written policies and procedures governing the marketing of products [or services] designed to ensure compliance with prohibitions against deceptive acts and practices, TILA, ECOA and any applicable federal and state consumer financial protection laws and regulations;
- A system of periodic quality assurance reviews, the scope of which includes, but is not limited to, reviews of training materials and scripts, as well as real-time monitoring and recording of telemarketing and customer service calls in their entirety, consistent with applicable laws;
- Independent audits of [the product or service marketing programs], which address the items listed above and consider whether these programs present elevated risk of harming consumers;
- Oversight of any affiliates or third-party service providers that perform marketing or other functions related to [the products or services] so that these third-parties are held to the same standard, including audits, quality assurance reviews, training, and compensation structure;
- An appropriate channel for receiving, investigating, and properly resolving consumer complaints related to [the products or services]; and
- A comprehensive training program for employees involved in the marketing, sale and operation of [the products or services].

This enforcement action and consent order against the bank and the bulletin show that the CFPB is serious about the responsibilities banks and consumer finance companies face for ensuring consumers aren't harmed by consumer financial products and services being marketed on their behalf by third-party service providers. The bureau made some history and set precedent with the enforcement action and the bulletin. These guidelines in the bulletin should be reviewed as possible standards the bureau will likely try and apply to automotive finance transactions.

But the CFPB wasn't finished there in making precedent. On the same day the Capital One Bank settlement was announced, the CFPB quietly filed its first ever civil enforcement action in federal court against a Los Angeles law firm. The complaint alleges that lawyer Chance Gordon, his law firm, another individual and other corporations: (i) charged consumers advance fees ranging from \$2,500 to \$4,500 for mortgage relief services in violation of federal law, (ii) made false statements about the consumers' ability to obtain relief from foreclosures, (iii) misrepresented their affiliation with government entities and (iv) failed to provide consumers with certain required disclosures. The complaint was filed under seal, which means that no one but the bureau and the court knew it had been filed; not even the defendants.

The bureau sought and obtained the same day the complaint was filed a temporary restraining order (TRO) freezing the defendants' assets and appointing a temporary receiver. The strategy of filing actions under seal in federal court, seeking a TRO, an order freezing assets and

appointing a temporary receiver is the same strategy that the Federal Trade Commission has used in many instances. This action was in stark contrast to the way the Capital One action was handled, and should be seen as a huge wake-up call for the approach the CFPB will take to bring enforcement actions. The CFPB is making history and setting precedent all right; I believe we can forget about this being a "kinder, gentler" agency that would be more transparent.

The NAF Legal Committee will continue to keep you informed about legal and regulatory changes of interest to the sub-prime auto finance industry.

*Eric L. Johnson is chair of the legal committee and a shareholder with Phillips Murrah P.C. in Oklahoma City, where he practices automotive finance law, banking and consumer financial services law. Prior to pursuing his legal career, he spent many years working in various departments for his family's car dealership. This article is provided for informational purposes and is not intended nor should it be taken as legal advice.*

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