

How Do the CFPB Orders Affect Providers?

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Shedding light on the CFPB orders and their implications for F&I providers

With the issuance of consent orders against U.S. Bank and Dealer's Financial Services LLC (DFS), the Consumer Financial Protection Bureau (CFPB) targeted deceptive advertising and marketing practices directed toward military service members in connection with the financing of auto loans and add-on products such as GAP and Vehicle Service Contracts (VSC). The orders extended the CFPB's reach to a third party administrator, and determined that U.S. Bank was responsible for the administrator's marketing materials. The CFPB also found that the commonly used disclaimer "see your Vehicle Service Contract for full coverages and exclusions" to be inadequate. The CFPB required DFS and U.S. Bank to make restitution of \$3.3 million and \$3.2 million respectively, none of which could be funded by any insurance coverage U.S. Bank or DFS might have.



Were the circumstances before the CFPB unique to the military loan program, or do providers and administrators need to be concerned about further regulation by the CFPB? Or even by state regulatory agencies, which are often influenced by the rulings of their federal counterparts? While the answer is uncertain, analysis of the U.S. Bank and DFS consent orders does provide some guidance as to the issues the industry may want to proactively address in order to assure that a balanced approach is followed by the CFPB.

1. What was the nature of the program that led the CFPB to bring an administrative proceeding against U.S. Bank and DFS?

U.S. Bank and DFS jointly developed an automobile loan program directed toward members of the military, known as the Military Installment Loans and Educational Services (MILES) Program. U.S. Bank was the primary lender. DFS recruited auto dealers for the MILES Program, maintained the MILES Web site, provided telemarketing, created promotional materials and gathered and reviewed credit applications before sending the applications to U.S. Bank for final approval. DFS, however, did not provide financing. U.S. Bank had the contractual right to review all marketing materials, but did not regularly validate them.

The MILES Program required the dealer to offer GAP and a VSC to service members who sought loans. Only GAP and VSCs that were approved under the MILES Program were offered and financed. The MILES Program required service members to repay their loans via a military pay allotment, and warned service members that if they discontinued their allotments while in active service, they would be in default on their loans.

2. What was the basis of the CFPB to assert its jurisdiction over U.S. Bank and DFS?

As a provider of consumer loans, U.S. Bank was obviously subject to the CFPB's jurisdiction. But DFS did not extend credit, so how did the CFPB assert its power over DFS? The answer is that the Consumer Financial Protection Act (CFPA) covers service providers. Service providers are defined as a person or entity that provides a material service to a person or entity covered by the CFPA (i.e. U.S. Bank), such as participating in the design, operation or maintenance of a consumer financial product. In particular, the CFPB found that by developing the MILES Program, recruiting and training the MILES dealers, operating the MILES Web site, and being responsible for marketing and selling the MILES Program loans and add-on products, DFS qualified as a service provider subject to the CFPA and the CFPB's jurisdiction.

IMPORTANT NOTE! A third party administrator of add-on products may become subject to regulation by the CFPB if the administrator participates in the design or development of a financing program that includes the administrator's add-on products, and then undertakes to market that financing program to dealers. The CFPB's jurisdiction, however, might not extend to a third party administrator who simply supplies its add-on products to a loan provider, so long as the third party administrator is not involved in the marketing or administration of the loan program. DFS provided dealers with blank U.S. Bank installment notes and Retail Installment Contracts, and also gathered and reviewed credit applications before sending them to U.S. Bank. On the other hand, the CFPB could find that the mere supplying of an add-on product constitutes the provision of a "material service," thereby subjecting the provider to the CFPB's jurisdiction.

3. What actions did the CFPB consider to be deceptive and in violation of the CFPA?

The CFPB concluded that U.S. Bank failed to accurately disclose the finance charge, annual percentage rate, payment schedule and total payment for MILES loans, particularly due to the way the military pay allotment operated. With regard to the add-on products, the CFPB found the following marketing to be deceptive:

- The VSC brochure contained a statement that purchasing a contract would add "just a few dollars to your monthly payment," but the average monthly cost turned out to be more than \$40.
- In telemarketing calls, off-script comments were made that GAP coverage would add "just a few cents to your car payment," or that it would cost "only a few pennies a day," when the cost was more than 40 cents a day.
- The VSC brochure listed covered parts, but did not "prominently disclose" parts excluded from coverage. As an example, the CFPB pointed out that the brochure listed "brakes" as covered, but did not disclose that brake pads and rotors are excluded. In addition, the CFPB noted that the brochure listed "transmission," "suspension," "electrical" and "cooling" as covered, even though the service contract did not, in fact, cover manual clutches, shock absorbers, ignition coils or radiator hoses.

IMPORTANT NOTE! The brochure did state that comprehensive coverage covers “most” major components of the vehicle, and “almost” every part of the vehicle. Moreover, the brochure stated in six-point-font at the bottom of the brochure that “For detailed coverage information, please refer to the Vehicle Service Contract for full coverages and exclusions.” None of this language was sufficient to keep CFPB from concluding that the brochure was deceptive. In fact, the CFPB described the six-point-font statement as a “vague footnote.”

Short of listing every exclusion, it is unclear as to what language the CFPB would find acceptable so as to make the brochure not misleading. The CFPB did state that a disclosure is clear and prominent if it is “of a type, size and location sufficiently noticeable for an ordinary consumer to read and comprehend, in print that contrasts with the background on which it appears.” In multipage documents, the disclosure must appear on the cover or first page. Both U.S. Bank and DFS were required by the CFPB to submit compliance plans correcting the items the CFPB deemed misleading, although it appears U.S. Bank is withdrawing from the MILES Program. The compliance plan accepted by the CFPB should provide further clarification as to acceptable language. In the meantime, the industry may wish to have its voice heard in order to assure a realistic approach is taken by the CFPB.

4. Was U.S. Bank responsible for the marketing materials developed by DFS?

Yes. The CFPB concluded that “by virtue of the overall structure and operation of the MILES Program,” U.S. Bank was responsible for the statements in DFS’ marketing materials. In reaching this conclusion the CFPB found that (a) the bank had the contractual right to review all marketing and advertising materials for the MILES Program, but “it did not regularly validate statements made in the DFS-provided materials;” and (b) since U.S. Bank would finance only products approved under the MILES Program, it should be responsible for what is said about the add-on products selected.

IMPORTANT NOTE! A significant issue is whether lenders would be required to review the marketing materials of any add-on products they finance. However, it appears from the remedial action the CFPB directed U.S. Bank to take that a lender would be required to review marketing and advertising materials only of those products that the lender selects and requires to be part of a financing program. Nonetheless, it remains an open question as to whether the CFPB might try to extend its reach to any add-on products financed by lenders. The result of that extension would lead to lenders requiring providers to submit marketing materials to the lender for approval.

5. What remedial actions did the CFPB require U.S. Bank and DFS to take?

- U.S. Bank was ordered to pay \$3.2 million.
- DFS was ordered to pay \$3.3 million.
- U.S. Bank and DFS are to develop compliance plans to ensure compliance with all applicable federal consumer financial laws.
- DFS is required to hire an independent consultant to develop its compliance plan.
- DFS is to develop a disclosure form to be given at the time of purchase of an add-on product that: states the total cash price; states that add-on products are optional, are not required to be financed and that a difference in cost exists between paying cash and financing; states that the product is cancellable; and clearly and conspicuously advises of the existence and the nature of exclusions.

- U.S. Bank and DFS are required to submit compliance progress reports to the CFPB.
- For at least 5 years, U.S. Bank and DFS are to keep copies of all sale scripts, training materials, Web site and other marketing materials.
- h. Neither U.S. Bank nor DFS may obtain any reimbursement or indemnification from any insurance policy.

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