

Developments in Deposit Advance/Overdraft Regulation

American Conference Institute's
8th National Forum on Prepaid Card Compliance

October 3-4, 2013

Omni San Francisco Hotel

Andrew J. Lorentz, Partner



“Small dollar credit”



Payday loans etc.

Overdraft

Deposit Advance

FDIC small-dollar loan pilot

Deposit Advance Products



Open-end credit

Flat fee (\$10 per \$100)

Eligibility (deposit account and direct deposit) but not underwritten

Repayment through next direct deposit (NLT 35 days after advance)

FDIC Proposed Guidance on Deposit Advance (4/25/13) (OCC same day)



“ Deposit advance products present supervisory risks”



- “ [H]igh fees,...short lump sum repayment terms,...inadequate attention to...ability to repay”
- “ ‘ [C]ooling off’ periods....easily avoided and ineffective in preventing repeated usage”



Safety and Soundness Concerns

- Credit Risk:
- Blemished credit
- High cost
- Numerous and repeated extensions of credit
- No consideration of income or financial capacity – U/W focuses on amount of deposit
- Re-aging, deferrals, cloud portfolio quality

FDIC Supervisory Expectations



Underwriting and Credit Administration Guidance

- Assess ability to repay while meeting other obligations
- Avoid “churning” and prolonged use
- U/W prior to account opening and ongoing



Underwriting and Credit Administration Guidance – Factors

- No less than 6 mos with bank
- Delinquent/adverse credit ineligible
- Analyze financial capacity including income
 - Inflows/outflows
 - Consider net surplus at end of six months
 - After analysis –decide if installment preferable

FDIC Supervisory Expectations



Underwriting and Credit Administration Guidance – Factors (cont'd)

- No more than 1 loan/month every other month
- No increase in line w/o U/W and request by borrower
- Re-evaluate suitability every six months

Comments on Deposit Advance Guidance



General Sentiment

For: Protection for consumers, limits "roll-over," stricter underwriting and credit administration, transparency

Notable commenters - Pew Charitable Trusts, AARP, NAACP, Elizabeth Warren (D-MA)

Against: Limits options, drives small dollar lending market underground, eliminates choice, meeting consumer needs

Notable commenters - American Bankers' Association, Regions Bank, KY & AR attorneys general, U.S. Chamber of Commerce Center for Capital Markets Competitiveness

CFPB Proposed Rulemaking (5/2012)



General Purpose Reloadable (GPR)
Prepaid ANPR



“The Bureau seeks public input on the costs, benefits, and consumer protection issues related to any credit features that may be offered by GPR cards.”

CFPB White Paper on Payday Loans and Deposit Advance Products (4/24/2013)



Year-long inquiry into short-term small dollar loans; data-driven analysis of use and outcomes



Conclusions Key for short-term small dollar loans to work as intended is sufficient cash flow to retire the debt in a short period of time

Products may become harmful for consumers when used to make up for chronic cash flow shortages

Primary focus is on "sustained use"

" [F]urther attention is warranted to protect consumers....[T]he CFPB expects to use its authorities to provide such protections."

Federal Reserve Statement on Deposit Advance (4/25/13)



“ [E]ncourages state member banks to respond to their customers’ small-dollar credit needs”



- Refers to CFPB report – *but not* FDIC/OCC guidance – No supervisory concerns?
- Focus on consumer protection: usual enumerated consumer protection laws and UDAAP

CFPB White Paper on Overdraft Programs (6/2013)



Year-long inquiry into the overdraft programs for consumer checking accounts



Conclusions Opt-in overdraft policy (Federal Reserve Rule, 2010) resulted in drastically reduced costs for heaviest overdraft users

Overdraft-related fees account for majority of checking account fee revenue

Large variance among institutions' insufficient fund rates, overdraft fees, involuntary account closures, opt-in rates, and rate of linked accounts for overdraft protection

“Nothing in this report implies that banks and credit unions should be precluded from offering overdraft coverage...The CFPB will continue its study [and] assess whether further action is warranted.”



Oral Statement of Mark Pearce, Director, Division of Depositor and Consumer Protection, FDIC:

- It is possible for banks to make small dollar loans that do not pose unnecessary risks for banks and customers
- In 2009, FDIC ran small-dollar pilot lending program with 28 institutions
 - \$2,500 or less, 90-days or longer, streamlined underwriting, APR 36% or less
 - 34,400 loans of approx \$40MM – Performance of loans was in line with other unsecured consumer credit products

How about prepaid?



Pricing for deterrence - or risk?

Underwriting - at all? Better?

What alternatives for consumers?

Applicability to prepaid?

Suitability for prepaid?





Andrew J. Lorentz, Partner

Davis Wright Tremaine LLP

Washington, D.C.

202.973.4232

andrewlorentz@dwt.com

www.paymentlawadvisor.com

Disclaimer



This presentation is a publication of Davis Wright Tremaine LLP. Our purpose in making this presentation is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Attorney advertising. Prior results do not guarantee a similar outcome.

Davis Wright Tremaine, the D logo, and Defining Success Together are registered trademarks of Davis Wright Tremaine LLP.

© 2013 Davis Wright Tremaine LLP