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Massachusetts Junk Fee Regulation Presents Challenges to Advertising of Bank Deposit Products

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In early March, nearly a year and a half after it was initially proposed, the Massachusetts Attorney General's Office finalized the Commonwealth's "junk fee" regulation (the "Final Rule") while simultaneously issuing a business guidance document (the "Guidance Document") that provides interpretive gloss to the Final Rule. The Final Rule eases some of the compliance challenges presented by its initial version. However, as you more carefully consider the scope and requirements of the Final Rule, some significant compliance challenges remain. This article discusses one such challenge.

Before diving in, we should give credit where its due and note that several questions raised by the proposed version are answered by the Final Rule in a helpful way. The first involves its scope. While the proposed version was unclear about whether it applied to the advertisement and sale of business or commercial products, the Final Rule clarifies that it does not. The Final Rule expressly states that it is designed to protect consumers who purchase, rent, or lease "products" (defined to include both tangible and intangible goods and services) that will be used for personal, family or household use. So, a transaction involving a sole proprietor obtaining a product for business or commercial use is outside the scope of the Final Rule. For the financial services sector, the Final Rule is further limited by its exclusion of any advertisement, sale or renewal of credit products by a creditor that complies with the requirements of CFPB Regulation Z or its Massachusetts counterpart.

However, financial services companies offer many products and services in addition to consumer credit. Because the Final Rule defines the term "product" broadly to include "services," absent further clarification a bank deposit account is presumably a "product" and thus covered by the Final Rule. With that in mind, a juxtaposition of the federal advertising law requirements applicable to deposit accounts and the requirements of the Final Rule will illustrate some challenges that remain.

We will start by selecting a ubiquitous form of deposit account - the lowly checking account. Banks of all sizes offer multiple types of checking accounts, each with different features and available for different costs. Some may be advertised as "free" because they require no maintenance and activity fees. Conversely, others impose a monthly fee for the consumer to maintain the account. Banks are free to include or exclude the amount of such monthly fees in their checking account advertisements.

Because banks often offer multiple types of checking accounts, it has become a common practice to present them side-by-side on a web page, in print advertisements, or in branch "take one" brochures. These advertisements include a summary of each account's features, often with a disclosure of the monthly fee required to maintain the account. This approach is akin to a restaurant menu - here is what we have to offer, and here is what it will cost. It is an efficient and effective way to provide consumers with basic purchasing information in an easy-to-understand format.

Under federal law, deposit account advertisements (including checking accounts) are governed by Regulation DD, which implements the Truth in Savings Act. Reg DD's advertising rules require the inclusion of certain information ("triggered disclosures") if the advertisement includes a "trigger term." There are several types of trigger terms: disclosure of an account's annual percentage yield (or "APY"), discussion of a "bonus" offered with the account, and the promotion of the bank's payment of overdrafts. A disclosure of the "cost" of the deposit account is not one of them.

For the sake of simplicity, we will focus on the most common trigger term - the inclusion of an APY in the marketing materials. Reg DD defines the APY as the effective rate of return a consumer may earn on that account given the rate of interest paid and frequency of compounding over the course of a year. So, if the lure of the advertisement is the amount the consumer might "earn" on the account, Reg DD requires that the consumer be informed of some potential pitfalls that "come with" that potential return. These triggered disclosures include (among other things) a statement that account fees might reduce the consumer's expected return on the account.

So, if a checking account does not earn interest (and many do not) it would not have an APY. And if no other Reg DD trigger terms are present in the advertisement, a bank can include the monthly maintenance fee "cost" of the deposit account without triggering additional disclosures under Reg DD. The Final Rule takes a different approach.

Under the Final Rule it will be a UDAP violation to misrepresent or fail to clearly and conspicuously disclose:

- The "total price" of the product when its price is initially presented or any subsequent presentation of its price;

- Both (a) the nature, purpose, and amount of any fees, charges, or expenses imposed due to the purchase of the product and (b) to the extent any of these fees, charges or expenses are optional to the consumer or waivable by the seller the fact that such amounts are optional or waivable along with information about how they may be avoided;

- At the "final presentation" of the product's price, (a) the final transaction amount (inclusive of the total price of all products purchased and any applicable shipping and government charges) must be presented more prominently than any other pricing information, (b) the nature, purpose and amount of any fees, charges, or other expenses imposed due to the purchase of the product and (c) if any fees are optional to the consumer or waivable by the seller, this fact along information on

how to avoid them.

The term "total price" is defined in the Final Rule to mean the "maximum price a consumer must pay for a Product, inclusive of all fees, charges, or other expenses." It is essentially an all-in price.

With those requirements in mind, we return to our hypothetical of a bank advertising several checking products in side by side fashion, with the monthly fee for each disclosed as part of the comparison. The monthly fee is the "price" for the checking account "product." The inclusion of this price will then trigger the need to disclose the "total price" of the product. From there a chain of additional disclosures is triggered. The end result of including a single term - the monthly fee - appears to require a bank to disclose not only the "total price" for the account, but also any fees, charges, and other expenses imposed on the account, and whether they are optional or waivable. This "one thing leads to another" (with apologies to The Fixx) series of disclosures start to look and sound like the bank's entire deposit account fee schedule.

If that is so, the problem next becomes how to provide these additional disclosures in a compliant manner. Banks often charge a wide variety of fees in connection with checking accounts (stop payment fees, return deposited item fees, overdraft fees, statement copy fees to name just a few). How many of these must be included in a print advertisement - such as a newspaper - to comply? And even in media where a bank has sufficient time and space to provide a longer disclosure, challenges remain. For example, for a disclosure to be "clear and conspicuous" in an online advertisement the Final Rule says the disclosure must be "unavoidable." Placement of a raft of fee schedule disclosures behind a link the consumer is not required to open or "below the fold" in a web advertisement will not meet this standard.

Compounding this problem is that, like the proposed version, the Final Rule says its advertising and sales requirements apply to any solicitation that is targeted to or results in a sale in Massachusetts. The term "targeted to" is defined to mean that the advertisement is "[e]mployed to induce consumers in Massachusetts to enter into a Sale, regardless of whether a Sale is completed." It is a given that the goal of any advertisement is to encourage its audience to make a purchase. But how does one construe whether an advertisement is specifically aimed at Massachusetts consumers? Some cases are easy. An advertisement in a print edition of *The Boston Globe*, for example. But what about an online advertisement that can be viewed by anyone, anywhere. If a bank located in Hawai'i issues a Reg DD compliant advertisement for a checking product that includes the monthly fee, does it violate the Final Rule if it does not include the additional pricing disclosures? Even if such a bank has never opened a deposit account for a Massachusetts resident, and does not intend to do so now?

The policy of the Final Rule is clear. The marketplace should be rid of surprise fees that are "dripped" into consumer transactions at the last minute, often after a long back-and-forth has occurred between the buyer and the seller regarding the product and its options. Perhaps the best example is the consumer who desires concert tickets. There are options to these tickets - where the seat will be located, whether the ticket come

with parking, does the purchaser desire to have a "meet and greet" with the act, and so on. Once the consumer has endured the selection process and finally reaches the point of check out, only then do certain required but previously undisclosed fees and charges arise. Often attrition prevails and the consumer agrees to the additional, late-arriving fees because of the time sunk into the purchase process.

But checking accounts are not concert tickets, and the manner in which they are commonly advertised is generally not iterative with pricing information doled out during a sales journey. There is a presentation of the account's features and price, and the consumer makes his/her decision to open the account based on that information - nothing more. While checking account advertisements were likely not the impetus for this regulation, its requirements apply to this type of sale, and the application is messy. Hopefully, the Massachusetts Attorney General will consider additional updates to the Guidance Document that will provide further clarification and perhaps regulatory relief to scenarios like the one discussed here before the Final Rule becomes effective in September.

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410.684.3200

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