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FDIC Consent Orders for FCB, Achieve Card are 'Wake-Up Call' for Issuers on Third-Party Oversight

By Kate Fitzgerald, Emerging Payments Editor

The FDIC's consent orders requiring First California Bank (FCB) and its third-party program manager, Austin, Texas-based Achieve Financial Services LLC (Achieve), to pay substantial penalties and restitution also include enhanced compliance processes that may be eye-opening for other prepaid card issuers, experts say. The consent orders leave no doubt that issuers are ultimately accountable for third-party program managers' activities, requiring both FCB and Achieve to significantly beef up their compliance management systems.

FCB's consent order required developing a comprehensive written compliance program to ensure that all third party activities comply with applicable consumer protection laws; appoint a qualified compliance officer to administer the third party compliance program; analyze current compliance staffing and increase the size of the compliance department, as necessary. FCB was also required to establish an internal compliance training program for FCB personnel responsible for overseeing third party activities; ensure that its third parties provide their employees and contractors with comprehensive training on applicable consumer protection laws; and enhance procedures for monitoring, tracking, addressing and resolving consumer complaints. Achieve's consent order included similarly detailed compliance measures.

Fees Not Clearly Disclosed

FCB and Achieve must pay a total of $1.8 million in restitution and civil monetary penalties for violating rules surrounding delivery of federal benefits to reloadable prepaid cards and for charging fees that were not clearly disclosed, according to two separate consent orders the FDIC issued May 28. These consent orders include a requirement that Achieve deposit an initial amount of $1.1 million into a cardholder restitution fund to be made available to up to 64,000 eligible Achieve MasterCard cardholders as well as the assessment of civil monetary penalties in the amount of $600,000 for FCB and $110,000 for Achieve. "This should serve as a wake-up call to all prepaid card issuers and program managers to make sure that they closely analyze their GPR card programs to comply with the applicable Treasury Rules," Brad Fauss, executive vice president and general counsel at Brightwell Payments Inc., tells Paybefore.

Although FCB in February announced it is exiting the prepaid card issuing business and plans to wind down its operations by Dec. 31, 2013, the FDIC made clear that FCB is responsible for funding and distributing restitution funds to eligible cardholders if Achieve doesn't satisfy its financial obligations to do so. PacWest Bancorp late last year agreed to pay $231 million for FCB's parent company First California Financial Group; that deal was approved in May. FCB, in Security and Exchange Commission filings, estimated the bank will incur total costs of approximately $2.4

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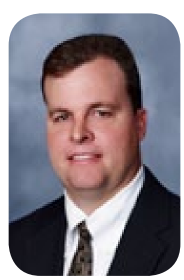

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million from exiting the prepaid card issuing business.

Regulation E Focus

The FDIC's consent orders for FCB and Achieve also allege violations of the U.S. Treasury rules surrounding ACH delivery of federal benefits through prepaid cards, which may be the first enforcement action regarding such rules since they were adopted in early 2011, Fauss notes. Because of the difficulty in tracking all federal ACH payments that are subject to the Treasury Rule, the only fail-safe method to ensure compliance is to make sure that the entire GPR program complies with the Regulation E requirements applicable to payroll cards, including items such as providing a 60-day transaction history, complying with error resolution procedures and notice periods, adhering to provisional credit requirements and applying limitations on cardholder liability, Fauss adds.

The FDIC's orders were not entirely surprising, Margo Hirsch Strahlberg, an associate with Bryan Cave LLC, tells Paybefore. "If anything, the consent orders emphasize that bank issuers must take a more proactive role in overseeing third-party partners" to ensure all advertising, marketing, offers and solicitations are not misleading or deceptive, she says. It is very significant that the orders make it clear the bank is ultimately responsible for any restitution Achieve fails to pay, Strahlberg notes. "That fact alone sends a strong message to issuers."