Consumer Finance Monitor (Season 4, Episode 38): A Look at Recent Developments related to Marketing by Nonbanks of Products and Services Offered with Bank Partners

Speakers: Chris Willis and Mindy Harris

Chris Willis:

Welcome to The Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host, Chris Willis, the co-leader of Ballard Spahr's Consumer Financial Services Group, and I'll be moderating today's program. For those of you who want even more information don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those of us in the industry. So to subscribe to our blog or to get on the list for our webinars, visit us at ballardspahr.com. And if you like our podcast, let us know. Leave us a review on Apple Podcasts, Google, or wherever you get your podcasts. Today. I'm joined by my colleague Mindy Harris, who is one of our lawyers in Colorado and is an extremely experienced regulatory consumer financial services lawyer.

Chris Willis:

And she and I today are going to be talking about a recent set of developments related to advertising and portrayal related to savings products. And in particular, with the concern that some regulators have expressed that some of those products when offered by non-banks might mislead consumers into thinking they're being offered by banks, and so that's the subject that we're going to be talking about today. So Mindy, first of all, welcome to the podcast and thanks for joining us.

Mindy Harris:

Thank you, Chris.

Chris Willis:

So I understand over the last 18 months or so, we've been seeing activity and issuance of various communications from the state banking regulators and even some federal regulators, reflecting a focus on whether certain nomenclature or language used by non-bank entities when they're marketing or communicating, and whether those constitute efforts by a non-bank to hold itself out as a bank or claim bank like attributes such as deposit insurance. Can you just first talk to our audience about what's going on here? What are the various sources of this activity that's been going on?

Mindy Harris:

Sure. Chris, you're exactly right. And we are seeing that activity from state and federal regulators and at least one lawmaker who all appear to be interested in this topic. And they come from a variety of diverse points of view, but somewhat intersecting perspectives. And the sources that we're seeing include state banking and consumer protection regulators, specifically the Texas banking commissioner who issued a supervisory issuance that we're going to talk about later. The states of California and Illinois that entered into consent orders with the company. And then we're also seeing interest from the FDIC, an indication that there might be rising interest from the conference of state banking supervisors and other sources that are not regulatory sources, such as banking trade associations in comments on the FDIC rule reflect concerns in this regard. So we're going to talk about all of those sources and what they're up to today.

Chris Willis:

So Mindy, let's unpack those things. You mentioned that there've been some state regulatory activities here like Texas and California, Illinois. Talk to us first about what's going on with those states.

Mindy Harris:

So first, Chris, I want to point out we haven't done a 50 state survey, but it's reasonable to assume that most if not all states have laws on their books in some way prohibiting use of the term bank in the like by non-banks. However, as I mentioned recently, a few states have stepped up their attention, and the first one I'm going to talk about is Texas. So in December, 2020, a supervisory memorandum was issued by the Texas banking commissioner. And the memorandum indicates that the commissioner had noted what he refers to as various companies, particularly technology companies that are vendors to banks, violating these laws that prohibit advertising in a manner that would imply to the public that the person is engaged in the business of banking in the state.

Mindy Harris:

Then he goes on to say at the same time other companies managed to actively and competitively market services without violating the laws. So this memorandum goes into great detail and gives very specific examples about what a non-bank can and cannot do in Texas and refers to things like a non-banks use of bank or banking in advertising violates in the following examples, if the non-bank says it offers mobile banking or provides a mobile banking account, the commissioner says there is no permissible way to offer a white labeled bank account or white label banking services, then the letter or the issuance goes on to suggest non-banks can accurately describe the non-banking services they provide, and with terms like access to mobile banking or bank account management platform and things like that.

Mindy Harris:

So it would be a good idea, and one of the questions that has been asked is, does this have the force of law for companies that market to consumers in Texas? The Texas statutes indicate that while the issuance, the supervisory memorandum does not have the force of law, unless it is adopted as a regulation, which it has not been, it is to be given great deference in courts.

Mindy Harris:

So people should pay attention to it. And if people are marketing to consumers in Texas, they should read this memorandum. And I would argue in other states as well it's an interesting development.

Chris Willis:

So speaking of interesting developments, you mentioned at the top of the podcast that there also been a couple of consent orders from some states. Can you tell us what's going on there?

Mindy Harris:

That's right, Chris. So a FinTech called Chime that partners with banks was the subject of two consent orders, one from the state of California, the consent order was with the California Department of Financial Protection and Innovation, the new California mini CFPB as it were. And the other consent order was with the state of Illinois. Both of these consent orders were entered into in March, 2021, and they're very similar, in many ways almost identical. The various regulators took umbrage at Chime's use of its website URL address, which was chimebank.com and Chime had to agree not to use that address, and then there's a long list of other things that Chime has to do both at high level and then in greater detail. So for example, Chime has to distance itself from use of the term banking and derivatives by clarifying statements, everywhere banking terminology is used on its website, its mobile app and in advertising.

Mindy Harris:

Chime has to have a disclosure that says Chime is not a bank and banking services are provided by it's bank partners. And it says, this disclosure has to be in bold and increased font size, clear and conspicuous, the usual disclosure kind of things that we see in disclosure laws and regulations. And then there's a bunch of other things that Chime has to do, internal reviews, even has to make sure that in paid Google search results, Chime places a statement on Google that will pop up that says banking services are provided by the bank partner. So a lot of very specific disclaimers that Chime is required to provide in advertising the services that it's providing in conjunction with its bank partners. Illinois also levied a $200,000 civil penalty. So these are important signposts for people to pay attention to, very clear, very specific. And anybody who is marketing banking products in conjunction with the bank partners should take a look at these.

Chris Willis:

So thanks for that Mindy, but I feel like there's no party unless politicians get in on the action. And so you mentioned that there were some lawmakers who had been making statements about this issue. Tell me what's going on in the halls of one of our legislature.

Mindy Harris:

Good question, Chris, and it's very interesting. In July of this year, Sherrod Brown, who is the chairman of the Senate Banking Committee, wrote a letter to the CFPB and the letter was triggered by the activities that occurred when Chime closed and froze a number of accounts. It became very high profile. It caught the attention of Congress and Chairman Brown produced this letter asking the CFPB to do a better job of dealing with non-banks and the consumer risks that non-banks pose. But he took the opportunity to also talk about Chime and other non-banks the dangers of those entities holding themselves out as banks, and so let me quote from this letter. Chairman Brown said to the CFPB, in addition to the harms from account closures, there are a number of consumer risks involving non-banks, including privacy concerns, fraud, data breaches, and proper disclosure that these companies are not actually banks. Chime, for example is not a bank, but has marketed itself as a bank, even after California regulators prohibited the company from calling itself a bank.

Mindy Harris:

So interesting that Chairman Brown writes this letter on July 27th. And he has a footnote in his letter that says he looked at the Chime website on July 15th and that Chime had not yet complied with the California order. I think Chime had a period of time in which to comply with that order, but it's interesting that Chairman Brown went to that level of detail to call Chime out. And then the letter ends with a call to action to the CFPB, asking the CFPB to take a look at risks posed by services offered by non-banks to consumers and asked about whether the bureau is taking measures to address these risks by non-bank FinTech companies and their affiliated banks, and then invites the CFPB to offer guidance to congress on gaps in the regulatory framework that may congressional action. So this is a pretty loaded letter.

Chris Willis:

Yeah, it sounds like it. And so there's all this activity going around with the states and with Chairman Brown, but are the federal banking agencies getting it on this? Has any of them said anything about this issue?

Mindy Harris:

Yes. And the one that I want to talk about in more detail today is the FDIC. So the Federal Deposit Insurance Corporation as we know, is the primary federal regulator for a number of banks and all banks that have federal insurance banks and savings associations must be insured by the FDIC in order to say they have Federal Deposit Insurance. Over the past two years, FDIC issuances have expressed heightened concerns about potential consumer confusion as to FDIC insurance coverage. So the FDIC is focusing primarily on, is anybody saying they have insurance coverage? But in some of the lengthy supplementary information in the request for information and proposed rule I'm going to talk about, you see the FDIC straying off into, is there consumer confusion about whether they're dealing with a bank or not. But the FDIC is primarily focusing on, are you

saying you're insured when you're not? So the... Let me go into a little bit of detail about what the FDIC has issued, and then I want to talk about some of the reactions from interested commenters to these FDIC rules.

Mindy Harris:

These concerns have been expressed by the FDIC, particularly in connection with some activities of FinTechs and other non FDIC insured entities. And the FDIC started out in 2020 by indicating its intention to issue rules to address misrepresentations. So back in February, 2020, the agency issued a request for information on the existing FDIC signage and advertising requirements and potential technological solutions. And in that 2020 RFI, which really wasn't about misrepresentations, the agency gratuitously included language pointing out that it is illegal to misuse the FDIC name, or make false representations regarding deposit insurance and expressed concern about non-banks such as FinTechs displaying the FDIC name or logo on a website to quote, convey legitimacy.

Mindy Harris:

And the FDIC said that in 2019, it had requested 65 service providers take down websites indicating FDIC coverage when that didn't exist, it's interesting. And in that RFI, one of the things that the FDIC asked about was how to address potential misrepresentations by non-banks about deposit insurance. The RFI said the FDIC has not issued specific regulations regarding false representations, meaning there's a statute, but no regulation. And the FDIC is asking should the sign and advertising statement requirements be changed to deal with misrepresentations.

Mindy Harris:

And the comment period for the 2020 RFI was extended, and then in April, 2020, the FDIC announced it was temporarily postponing its efforts to modify signage in light of COVID-19. So there was a pause for a year. On April 9th, 2021, the FDIC published an updated version of that request for information, and it was substantially similar to the RFI that was published in 2020 with one outstanding difference, it did not deal with the issue of misrepresentations about deposit insurance. And the agency said that would be dealt with in a separate notice of proposed rulemaking. And the FDIC said, pursuant to its statutory authority it actively seeks to protect depositors by ensuring the FDIC's name, seal and logo are appropriately used and limited to being associated with insured depository institutions.

Mindy Harris:

And again, cited an increasing number of instances where people or entities have misused the FDIC name or logo. So the RFI about the advertising rule and technological solutions was issued separately, and then the proposed rule on false advertising followed. So on April 22nd, 2021, the FDIC issued a notice of proposed rulemaking and request for information entitled false advertising, misrepresentation of insured status and misuse of the FDIC's name or logo. And the policy objectives of the rule are stated broadly and actually are not limited to addressing this representations related to deposit products, however, focusing pretty much primarily on deposit products.

Mindy Harris:

The FDIC again says it has observed an increasing number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo, or have made false or misleading representations that would suggest to the public that these providers products are FDIC insured, and the FDIC wanted to provide transparency as to how it's going to address these concerns. So it adopted or proposed to adopt an entirely new section of the regulation, a new subpart B that would implement section 18A4 of the Federal Deposit Insurance Act, which prohibits any person, not just banks from making false or misleading representations about deposit insurance or from using the FDIC name or logo in a manner that would imply that an uninsured financial product is insured or guaranteed by the FDIC. So uninsured financial product is a new definition that would be added in the proposed rule.

Mindy Harris:

In addition to the existing definition of non-deposit product, which per the proposed rule would stay in place. And I think you'll see a non specific reference to that, but some references suggesting clarifications are needed in some of the comment letters. The FDIC in its flexibility analysis noted that potential instances of misuse or misrepresentation of the FDIC name or logo by insured depository institutions are usually addressed under the normal supervisory authority. So they felt they already had in place what they need to address concerns about how banks use the FDIC name or logo. And the FDIC went on to say, although the new proposed rule could affect insured depository institutions, in practice they expect the proposal would primarily affect non-bank entities and private individuals. So the proposed rule was published in the federal register on May 10th, and the comment period closed on July 9th, 2021.

Chris Willis:

Was there anything interesting in any of the comments submitted to the proposed rule by either other regulatory agencies or industry groups or anything like that?

Mindy Harris:

Yeah, Chris, there were some interesting comments, again, there were only about 20 comments but coming from very different perspectives and raising some interesting issues. So let me talk about a couple of those types of comment letters. A comment letter from the Innovative Payment Association representing FinTechs was concerned about whether the rule would go too far and maybe affect the operations or the activities of people who are acting in good faith and doing their best and yet not meeting the bar that the FDIC has set. So that comment letter said, our members however, are wary of any obligations that would limit the ability of third parties operating under a legitimate business relationship with a member bank to use the FDIC logo or communicate FDIC insurance coverage to end users. While we do not interpret the proposed rule as imposing such a limitation, we need to highlight this concern for the FDIC.

Mindy Harris:

And the letter goes on to say, in particular we note that the use of the FDIC logo by the third party promotes consumer confidence and imbues the product with a level of trust and security, which is exactly why people might want to use the FDIC logo. This trade association says, any risk that a consumer may be confused by the presence of the FDIC logo or representations with respect to deposit insurance coverage is addressed through the requirement that the third-party clearly and conspicuously disclose the bank, the FDIC member, and I think they meant the FDIC Insured Depository Institution, responsible for providing deposit insurance coverage. So I'd be interested in your thoughts, but I read that to be an effort to say, "Please make sure that the rule doesn't go overboard and affect people who are acting legitimately and in good faith."

Chris Willis:

That seems like to me a statement of, "Hey, we think it's good for you to have a rule, but don't target those who have legitimate good faith relationships with banks and are simply marketing them." That's how I interpret it.

Mindy Harris:

Yeah. I think that's the intent. And then a whole group of letters, comments from various state bankers associations and the independent community bankers of America raised an interesting issue, which is that this could adversely affect deposit placement networks. And that is interesting because that's, I guess one example of a situation where there's lots of bank partners involved in something like Cedars or a deposit placement Sweep or network, and you couldn't identify all of them. And these commenters said there should be a carve out for situations where you can't identify the bank. So it'll be interesting to see what the FDIC makes of that. The Texas Independent Bankers wrote a very vigorous comment letter supporting the proposed rule and urging the FDIC to be more aggressive or more exacting as did the Texas Bankers Association and a joint letter from the Bank Policy Institute and the American Bankers Association, which is interesting.

Mindy Harris:

And then a supportive letter of interest, I think, from the conference of state bank supervisors includes a reference to state regulators focusing on and taking enforcement actions as to companies that misrepresent their status as banks, and proposes that the FDIC get together with state bank regulators to share information about formal and informal enforcement actions on this point, which I'm not sure the FDIC can do, but that was an interesting letter as well. And then finally, a bank suggested that the FDIC provide even more specific rules because it would be helpful to banks to help them guide their FinTech partners. So the comment pretty close to ninth, we haven't seen either an updated proposed rule or a final rule. This suggests to me the 9th of July, so almost three months, going on three months, it'll be interesting to see what the FDIC makes of all of this.

Chris Willis:

Yeah, definitely will. But for the time being, given all of the activity on this issue that you've just told us about, what do you think are the takeaways for industry participants, both banks and FinTechs?

Mindy Harris:

Why don't we talk about that? So I think the first thing to do is, I do think it's important to stay on top of the FDIC rule and anything else that we see states doing. I would encourage everyone to have their legal team or their compliance team with the FDIC proposed rule in detail, take a look at those consent orders and be thoughtful about the company's current and plan uses of terminology, hold yourself up against that, because now that it's gaining traction and getting some publicity, it's a good idea to think about it. It didn't used to be something... Remember FDIC used to be just an automatic thing and it's a good idea to be thoughtful about it.

Chris Willis:

But it also seems given the tenor of some of the material that you've reported on, it's probably safer for everyone if there's a say, a bank FinTech partnership related to deposit type account, that there be more prominent mention of the bank partner and its role in the transaction, or in the service that's being offered, because the concern that seems to be expressed is, "Well, I only see the non-bank, I don't see the bank enough. And so I'm confused that I think the non-bank is actually masquerading as a bank." And so it would seem that the greater emphasis on the bank partners involvement in the service would seem to be a good idea, and in terms of making that prominent, making it obvious to ordinary consumers. What do you think about that?

Mindy Harris:

Yeah, I think you're absolutely right. I think in the past some folks have thought that it's enough to mention the bank partner once or put the bank partner in a footnote or something like that. And I think people should be thoughtful along the lines you've just explained, talk about the bank partner more frequently, maybe multiple references and explain more clearly exactly who's doing what.

Chris Willis:

Yeah. And I think in that regard one of the best reference materials that I am aware of about how to properly disclose things, particularly in online context, which is where I think a lot of this comes up is the ftcs.com advertising manual. It's a wonderful resource. I consult it all the time and it has a lot of very practical and useful guidance about how to disclose things that you want to disclose when you're advertising or marketing something online. So I would recommend that to our listeners. What else would you suggest maybe?

Mindy Harris:

Well, Chris, let me first say, I completely agree with you and as a matter of fact, the FDIC refers to the principles of the FTC in one of their issuances about clarity and not being deceptive. So great idea. Thank you. It might be a good idea for people to, as I said, take a thoughtful look at what's being done. The rule is still just a proposed rule, we don't know what it's going to say

in particular. Now the state guidance we've talked about in the consent orders, those are things that really happen, that's law. If the CFPB should come out with something, we'll see. But at least make a plan for how materials could be reviewed for these issues, and then the company would be ready if it became necessary. If things are reviewed along these lines in the course of existing regular compliance management system reviews, be careful to document that that's being done and what the findings are and any corrective action it's recommended or taken.

Chris Willis:

That sounds like great advice. So Mindy, I wanted to thank you for being on today's podcast. It's a very interesting discussion of a very up and coming and developing issue with respect to some of the most innovative financial products that are becoming available on the market today. So thank you very much for joining us.

Mindy Harris:

Thank you, Chris.

Chris Willis:

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