

The complaint

Mr M has complained that Capital One (Europe) plc registered a fraud marker against him.

What happened

Mr M opened a credit card with Capital One. He arranged a direct debit to clear the card's full balance each month.

Mr M spent the card's credit limit. When the direct debit payment came in, he quickly spent the full limit again. His direct debit was then returned unpaid as there wasn't enough money in his bank account. This left his credit card with a balance of around twice its allowed credit limit. Mr M then did the same thing the following month, and attempted to do it a third time, but was blocked by Capital One. Mr M did not repay the outstanding balance. He said he'd assumed his direct debit had been paid and said this wasn't intentional.

Capital One closed the account and registered a fraud marker against Mr M for this. They had also registered a different fraud marker as they had concerns about a fraudulent application, though they removed that marker. They caused some confusion by saying that they'd unblock his card, when actually they were closing the account. And they accepted they'd over-complicated things in places. They offered Mr M £75 compensation. But Mr M wants the remaining marker removed, the account re-opened, and more compensation.

Our Investigator gave Mr M the benefit of the doubt and recommended that Capital One remove the remaining marker. Mr M appealed and asked for more money. The complaint's been passed to me to decide.

I sent Mr M and Capital One a provisional decision on 9 December 2024, to explain why I didn't think the complaint should be upheld. In that decision, I said:

In order to register these markers, Capital One were not required to prove beyond all reasonable doubt that Mr M had committed a crime. They did need to have reasonable grounds to believe that he'd done something wrong, which went beyond a suspicion or concern, and which had appropriate supporting evidence. Having carefully considered everything that both sides have said and provided, I currently think Capital One did have sufficient grounds to register both markers against Mr M. I'll explain why.

Across two different months, Capital One received two card applications using Mr M's phone number. Each application used a completely different name, date of birth, postal address and so on. The first application was for the credit card account in Mr M's name which is the subject of this complaint. The second, later application was made in someone else's name and was rejected. Capital One phoned Mr M on his genuine mobile phone number – the same number he gave us – to ask him about the second application at the time.

I've listened to that call. In it, Mr M identified himself using the other person's name, and claimed he was that person. When asked for his date of birth and post code, he gave over that other person's date of birth and post code and claimed they were his. He confirmed that he'd made that application himself and had tried to withdraw most of the credit limit in cash. I've compared this recording to other calls between Mr M and Capital One, made using the same phone number, where Mr M identified himself using his own name and discussed his own account. The voices match. I'm reasonably satisfied that Mr M made the second application, which Capital One found to be fraudulent. This suggests that Mr M attempted some kind of identity fraud.

As such, I currently find that it was fair for Capital One to add that marker. I would not have directed them to remove it.

Turning to the second marker, this was for uncleared effects fraud. Essentially, that's where a customer tries to use funds which don't belong to them – for example, by abusing the direct debit system to spend funds over their credit limit. I've thought carefully about whether the evidence suggests that Mr M did so deliberately or not.

Mr M set up his direct debit to pay the card's full balance. And when each direct debit payment came in, he only had a relatively short period before it would return unpaid. Yet each time, Mr M managed to spend his credit limit all over again during that short period.

I've gathered evidence from the bank who held Mr M's current account at the time. Mr M had been running his current account well into its overdraft, and before each direct debit payment was due, Mr M had brought his current account up to or even over its overdraft limit. Mr M was sent numerous alerts about his overdraft – including an alert about going over his limit when a direct debit payment was due. And I can see that Mr M was checking his bank account very frequently – usually many times a day – especially around the times each direct debit payment was due. He was also checking his Capital One account frequently around those times.

So Mr M would have reasonably been aware that his direct debit payments would not go through. Yet each time, before they were returned unpaid, he acted quickly to spend his credit limit all over again, the bulk of which he did by withdrawing cash. This is all highly consistent with uncleared effects fraud.

As unlikely as this would've been to happen once, this happened multiple times. The only reason Mr M was unable to spend his credit limit a third time was because Capital One blocked his payment attempts – and at that point Mr M even called Capital One and tried to get them to unblock the card. Notably, there were no significant attempts to spend on the credit card between direct debit payments. Essentially, Mr M would wait for the direct debit repayment to come through, while checking his accounts very frequently, then would quickly spend the credit limit before the repayment was returned unpaid.

As such, I am currently reasonably satisfied that the uncleared effects fraud was deliberate in Mr M's case.

While this is a more minor point, if this had been a genuine mistake then I might have expected Mr M to have tried to rectify the situation with Capital One. But instead, he stopped attempting to repay his debt once Capital One blocked him from misusing the account further. Mr M said he stopped paying because Capital One had briefly thought he might not be liable for the account as they were concerned it had been applied for fraudulently in his name. But that's not a valid reason to withhold payment – Mr M knew he'd applied for this card himself, and that matter was sorted out long ago. It follows that I also find the fees for Mr M's late or missed payments to be fair.

Lastly, Capital One have accepted that their communication could've been better in places. For example, I understand Mr M may've been passed around or given unclear explanations. But those were relatively minor issues, which mainly stemmed from the confusion created by Mr M's multiple applications and his subsequent misuse of this account. So I would not have awarded compensation here. I find that the £75 Capital One offered is more than sufficient to put right their customer service issues in this case.

In summary, I'm reasonably satisfied that Mr M attempted to open an account using a third party identity, and that he misused this account for uncleared effects fraud. So it was fair for Capital One to register the markers they did, and I find that Capital One do not need to remove any data they registered against Mr M here. It was also fair for Capital One to close the account, which they were allowed to do under the terms in situations like this. And it's fair for Capital One to hold Mr M liable for the debt he ran up. I know that this is not the outcome that Mr M was hoping for. But given the evidence I have so far, and the balance of probabilities, I'm currently unable to reasonably reach any other conclusion.

Both parties responded. Capital One accepted the provisional decision, whereas Mr M did not. I'll talk about Mr M's replies below.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr M insisted that he hadn't committed fraud. He said he didn't apply for the second card and said someone must have used his telephone number without his knowledge.

However, Capital One called Mr M's number about that second application. And having listened to that call and compared the voices to other calls with Mr M, I'm reasonably satisfied that it was Mr M who answered his own phone. During that call, Mr M identified himself as the second applicant, claiming to have another person's name and details. So the evidence does suggest that Mr M was involved in some kind of identity fraud and that the fraud marker there was justified. And in any case, Capital One removed that marker anyway.

Regarding the uncleared effects fraud, Mr M insisted he thought the balance was being paid by the direct debit. But as set out before, Mr M was checking his accounts very frequently and was receiving alerts about his overdraft. He ran his overdraft up to or over its limit before each direct debit payment, and reasonably knew there were not nearly enough available funds to cover the direct debit. During the short period before each direct debit payment was returned unpaid, he acted quickly to spend his credit limit all over again, the bulk of which he did in cash. His actions are highly unlikely to be coincidental and are highly consistent with deliberate uncleared effects fraud. Mr M did this repeatedly, and was only stopped by Capital One blocking the card. The timing of this was specific to the short periods where it was possible to commit uncleared effects fraud. There were no significant attempts to spend on the card in the long periods of time after each direct debit payment bounced or before the next direct debit payment came in. And Mr M stopped trying to repay his debt once Capital One stopped him from misusing the account further.

Mr M reiterated that he stopped paying his debt because of Capital One's fraud concerns, which he says were too vague. But I've gone through the correspondence involved. Capital One made it sufficiently clear their concern was that someone else might have impersonated Mr M and applied for this card without his knowledge. They asked Mr M to confirm whether he opened this account. Obviously, Mr M knew he opened this account. And he confirmed as much. And even after that was cleared up, Mr M continued not to pay his debt. So I don't find that Mr M had a valid or compelling reason to stop paying his debt. And as I set out before, his lack of payments was only a relatively minor point. There's much more evidence which substantiates that he misused the account for uncleared effects fraud, which I've set out above.

Lastly, Mr M didn't understand how our ruling could change from our Investigator upholding his complaint to me not upholding it. It changed because Mr M rejected our Investigator's assessment and asked for an Ombudsman to review his case. That Ombudsman is me. Ombudsmen are not here to simply rubber stamp what our Investigators say. We review each case afresh and come to our own conclusions. As our Investigator explained to Mr M, an Ombudsman may disagree with the Investigator's assessment and find that the marker should not be removed. And we are more senior than our Investigators, granted power in law to make final decisions. Our decisions effectively overrule the Investigators' assessments. Here, the reasons why I've departed from our Investigator's assessment are detailed above.

Other than that, neither side sent me any new evidence or arguments. So having reconsidered the case, I've come to the same conclusion as before, and for the same reasons as set out in my provisional decision above.

My final decision

I do not uphold Mr M's complaint.

This final decision marks the end of our service's consideration of the case.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 7 January 2025.

Adam Charles
Ombudsman