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CFPB TAKES ACTION AGAINST HEALTH CARE CREDIT CARD ISSUER FOR ENROLLMENT PRACTICES

On December 10th, the Consumer Financial Protection Bureau (CFPB) entered into a consent order with CareCredit LLC. CareCredit agreed to refund up to $34.1 million to borrowers who were allegedly subject to deceptive credit card enrollment practices.

Prompted by consumer complaints, the CFPB's investigation focused on enrollment practices at health care providers' offices for deferred interest credit card plans. The CFPB allegedly found incidences where health care providers: (i) orally misrepresented that the plan has no interest for 12 months as distinct from a deferred interest promotion, (ii) did not provide consumers with copies of the credit agreement or Truth in Lending Act (TILA) disclosures, (iii) failed to disclose the interest rate on the plan once the promotional period expired and (iv) finished incomplete applications and submitted them on behalf of borrowers. The CFPB also noted the lender's limited involvement in the credit card enrollment process and the lack of training provided to health care providers, many of whom did not understand deferred interest credit cards. Notably, the CFPB did not find any deficiencies in the lender's TILA disclosures, but the CFPB opined that the accurate consumer-facing materials were not adequate to counteract the effects of the incorrect information given by health care providers.

The CFPB's enforcement action requires CareCredit to:

- Amend its contracts with health care providers to include "Transparency Principles" that describe the terms of the deferred interest plan and require health care providers to share the "Transparency Principles" with consumers;
- Prohibit health care providers from charging for services not yet rendered unless the services are completed or out-of-pocket costs are incurred within 30 days of the charge;
- Require consumers to enroll directly through the lender's representative for certain transactions over $1,000;
- Include a CFPB-approved revised cover page with all printed credit card applications;
- Call consumers within 72 hours after submission of an application through a health care provider and explain the essential terms of the credit card plan;
- Include in the two billing statements before the promotional period ends, a "clear and prominent" warning of the promotional period's expiration date;
- Enhance the training curriculum for health care providers;
- Eliminate any kickbacks, rebates, compensation or in-kind services to any health care providers based on new loan volume; and
- Use its best efforts to resolve consumer complaints within 30 days of receipt.

The CFPB's consent order emphasizes that lenders must have sufficient oversight of their credit card enrollment process, especially when third-party facilitators interact with consumers during a credit plan's enrollment process. Lenders must educate third-party facilitators on their loan products. Lenders also must ensure that third-party facilitators do not impede the delivery of written disclosures or make oral misrepresentations regarding the terms of the loan product.

In accompanying remarks to the consent order, Richard Cordray, Director of the CFPB, identified consumers seeking financing for medical costs as a "vulnerable" class of consumers who are focused on getting better rather than being financially "on guard." Cordray warned that credit card companies offering personal lines of credit to pay for health care must do everything to the letter of the law. In recent years, Minnesota, New York and New Jersey have also initiated investigations into health care financing. States' investigations focused on improper practices by both lenders and health care providers, including alleged deceptive enrollment practices, improper charges, kickbacks and unfounded endorsements.

In addition to placing the spotlight on health care financing, the CFPB's enforcement action also intensifies the scrutiny of deferred interest loan products. The CFPB flagged deferred interest credit cards as an area of concern in its October report to Congress on the Credit Card Accountability Responsibility Disclosure Act of 2009. The CFPB has commented that deferred-interest products pose a risk to consumers because consumers often misunderstand these products and have difficulty distinguishing deferred interest credit cards from standard credit card offerings.

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We can assist in reviewing deferred interest programs and health care credit practices. ❑

✧ *Mike Tomkies, Charles Gall and Susan Manship*

MEDICAL BILLING COMPANY SETTLES DATA SECURITY CHARGES AND AVOIDS HEALTH CARE COLLECTION ACTION

On December 31, 2013, the Federal Trade Commission (FTC) announced that Accretive Health (Accretive), a medical billing and revenue management company, agreed to settle charges of inadequate data security measures. The FTC also issued a letter stating it will not pursue an enforcement action against Accretive for alleged violations of the Fair Debt Collection Practices Act (FDCPA) and unfair and deceptive trade practices relating to the company's debt collection practices in hospitals.

Accretive received attention from state and federal regulators after an employee's laptop containing personal information of 23,000 patients was stolen from the front seat of the employee's rental car. The FTC's complaint alleges that Accretive failed to provide appropriate security measures to protect patients' personal information, which included patients' names, dates of birth, Social Security numbers, billing information and medical diagnostic information. The FTC argued that the company's security practices in the aggregate created an unreasonable risk of unauthorized access to patients' personal information and thus constituted an unfair trade practice in violation of the Federal Trade Commission Act (FTCA). The company created unreasonable risk to personal information by: (i) using patients' personal information in training sessions and failing to remove information from employees' computers after training was complete, (ii) granting employees full access to personal information, even if an employee had no business need for the information, (iii) transporting laptops in a manner that made them vulnerable to theft or other misappropriation, and (iv) failing to remove personal information from employees' laptops after an employee no longer needed the information. The FTC plans to publish a proposed order against Accretive and will accept comments on the order until January 30, 2014

The investigation into the company's data security system prompted examination of the company's debt collection practices. The company allegedly attempted to collect unpaid medical debts from patients while they were waiting in the emergency room and other medical facilities in violation of the FDCPA and the FTCA. The FTC remarked that these practices "raise serious consumer protection concerns." Such practices may deter individuals from seeking necessary medical care or cause individuals undue emotional stress. Individuals may also be unable to evaluate the validity of their medical debts or their financial ability to make payments from a hospital waiting room or reception area. The FTC decided not to pursue an enforcement action against the company for its debt collection practices because of the Minnesota Attorney General's 2012 settlement with the company for similar practices and the lack of evidence that such debt collection practices occurred in states other than Minnesota.

The Consumer Financial Protection Bureau (CFPB) is expected to promulgate rules on medical debt collection that will regulate how medical providers treat individuals with unpaid medical debts. The CFPB's rules will likely give medical providers guidance on charging off debt, working with third-party debt collectors and reporting to credit bureaus. ❑

✧ *Mike Tomkies and Susan Manship*

CFPB'S PRELIMINARY REPORT ON ARBITRATION STUDY SIGNALS RESTRICTIONS NOT LIKELY IN NEAR TERM

On December 12, 2013, the Consumer Financial Protection Bureau (CFPB) published a preliminary report on its ongoing arbitration study, a study mandated by the Dodd Frank Wall Street Reform and Consumer Protection Act. The Dodd Frank Act gives the CFPB authority to issue rules restricting predispute arbitration clauses in consumer financial contracts if the CFPB finds that a rule is in the public interest and for the protection of consumers. In addition to publishing the CFPB's initial findings, the preliminary report outlines future areas of study.

The preliminary report focuses on four financial products: credit cards, prepaid cards, check accounts and payday loans. The preliminary report summarizes features of arbitration clauses across these four financial products and gathers statistics on arbitration and small claims court filings involving these four products. Here are some of the CFPB's findings:

- Arbitration clauses are typically more complex than the credit contracts they accompany.
- 90% of the arbitration clauses studied bar consumers from participating in class arbitrations.
- 72% of arbitration filings with the American Arbitration Association (AAA) between 2010 and 2012 were initiated by consumers.
- Larger institutions are more likely than smaller institutions (*i.e.*, credit unions, community banks) to include an arbitration clause in their consumer contracts.
- Few consumers file arbitrations for small dollar disputes -- almost no disputes in an amount of $1,000 or less were filed with the AAA.

The CFPB's preliminary report includes a caveat that the CFPB's findings may be refined and placed in a fuller context before the CFPB issues a mandatory report to Congress.

In the second stage of the study, the CFPB plans to analyze arbitration clauses in other consumer financial products, such as private student loans. The CFPB intends to engage credit card consumers as to evaluate consumers' awareness of arbitration clauses in financial products and to determine whether dispute resolution provisions impact consumers' buying decisions on financial products. The CFPB will also compare the benefits and costs of arbitration proceedings to the benefits and costs of court proceedings, paying particular attention to class actions. Finally, the CFPB will conduct an empirical study that considers the "interrelationship between public enforcement and private aggregate enforcement" in the consumer law context.

In his announcement of the preliminary report, Richard Cordray expressed concern about a consumer's ability to understand arbitration clauses and ability to negotiate dispute resolution options with a lender.

The CFPB did not share its timeline for issuing a report to Congress or publishing a proposed rule. Based on the scope of the study's second stage, the CFPB is unlikely to publish a proposed rule in the near term. However, the study suggests areas for improvement in current clauses, such as better organization and improvements in plain language. We can assist in the review of current clauses and make recommendations for improvements. ❑

✧ *Mike Tomkies and Susan Manship*