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Five Credit Counseling Compliance Tips and Best Practices for the New Year

With the start of the New Year, it's time for credit counseling agencies to think about ways to enhance legal and regulatory compliance. Here are some tips on topics that you may not know about.

1. Reduce the Threat of Class-Action Lawsuits

In a profoundly significant decision with far-reaching implications for counseling agencies, the U.S. Supreme Court in *CompuCredit Corporation and Synovus Bank v. Greenwood*, ruled that lawsuits brought under the federal Credit Repair Organizations Act can be subject to arbitration on January 10, 2012. In addition, the U.S. Supreme Court last year overturned an appellate court decision that held that an arbitration clause in a consumer agreement containing a class-action waiver was unconscionable, and therefore unenforceable as a matter of law.

Credit counseling agencies can use these two rulings to help eliminate the threat of consumer class actions by using carefully drafted contract language. While not bullet-proof, consumer-friendly arbitration provisions with class-action waivers can reduce the risk of class-action lawsuits (or put you in a better position to successfully defend them).

We've worked with a number of clients about ways to revise their debt management plan agreements to include arbitration provisions and class-action waivers, but these safeguards can be used in other agreements with clients as well. This is an evolving area of the law that can mean the difference when a lawsuit strikes.

One important related development to be on the watch for: The federal Consumer Financial Protection Bureau ("CFPB") is expected to report to Congress on the use of arbitration provisions in consumer financial product and service agreements.

2. Stay Ahead of the Consumer Financial Protection Bureau

The CFPB, through a formal rulemaking, is in the process of determining whether credit counseling agencies will be subject to supervision and examination. In the meantime, the CFPB can take action to prevent unfair, deceptive or abusive acts or practices. On top of this, the CFPB has signaled in the areas of credit cards, mortgages and student loans that it is no longer enough for lenders to provide full and accurate disclosures so consumers can make decisions. Rather, the CFPB is actively encouraging providers of financial products and services to provide enhanced disclosures so consumers "know before they owe." As a result, it would be a good time for credit counseling agencies to consider whether the information they provide to consumers about their products and services is adequate in light of the push for enhanced transparency and limits on certain practices. On top of this, the CFPB will continue to place a spotlight on such topics as credit cards, student loans, services for members of the military and veterans, and older Americans.

3. Money Transmission Compliance

Understanding and implementing the varied requirements of state money transmitter laws in jurisdictions where they apply to debt management plan activity can seem daunting, especially for credit counseling agencies that don't have a dedicated compliance team. However, many of the requirements called for under state money transmitter laws are similar to those required under state debt adjusting laws. The reputation, business risks, and cost of noncompliance with applicable laws are just too high to ignore this potentially significant area of legal exposure.

4. Liability Insurance Review

For most credit counseling agencies, the importance of insurance is old news. But all too often, organizations haven't reviewed their insurance policies vis-à-vis their activities and areas of potential

liability risk in years. As a result, it's too easy to assume that the insurance policies that an organization relies upon cover potential liabilities when they really do not. In our experience, coverage "gaps" typically abound for most agencies. Common areas that are often overlooked include: geographic expansion, online advertising and marketing, new service lines (e.g., housing counseling), and new services within an existing area of service line (e.g., document collection as part of comprehensive housing counseling). By routinely having all of its relevant insurance policies reviewed by an expert in this area, a credit counseling agency can help to minimize its downside risk and maximize its insurance coverage in the event of a claim.

5. Privacy Policy and Procedures: Is it time to update?

Under the federal Gramm-Leach-Bliley Act ("GLBA"), "customers" of credit counseling agencies are entitled to initial and annual privacy notices regardless of the information disclosure practices of the organization. However, when was the last time your privacy notice was reviewed to confirm that it is legally compliant and that what's in the notice matches the information collection and disclosure practices of the organization? Have you kept your notice up to date with the services you are providing? It's always a good idea to periodically review the privacy notice against agency policies and practices, as well as any time new products or services are rolled out or there are changes to existing offerings. Note that there is now a "new" model form that can be used to obtain a "safe harbor" for compliance with the content requirements for notifying consumers of information-sharing practices and their right to opt out of certain sharing practices. Along with a number of other laws and regulations, enforcement authority for the privacy notice requirements of the GLBA were transferred to the CFPB on July 21, 2011.

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