



May 22, 2014

## **THE CONSUMER FINANCIAL PROTECTION BUREAU AND MEDICAL DEBT COLLECTION: WHAT HOSPITALS NEED TO KNOW**

### **BACKGROUND**

The Consumer Financial Protection Bureau (CFPB), which was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), has jurisdiction over a wide array of businesses, industries and practices related to consumer finance. In addition to the typical financial companies and industries, such as banks, credit unions and credit card companies, the CFPB's authority extends to businesses that engage in activities such as charging interest, collecting on debts and providing information to consumer reporting agencies. The CFPB has repeatedly identified medical debt collection as a major area of concern.

The CFPB was created largely as a response to perceived deficiencies in the nation's consumer finance system surrounding the recent financial crisis. Many lawmakers and consumer advocates viewed the system as poorly governed by a loose patchwork of laws and various government agencies designed to regulate specific industries or transactions, or to address specific problems, rather than to consider the needs of the system as a whole.

To remedy the various gaps between existing laws, and to ensure that regulatory efforts account for system-wide problems and considerations, the Dodd-Frank Act gave the CFPB two powerful sources of jurisdiction:

- 1) broad authority to prohibit "unfair, deceptive, or abusive acts or practices" in connection with a "consumer financial product or service;" and
- 2) jurisdiction over 18 pre-existing consumer protection laws.

In effect, the CFPB has two "realms" of authority. Importantly, the scope of the CFPB's jurisdiction, as well as its available powers and tools, are significantly different under each of the two, particularly when applied to non-financial businesses such as hospitals.

This advisory provides an introduction to the CFPB's scope of authority and identifies some of the CFPB's areas of concern that may affect hospitals. It also discusses the CFPB's first major enforcement action concerning medical debt as

an illustration of how the CFPB may alter hospitals' debt collection practices, even where it cannot assert jurisdiction over the hospitals directly.

## **AT ISSUE**

### ***Dodd-Frank Wall Street Reform and Consumer Protection Act***

Although very broad, the CFPB's authority to prohibit "unfair, deceptive, or abusive acts or practices" comes with an important limitation: it applies only where the act or practice involves a "consumer financial product or service." The Dodd-Frank Act defines that term with an illustrative list of covered business practices, including "extending credit and servicing loans," collecting and analyzing consumers' credit history information, and "collecting debt related to any consumer financial product or service."

The question of exactly how the broad prohibition on "unfair, deceptive, or abusive acts or practices" applies to non-financial entities such as hospitals is a difficult one, and is likely to receive considerable attention from the CFPB in the coming years. Yet, based on the text of the Act, the legislative history, and the CFPB's early interpretations, it appears that the key factor for determining whether a hospital falls under that provision is whether the hospital imposes a finance charge on patients to whom it extends credit.

Throughout the legislative process a key concern for many was how changes in the law might affect providers of non-financial goods and services, such as doctors, dentists and retailers, who sometimes may offer installment plans, deferred payment options, etc., to enable consumers to purchase those goods and services. Since many of those providers had not previously been subject to the many complex consumer financial rules, the Dodd-Frank Act could have required major changes in their operation. Although the debate largely focused on preventing excessive burdens on small businesses, both the Dodd-Frank Act and the CFPB's subsequent interpretation of the Act provide guidance on when hospital activities may be within the CFPB's jurisdiction.

Principally, the CFPB has stated that, where a hospital or other health care provider is simply trying to collect on past-due bills for services rendered, the hospital is not providing a "consumer financial product or service" and, as a result, those activities are not subject to the CFPB's jurisdiction. Additionally, the Act states that a hospital does not provide a "consumer financial product or service" where it sells delinquent debt from medical bills to a debt buyer. However, if a patient's debt arises from an "extension of credit" such as a payment plan, or a similar arrangement, the hospital may be providing a "consumer financial product or service" in certain circumstances and therefore subject to the CFPB's authority.

The text of the Dodd-Frank Act itself indicates that the defining characteristic of an arrangement subject to CFPB oversight will be the imposition of a finance charge, such as an interest rate. So long as hospitals and other providers are not charging patients additional money to enter into a payment plan, they will have a

strong argument that the Act does not apply. Additionally, the legislative history suggests that hospitals will not become subject to the CFPB's jurisdiction simply because the hospital charges a late fee for a delinquent payment. The Act also contains an exemption for non-financial businesses that do not "significantly" engage in providing "financial products or services," meaning that the law may not apply to businesses that only occasionally impose finance charges.

### ***Other Pre-Existing Consumer Protection Laws***

The Dodd-Frank Act also transferred to the CFPB jurisdiction over more than 18 specific consumer protection laws, including the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA) and the Gramm-Leach-Bliley Act (GLBA). The Act did not, however, change the substance or scope of those laws. As a result, those laws continue to apply (or not apply) as they did in the past, subject to any interpretive rules subsequently issued by the CFPB. Importantly, while the CFPB's authority to address unfair, deceptive or abusive acts or practices under the Dodd-Frank Act applies only when a "consumer financial product or service" is involved, that limitation does not apply to the CFPB's authority over the 18 pre-existing consumer protection laws.

On the subject of medical debt collection, the CFPB has shown particular concern with how health care providers report medical debt to CRAs. In particular, the CFPB has stated that providers may be reporting debt as delinquent before consumers understand what they owe and what their insurance will not cover. The CFPB has already issued [guidance](#) on what businesses must do under the FCRA to investigate consumer disputes to information on their credit report, and it is likely to engage in enforcement or rulemaking related to the FCRA with the goal of creating standards for when providers report delinquent debt and what steps they must take before they do so. The guidance applies to any entity that provides information that relates to consumers to a CRA for inclusion in consumer reports.

### ***CareCredit Enforcement Action***

Although the Dodd-Frank Act limits the CFPB's ability to reach a considerable amount of medical debt collection directly, the CFPB is likely to look at a variety of actions it can take to affect those practices indirectly. One way is to take actions against debt collectors, financial companies and other entities that work with hospitals in the area of medical debt and may be subject to CFPB jurisdiction even where hospitals are not.

The CFPB has already brought one such enforcement action against CareCredit, a company that provides credit cards that patients can use to pay off their medical bills over time. The cards offered deferred interest, and if the patient paid the credit card off within a certain period of time, no interest was owed. However, if the entire amount had not been paid off once that period of time expired, the patient would owe a large amount of interest for the entire period since the charge was incurred.

Although CareCredit sets the terms of the card agreements, including the interest rate and fees, and services the credit accounts, the cards were actually marketed and offered by staff at the medical providers' offices at the time of treatment. According to the CFPB, the key problem with this arrangement was that staff members at the providers' offices were not qualified to market or offer the cards – they received little or no training or information about the products, and often did not understand or were not aware of the cards' most complex and important terms. The CFPB alleged that, as a result, many patients were not aware they were accruing substantial amounts of interest and did not understand the interest charges. CareCredit settled with the CFPB by agreeing to set up \$34.1 million reimbursement fund for affected consumers and to improve its sales and marketing practices, including by having CareCredit representatives contact patients directly.

Although the CFPB brought the action against CareCredit and not the providers, this case provides a good example of how the CFPB can affect hospitals' practices even where it does not or cannot assert authority over the hospitals themselves. The availability of partnerships with financial companies to provide additional ways for patients to pay their bills may be limited by CFPB rules or the threat of enforcement actions.

The FDCPA is another vehicle through which the CFPB is especially likely to affect hospitals indirectly by increasing the requirements on debt collectors. The CFPB has shown interest in setting standards for the steps debt collectors must take and the documents they must review to ensure that they are collecting the correct amounts from the correct consumers. The FDCPA does not apply to the individual business to which the debt is originally owed (creditor), and therefore generally could not be used to directly require hospitals to conduct any additional review. However, for debt collectors acting on behalf of hospitals to comply with those heightened requirements, they may need the hospitals to provide more thoroughly vetted information about patients and past-due bills, as well as to retain and make available more documentation. In this way, the CFPB can affect how hospitals manage debt collection issues even if the hospitals are technically beyond the CFPB's jurisdiction.

### **FURTHER QUESTIONS**

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