

LEGAL UPDATES

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Lender Settles Dispute with Colorado over Membership Fees to Access Loan Products

On November 13, 2023, a nonbank lender and the Colorado Administrator of the Uniform Consumer Credit Code (Administrator) entered into an Assurance of Discontinuance to settle allegations that the lender charged membership fees to consumers that were not authorized additional charges under the Colorado Consumer Credit Code (Code). This settlement serves as a reminder to financial services providers to verify the treatment of membership or subscription fees under applicable credit and consumer protection laws when access to credit products is a benefit of membership.

The membership program in the settlement

According to the Assurance of Discontinuance, the lender offered consumers a variety of paid and nonpaid membership options. These memberships allowed consumers to access various financial products and services, including, but not limited to, deposit accounts, investment accounts, loan products, loyalty accounts, and credit monitoring products. If a consumer signed up for a paid membership, the lender charged the consumer monthly membership fees.

The dispute between the lender and Administrator focused on paid memberships that allowed consumers to access loan products with low APRs. These paid memberships could be canceled at any time at no cost so long as a consumer had no active, outstanding loan. Notably, nonpaid memberships did not give consumers access to loan products.

The Administrator took the position that the membership fees were not permitted additional charges under the Code. By way of background, the Code sets forth maximum finance charge rates and a list of permitted additional charges that may be contracted for and received in connection with consumer

credit transactions. Although the Administrator did not expressly allege that the membership fees were unlawful finance charges under the Code, the Assurance of Discontinuance provides that it resolved all issues between the lender and the Administrator “including charges concerning the membership fees under Section 5-2-201(2) [maximum finance charges for supervised loans] and Section 5-2-202(1) [permissible additional charges].” The scope of this liability release suggests that there may have been some discussion between the lender and Administrator on whether the membership fees were finance charges under the Code.

To settle this matter, the lender agreed to refund \$271,000 to consumers and reimburse the Administrator \$75,000 for its investigation. The lender also agreed not to originate loans to Colorado consumers through a program that requires a consumer to pay a membership or subscription fee to access loans if the membership fee is unlawful under the Code. Interestingly, the settlement provides that if the lender enters into an agreement with any other state attorney general or state regulator to resolve similar claims regarding the membership fees within the next three years and the lender agrees to pay restitution on a per-loan basis in excess of the restitution paid to Colorado consumers on a per-loan basis, then the lender must pay additional restitution to Colorado consumers so that the restitution is equal to or greater than what the lender paid in the other state(s).

What this settlement means for you

Recently, we have observed more financial services providers offering programs that combine a membership or subscription-based program with access to credit offerings. This Colorado settlement should remind financial services providers to verify how membership or subscription fees may be treated under federal and state credit laws when a membership benefit is access to credit products.

Other issues and regulatory scrutiny can arise with membership or subscription programs. Both the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission have scrutinized enrollment, automatic renewal, and cancellation practices with membership and subscription programs and services. Of note, in January 2023, the CFPB published a Circular confirming that a company may engage in unfair, deceptive, or abusive acts or practices under federal law by engaging in certain negative option marketing practices. As defined in the circular, negative options take a consumer’s silence or inaction as consent for initial or continual services.

Contact us

We often counsel clients on potentially applicable laws, including interest and fee restrictions, for innovation or hybrid products. Please contact Susan Seaman, Catherine Albrecht-Wiese, or your Husch Blackwell attorney if you are interested in an initial regulatory vetting of a new product or have interest rate or fee questions.