

VENABLE[®]LLP

Preparing for a CFPB Examination or Investigation

**Association of Credit Counseling Professionals
Fall 2013 Conference
November 14, 2013, 9:15 am– 10:30 am ET
Tampa, Florida**

Jonathan L. Pompan, Esq.
**Venable LLP, Washington, DC
jpgompan@venable.com**



IMPORTANT INFORMATION ABOUT THIS PRESENTATION

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.

***This presentation will be available at
www.venable.com/ccds/publications***



How did we get here?

- Federal and state laws governing consumer credit counseling agencies continue to evolve and create potential obstacles and new compliance requirements.
- The industry has responded with self regulation, but many credit counseling agencies limit their activities due to fear of crossing the lines set by regulators, law enforcement, and the Internal Revenue Service.



What's the cost of noncompliance?



Key Consumer Protection Statutes Related to Credit Counseling

- Credit Repair Organizations Act
- State Credit Services Organizations Acts
- State SAFE Act Statutes
- Federal Mortgage Assistance Relief Services Rule
- Federal Mortgage Acts and Practices Advertising Rule
- RESPA
- And more...



The CFPB and Credit Counseling

- **Enforcement**
- **Supervision**
 - Banks (\$10 billion in total assets or greater)
 - Nonbanks
 - Mortgage, Private Student Loans, Small Dollar Lenders
 - Larger Participants (Credit Bureaus, and Debt Collectors, and more...)
 - Companies involved in high risk activities?
 - Is credit counseling next?
 - Service providers
- **Student Affairs, Older Americans, Financial Education, Reports, etc.**
- **Regulatory**



CFPB Areas of Authority related to Credit Counseling

- Unfair, Deceptive and Abusive Acts and Practices
- Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.)
- Fair Credit Reporting Act (15 U.S.C. 1681 et seq.)
- Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);
- Gramm-Leach-Bliley Act of 2009
- S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);
- Section 626 of the Omnibus Appropriations Act of 2009, Public Law 111-8
- Telemarketing Sales Rule (16 CFR Part 310)
- Use of Prenotification Negative Option Plans (16 CFR Part 425)
- Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (16 CFR Part 429)
- Internal Revenue Code* (may report to the IRS)
- State Statutory and Regulatory Requirements (may report to state AGs)



Overview of CFPB's Unfair, Deceptive, Abusive Acts or Practices (UDAAP) Authority

- Unfair Acts and Practices: Defined in the CFPA
- Deceptive Acts and Practices: Not defined in the CFPA; CFPB has looked to the Federal Trade Commission Act
- Abusive Acts and Practices: Defined in the CFPA; new standard



CFPB's Authority vs. Authority of the FTC and Banking agencies

- Section 5 of the **Federal Trade Commission Act** (FTCA) is the basis for the unfairness and deception standards used by the FTC and banking agencies
- CFPB looks to the Dodd-Frank Act (Title X, **Consumer Financial Protection Act**)
 - CFPB **deception** and **unfairness** standards are similar to FTC Act standards
- Only CFPB has the **abusive** standard in its core statute
 - “Abusive” standard appears in Telemarketing Sales Rule



What Types of Practices Are Abusive?

Abusive means an act or practice that:

- materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; OR
- takes unreasonable advantage of
 - a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product/ service; OR
 - the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product/service; OR
 - the reasonable reliance by the consumer on a covered person (bank or nonbank within the CFPB's jurisdiction) to act in the interests of the consumer

Recently settled case: *Consumer Financial Protection Bureau v. American Debt Settlement Solutions, Inc. et al.*



CFPB may enforce several rules issued by the Federal Trade Commission

- Telemarketing Sales Rule (16 CFR Part 310);
- Use of Prenotification Negative Option Plans (16 CFR Part 425);
- Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (16 CFR Part 429);
- Preservation of Consumers' Claims and Defenses (16 CFR Part 433);
- Credit Practices (16 CFR Part 444);
- Mail or Telephone Order Merchandise (16 CFR Part 435);
- Disclosure Requirements and Prohibitions Concerning Franchising (16 CFR Part 436);
- Disclosure Requirements and Prohibitions Concerning Business Opportunities (16 CFR Part 437).



Application of UDAAP Authority in Recent CFPB Actions

- Types of **UDAAP** issues flagged by the CFPB to-date
 - **Deciphering Claims**
 - Distressed consumers
 - **Telemarketing/Backroom issues**
 - **Traditional advertising/marketing**
 - **Lack of Fulfillment**
 - **Advance Fees* (TSR)**
- Remedies
 - Scope of redress
 - Civil Money Penalties
 - Injunctive Relief



Settlements/Compliance Process

- Implications of CFPB settlement potentially far greater than FTC
- Far-reaching compliance provisions
- Regular periodic reports
- Third party consultant
- Oversight and responsibility of Board
- Order scope potentially very broad (all advertising and marketing)
- In one case, ceasing activity until approved plan



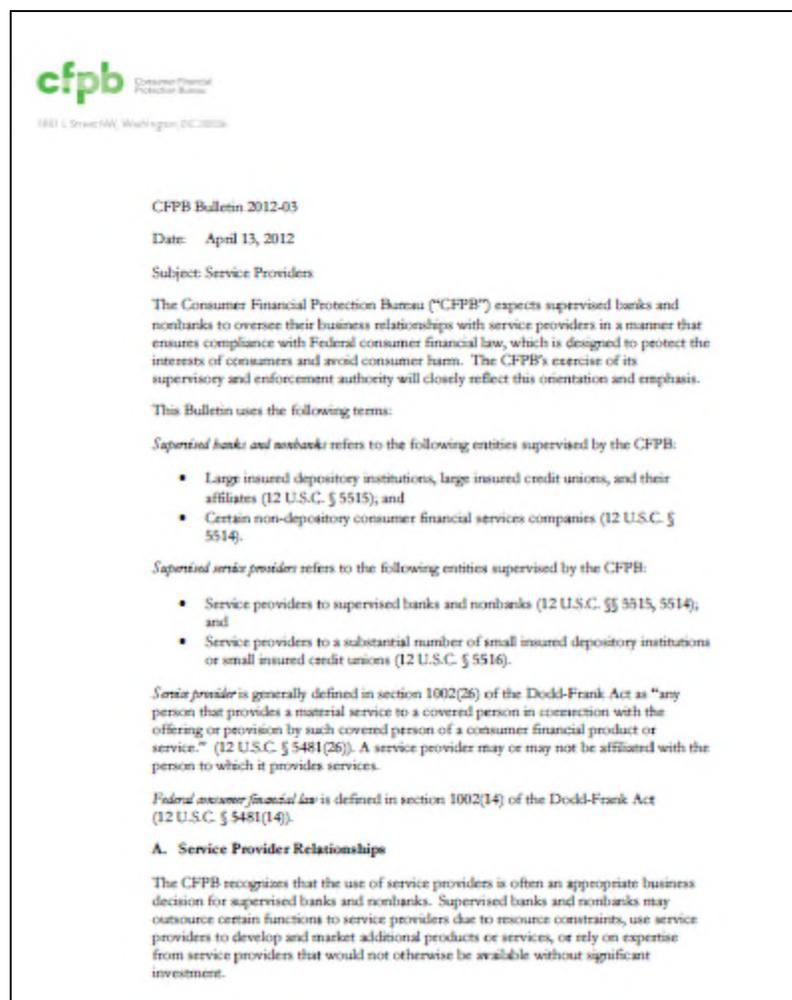
Preventative Steps

- Periodic training
- Audit customer interactions
- Remedy problems when discovered
- Backstop oral representations with written follow-up
- Prepare for supervision/upgrade compliance



Third Party Service Providers

- What a service provider is under the CFPA
- CFPB's stated-expectations: April 2012 Bulletin
- Managing service providers: UDAAP context



How The Bureau Can Apply Its UDAAP Authority

- Understanding the CFPB's Enforcement Process
- Understanding the CFPB's Supervision Process



CFPB Enforcement Authority

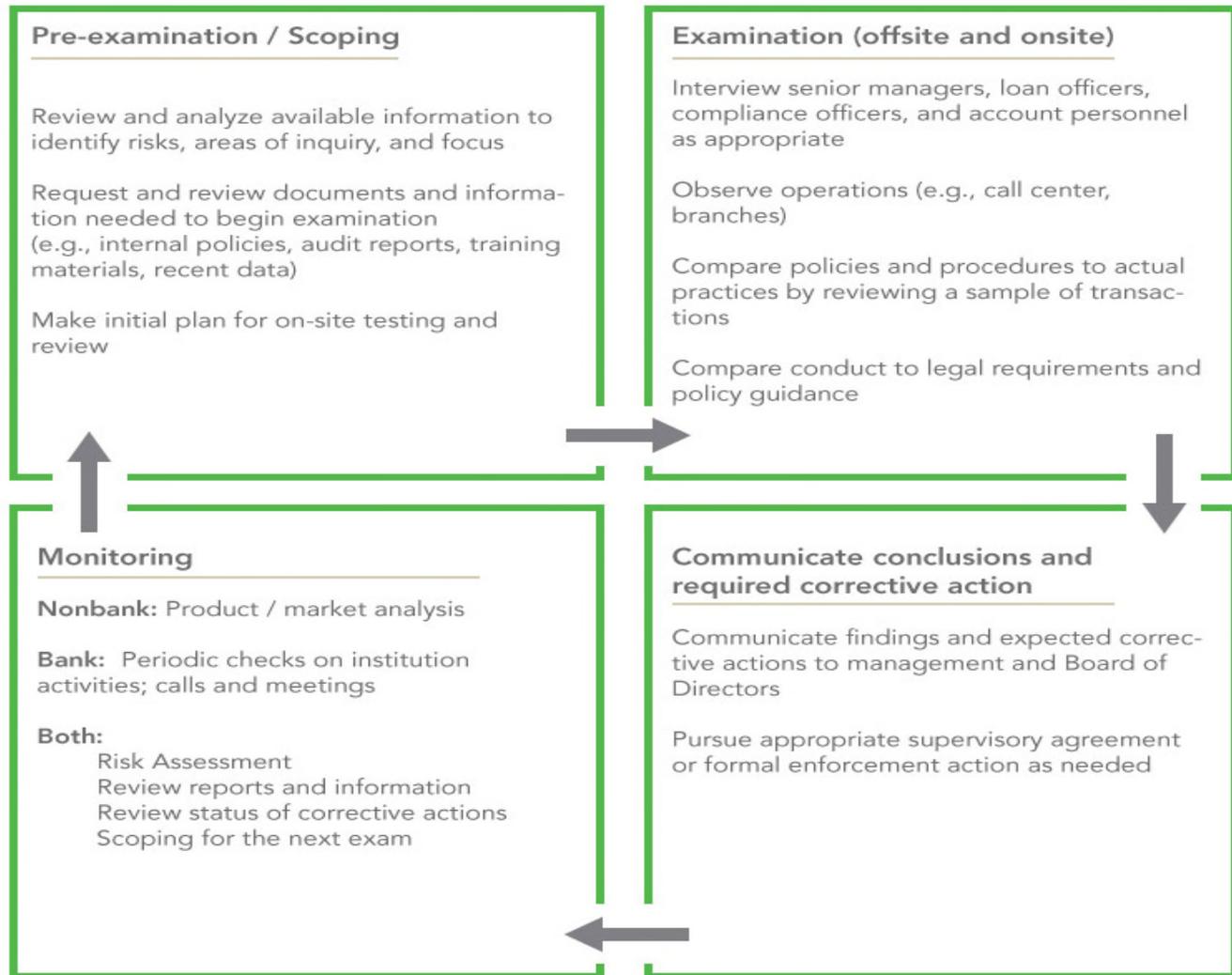
- CFPB is authorized to conduct investigations to determine whether any person is, or has, engaged in conduct that violates Federal consumer financial law.
- Investigations may be conducted jointly with other regulators, and may include:
 - subpoenas or civil investigative demands for testimony,
 - responses to written questions,
 - documents, or
 - other materials



CFPB Enforcement Power

- CFPB may investigate, issue subpoenas and civil investigative demands, and compel testimony
- CFPB may conduct hearings and adjudications to enforce compliance, including issuing cease-and-desist orders
- CFPB may initiate actions for civil penalties or an injunction
- Penalties up to \$1M per day for knowing violations
- No exemplary or punitive damages
- Criminal referrals to DOJ
- Whistleblower protection
- State attorneys general may also enforce the CFPA with notice to the CFPB
- May enforce rules issued by the FTC to the extent such rules apply to a covered a person or service provider
- No express private right of action under the CFPA





What's happening at the CFPB re Nonbank Supervision?

- **CFPB May Publish Debt Relief Services “Large Participant” NPRM Within Next Two Years**
 - Has already launch supervision for “larger participant” for Debt Collectors and Credit Bureaus
 - Examinations Underway
 - Exams conducted similar to other types of financial institutions that are currently regulated at the federal level or pursuant to federal statute
 - **Attorney-Client Privilege and Attorney Work Product Considerations—CFPB Rulemaking Efforts**
 - **Supervisory Highlights**



CFPB Supervision and Examination

- The statutory frameworks for supervision of large depository institutions and their affiliates and for non-depository consumer financial service companies are largely the same.
- The purpose of supervision, including examination, to:
 - assess compliance with **Federal consumer financial laws**,
 - obtain information about activities and compliance systems or procedures, and
 - detect and assess risks to consumers and to markets for consumer financial products and services;
- The requirement to coordinate with other Federal and state regulators; and
- The requirement to use where possible publicly available information and existing reports to Federal or state regulators pertaining to supervised entities.



CFPB Referrals from Exams

- **Criminal Wrongdoing** – Department of Justice
- **Tax Law Non-Compliance** - The CFPB is also required under the Act to refer information identifying possible tax law non-compliance to the Internal Revenue Service (IRS).



CFPB Solicits Whistleblowers

“We are providing whistleblowers and other knowledgeable sources with a direct line of communication to the CFPB,” said Rich Cordray, Assistant Director of Enforcement for the CFPB. “Their tips will help inform Bureau strategy, investigations, and enforcement. And they will help us fulfill our commitment to consumers.”

The whistleblower channels announced include an email address, whistleblower@cfpb.gov, and a toll free “tips hotline” at (855) 695-7974. And soon, an online tips portal accessible through its website.

The consumer finance whistleblower protections have significant implications for legal and regulatory compliance and raise a number of challenges for providers of consumer financial products and services. Covered employers will need to consider such issues as:

- How to maintain legal and regulatory compliance with consumer financial protection laws and regulations;
- How to ensure that, to the extent there is a violation of consumer financial protection law or regulations, an employee will take advantage of internal reporting mechanisms as opposed to bypassing such mechanisms and going straight to the CFPB;
- How to conduct internal investigations without encouraging whistleblowers; and
- How to successfully mediate any problems discovered.



Information and Document Requests

- Management Information and Business Structure
- Compliance Management System
 - Compliance Committee
 - Staff, Minutes, Etc.
- Policies and Procedures
 - Scripts, templates, language, disclosures, letters and other materials that are used when communicating with consumers
 - Disciplinary and compensation policies
 - Debt relief service related policies and procedures
 - Creditor proposals
 - Fee policy (timing and collection)
 - Payment processing
 - Privacy/data security



Information and Document Requests

- Training
- Audit/Internal Reviews/Quality Assurance
- Consumer Acquisition
 - Advertising, marketing, and lead generation
 - Counseling and enrollment in services
 - Creditor relations and conflicts of interest
 - Documentation practices
 - Document retention
 - Disclosures provided to consumers
 - Time barred debt?
 - Contract with consumers



Information and Document Requests

- Grant Policies
- Details regarding fair share and related grant money
- Documentation related to amount of debt, type, fees collected from consumer
- IT/Data Infrastructure
 - Dialer Controls and related safeguards
- Vendor Management
 - Contracts, policies, monitoring, audit
- Other
 - Litigation, state investigations, etc.



QUESTIONS AND DISCUSSION

VENABLE[®]_{LLP}

JONATHAN L. POMPAN

Attorney at Law

jlpompan@Venable.com

575 SEVENTH STREET, NW
WASHINGTON, DC 20004

T 202.344.4383

F 202.344.8300

www.Venable.com

To view Venable's index of articles and PowerPoint presentations on related legal topics, see www.Venable.com/ccds/publications.

