



**What the New Consumer Financial  
Protection Act Means for Credit Counseling  
Agencies and Other Debt Service Providers**

**September 21, 2010  
12:30 – 2:00 p.m. ET**

Venable LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, DC 20004

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***Speakers:***  
**Jeffrey S. Tenenbaum, Esq.**  
**Jonathan L. Pompan, Esq.**



# Presentation



**What the New Consumer Financial Protection Act  
Means for Credit Counseling Agencies and  
Other Debt Relief Service Providers**

*Jeffrey S. Tenenbaum, Esq. and Jonathan L. Pompan, Esq.*

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PRESENTATION**

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## Agenda

- **Background:** How did we get here?
- **Consumer Financial Protection Bureau**
  - Purpose, Organization and Structure
  - Coverage and Exemptions
  - What Authority is Provided?
    - Transfer of Existing Statute (and Rulemakings)
    - General Rulemaking Authority
  - Enforcement and Penalties
    - Relationship of Bureau and the FTC
  - Relationship of Bureau rulemakings and state laws
  - Required Studies and Reports
- **Other Opportunities and Pitfalls**
- **Issues for the Future**
- **Question and Answers**

## Background: How did we get here?

*President Obama ushered in a new era of regulation over credit counseling, housing counseling, and other debt relief services that will have a broad impact for years to come. For the first time in history, there will be an independent federal regulator with sweeping rulemaking and broad enforcement authority over all providers of credit counseling and related debt relief services.*

## Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, July 21, 2010)

- President signed Dodd-Frank Act into law on July 21, 2010
- Over 2,000 pages long
- Enacted in wake of the worst financial crisis since the Great Depression.
- Addresses a variety of issues that arose as a result of the crisis, including the perception that consumer protection was fragmented and, in some cases inconsistent with other regulatory functions.
- Expected to generate more than 300 regulations

## Consumer Financial Protection Act of 2010

- Title X of the Dodd-Frank Act, entitled the “**Consumer Financial Protection Act of 2010**” consolidates many federal consumer protection responsibilities into a new Bureau of Consumer Financial Protection (not Agency) (“CFPB” or the “Bureau”).
- Strips rulemaking authority for a host of federal consumer statutes from other agencies and authorizes CFPB to prescribe uniform rules
- Strips federally-chartered institutions of a significant degree of charter preemption authority
- Consolidates and Duplicates various supervisory and program authority areas related to debt relief services

What will the Bureau have jurisdiction over and how will it be structured?



**Purpose, Organization, and Structure**



## Structure

- Independent bureau of the Federal Reserve Board (“FRB”)
- A director with a 5-year term
  - Nominated by the President and approved by the Senate
    - September 17, 2010 - President Obama named Elizabeth Warren to an advisory post to setup the Bureau
- Statutory language that makes clear the FRB itself cannot interfere with the functions of the CFPB
  - An independent agency within an independent agency
  - FRB may delegate their bank consumer examination and supervision functions to the CFPB



## Functional Units Required to be Established

- Research
- Community Affairs
- Complaint Function
- Office of Fair Lending and ECOA
- Office of Financial Education
- Office of Service Members Affairs
- Office of Financial Protection for Older Americans
- Note: some offices are required to be established within one year of “Transfer Date”
- Consumer Advisory Board
  - The FRB may keep its own



## Funding of the New CFPB

- FRB revenues to be used to fund operations of the CFPB
- A “Victims Relief Fund” established
  - To be funded with civil money penalties
  - May be an incentive to bring CMP actions



## Coverage and Exemptions





## CFPB Coverage

- Broad authority to examine and supervise a “Covered Person” engaged in a “Financial Activity” in connection with a consumer financial product or service
  - Banks below \$10 billion exempted from direct CFPB jurisdiction
  - Other significant exemptions provided by statute
  - Note—it is unclear whether exemptions might be interpreted as applying to supervision or activity
  - It is also *very unclear* whether exempted persons or entities will be exempted from acts or practices determined by CFPB to be unfair, deceptive or abusive



## Broad Coverage

- Covered persons include the following:
  - Banks, thrifts, and credit unions;
  - Currency exchanges;
  - Mortgage loan originators, servicers and brokers;
  - Real estate settlement companies, appraisers, appraisal companies, and appraisal management companies;
  - Consumer credit reporting agencies, in some cases;
  - Debt collectors;
  - Check cashing, collection, or guaranty services;
  - Lenders and brokers in certain lease-to-own arrangements;
  - Financial and investment advisors;
  - **Credit counseling agencies, debt management plan providers, debt settlement service providers, mortgage foreclosure consultants, housing counseling agencies;**
  - Broker-dealers, non-depository trust companies, and deposit intermediation services;
  - Some sellers or issuers of stored value cards and instruments;
  - Money services businesses, money transmitters, and wire transmitters;
  - In limited cases, tax preparers, merchants or retailers, and financial data processors including data storage providers, transmission services, and software and hardware providers.



## Coverage (cont'd)

- A covered person includes “Related Persons”—
  - Officers and directors
  - Management employees
  - Joint venture partners
  - Independent contractors--who knowingly or recklessly participate in violations or breaches of duty, and includes—
    - Attorneys
    - Appraisers
    - Accountants
    - Vendors



## Exemptions from Coverage

- Partial or full exemptions are provided for the following entities—
  - Banks and thrifts below \$10 Billion
  - Investment advisor
  - CFTC-regulated party
  - SEC-regulated party
  - Farm credit-regulated party
  - Real estate broker
  - Insurance company
  - Income tax preparers
  - Merchants or retailers
  - Mobile home sales
  - Auto finance
  - Employee benefit plans



## Exemptions from Coverage (cont'd)

- **Limited exemption for attorneys engaged in the practice of law** – subject to certain preconditions – which may make it difficult for attorneys engaged in credit counseling, debt management, debt settlement, and loan modification activities to assert an exemption from regulations enacted by the Bureau under the CFPB.
- Narrow carve-out for activities relating to the solicitation or making of voluntary charitable contributions to tax-exempt organizations as recognized by the Internal Revenue Code.



## **Bottom Line: Coverage Includes Credit Counseling and Other Debt Relief Service Providers**

- The definition of “**covered persons**” includes a broad range of organizations and activities from banks and traditional financial institutions to “financial advisory services” such as:
  - “providing **credit counseling**”,
  - “providing services to assist a consumer with **debt management or debt settlement services, modifying the terms of any extension of credit, or avoiding foreclosure**,” and
  - “engaging in **deposit taking, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer**.”
- There is **no exemption for bona fide nonprofit credit counseling agencies**.



## What Authority is Provided?



## Statutes Transferred to CFPB

- Primary authority to issue regulations and interpretations of federal consumer statutes—
  - Alternative Mortgage Transaction Act
  - Consumer Leasing Act
  - **Electronic Funds Transfer Act**
  - Equal Credit Opportunity Act
  - Fair Credit Billing Act
  - Fair Credit Reporting Act (with exceptions)
    - Except 615(e) and 628
  - **Fair Debt Collections Practices Act**
  - FDI Act (Sections 43(b) through (f))
  - **Gramm-Leach-Bliley Act, Privacy Sections 502 through 509**
    - Except 505 as it applies to Section 501(b)



## Statutes Transferred to CFPB (cont'd)

- Federal consumer statutes, continued—
  - Home Mortgage Disclosure Act
  - Home Ownership and Equity Protection Act
  - Real Estate Settlement Procedures Act
  - S.A.F.E. Mortgage Licensing Act
  - Truth-in-Lending Act
  - Truth-in-Savings Act
  - Section 626 of Omnibus Appropriations Act of 2009
  - The Interstate Land Sales Full Disclosure Act
- Authority does **NOT** Include Section 5 of the FTC Act



## Supervisory Authority

- Monitoring authority
- Data gathering authority
- Access to prudential regulator examination reports
- Ability for CFPB to share its own data with other state and federal regulators



## Supervisory Authority (cont'd)

- Examination, supervision and enforcement authority over non-exempted covered persons
- Ability to require that covered persons register other than—
  - Insured depository institutions
  - Insured credit unions or
  - Related persons
- Direct examination authority for large depository institutions
- Direct examination authority for identified non-depository entities
  - Subject to rulemaking
  - Balance with prudential and state regulators
- Tax scofflaw reporting requirement
- Negotiation with FTC required

## General Rulemaking Authority

- Ability to Issue rules and regulations of consumer laws
- Primary authority—dual agency role eliminated
- CFPB granted what appears to be *Chevron* deference when interpreting transferred consumer protection laws

## What Authority Provided?

- Ability to prescribe rules to ensure that a consumer financial product is fully and completely described to a consumer
  - An additional layer of authority beyond specific federal consumer statutes
  - Model disclosures authorized
  - Safe harbor provided if model disclosures used



## General Rulemaking Authority (cont'd) – Expansive Power to Declare “Unfair, Deceptive or Abusive”

- Provides the CFPB with authority to declare an act or practice by a provider of a consumer financial product or service to be an unfair, deceptive or abusive act or practice
- Likely law developed interpreting Section 5 of the FTC Act will determine scope of terms “unfair and deceptive”
- Concept of “abusive” a relatively new addition
  - Used by the FTC in its recent amendment to the Telemarketing Sales Rule to prohibit charging and collecting fees in advance of providing debt relief services (effective October 27, 2010)



## Definition of Abusive

- In order to find an act or practice to be “abusive,” the CFPB must find that the act or practice:
  - 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 or service;
    - the inability of the consumer to protect his/her interests in selecting or using a consumer financial product or service; or
    - the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.
- Note: New authority is susceptible to an after-the-fact, qualitative analysis

## Enforcement and Penalties



## Enforcement and Penalties

- 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
  - Note: The FTC does not have enforcement jurisdiction under the FTC Act over *bona fide* nonprofit organizations (e.g., tax-exempt, nonprofit credit counseling agencies).
- No express private right of action under the CFPA

## How can a credit counseling agency or other debt relief service provider violate the law?

- CFPA prohibits **any covered person**, including a credit counseling agency, debt settlement service, loan modification or foreclosure assistance service, or a related service provider
  - (a) to offer or provide to a consumer any financial product or service **not in conformity with federal consumer financial law, or otherwise commit any act or omission in violation of a federal consumer financial law; or**
  - (b) to engage in any **unfair, deceptive, or abusive** act or practice.
- Also, any person to knowingly or recklessly **provide substantial assistance** to a covered person or service provider in violation of rules addressing unfair, deceptive, or abusive act or practice, or any rule or order issued thereunder, shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

## Relationship with State Law



## Federal Preemption

- The CFPB cannot preempt state laws if the state law provides greater protection to consumers
- States will be able to petition the CFPB to issue a new or modified consumer protection regulation
  - A hidden reverse preemption provision
- The CFPB will be required to consult with the federal banking agencies to ensure that the proposed regulation or rule does not present a safety or soundness risk
- The CFPB's determination must be published in the Federal Register
- Any CFPB preemption decision cannot impact any prior preemption determination of the OTC or the OCC for loans or activities entered into prior to the decision of the CFPB



## The CFPB and Preemption

The Act also modifies preemption in three ways:

- Charter preemption;
- Transactional preemption; and
- Provides the CFPB authority to override both charter preemption and transactional preemption through the grant of broad UDAP authority



## CFPB Unfair, Deceptive or Abusive Rulemaking Authority—A Backdoor Preemption

- Provides the CFPB with authority to declare an act or practice by a provider of a consumer financial product or service to be an unfair, deceptive or abusive act or practice
- As a federal statute, this authority may be used to negate activity otherwise authorized by a state debt adjusting law.



## Specific Mandates/Limitations

- A rulemaking to limit mandatory arbitration
- CFPB prohibited from imposing usury limits
- Combine TILA and RESPA disclosures within one year
- Issue regulations to enable a consumer to obtain information from a covered person



## CFPA Required Studies and Reports



## CFPA Required Studies and Reports

- Consumer Financial Protection Bureau:
  - Numerous Studies and Reports Related to its Primary Purpose
  - Reverse Mortgage Study and Regulations
  - Report on Private Educational loans and Private Educational Lenders
  - Study and Report on Credit Scores
- Government Accountability Office (“GAO”) reports, including:
  - Feasibility of Certification of Financial Literacy and Financial Counseling



## Additional Opportunities and Pitfalls



## Additional Opportunities and Pitfalls

- The “**Improving Access to Mainstream Financial Institutions Act of 2010**” promotes financial literacy and credit counseling that is supported by the Department of Treasury.
- The “**Mortgage Reform and Anti-Predator Lending Act**” sets minimum standards for mortgages.
- **Housing Counseling For Certain First Time Homebuyers**
- **Pre-Loan Housing Counseling Requirements**
- **Report on Efforts to Combat Foreclosure Rescue Scams**
- **Additional Funds for Neighborhood Stabilization Program**
- **Foreclosure Legal Assistance**
- **GAO Report on the Dodd-Frank Act and Housing Counseling**
- Amendments to the **Telemarketing and Consumer Fraud and Abuse Prevention Act** (co-enforcement authority of the Telemarketing Sales Rule by the CFPB and FTC)

## Issues for the Immediate Future

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- Focus and content of studies and reports to Congress and others by the CFPB, its functional units, and the GAO.
- Do old/new preemption rules apply to a loan or practice?
  - DMP providers be on the look out
- Is the DMP, debt settlement program, housing counseling service compliant with applicable state and federal laws and regulations?
- Is the service you offer or provide “fair” as structured and as implemented? How will the CFPB apply its “unfair, deceptive or abusive” acts or practices authority to for-profit and nonprofit debt relief service providers?

## Issues for the Immediate Future

- Will the CFPB differentiate between credit counseling, DMP providers, debt settlement, mortgage foreclosure consultants, HUD-approved housing counseling agencies, etc.?
- Numerous regulatory initiatives (e.g., SAFE Act, MARS Rulemaking, FTC’s Debt Relief Service Amendments to the TSR) and rulemakings (e.g., registration, contract disclosures, form agreements, justification for fees).
- Policy determinations regarding the focus of enforcement posture
- Recruiting of personnel and negotiations with other agencies (Elizabeth Warren)
- The use of the “bully pulpit”
- A bureaucracy larger than anyone imagined

## QUESTIONS AND DISCUSSION

Jeffrey S. Tenenbaum, Esq.

[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)

(202) 344-8138

Jonathan L. Pompan, Esq.

[jjpompan@Venable.com](mailto:jjpompan@Venable.com)

(202) 344-4383

Venable LLP  
575 7th Street, N.W.  
Washington, DC 20004  
[www.Venable.com](http://www.Venable.com)  
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## **Speaker Biographies**

**JEFFREY S. TENENBAUM**

**Jeffrey S. Tenenbaum** is a nationally recognized lawyer in the nonprofit and credit counseling / debt negotiation communities. Based in the firm's Washington, D.C. office, Mr. Tenenbaum heads up Venable's credit counseling and debt services practice, which provides extensive counseling to and advocacy for approximately 200 credit counseling and debt management agencies, debt relief services companies, and their affiliates and service providers, including most of the largest agencies and companies in the industry. Venable LLP, comprised of nearly 600 lawyers, is widely regarded as the country's premier law firm in the credit counseling and debt services industries.

Mr. Tenenbaum and his colleagues provide a broad range of legal services in this area, from obtaining and maintaining federal tax exemption (including over 75 Internal Revenue Service audits); to obtaining state debt adjusting licenses and otherwise ensuring compliance with state debt adjusting and related laws; to obtaining approval by the U.S. Justice Department's Executive Office for U.S. Trustees for pre-bankruptcy counseling and pre-discharge debtor education; to compliance with the Federal Trade Commission Act, Gramm-Leach-Bliley Act, Credit Repair Organizations Act, and federal and state telemarketing, fax and spam laws; to defending Congressional, Federal Trade Commission, state attorney general, and state banking / financial institution department investigations and enforcement actions; to defending class action and other private lawsuits; to proactive commercial litigation; to the formation of new nonprofit and for-profit credit counseling and debt relief services companies, including the transition from one corporate or tax form to another; to mergers, dissolutions and asset transfers.

He is a frequent lecturer and author for the leading industry associations, and has given numerous presentations with top IRS, FTC and other governmental officials on legal topics affecting the industry. Mr. Tenenbaum also is a regular commentator for *The New York Times*, *The Washington Post*, *The Los Angeles Times*, and other periodicals on industry topics, and has represented various industry segments before Congressional committees, the IRS, the FTC, the EOUST, and numerous state regulatory agencies.

In 2006, Mr. Tenenbaum was presented with the American Bar Association's Outstanding Nonprofit Lawyer of the Year award, and in 2004, he was an inaugural recipient of the *Washington Business Journal's* Top Washington Lawyer award. Mr. Tenenbaum has been listed in *Who's Who in American Law* and *Who's Who in America* annually since 2005. He received the distinguished Chairman's Award in 1997 and again in 2004 from the Greater Washington Society of Association Executives and The Center for Association Leadership for his leadership efforts in the association community. He serves as special counsel to ASAE & The Center for Association Leadership.

Mr. Tenenbaum is the author of the book *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books and publications and a frequent speaker at ASAE and other nonprofit industry programs. He is a prolific author on nonprofit legal topics, and served on the faculty of the ASAE Virtual Law School.

Mr. Tenenbaum previously served as legislative assistant to U.S. Congressman Peter Kostmayer and managed the Legal Section at ASAE. He received his J.D. from Catholic University and his B.A. in political science from the University of Pennsylvania.

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## JONATHAN L. POMPAN

**Jonathan L. Pompan** is an attorney in the Washington, D.C. office of Venable LLP. Mr. Pompan is part of Venable's Credit Counseling and Debt Services Industry Services practice, [www.venable.com/ccds](http://www.venable.com/ccds), which provides extensive counseling to and advocacy for approximately 200 credit counseling and debt management agencies, debt relief services companies, and their affiliates and service providers, including most of the largest agencies and companies in the industry. Venable LLP, comprised of nearly 600 lawyers, is widely regarded as the country's premier law firm in the credit counseling and debt services industries.

Mr. Pompan leads the Credit Counseling and Debt Services practice's Compliance Team, which conducts federal/state regulatory reviews of advertising and marketing and state law compliance for credit counseling agencies and debt relief services companies and related providers. Working with credit counseling agencies and debt reliever services companies, Mr. Pompan's experience includes representing various companies in Federal Trade Commission, state attorneys general and state banking / financial institution department investigations and enforcement actions; conducting compliance audits of credit counseling, housing counseling agencies, and debt negotiation companies; and assisting in the formation of new nonprofit and for-profit organizations.

Mr. Pompan provides a broad range of legal services in this area, from obtaining state debt adjusting licenses and otherwise ensuring compliance with state debt adjusting and related laws; to obtaining approval by the Executive Office of the U.S. Trustees for pre-bankruptcy counseling and pre-discharge debtor education; to obtaining and maintaining federal tax exemption; to compliance with the FTC Act, Gramm-Leach-Bliley Act, Credit Repair Organizations Act, Department of Housing and Urban Development Housing Counseling Program Requirements, federal and state money transmission statutes, and federal telemarketing, fax and spam laws. Mr. Pompan also has extensive experience in performing due diligence on credit counseling agencies and debt relief companies.

Mr. Pompan is the author of numerous articles on credit counseling and debt relief services industry related topics. He also has been a featured speaker at a number of industry conferences.

Mr. Pompan joined Venable after serving as in-house associate counsel at one of the nation's largest industry trade associations. Mr. Pompan also has had a significant amount of Washington regulatory and political experience after, during and prior to attending law school.

Mr. Pompan is a member of the American Bar Association and its Section on Business Law and Nonprofit Committee. He formerly served as the Parliamentarian for and on the board of directors of the George Washington Alumni Association, the alumni association of the George Washington University.

Mr. Pompan is a member of the District of Columbia and Maryland Bars. He received his J.D. from the Washington University in St. Louis School of Law. He holds a B.A. in political science from the George Washington University in Washington, D.C., where he was the recipient of the George Washington Award.

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## **Additional Materials**



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---

#### New York

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---

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T 703.760.1600

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T 202.344.4000

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Our clients rely on Venable's broad capabilities and experience across an array of disciplines and industries. The businesses we represent cover the full spectrum of industries and organization types, and range from entrepreneurs and emerging growth companies to large national and international organizations. Our lawyers bring a wealth of experience to the challenges and opportunities our clients face, and are recognized in the business and legal communities as the leading practitioners in their fields. Our clients also benefit from the broad perspective that our firm brings, as a large number of our attorneys are former prosecutors, regulators and lawmakers, as well as inside counsel.

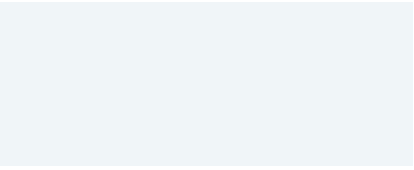
The commitment we have to our clients is matched by our commitment to the communities in which we and our clients operate. Venable attorneys are leaders and volunteers in philanthropic organizations, and perform tens of thousands of hours of pro-bono work. The Venable Foundation provides needed financial support to organizations that are indispensable to the least fortunate communities, and continues a long tradition of unparalleled giving which complements the pro bono legal work and community service of Venable attorneys and staff.

At Venable, we are proud that our clients come to us to solve their most complex legal issues, relying not only upon the knowledge and skills of our attorneys, but also on our unwavering commitment to delivering outstanding service. It is this combination that enables Venable attorneys to deliver counsel that is grounded in the reality that matters most – our clients'.

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- Congressional Investigations
- Construction

- Consumer Finance
- Consumer Products and Services
- Consumer Financial Protection Bureau Task Force
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## Credit Counseling Alert

July 2010

### The Dodd-Frank Act: What It Means for Credit and Housing Counseling Agencies and Other Debt Relief Service Providers

#### AUTHORS

Jonathan L. Pompan  
Jeffrey S. Tenenbaum

#### DOWNLOADABLE FILES

- The Dodd-Frank Act: What It Means for Credit and Housing Counseling Agencies and Other Debt Relief Service Providers

#### RELATED INDUSTRIES

Credit Counseling and Debt Services  
Consumer Financial Protection Bureau Task Force

#### ARCHIVES

2010	2006	2002
2009	2005	2001
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*President Obama ushered in a new era of regulation over credit counseling, housing counseling, and other debt relief services that will have a broad impact for years to come. For the first time in history, there will be an independent federal regulator with sweeping rulemaking and broad enforcement authority over all providers of credit counseling and related debt relief services.*

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and with it, the Consumer Financial Protection Act ("CFPA") that created a new Bureau of Consumer Financial Protection (the "Bureau" or "CFPB").

Among its responsibilities, the CFPB will take over direct or indirect supervision of most providers of consumer financial products and services, and will be empowered to declare individual acts or practices to be "unfair, deceptive, or abusive." Thus, any organization that operates in the consumer finance sphere – a broad group ranging from banks to credit counseling agencies, debt management plan providers, debt settlement service providers, mortgage foreclosure consultants, housing counseling agencies, and many others – will be impacted by the new law and the operations and decisions of the Bureau.

To assist our clients and friends in navigating this new regulatory landscape, we provide this summary of the key provisions of the Dodd-Frank Act related to the CFPA, including a discussion of the CFPB's structure and organization, primary authorities, primary purpose, jurisdiction, enforcement power and probable implementation process, and significant legal issues for the credit counseling industry and other providers of debt relief services.

As the provisions of the Dodd-Frank Act and the CFPA will broadly impact providers of credit counseling and other debt relief services, the focus is intended to be broad to cover a range of related industry participants. Nevertheless, please note that many of the topics discussed in this article are summary in nature and will continue to evolve as the CFPB commences its operations.

#### I. Consumer Financial Protection Act.

Key aspects of the CFPA as it relates to credit counseling agencies and other debt relief service providers include, but are not limited to:

##### **A. Structure and Organization of the CFPB.**

The Bureau will be an independent bureau housed within the Federal Reserve Board ("FRB") and funded out of FRB revenues. As an independent bureau within a federal agency that exists outside of the Executive Branch, the CFPB may be insulated from many of the usual political influences associated with federal administrative functions.

The CFPB will be led by a Director, who will be appointed by the President and confirmed by the Senate for a set term of five years. In contrast to other agencies with voting boards that hold mandates to oversee important components of our economy, the Director will be solely



responsible for the CFPB's issuance of regulations, enforcement and policy development.

The Director will be responsible for organizing several functional units and offices within the CFPB, including the following:

- Research
- Community Affairs
- Consumer Complaint Function
- Office of Fair Lending and Equal Opportunity
- Office of Financial Education
- Office of Service Member Affairs
- Office of Financial Protection for Older Americans
- Consumer Advisory Board

In addition, because the CFPB will have direct examination and supervision authority over all non-exempted (or partially-exempted) providers of consumer financial products and services – termed “covered persons” – the Director will be responsible for recruiting and organizing an examination, supervision and enforcement staff that ultimately may dwarf the size of comparable staffs at the federal banking agencies and the Federal Trade Commission (“FTC”).

#### **B. The CFPB's Primary Authorities.**

In an effort to centralize and coordinate federal financial consumer protection efforts, the CFPB has been given extraordinary authority in the following primary areas:

- **Federal Financial Consumer Protection Laws** – The CFPB will receive interpretative and rulemaking authority over 17 federal consumer protection laws, including the Fair Debt Collection Practices Act, sections of the Omnibus Appropriations Act of 2009 related to mortgage transactions, the Truth-in-Lending Act (“TILA”), the Real Estate Settlement Procedures Act (“RESPA”), and the Safe and Fair Enforcement for Mortgage Licensing Act (“SAFE Act”). Even in instances in which other state or federal agencies will continue to exercise primary examination authority, the responsibility for issuing regulations and interpretations for virtually all federal financial consumer laws will now reside with the CFPB.
- **Enhanced Consumer Disclosure and Registration Authority** – In addition to the above-mentioned individual consumer protection laws, the CFPB has been given separate authority to require new disclosures for all consumer products and services. This authority would permit, for example, developing disclosures for debt management plans, debt settlement services, and mortgage delinquency housing counseling.
- **Expansive “Unfair, Deceptive, or Abusive” Acts or Practices Authority** – In order to address concerns about unfair treatment of consumers by providers of consumer financial products and services, the CFPB has been given broad authority to declare acts or practices related to the delivery of a consumer financial product or service to be “unfair, deceptive, or abusive.” Although this mandate is similar to the FTC's unfair and deceptive acts or practices authority under the Federal Trade Commission Act (“FTC Act”), the enforcement of the new “abusive” element is less-charted territory.

With that said, it is safe to assume that the new Bureau, which will likely have former FTC staffers in key enforcement positions, will look to the FTC's precedent when issuing rules or taking enforcement actions based on unfairness theories. The same is true with respect to deceptive acts or practices.

While the “abusive” standard is not found in the FTC Act, it is of increasing importance. For example, the FTC's Telemarketing Sales Rule (“TSR”) – which was issued in 1995 in response to very specific direction from Congress – prohibits not only deceptive telemarketing practices, but also abusive telemarketing practices. Among the rules that the FTC has enacted using its power to curtail “abusive” telemarketing practices is the Do-Not-Call Rule. And, in 2009, the FTC proposed amending the TSR to prohibit the charging or collecting of fees before services are rendered by telemarketers of debt relief services as a practice they considered abusive – an example of the kind of regulatory action that might come from the new Bureau as it relates to consumer financial products and services, including debt settlement services.

- **Examination, Supervision and Enforcement** – Except for exempted financial service providers, the CFPB has been given authority to examine and enforce consumer laws against

large depository institutions and their holding companies and affiliates, as well as literally thousands of companies not previously directly regulated by the federal government.

While the Bureau will assume certain rulemaking and other authorities of the FTC under certain consumer protection laws transferred to the Bureau, the FTC retains its authority under the FTC Act and is required to be consulted in certain rulemakings. In addition, the agencies are required to negotiate an agreement to address avoiding duplication of or conflicts between rules prescribed by the Bureau and the Federal Trade Commission that apply to a covered person or service provider with respect to the offering or provision of consumer financial products or services. While the CFPB does not specify where the lines will be drawn between the organizations, it does require that the agreement address consultation with the other agency prior to proposing a rule and during the comment period.

### **C. Primary Functions of the CFPB.**

The CFPB has been given a sweeping mandate in the following primary areas:

- conducting financial education programs;
- collecting, investigating and responding to consumer complaints;
- collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;
- subject to specified criteria, supervising “covered persons” or “service providers” – including credit counseling agencies and other debt relief service providers – for compliance with federal consumer financial laws, and taking appropriate enforcement action to address violations of federal consumer financial laws;
- issuing rules, orders and guidance implementing federal consumer financial laws; and
- performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

In addition, the Bureau and its offices are required to produce a number of enumerated studies and reports for Congress.

### **D. Coverage and Exemptions.**

It may come as no surprise to credit counseling agencies and other providers of debt relief services that virtually all or most their activities will now be subject to direct or indirect supervision by the CFPB as part of the definition of “covered persons” or “service providers.”

Specifically, the definition of “covered persons” includes a broad range of organizations and activities from banks and traditional financial institutions to “financial advisory services” such as “providing credit counseling”, “providing services to assist a consumer with debt management or debt settlement services, modifying the terms of any extension of credit, or avoiding foreclosure,” and “engaging in deposit taking, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer.” There is no exemption for bona fide nonprofit credit counseling agencies.

The term “service providers” generally means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that (a) participates in designing, operating or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form that the person transmits or processes). However, the term “service provider” does not include a person that offers or provides to a covered person a “ministerial service” or “time or space for advertisements for a consumer financial product or service through print, newspaper, or electronic media.”

Also, it is noteworthy that, unlike many other federal regulatory schemes that base their jurisdiction on the form of charter (such as banking), the CFPB’s jurisdiction will cut across all individuals and corporate forms and focuses on the fact that a consumer financial product or service is being delivered.

While the definition of “covered persons” and “service providers” is very broad, it remains to be seen whether the CFPB will be capable of asserting direct supervision over every category of covered person – particularly during the initial stages of the CFPB’s organizational efforts.

While the majority of consumer financial service providers were not able to obtain exemptions from CFPB jurisdiction, several industry groups were successful (or partially successful) in their efforts to be exempted. Notably, the laundry list of exempt professions includes attorneys engaged in the practice of law – subject to certain preconditions – which may make it difficult for attorneys engaged in credit counseling, debt management, debt settlement, and loan modification activities to assert an exemption from regulations enacted by the Bureau under the CFPB. Also, among the exemptions is a narrow carve-out for activities relating to the solicitation or making of voluntary charitable contributions to tax-exempt organizations as recognized by the Internal Revenue Code. This exemption does not apply to the offering or provision of other consumer financial products or services covered by the CFPB.

It is important to note that the exemptions referenced above generally relate to core business activities and arguably may not extend to ancillary businesses that involve consumer financial services and products. The CFPB likely will issue regulations that will circumscribe the scope of any exemptions that are enjoyed by these entities. It is also probable that, as part of the rulemaking process, many “covered persons” and “service providers” will attempt to obtain exemptions for specific products and business activities.

Accordingly, exempted businesses and persons should closely monitor regulatory developments as the CFPB interprets the scope of exemptions from its direct or indirect regulatory jurisdiction.

#### **E. Enforcement and Penalties.**

CFPA and regulations issued thereunder may be enforced by the Bureau, state Attorneys General, and other state regulators, after consultation with the Bureau. In particular, the Bureau has the authority to issue subpoenas and demands that are functionally equivalent to civil investigative demands used by the FTC. Like the FTC, the Bureau is afforded two different ways of enforcing its rules: administrative (but with the ability to issue cease and desist orders) and federal court litigation.

The Bureau has the power to seek truly sweeping relief, including rescission or reformation of contracts, refund of money, restitution and disgorgement, payment of damages or other monetary relief, as well as injunctive relief, and the Bureau may recover its costs in connection with prosecuting such actions. Unlike the FTC’s ability in most cases, under the Act, the civil penalties that may be assessed for any violation of law, rule or final order or condition imposed in writing by the Bureau are as follows: up to \$5,000 per day for any violation; up to \$25,000 per day for reckless violations; and up to \$1 million per day for knowing violations.

Notably, the FTC also gains the authority to enforce rules issued by the Bureau as violations of the FTC Act with respect to “covered persons” or “service providers,” but subject to the jurisdictional limitations under the FTC Act. Significantly, this would allow the FTC to bring an enforcement action for violation of a rule issued by the Bureau against a for-profit debt relief service provider. However, the FTC would not be able to bring an action for violation of a Bureau rule against a *bona fide* nonprofit credit counseling agencies because *bona fide* nonprofit organizations are exempt from the jurisdiction of the FTC.

Of particular importance for credit counseling agencies and other providers of debt relief services is the fact that the Bureau will have the authority to enforce rules issued by the FTC (with respect to an unfair or deceptive act or practice) to the extent such rules apply to a covered person or service provider in connection with the offering or provision of a consumer financial product or service. As a result, by way of example, the Bureau would have the ability to enforce the FTC’s amendments to the TSR regarding debt relief services against *bona fide* nonprofit credit counseling agencies, even though the FTC itself lacks jurisdiction over such agencies. This is potentially extremely significant and bears close watching by the nonprofit credit counseling industry.

#### **F. The Implementation Process.**

Although the CFPB may eventually grow into a sizable government agency, there are several necessary organizational hurdles that it must address.

The first is staffing. Other than staff from the Office of the Comptroller of the Currency, there is no mandated transfer of personnel from federal agencies to the CFPB. Thus, the Director will be required to negotiate with other federal agencies in order to recruit staff. Because of the

required number of functional offices that must be created, this task may take a considerable period of time to accomplish.

The second is the organizational challenge of assembling an examination and supervision staff. Because the CFPB's jurisdiction is based upon function and not charter form, any effective examination processes must be capable of accommodating the various industry segments and their respective approaches to consumer compliance. Moreover, with the exception of banking organizations and their examination policies and procedures, the CFPB will be faced with the task of drafting new examination procedures that must accommodate different approaches to effective compliance.

Finally, and most importantly, virtually every aspect of the creation and functions of the CFPB will depend upon the administrative rulemaking process, including the transfer of federal consumer protection statutes to the CFPB, the issuance of guidance regarding the CFPB's interpretation of key statutory terms and provisions, and the negotiation of relationships with other federal agencies and state licensing authorities. Even assuming the successful assembly of a core operating staff for the CFPB, it is difficult to imagine how these initial administrative tasks can be completed within 12 to 18 months.

Within 60 days of enactment, the Secretary of the Treasury is required to designate a "transfer date" in 6 to 12 months, on which the CFPB will become operational (with the flexibility to extend the transfer date by an additional year). Until the appointment of the Director, the Secretary of the Treasury is authorized to exercise the powers granted to the CFPB.

#### **G. CFPB Required Studies and Reports.**

As mentioned above, the CFPB requires the Bureau to conduct a number of studies and reports related to its primary purposes. In addition, the CFPB mandates other particular studies and reports, including:

- **Reverse Mortgage Study and Regulations** – Within one year of the designated transfer date of jurisdiction from HUD, the CFPB requires the Bureau to conduct a study of reverse mortgage transactions, including identifying unfair, deceptive or abusive practices. While the Bureau has the general authority to issue regulations relating to reverse mortgages, after the completion of the study, the Bureau may issue regulations if it determines that conditions or limitations on reverse mortgage transactions are necessary or appropriate for accomplishing the purposes of the law. The regulations may provide for integrated disclosure standards and model disclosures for reverse mortgage transactions that combine the disclosures required under RESPA with the Home Equity Conversion Mortgages section of the National Housing Act.
- **Report on Private Education Loans and Private Educational Lenders** – By July 21, 2012, the Director of the Bureau and the Secretary of Education, in consultation with the Commissioners of the FTC and the Attorney General of the United States, are required to submit a report on private education loans and private educational lenders to the Attorney General of the United States, the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Health, Education, Labor, and Pensions, the House Committee on Financial Services, and the House Committee on Education and Labor. The CFPB specifies minimum content requirements for the report.
- **Study and Report on Credit Scores** – By July 21, 2011, the Bureau is required to conduct a study on the nature, range and size of variations between the credit scores sold to creditors and those sold to consumers by consumer reporting agencies.
- **GAO Reports** – The CFPB requires a number of reports by the Government Accountability Office ("GAO"), including a study and report on the feasibility of certification of financial literacy and financial counseling, including "recognizing outstanding programs, and developing guidelines and resources for community-based practitioners."

#### **II. Significant Legal Issues under the CFPB for the Credit Counseling Industry and Other Providers of Debt Relief Services.**

While space does not permit a complete analysis of all of the legal concerns that consumer financial product and service providers must consider, several of the more significant topics and questions for anyone engaged in providing a debt relief service (including credit counseling agencies) and their service providers are as follows:

- Focus and content of studies and reports to Congress and others by the Bureau, its functional units, and the GAO
- Use of “unfair, deceptive, or abusive” acts or practices authority
  - Will the CFPB follow in the footsteps of the FTC and consider charging or collecting fees prior to services being rendered for debt relief services by for-profit organizations an abusive practice that requires a prohibition?
- Lack of federal preemption (effectively, no preemption of state consumer protection laws or state debt adjusting statutes)
- Coverage determinations
  - Will the CFPB differentiate between credit counseling, debt management plan providers, debt settlement services, mortgage foreclosure consultants, and others involved in providing debt relief services?
  - What recognition will there be with regard to the life cycle of consumer credit and debt and what impact will that have on the regulation of creditors, debt collectors, credit counseling agencies, debt management plan providers, debt settlement companies, mortgage foreclosure consultants, and other providers of debt relief services?
- Examination and supervision
- Interaction with the Executive Office for the United States Trustees (“EOUST”) (which approves bankruptcy counseling and debtor education providers), FTC, HUD (which retains overall jurisdiction for HUD-approved housing counseling), the federal banking agencies, and state regulators
- Rulemakings –
  - Will the Uniform-Debt Management Services Act by the National Conference of Commissioners on Uniform State Laws become the new standard?
  - What business models, corporate forms and services will be favored, if any?
  - Will registration or written disclosures be proposed?
  - What will be the future of the FTC rulemakings to amend the TSR to address the sale of debt relief services and mortgage assistance relief services?
  - What will be the future of the HUD rulemaking to implement the SAFE Act?
- Enforcement –
  - How will the Bureau and FTC coordinate enforcement priorities?
  - Will the Bureau enforce the FTC’s rules, such as the TSR amendments regarding the sale of debt relief services, against *bona fide* nonprofit credit counseling agencies that are exempt from the FTC’s reach?
  - How will state Attorneys General and other state regulators take advantage of the new tools available to them to bring law enforcement actions against providers of consumer financial products and services?

### **III. Additional Opportunities for Credit Counseling Agencies and Other Providers of Debt Relief Services.**

In addition, within the Dodd-Frank Act, credit counseling agencies and other debt relief services providers may find relevant the following provisions:

1. The “**Improving Access to Mainstream Financial Institutions Act of 2010**” encourages small-dollar lending to low-to-moderate-income Americans, provided that the lender also promotes financial literacy and credit counseling that is supported by the Department of Treasury.
2. The “**Mortgage Reform and Anti-Predator Lending Act**” sets minimum standards for mortgages by requiring lenders to establish that a consumer has a reasonable ability to repay at the time the mortgage is consummated. Several mortgage reforms that relate to HUD-approved

housing counseling are highlighted below:

- The “Expand and Preserve the Home Ownership Through Counseling Act” amends the Department of Housing and Urban Development Act to place a renewed emphasis on housing counseling by establishing the Office of Housing Counseling within the Office of the Secretary of HUD, which shall conduct activities relating to homeownership and rental housing counseling. Additional aspects include:
  - Creation of an advisory committee of not more than 12 individuals that will include HUD-approved housing counseling agencies.
  - Requires the Secretary of HUD to provide for the certification of various computer software programs for consumers to use in evaluating different residential mortgage loan proposals.
  - Directs the Director of Housing Counseling to develop, implement and conduct national public service multimedia campaigns designed to make persons facing mortgage foreclosure, persons considering a subprime mortgage loan to purchase a home, elderly persons, persons who face language barriers, low-income persons, and other potentially vulnerable consumers aware that: (1) it is advisable, before seeking or maintaining a residential mortgage loan, to obtain homeownership counseling from unbiased and reliable sources; and (2) such homeownership counseling is available. Requires ten percent of funds appropriated to be used for education programs focused on foreclosure rescue education programs.
  - Requires the Secretary of HUD to provide: (1) advice and technical assistance to states, local governments, and nonprofit organizations regarding the establishment and operation of related educational programs; and (2) financial assistance in this regard.
  - Authorizes \$45 million for the next 4 years for housing counseling assistance to HUD-approved housing counseling agencies and state housing finance agencies that meet qualification standards and guidelines established by the Secretary of HUD. The grant program assistance is targeted at programs for rural areas having traditionally low access to counseling services including areas with insufficient Internet.
  - Requires homeownership counseling or rental housing counseling organizations receiving HUD assistance for counseling activities to provide such counseling only through organizations or counselors certified by the Secretary as competent to provide such counseling.
  - Directs the Secretary to study and report to Congress on the root causes of the default and foreclosure of home loans.
  - Establishes new requirements for the accountability and transparency for grant recipients, as well as remedies for the misuse of funds.
  - Amends RESPA to revise requirements for HUD booklets designed to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services.
  - Directs NeighborWorks to dedicate a percentage of funds to foreclosure rescue warnings.
- **Housing Counseling Required for Certain First Time Homebuyers.** A creditor is prohibited from providing loans that result in negative amortization before: (1) certain disclosures are provided; and (2) in the case of a first-time homebuyer with respect to a non-qualified mortgage (as defined by the Act), the first-time borrower provides the creditor with sufficient documentation to demonstrate that the consumer received homeownership counseling from organizations or counselors certified by the Secretary of HUD as competent to provide such counseling.
- **New Housing Counseling Disclosure on Monthly Statements/Hybrid Adjustable Rate Mortgages Reset Notices.** There are several provisions in the Dodd-Frank Act requiring that homeowners be provided with a notice about the availability of HUD-approved housing counseling. For example, the Truth in Lending Act is amended by adding a provision that requires on periodic statements for residential mortgages names and contact information of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publicly available by HUD or a state housing finance authority. Also, Hybrid Adjustable Rate Mortgage reset notices sent to homeowners are required to include the same information.

- **Pre-Loan Housing Counseling Requirements.** A creditor may not extend credit to a consumer in the form of a mortgage designated as a “high cost mortgage loan” without first receiving certification from a counselor employed by a counseling agency that is approved by the Secretary of HUD, or, at the discretion of the Secretary, the state housing finance authority, that the consumer received counseling on the advisability of the mortgage. Such counselor cannot be employed by the creditor or an affiliate of the creditor or be otherwise affiliated with the creditor.

### 3. Miscellaneous Provisions of Importance.

- **Report on Efforts Combat Foreclosure Rescue Scams.** The GAO is directed to conduct a study of the current inter-agency efforts of the Department of Treasury, HUD, the Department of Justice, and the FTC to crack down on mortgage foreclosure rescue scams and loan modification fraud, and to then report to Congress. No deadline is provided for the report.
- **Additional Funds for the Neighborhood Stabilization Program.** The law authorizes \$1 billion to be provided to HUD for states and localities to combat the ugly impact on neighborhoods of the foreclosure crisis by rehabilitating, redeveloping, and reusing abandoned and foreclosed properties.
- **Emergency Mortgage Relief.** The law authorizes \$1 billion to be provided to HUD to make available through the Emergency Homeowners’ Relief Fund funding for loans to qualified unemployed homeowners with reasonable prospects for re-employment to help them cover mortgage payments until they are re-employed.
- **Foreclosure Legal Assistance.** The law authorizes a HUD-administered program for making grants to provide foreclosure legal assistance to low- and moderate-income homeowners and tenants related to homeownership preservation, home foreclosure prevention, and tenancy associated with home foreclosure.
- **GAO Report on the Dodd-Frank Act and Housing Counseling.** By July 21, 2011, the GAO is directed to conduct a study to determine the effects that the enactment of the Act will have on the availability and affordability of credit for consumers, small businesses, homebuyers, and mortgage lending. As part of this study, the GAO is instructed to, among other listed categories, study the effect of housing counseling services regulated by HUD and the new Office of Housing Counseling.

Lastly, of note, the Dodd-Frank Act did not include the legislative text of S. 3264 (2010), entitled the Debt Settlement Consumer Protection Act, which would grant the FTC broad rulemaking and enforcement authority over debt settlement and debt relief services, as well as enact significant restrictions on debt settlement service providers, including up-front fee restrictions (except for a modest setup fee) and disclosure requirements.

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### About Venable's Credit Counseling and Debt Services Practice Group and the CFPB

We are dedicated to providing our thoughts and observations on the CFPB and the short- and long-term impact that its policy determinations will have on credit counseling agencies, housing counseling agencies, and other debt relief service providers. We will continue to make industry-specific alerts available at [www.Venable.com/ccds/publications](http://www.Venable.com/ccds/publications). In addition, we are part of Venable’s CFPB Task Force; its general updates and materials can be found at [www.Venable.com/cfpb-task-force](http://www.Venable.com/cfpb-task-force).

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***Jonathan Pompan**, an attorney in the Washington, DC office of Venable LLP, represents nonprofit credit counseling agencies and others in a wide variety of areas including regulatory compliance, as well as in connection with federal and state investigations and law enforcement actions. For more information, please contact Mr. Pompan at 202.344.4383 or [jpgompan@Venable.com](mailto:jpgompan@Venable.com).*

***Jeffrey Tenenbaum**, a partner in the Washington, DC office of Venable LLP, chairs Venable’s*

*nonprofit organizations practice as well as its credit counseling and debt services practice. For more information, please contact Mr. Tenenbaum at 202.344.8138 or [jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com).*

*This article 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 a specific fact situation.*





## Articles

July 30, 2010

### FTC Issues Final Rules for Debt Relief Services: Landmark Changes for Service Providers, Advertisers and Marketers of Debt Relief Services

#### AUTHORS

Jonathan L. Pompan  
Jeffrey S. Tenenbaum

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On July 29, 2010 at the White House, with Vice President Biden at the podium, the Federal Trade Commission (the “FTC” or “Commission”) announced its long-awaited amendments to the Telemarketing Sales Rule (“TSR”) targeting the sale of “debt relief services” (the “Final Rule” or the “rule”). Under the Final Rule, virtually all debt relief service providers that promote their services through inbound or outbound telephone calls, including in response to inquiries arising from lead generators, will be subject to a ban on advance fees before services are provided, as well as new and existing requirements, and other provisions, of the TSR.

Although the TSR does not apply to *bona fide* nonprofit credit counseling agencies, the new rule potentially may impact such agencies because they now fall under the jurisdiction of the new Bureau of Consumer Financial Protection, which shares enforcement authority with the FTC for violations of the TSR.

The Final Rule will be published in the *Federal Register* shortly, and is available now on the FTC’s website. The provisions of the Final Rule will take effect on September 27, 2010, with the exception of the advance fee ban provision, which will take effect on October 27, 2010. Importantly, the advance fee ban does not apply retroactively, so it does not apply to contracts with consumers executed prior to October 27, 2010. The FTC has issued guidelines for complying with the TSR, including the new debt relief rules.

The FTC’s stated goals of the new rule to curb deceptive and abusive practices in the telemarketing of debt relief services. The rule defines the term “debt relief service;” ensures that, regardless of the medium through which such services are initially advertised, telemarketing transactions involving debt relief services will be subject to the TSR; mandates certain disclosures and prohibits misrepresentations in the telemarketing of debt relief services; and, most significantly, prohibits any entity from requesting or receiving payment for debt relief services until such services have been fully performed, accepted and documented to the consumer.

A few other highlights of the rule: (1) it will now be illegal to provide “substantial assistance” to another company if you know they are violating the rule or if you remain deliberately ignorant of their actions (this expressly applies to lead generators, back-office processors, and “dedicated account” providers, among others); (2) strict parameters are established regarding “dedicated accounts” utilized to set aside funds for settlement and settlement company fees; (3) there are very specific and strict guidelines for the types of substantiation necessary before certain marketing claims can be made; and (4) the rule can be enforced by the FTC, the new Bureau of Consumer Financial Protection, state Attorneys General, and through private litigation, including class actions.

The Final Rule is likely to cause debt relief providers – primarily for-profit debt settlement companies – to have to transition to new business models and to develop compliance programs that reflect strict advertising and marketing requirements. It also will impact the activities of lead generators, affiliate marketers, back-office service providers, payment processors, banks, and

others that provide substantial assistance to debt relief providers, even if they do not sell or provide debt relief services directly to consumers. In short, according to the FTC, those who provide such “substantial assistance” will now be required to review the policies, procedures and operations of debt relief companies to ensure they are complying with the Final Rule, or risk violating the law themselves.

The Commission adopted the rule by a 4-1 vote, with Commissioner J. Thomas Rosch voting “no.” In the announcement, Chairman Jon Leibowitz said that the “rule will stop companies who offer consumers false promises of reducing credit card debts by half or more in exchange for large, up-front fees. Too many of these companies pick the last dollar out of consumers’ pockets – and far from leaving them better off, push them deeper into debt, even bankruptcy.”

Below we provide a summary of the key provisions of the Final Rule, the FTC’s Statement of Basis and Purpose (“SBP”), and the newly issued business guidance for debt relief services. The focus is intended to be broad to cover a range of industry participants and issues. Nevertheless, please note that the discussion is general in nature and how the Final Rule may impact your activities and relationships may differ. In addition, we note that this is not a discussion of all of the requirements under the TSR, which include provisions concerning the Do-Not-Call Registry and other telemarketing practices.

### **I. Background.**

While the FTC’s debt relief services rule has its technical origins in the TSR, which is promulgated under the *Telemarketing and Consumer Fraud and Abuse Prevention Act* (the “Telemarketing Act”), the FTC has long been active in bringing enforcement actions to stamp out deceptive debt relief practices. In the last seven years, the FTC has brought over 20 lawsuits against sham nonprofit credit counseling agencies, debt settlement companies, and debt negotiators. These cases involved allegations of violations of Section 5 of the Federal Trade Commission Act (the “FTC Act”), which prohibits unfair and deceptive trade practices, and some of these cases involved TSR violations.

The Commission also has issued numerous publications to consumers warning of debt relief scams and has sent warning letters to media outlets. In addition, the FTC has authority to challenge credit repair companies under the Credit Repair Organizations Act and has a pending rulemaking to address Mortgage Assistance Relief Services.

The state Attorneys General and other state regulators also have been very active in bringing law enforcement actions against debt relief companies, having filed over 200 cases in the last several years. Nearly every state has laws that regulate debt adjusting to some degree, including debt settlement, debt management, and credit counseling, and have used these laws to regulate debt relief service providers.

In light of all of this ongoing activity and the growing number of consumers in financial distress because of the state of the U.S. economy, the FTC held a public workshop in September of 2008 entitled, “Consumer Protection and the Debt Settlement Industry.”

On July 30, 2009, the FTC issued a notice of proposed rulemaking that sought comments on the proposed debt relief amendments to the TSR. The comment period, as extended, closed on October 26, 2009. The FTC received 321 comments from interested parties. The FTC held a public forum on November 4, 2009, where Commission staff and interested parties discussed the proposed amendments and issues raised in the comments.

### **II. Types of Entities Subject to the Rule.**

The new rule applies to for-profit sellers of debt relief services and telemarketers for debt relief companies. The TSR defines “telemarketing” as a “plan, program, or campaign . . . to induce the purchase of goods or services” involving more than one interstate telephone call.

In addition, under the TSR, it is illegal for a person to provide “substantial assistance” to another seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates the rule.

Although the TSR generally exempts inbound calls placed by consumers in response to direct mail or general media advertising, there is no such exemption in the Final Rule. The Final Rule, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption. As a result, virtually all debt relief transactions involving interstate telephone calls

are now subject to the TSR.

#### **A. Definition of Debt Relief Services.**

The Final Rule defines “debt relief service” as “any service or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.”

The FTC’s SBP makes clear that the use of the term “service” is not intended to be limiting in any way. As a result, the Commission states that “regardless of its form, anything sold to consumers that consists [sic] of a specific group of procedures to renegotiate, settle, or in any way alter the terms of a consumer debt, is covered by the definition.” Further, “[t]he Commission believes that this definition appropriately covers all current and reasonably foreseeable forms of debt relief services, including debt settlement, debt negotiation, and debt management, as well as lead generators for these services.”

Although the Final Rule does not include “products” in the definition of “debt relief services,” the Commission notes in the SBP that this limitation should not be “used to circumvent the rule by calling a service – in which a provider undertakes certain actions to provide assistance to the purchaser – a ‘product.’ Nor can a provider evade the rule by including a ‘product,’ such as educational material on how to manage debt, as part of the service it offers.”

#### **B. Coverage of Attorneys.**

The FTC is concerned with attorneys in connection with debt relief services. Based on the record in the rulemaking, the Commission decided that an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services “is not warranted.” The FTC offers several reasons for its decision, including that:

[I]n general, attorneys who provide *bona fide* legal services do not utilize a plan, program, or campaign of interstate telephonic communications in order to solicit potential clients to purchase debt relief services. Thus, an attorney who makes telephone calls to clients on an individual basis to provide assistance and legal advice generally would not be engaged in “telemarketing.”

In addition, the FTC states that “it is important to retain [TSR] coverage for attorneys, and those partnering with attorneys, who principally rely on telemarketing to obtain debt relief service clients, because they have engaged in the same types of deceptive and abusive practices as those committed by non-attorneys.” The FTC also states that its decision to not grant an exemption to attorneys from the Final Rule is consistent with the existing scope of the TSR and several other statutes and FTC rules designed to “curb deception, abuse and fraud.”

#### **C. Coverage of Sham Nonprofits.**

The Final Rule does not cover *bona fide* nonprofit organizations, but does cover companies that falsely claim nonprofit status. Over the years, the FTC has brought enforcement actions against companies that it has alleged are sham nonprofits in order to curb perceived unfair and deceptive conduct.

#### **D. Persons Providing Substantial Assistance.**

The FTC is concerned about those that work with debt relief companies and telemarketers. As mentioned above, the TSR makes it illegal to provide “substantial assistance” to a provider if that person knows that the primary actor is violating the rule or if the person remains deliberately ignorant of their actions. In particular, the FTC provides examples in its business guidance that, in the context of debt relief services, substantial assistance may include: obtaining leads, helping a debt relief provider with its back-room operations, and offering dedicated accounts (as explained below). The FTC warns businesses, “[i]f you work with debt relief companies, review their policies, procedures and operations to make sure they’re complying with the Rule. Willful ignorance isn’t a defense.”

### **III. Scope of Prohibitions and Disclosure Requirements.**

The Final Rule cites a number of practices that it views as deceptive or abusive under the TSR, thus making them illegal. While the Final Rule contains provisions similar to the proposed rule, it differs in a number of critical respects. Below we provide a brief summary of these provisions.

#### **A. Advance Fee Ban.**

##### *1. Overview*

The FTC rule will make charging an advance fee before providing any debt relief services illegal throughout the United States, effective October 27, 2010. As mentioned above, several states already have laws regulating debt relief services, outlawing advance-fee debt relief services, and establishing maximum fees that may be charged.

As explained in the SBP, the Commission believes that regulating the timing of fee collection constitutes a reasonable exercise of authority under the Telemarketing Act in light of the record and its own observations. In the Final Rule, the FTC takes the position that charging an advance fee for debt relief services is abusive. The TSR already bans the abusive practice of collecting advance fees for three other services – credit repair services, recovery services, and offers of a loan or other extension of credit, the granting of which is represented as “guaranteed” or having a high likelihood of success. In reaching its decision, the SBP goes into significant detail to address comments both in support of and against the advance fee ban.

Specifically, the Final Rule includes an advance fee ban, but in a form modified from the proposed rule. In short, the Final Rule sets forth three conditions before a debt relief provider may collect a fee for resolving a particular debt:

- (1) the consumer must execute a debt relief agreement with the creditor or debt collector;
- (2) the consumer must make at least one payment pursuant to that agreement; and
- (3) the fee must be proportional, i.e., the fee must bear the same proportional relationship to the total fee for settling the entire debt balance as the individual debt amount bears to the entire debt amount (the “individual debt amount” and the “entire debt amount” refer to what the consumer owed at the time her or she enrolled the debt in the program); in other words, if the provider settles a proportion of a consumer’s total debt enrolled in the program, it may get that same proportion of the total fee. Alternatively, if the provider bases its fee on the percentage of what the consumer saves as result of using its services, the percentage charged must be the same for each of the consumer’s debts.

As a result, front-loaded payments – charged by a number of debt settlement companies and the lifeblood of many advertisers and marketers – will be prohibited.

##### *2. Dedicated Account for Fees and Savings*

Notably, the Final Rule allows the provider to require customers to place funds in a “dedicated bank account” for provider fees and payments to their creditor(s) or debt collector(s) in advance of securing the debt relief, provided that certain conditions set out in the Final Rule are met. This is a significant change from the proposed rule – as it recognizes the risk of non-payment by consumers for services provided – and bears careful study by debt relief providers who choose to take advantage of this optional provision. There are significant restrictions on how these dedicated accounts may be set up and operated, which serve to safeguard the customer’s funds.

##### *3. Limitation on Setup Fees for DMPs*

Of particular importance to credit counseling agencies and debt management plan (“DMP”) providers, the Final Rule prohibits them from charging a set-up or other fee before the customer has enrolled in a DMP and made the first payment under the DMP, but it would not prevent the provider from collecting subsequent periodic (e.g., monthly) fees for servicing the account. For *bona fide* nonprofit credit counseling agencies, this is a requirement that bears careful scrutiny, even though the FTC does not have the jurisdiction to enforce the Final Rule against such agencies.

#### *4. Relationship with State Law*

State laws can impose additional requirements as long as they do not directly conflict with the TSR. However, providers may not charge initial or monthly fees in advance of providing the specified services, even if state laws specifically authorize such fees.

#### *5. No Retroactivity*

According to the FTC's SBP, "[t]he Final Rule does not apply retroactively; thus, the advance fee ban does not apply to contracts with consumers executed prior to October 27, 2010."

### **B. Disclosures.**

Under the Final Rule, providers will have to make several disclosures when telemarketing their services to customers. These requirements will take effect on September 27, 2010.

The FTC Rule mandates four debt relief-specific disclosures that must be made before a customer consents to pay for the goods or services offered. These are in addition to the existing, generally applicable disclosures currently in the TSR (not discussed within this article in detail). Before the customer consents to pay, the Final Rule requires debt relief service providers to disclose to the customer, clearly and conspicuously:

- (1) the amount of time necessary to achieve the represented results;
- (2) the amount of savings needed before the settlement of a debt;
- (3) if the debt relief program includes advice or instruction to consumers not to make timely payments to creditors, that the program may affect the consumer's creditworthiness, result in collection efforts, and increase the amount the consumer owes due to late fees and interest; and
- (4) if the debt relief service provider requests or requires the customer to place funds in a dedicated bank account at an insured financial institution, that the customer owns the funds held in the account, may withdraw from the debt relief service at any time without penalty, and then may receive all of the funds in the account.

According to the SBP, the above disclosures are required "to the extent that any aspect of the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors."

The proposed rule contained three additional debt relief-specific disclosures that have been omitted from the Final Rule:

- (1) that creditors may pursue collection efforts pending the completion of the debt relief service (which has been combined with another required disclosure);
- (2) that any savings from the debt relief program may be taxable income; and
- (3) that not all creditors will accept a reduction in the amount owed.

The Commission decided the above omitted disclosures were "largely duplicative or likely to detract from the efficacy of the required disclosures." In addition, the Commission acknowledged that "even those creditors that claim not to work with debt relief providers may do so in certain situations."

### **C. Misrepresentations.**

The Final Rule supplements the existing TSR prohibitions against misrepresentations with a provision specifically intended to target deceptive practices by debt relief service providers. Under FTC precedent, an act or practice is deceptive if: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation or omission is material to consumers.

#### *1. Debt Relief-Specific Illustrative Examples*

The Final Rule prohibits sellers or telemarketers of debt relief services from making misrepresentations regarding any material aspect of any debt relief service and it provides several illustrative examples, including misrepresentations of:

- the amount of money or the percentage of the debt amount that a customer may save by using such service;
- the amount of time necessary to achieve the represented results;
- the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider will initiate settlement attempts with the customer's creditors or debt collectors or make a *bona fide* offer to negotiate, settle or modify the terms of the customer's debt;
- the effect of the service on a customer's creditworthiness;
- the effect of the service on the collection efforts of the customer's creditors or debt collectors;
- the percentage or number of customers who attain the represented results; and
- whether a service is offered or provided by a nonprofit entity.

### 2. Debt Relief Savings Claims

The FTC requires that representations promising specific savings or other results be truthful, and that the provider have a reasonable basis to substantiate the claims. In this regard, the SBP contains extensive guidance about the specific evidence required to make various representations regarding debt relief services. For example, the SBP states when a debt relief service provider represents that it will save the consumer money, the savings claims should reflect the experiences of the provider's own past customers and must account for several key pieces of information. Although this is consistent with the FTC's longstanding policy statement on advertising substantiation, the Commission provides detailed guidance on the proper methodology for conducting this historical experience analysis. This guidance should be studied carefully by anyone making debt relief savings claims or other representations concerning debt relief services.

### 3. Existing TSR Provisions Prohibiting Deceptive Representations and Misleading Statements

In addition to the above debt relief-specific misrepresentations, existing prohibitions found in the TSR will now apply to the inbound or outbound telemarketing of debt relief services. The SBP provides guidance on the meaning of these prohibitions in the context of debt relief services, using claims that are frequently used in the marketing and sale of debt relief services.

#### D. Recordkeeping.

Under the Final Rule, any debt settlement, DMP or other debt resolution plan from a creditor must be in writing. Providers must keep these documents for at least 24 months. Further, the FTC business guidance recognizes that oral agreements for settlements may be needed in isolated cases, but strongly favors written approval for settlements.

#### IV. Enforcement and Outlook.

At the July 29 press conference, Chairman Leibowitz promised "aggressive" enforcement of the new debt relief rules. The TSR and the Final Rule are enforceable both by the FTC and state Attorneys General, and allows either the ability to obtain nationwide injunctive relief and consumer redress. Also, the TSR may be enforced by the Bureau of Consumer Financial Protection, under the Consumer Financial Protection Act, which amended the Telemarketing Law. Finally, the TSR provides for a private right of action, whereby injured consumers can bring private litigation, including potentially as class actions, for violations of the TSR.

As a legal matter, the FTC only has the authority to enforce the rule against debt relief providers within its jurisdiction. The FTC Act exempts banks and other depository institutions and *bona fide* nonprofits, among others, from the Commission's jurisdiction. These exemptions apply to the Telemarketing Act and the TSR as well. As discussed above, this means that the FTC's authority to enforce the new rule would not extend to *bona fide* nonprofit credit counseling agencies.

The new Bureau of Consumer Protection was granted authority to enforce the TSR by amendments to the Telemarketing Act that took effect with the enactment of the *Consumer Financial Protection*, which is part of the comprehensive *Dodd-Frank Wall Street Reform and*

*Consumer Protection Act.* As a result, the Bureau has the ability to enforce the FTC's amendments to the TSR regarding debt relief services against *bona fide* nonprofit credit counseling agencies, even though the FTC itself lacks jurisdiction over such agencies. For instance, if the rule was applied to *bona fide* nonprofit credit counseling agencies by the Bureau, no initial DMP set-up fee would be permitted to be charged. This bears close watching by the nonprofit credit counseling industry and other nonprofit organizations providing debt relief services, especially as new less-than-full balance DMP programs and other settlement-type products gain steam.

**NEW TSR DEBT RELIEF RULES:  
JURISDICTIONAL AUTHORITY FOR ENFORCEMENT**

	<b>For-Profit Debt Relief Service Provider</b>	<b><i>Bona fide</i> Nonprofit Credit Counseling Agency</b>
<b>Federal Trade Commission</b>	Yes	No
<b>Bureau of Consumer Financial Protection</b>	Yes	Yes

Although the FTC announced no new enforcement actions at the press conference, we understand that it has a number of pending non-public investigations in response to perceived abuses by debt settlement companies and others, including affiliate marketers and lead generators. We also are aware that several state Attorneys General and other state regulators have open investigations and pending lawsuits against a number of debt relief providers. In addition, it is not unusual for the FTC to coordinate with state Attorneys General to bring a law enforcement sweep against violators shortly after a new rule becomes effective (this happened after the enactment of the Credit Repair Organizations Act, for instance). Lastly, FTC staff has publicly stated that the Final Rule is in addition to existing compliance obligations under Section 5 of the FTC Act, which would allow the Commission to bring an enforcement action even if the activities in question fall outside of the TSR.

**V. Debt Settlement Industry Legal Challenge Possible.**

The FTC is authorized to conduct rulemaking proceedings under the Telemarketing Act using the Administrative Procedure Act's "notice-and-comment" procedures. The FTC generally does not have rulemaking authority under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. Moreover, unlike the FTC's pending rulemaking for mortgage assistance relief services, this rulemaking was not authorized specifically by statute. Rather, the FTC is using the Telemarketing Law's deceptive and abusive practices standard as its basis to issue the Final Rule.

As a result, while expedient, the FTC's use of the Telemarketing Act to regulate the debt relief services industry is aggressive since a "debt relief" rule was not specifically authorized by law. Although it is safe to assume the FTC believes it is on firm ground, there are some significant questions about whether the rule is enforceable given its origins. Therefore, debt settlement industry opponents of the rule potentially may attempt to challenge the authority of the FTC to issue the rule under the Telemarketing Act. The prospects for industry success are uncertain in light of the record developed by the FTC during the rulemaking and the discretion granted by courts to government agencies.

**VI. FTC Business Guidance Released and Additional Information.**

As mentioned above, the FTC staff issued a compliance guide to help businesses comply with the new debt relief rules, including detailed examples and best practices. The new rule and the compliance guide are available on the agency's website at <http://www.ftc.gov/opa/2010/07/tsr.shtm>.

In addition, several articles, presentations and alerts are available on this subject on our firm's website, including our articles:

- *Public Forum on Proposed Debt Relief Amendments to the Telemarketing Sales Rule*, available at <http://www.venable.com/ftc-hosts-public-forum-on-proposed-debt-relief-amendments-to-the-telemarketing-sales-rule/>;
- *Federal Trade Commission Issues Notice of Proposed Rulemaking to Amend Telemarketing Sales Rule to Cover Debt Relief Services*, available at <http://www.venable.com/federal-trade-commission-issues-notice-of-proposed-rulemaking-to-amend-telemarketing-sales-rule-to-cover-debt-relief-services-07-31-2009/>; and
- *FTC Commissioner Rosch Calls for More Responsibility and Reforms in the Debt Settlement Industry*, available at <http://www.venable.com/ftc-commissioner-rosch-calls-for-more-responsibility-and-reforms-in-the-debt-settlement-industry-04-06-2009/>.

Lastly, for additional information about the Bureau of Consumer Financial Protection and the Consumer Financial Protection Act, see our article, *The Dodd-Frank Act: What It Means for Credit and Housing Counseling Agencies and Other Debt Relief Service Providers*, available at <http://www.venable.com/the-dodd-frank-act-what-it-means-for-credit-and-housing-counseling-agencies-and-other-debt-relief-service-providers-07-26-2010/>.

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For several years now, many in the debt relief industry and consumer groups had publicly wondered who would be the executioner of the present day for-profit debt settlement business model that relies on advance fees to maintain their business and finance advertising and marketing. The answer to that question now appears clear. With the announcement of the Final Rule, the FTC has taken decisive action to promulgate rules and issue guidance related to debt relief services. Now the questions become: (1) Will the Final Rule be enforceable?; (2) How will the Bureau of Consumer Financial Protection utilize the rule?; (3) How will providers of debt relief services react to and comply with the new requirements?; (4) For those that are not able to or are unwilling to comply, how long they will be able to continue before the FTC, state Attorneys General, or consumers (acting under a private right of action) catch up to them in a law enforcement action or private lawsuit?; and (5) What will happen to debt settlement company customers if a company chooses to or is forced to close its doors?

In addition, up until just a week ago, for nonprofit credit counseling agencies, the proposed rule had only been a policy matter that was easy to support. Now, however, nonprofit credit counseling agencies will potentially be confronted with new compliance requirements under the Bureau of Consumer Financial Protection that will share enforcement authority under the Telemarketing Law with the FTC. In addition, the new Bureau is likely to look at the FTC for guidance in developing its own rules, including rules to regulate credit counseling, debt management plan services, and other debt relief services. As a result, as nonprofit credit counseling agencies develop new services to address the needs of consumers in financial distress that closely resemble those services regulated under the TSR – such as less-than-full-balance DMP programs – they should be mindful of the baseline requirements established by the FTC.

Lastly, as a practical matter, the Final Rule (and business guidance) may be viewed by many as establishing a new minimum level of standards to which those advertising and engaged in providing debt relief services may be held by regulators and private plaintiffs, irrespective of whether they are organized as nonprofit or for-profit organizations. As a result, all providers of debt relief services – both nonprofit and for-profit – should carefully consider their operations, policies and procedures, including advertising and marketing (e.g., websites, inbound telephone scripts, print, radio, television and Internet advertisements, affiliate relationships, lead generation relationships, back-office provider relationships), in light of the new rule.

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**Jonathan Pompan**, an attorney in the Washington, DC office of Venable LLP, represents nonprofit credit counseling agencies and others in a wide variety of areas, including regulatory compliance, as well as in connection with federal and state investigations and law enforcement



actions. **Jeffrey Tenenbaum** chairs Venable's Credit Counseling and Debt Services practice, as well as its Nonprofit Organizations practice. For more information, please contact Mr. Pompan at 202.344.4383 or [jlpompan@venable.com](mailto:jlpompan@venable.com), or Mr. Tenenbaum at 202.344.8138 or [jstenenbaum@venable.com](mailto:jstenenbaum@venable.com).

For more information about this and related industry topics, see [www.venable.com/ccds/publications](http://www.venable.com/ccds/publications).

*This article 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 a specific fact situation.*



VENABLE SNAPSHOT

- Nearly 600 lawyers nationally
- .....
- Top 100 nationally
- American Lawyer*, 2009
- .....
- Top 10 in Washington, DC
- Washington Business Journal*, 2009
- .....
- Counsel to 40 of the Fortune 100

CREDIT COUNSELING AND DEBT SERVICES QUICK FACTS

- Nearly 20 attorneys focused on advising and defending credit counseling and debt relief services providers
- Authors of numerous articles on credit counseling/debt relief services topics
- Frequent presenters at industry conferences

CLIENT FOCUS

- Credit counseling agencies
- Debt relief services companies
- Service providers in both industries

PRACTICE FOCUS

- Advertising and marketing reviews
- Bankruptcy counseling
- Class actions and other private lawsuits defense
- Compliance with federal and state regulations
- Contracts
- Formation of credit counseling and debt relief services companies
- Housing counseling compliance
- Investigations and enforcement actions by Congressional

CREDIT COUNSELING AND DEBT SERVICES

proactive counseling, advocacy and vigorous defense

Growth industries, such as credit counseling and debt relief services, attract the attention of federal and state lawmakers, federal and state regulatory agencies, state attorneys general and class action plaintiffs' lawyers.

Credit counseling agencies, debt relief services companies and their related marketers, processors and service providers require a high level of sophisticated, nuanced legal representation to successfully navigate and comply with the ever-changing, complex regulatory schemes that govern these industries and that can be filled with costly pitfalls at every turn.

EXPERIENCE IN ALL ASPECTS OF YOUR BUSINESS

we know how the business works, and what it takes to help it run smoothly

WHAT YOU DO

- Housing Counseling
- Debt Counseling
- Bankruptcy Counseling
- Money Transmission
- Debt Settlement / Negotiation
- Credit Services
- Lead Generation
- Debt Management Plans
- Student Loans
- and more...

HOW WE HELP

- State Law Compliance
- Litigation
- State Registration and Licensure
- Regulatory Due Diligence
- Class Action Defense
- Government Investigations
- Advertising and Marketing Compliance
- Financial Services Regulation
- Business Transactions
- Federal Tax-Exempt Status
- Venture Capital, Government Support and Grants
- and more...

Our capabilities are broad and deep.

Venable has the largest concentration of lawyers, and represents the most clients, in the credit counseling and debt services industries. Our capabilities are broad and deep, and combine the skills of more than 15 attorneys with extensive experience representing numerous companies in these industries.

Our legal team covers the gamut of issues—from federal tax-exempt status to state debt-adjusting laws to bankruptcy counseling—from debtor education to banking and financial services regulation—from advertising and marketing to privacy restrictions—and from the unauthorized practice of law to commercial litigation.

committees, Federal Trade Commission, State Attorneys General and regulators

Mergers, dissolutions and asset transfers

Privacy policies

Tax exemption status and Internal Revenue Service audits

## NAVIGATING A COMPLEX PATCHWORK OF FEDERAL AND STATE LAW AND REGULATIONS

Credit Repair Organizations Act

Fair Debt Collection Practices Act

Federal Trade Commission Act

Gramm-Leach-Bliley Act

State consumer protection laws

State credit repair laws

State debt adjusting laws including the

Uniform Debt-Management Services Act

California Check Sellers, Bill Payers and Proraters Law

*and more*

For tax-exempt and nonprofit clients

the Internal Revenue Code

State charitable solicitation statutes

*and other related governance and operational issues*

## WE HAVE DEFENDED CLIENTS IN REGULATORY MATTERS, INVESTIGATIONS AND ENFORCEMENT ACTIONS BEFORE

Alabama Securities Commission

Arizona Department of Financial Institutions

California Attorney General

California Department of Corporations

Executive Office for the United States Trustees

Florida Attorney General

Florida Department of Financial Services

Georgia Office of Consumer Affairs

Kansas Office of the State Banking

We work with both long-established companies and start-up companies that provide credit counseling services, housing counseling, debt management plan services, credit and debt negotiation services, as well as those creating new products and services for consumers in need.

[Our work principally involves a combination of proactive counseling and aggressive defense.](#)

**Proactive counseling**—to help ensure compliance with the myriad of applicable federal and state laws and regulations, plus assistance and advocacy in helping clients get licensed, registered, or otherwise approved by various regulators.

**Aggressive defense of federal and state enforcement actions**—especially actions by the Federal Trade Commission, Internal Revenue Service, state attorneys general and other state regulators—as well as in private class action litigation.

[Providing proactive counseling and advocacy.](#)

As legal compliance for credit counseling and debt services companies is a rapidly-moving target, Venable devotes considerable time and resources to tracking new developments and keeping our clients up to date on what they need to know. Venable clients are able to stay ahead of the legal curve in order to make sound business and legal decisions.

Our attorneys have met legal and regulatory objectives across the broad spectrum of issues that face credit counseling agencies, debt negotiation companies, and related advertisers and marketers. In addition, we draw on the extensive experience of Venable attorneys nationwide, in everything from advertising and marketing matters to trademark clearance, and from employment law, executive compensation and employee benefits to real estate leases. In addition, for our nonprofit clients, Venable has one of the largest nonprofit practices in the country. As a result, credit counseling agencies and debt services companies benefit from experienced attorneys that understand their business and issues.

While our attorneys work with clients at all stages, we are most successful and efficient when we become a part of the team in the early stages of an issue. By understanding your business objectives and legal issues, we can recommend effective and efficient courses of action. We factor in real-time intelligence on the complex and dynamic requirements imposed by governmental regulatory agencies, and we always tailor our recommendations and actions with your larger goals at the forefront.

Our work includes:

- **reviewing marketing materials**, such as client contracts, scripts, advertisements, Web sites and infomercials;
- **assessing, obtaining and maintaining state law compliance**, including debt adjusting licenses, state regulatory examinations and compliance audits;
- **reviewing products and services for regulatory compliance**, including websites, scripts, service level standards, policies and procedures, newsletters, education and counseling materials; and
- **obtaining and maintaining federal tax exemption status** for nonprofit tax-exempt credit counseling agencies. We are currently handling multiple active IRS audits at all stages of the process, from field work to settlement negotiation to appeals.

[When trouble strikes, we vigorously defend your business.](#)

In recent matters, we have defended:

- **a credit counseling agency** in a breach of contract suit filed in federal court by its marketing and payment-processing service provider;
- **a debt negotiation company and its principals** in a nonpublic investigation by the Federal Trade Commission;
- **a debt negotiation company** faced with countless consumer complaints, multiple state regulatory investigations, several state cease and desist orders, and private lawsuits;
- **a third-party service provider** to debt negotiation companies and their clients that was the subject of a litigated desist and refrain order that alleged violation of the California's Check Sellers, Bill Payers and Proraters Law brought by the California Department of Corporations; and

Commissioner  
Maine Attorney General  
Maryland Attorney General  
Maryland Division of Financial Regulation  
Massachusetts Attorney General  
Mississippi Department of Banking and Consumer Finance  
Missouri Attorney General  
Nevada Consumer Affairs Division  
Nevada Division of Financial Institutions  
New Hampshire Banking Department  
New Jersey Department of Banking and Insurance  
Oregon Division of Finance & Corporate Securities  
Pennsylvania Attorney General  
South Carolina Department of Consumer Affairs  
Texas Office of the Consumer Credit Commissioner  
Virginia Bureau of Financial Institutions  
West Virginia Attorney General  
Wisconsin Department of Financial Institutions  
*and other agencies*

- **an individual and marketing partner to a credit counseling agency** and other related companies who was prosecuted by the Federal Trade Commission for violation of the Telemarketing Sales Rule by calling consumers on the National Do Not Call Registry and by failing to place consumers' names on in-house do-not-call lists when requested. The FTC also alleged the individuals and their companies misrepresented their businesses and failed to disclose material information to consumers, among other allegations.

Venable clients also benefit from our team of former Department of Justice attorneys, former Federal Trade Commission officials, and former deputy attorneys general. Their collective knowledge enables us to represent clients effectively before the IRS, the Federal Trade Commission, state attorneys general, as well as in private litigation.

Venable's success in class action defense of credit counseling agencies and debt relief services companies deserves special mention. Our attorneys regularly defend against class claims brought in all of the federal districts, as well as in state jurisdictions.

- We recently negotiated a favorable settlement for a credit counseling agency in a nationwide class action alleging that the company violated the Federal Trade Commission Act and the Credit Repair Organizations Act.
- We recently defended credit counseling agencies and debt settlement companies in lawsuits alleging violations of a variety of federal and state laws (including credit repair statutes) brought against them in both single-plaintiff suits and class actions.

#### [The advantages of working with Venable.](#)

We work hard to keep you ahead of the legal curve. We track new developments and frequently issue alerts that keep clients up-to-date on what they need to know and act on. We work closely with key federal and state regulators. They are aware of our active involvement within the industry and of our work advocating on behalf of clients, resulting in a high level of respect and visibility that can be extremely beneficial to clients when trouble arises.

We also provide access to Venable's depth of resources and insights gained from our experience in related areas, ensuring that every issue receives the focus required for the most favorable outcome possible.

Five years from now, credit counseling and debt relief services will be vastly different than today. Getting from here to there will be no easy task. Of critical importance will be keeping abreast of the ever-changing body of federal and state rules, regulations and laws, and anticipating legal and regulatory trends. Venable takes a positive and comprehensive approach to every aspect of this legal problem solving. We are fully committed, accessible, versatile and willing to work harder for you.

**How can we help you?** To find out, please contact us at 1.888.VENABLE or [www.Venable.com](http://www.Venable.com).