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Legal and Regulatory Risks and Opportunities Facing Credit Counseling Agencies: Navigating a Legal Minefield to Help Consumers in Need

Association of Credit Counseling Professionals
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Agenda

- **Introduction**
- **Dodd-Frank Wall Street Reform and Consumer Protection Act**
 - **New Bureau of Consumer Financial Protection**
 - **Other Opportunities and Pitfalls**
- **Other Federal Developments**
 - **What does the new Telemarketing Sales Rule Mean for Credit Counseling?**
 - **What's Next for the Federal Trade Commission?**
 - **Housing Counseling**
 - **Internal Revenue Code**
- **State Legal and Regulatory Developments**
- **Issues for the Future**
- **Question and Answers**



For the first time in history, there is about to be one federal regulator with rulemaking, supervisory and enforcement responsibilities over credit counseling agencies and lenders alike.

On top of that, other federal and state legislative and regulatory activity related to credit counseling has seemingly reached record levels, with overlapping and often conflicting regulations potentially applying to credit counseling agencies, as well as financial products and services.



***Dodd-Frank Wall Street Reform and
Consumer Protection Act***
and the
**Bureau of Consumer Financial
Protection**



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



CFPB Staff will include Familiar Names

“Most members of the fledgling agency’s current staff have come from other agencies. They include ...**Timothy R. Burniston**, a senior associate director for the Federal Reserve’s consumer affairs division; **Peggy L. Twohig**, director of the office of consumer protection at Treasury; and **Alice Hrdy** and **Lucy Morris** from the **Federal Trade Commission’s consumer protection division.**”

Source: Edward Wyatt, “Adviser to Consumer Agency Had Role in Lending,” NY Times (Oct. 27, 2010).



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”
– July 21, 2011**
- 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;**
 - and more...
- 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
- 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 CFPA.
- 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)**
- 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
- Transferred Authority does **NOT** Include Section 5 of the FTC Act or Credit Repair Organizations Act
- ***Dodd-Frank Amended the Telemarketing and Consumer Fraud and Abuse Prevention Act (Section 1100c)***



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
- **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
- Consider: What does this mean for credit counseling agencies?



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)
- ***Sec. 1100C. Amendments to the Telemarketing and Consumer Fraud and Abuse Prevention Act, e.g., the Telemarketing Sales Rule***



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?

- CFPB 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.



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**
 - **New Congress – Expect Potentially 100s of hearings**



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)

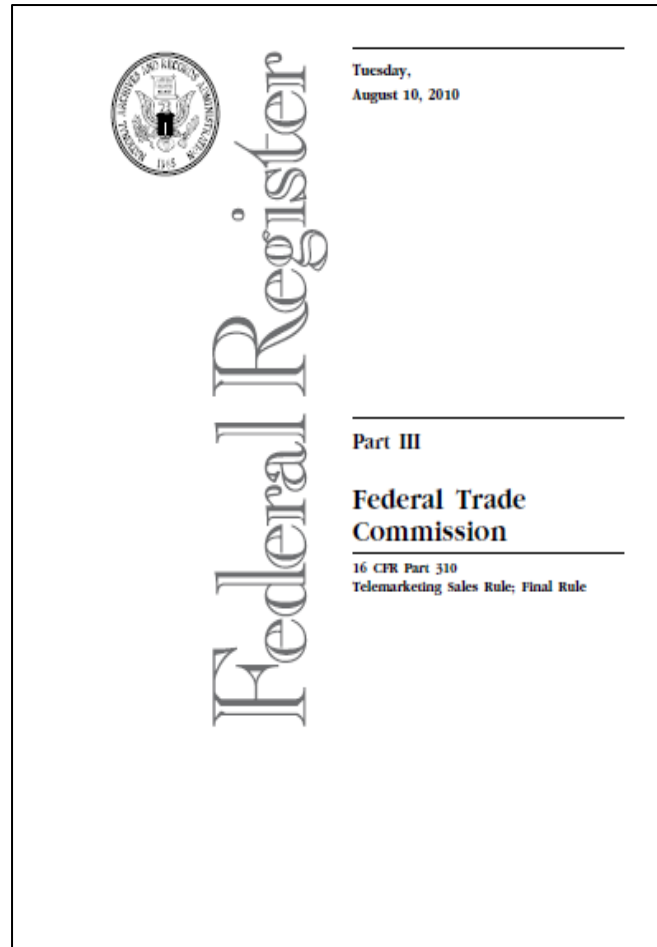


Other Federal Developments



Final Rule – Debt Relief Amendments to the FTC’s Telemarketing Sales Rule

- Released on July 29, 2010
- 16 C.F.R. Part 310: Telemarketing Sales Rule: Amendments Addressing the Telemarketing of Debt Relief Services: Final Rule and Statement of Basis and Purpose
- Key Features:
 - advance fee ban for debt relief services;
 - require debt relief companies to make specific disclosures to consumers;
 - prohibit them from making misrepresentations; and
 - extends the Telemarketing Sales Rule to cover calls consumers make to these firms in response to debt relief advertising.



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.



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 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 Statement of Basis and Purpose 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.”



No Coverage of *Bona Fide* Nonprofits

I operate a non-profit organization. Does the new Rule apply to us?

Bona fide non-profit organizations aren't covered because the TSR applies only to for-profit companies. However, the Rule covers companies that falsely claim nonprofit status.



Advance Fee Ban

- Effective October 27, 2010
- The Final Rule contains specific requirements for debt relief providers related to charging an advance fee before providing any services. It specifies that fees for debt relief services may not be collected until:
 1. the debt relief service successfully renegotiates, settles, reduces, or otherwise changes the terms of at least one of the consumer's debts;
 2. there is a written settlement agreement, debt management plan, or other agreement between the consumer and the creditor, and the consumer has agreed to it; and
 3. the consumer has made at least one payment to the creditor as a result of the agreement negotiated by the debt relief provider.



Dedicated Accounts

- May require consumers to set aside their fees and savings payments to creditors. Providers may only require a dedicated account as long as five conditions are met:
 1. the dedicated account is maintained at an insured financial institution;
 2. the consumer owns the funds (including any interest accrued);
 3. the consumer can withdraw the funds at any time without penalty;
 4. the provider does not own or control or have any affiliation with the company administering the account; and
 5. the provider does not exchange any referral fees with the company administering the account.



Disclosures and Prohibited Misrepresentations

- **Effective September 27, 2010.**
- **Under the Final Rule, providers will have to make several disclosures when telemarketing their services to consumers. Before the consumer signs up for any debt relief service, providers must disclose fundamental aspects of their services, including how long it will take for consumers to see results, how much it will cost, the negative consequences that could result from using debt relief services, and key information about dedicated accounts if they choose to require them.**
- **The Final Rule also prohibits misrepresentations about any debt relief service, including success rates and whether the provider is a nonprofit entity. The FTC's Statement of Basis and Purpose, which accompanies the Final Rule, provides extensive guidance about the evidence providers must have to make advertising claims commonly used in selling debt relief services.**



What's next at the FTC related to debt relief services?



- Mortgage Rulemakings
- Updates on the FTC Red Flags Rule (effective Dec. 1, 2010)
- Privacy Notice Safe Harbor
- Push for Greater Rulemaking Authority
- Stepped-up Enforcement



Deadline for Implementing New Model Privacy Form Fast Approaching

- Starting on January 1, 2011, “financial institutions” subject to the federal Gramm-Leach-Bliley Act (the “GLB Act”) will have to use new model privacy forms if they want to take advantage of a “safe harbor” for compliance with requirements for providing initial and annual privacy notices to customers.
- The model privacy forms will replace the sample clauses associated with an existing safe harbor that expires at the end of 2010.
- Bottom Line: financial institutions—ranging from banks to credit counseling agencies to payday lenders to travel agencies to debt collectors – will need to update their privacy notices in order to rely on the safe harbor.
- More information:
www.venable.com/ccds/publications.

FACTS		WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?	Rev. [insert date]
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.		
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: <ul style="list-style-type: none"> ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores] 		
How?	All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.		
Reasons we can share your personal information		Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes—such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus			
For our marketing purposes—to offer our products and services to you			
For joint marketing with other financial companies			
For our affiliates' everyday business purposes—information about your transactions and experiences			
For our affiliates' everyday business purposes—information about your creditworthiness			
For our affiliates to market to you			
For nonaffiliates to market to you			
To limit our sharing	<ul style="list-style-type: none"> ■ Call [phone number]—our menu will prompt you through your choice(s) or ■ Visit us online: [website] Please note: If you are a new customer, we can begin sharing your information [30] days from the date we sent this notice. When you are no longer our customer, we continue to share your information as described in this notice. However, you can contact us at any time to limit our sharing.		
Questions?	Call [phone number] or go to [website]		



Credit Repair Organizations Act Decision

- The United States Court of Appeals for the First Circuit recently found in *Zimmerman v. Puccio* that a tax-exempt, nonprofit credit counseling agency operated as a “credit repair organization” within the meaning of the Credit Repair Organizations Act (“CROA”), 15 U.S.C. §§ 1679-1679j, and that certain principals of the organization were personally liable under CROA. *Zimmerman v. Puccio*, No. 09-1416 (1st Cir. 2010).
- The *Zimmerman* decision adopts a sweeping interpretation of CROA that equates credit counseling agencies with credit repair organizations.
 - As the First Circuit observed, “credit counseling aimed at improving future creditworthy behavior is the quintessential credit repair service.”
- As a result, we are likely to see an increase in credit repair class action lawsuits, which can be crippling to nonprofit credit counseling agencies, especially those that offer or provide services to renegotiate, settle, reduce, or otherwise alter the terms of consumer debts.
- Some courts have adopted a two-part test for the CROA exemption for *bona fide* tax-exempt nonprofit credit counseling agencies, requiring such agencies to: (1) be recognized by the IRS as being exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code; and (2) actually operate as a *bona fide* nonprofit organization.



HUD - Heightened Scrutiny and Reverse Mortgage Counseling

- Changes abound for HECM and non-HECM Reverse Mortgages and the aftermath of the GAO report.
 - Example: New HUD Protocol and Counseling Manual
 - HUD also recently took action against two lenders for deceptive advertising of HUD-insured reverse mortgages. See Press Release, HUD, FHA Withdraws Three Lenders, Suspends a Fourth (Feb. 25, 2010), available at (http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-019).
- Consumer Protection Issues Remain Front and Center. Example: Issues concerning the consumer's right to reside in the dwelling have frequently arisen in the sale of reverse mortgages. Such misrepresentations have been identified as problematic in the offering of reverse mortgages
 - See generally, U.S. Gov't Accountability Office (GAO), GAO-09-606, Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls over Counseling for Borrowers (2009) (GAO Reverse Mortgage Report).
- Private lawsuits target lenders and counseling agencies.
- New Federal and state laws seek to address perceived issues, but may complicate compliance and role of counseling



Developments at the Department of Housing and Urban Development

- New Housing Counseling Manual
 - Covers All Housing Counseling Activities Approved by HUD
 - New Standards for reverse mortgage counseling
 - “For HECM loans, a HECM Counseling Certificate is issued to demonstrate to the lender that the statutorily required counseling was provided.”
 - “The counseling agency's issuing of a certificate of counseling attests ONLY to the fact that the client attended and participated in the required counseling and that the statutorily required counseling for a HECM was provided. Issuing a certificate does NOT indicate whether the counseling agency recommends or does not recommend the client for a reverse mortgage.”
- New HECM Counseling Protocol
- Mortgagee Letters Continue



Reverse Mortgages and Federal Rulemakings

- **Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks (FFIEC Reverse Mortgage Guidance), 75 Federal Register 50801 (Aug. 17, 2010):** guidance issued by federal and state bank regulatory agencies on need for adequate information and other consumer protections regarding reverse mortgage products.
- **Federal Trade Commission, Notice of Proposed Rulemaking: Mortgage Acts and Practices - Advertising Rule, 75 Federal Register 60352-60371 (Sept. 30, 2010).**
 - The proposed rule published for comment, among other things, would prohibit any misrepresentation in any commercial communication regarding any term of any mortgage credit product; and impose recordkeeping requirements.
 - Comment Deadline: Nov. 15, 2010.
- **Federal Reserve Board: Notice of Proposed Rulemaking: Regulation Z; Truth in Lending, 75 Federal Register 58539-58788 (Sept. 24, 2010).**
 - The Board proposes to amend Regulation Z, which implements the TILA and the staff commentary to the regulation, as part of a comprehensive review of TILA's rules for home-secured credit. The proposal also would amend the rules for reverse mortgage advertising.
 - Comment Deadline: Dec. 23, 2010.



Internal Revenue Code



For Tax-Exempt CCAs Compliance with Section 501(q) of the Internal Revenue Code Remains Critical

- Are you engaged in credit counseling services as a substantial purpose? If so, 501(q) requirements include:
 - Loans
 - Credit repair
 - Ability to pay
 - Board composition
 - Ownership
 - Referrals
 - Contributions
 - Debt management plan services revenue limit
- **IRS Form 990** credit counseling services (Part IV, Line 9 and Schedule D, Part IV)
- Private Benefit and Private Inurement (e.g., Intermediate Sanctions)
- **March 30, 2010 IRS Chief Counsel Advice Memorandum**
 - First published IRS guidance regarding 501(q)
 - Concludes that organizations that provide educational information on financial topics or provide financial counseling to homeowners who are at risk of foreclosure are providing "credit counseling services" within the meaning of 501(q). An organization that engages in such activities as a "substantial purpose" must comply with 501(q).
 - What about creditor support?



Notable State Law Developments



Notable State Law Developments

- **Nevada Uniform-Debt Management Services Act** (effective July 1, 2010)
- **Tennessee Uniform-Debt Management Services Act** (effective July 1, 2010)
- **Illinois Debt Management Service Act / Debt Settlement Consumer Protection Act** (effective Aug. 3, 2010)
- **Kentucky Debt Adjuster Act** Amendments (HB 166, July 15, 2010)
- **Indiana Debt Management Services Act Amendments** (effective July 1, 2010)
- **California Money Transmission Act** (AB 2789, effective Jan. 1, 2011)
- **Changes Related to Debt Settlement Continued**
 - **Connecticut**
 - **Maryland Study (HB 392)**
 - **Florida** (died in committee)
 - **Indiana Credit Services Organization Act** (HB 1332, effective March 24, 2010)
- **UDMSA Considered** in MI, MO, NJ, and NY.



Notable State Law Developments

- **2011 Has Already Started:**
 - **Texas SB 141 Uniform Debt Management Services** (prefiled Nov. 8, 2010)
 - New NCCUSL UDMSA?
- **Reverse Mortgage**
 - Minnesota, SB 2430 –requires lender to refer prospective borrower to agency domiciled in state, by providing list of at least 3 agencies, effective August 1, 2010.
 - Arizona, SB 2242 – Minimum disclosure requirements on lender, including a list of 5 agencies, effective July 29, 2010.
 - Massachusetts, HB 4934 - face-to face requirement, effective in 2012
 - Maryland, various changes – HECM protocol endorsement, effective October 1, 2010.
- **Mortgage Assistance Relief Services / Mortgage Foreclosure Consultant Fraud Prevention Acts**
- **State Credit Service Organization Acts**
- **Secure and Fair Enforcement Mortgage Licensing Act (SAFE Act)**
- **State Attorney General Enforcement Actions and Settlements**
- **Private Lawsuits**



Secure and Fair Enforcement of Mortgage Licensing Act of 2008

- In order to comply with the federal SAFE Act mortgage loan origination statutes have been amended to, at a minimum, require the registration/licensing of an individual who takes a residential mortgage loan application, or offers or negotiates terms of a residential mortgage loan, for compensation or gain. There is no automatic exemption for nonprofit housing counselors. As a result, state laws may be interpreted to require potential mandatory registration of nonprofit housing counselors.
- The SAFE Act gave states one year from July 30, 2008 (was extended to July 31, 2010 for most states) to pass legislation requiring the licensure of mortgage loan originators according to national minimum standards. Requirements in these statutes include, among many: criminal history and credit background checks; pre-licensure education; pre-licensure testing; continuing education; net worth, and surety bond or recovery funds.
- HUD is tasked with reviewing state laws enacted in response to the SAFE Act and if it determines that a state's mortgage licensing standards do not meet the minimum requirements of the Act, HUD is charged to establish and implement a system for mortgage loan originators in that state.
- HUD has proposed rules to set forth the minimum standards that the SAFE Act requires states to meet when licensing loan originators and has indicated that the SAFE Act and the proposed rules do not provide any exemption for certain nonprofit organizations. As a result, both HUD and the states may provide for the potential mandatory licensing of nonprofit housing counselors
- **Is Housing Counseling SAFE in the states you are working in?**
 - California, New York, Texas suggest “yes”
 - New Hampshire and others?
 - CSBS Nonprofit Guidance
 - HUD Rulemaking – Too Late or Just in Time?



Issues for the Immediate Future



Issues for the Immediate Future

- Focus and content of studies and reports to Congress and others by the CFPB, its functional units, and the GAO.
- Do policymakers adequately understand the role and value of credit counseling?
- Are services 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 reverser mortgage counseling agencies?
- Are the fees charged “fair”?
- How does the industry define success in all of its program areas?
- How will CFPB interact with the FTC, HUD, EOUST, others?



Focus on the Bureau of Consumer Financial Protection

- **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?



Issues for the Immediate Future

- What type of legal liability will plaintiffs seek to impose for credit counseling services?
 - Are you adequately insured?
 - What services are you offering and what do your present policies cover?
- How will state laws continue to impact reverse mortgage counseling agencies?
- SAFE Act and state regulation of mortgage foreclosure prevention housing counseling?
- Federal Grant Money and Related Obligations
- Alternative Revenue Services and Cross Referrals
- What's the hold-up on 60/60 plans?
 - E.g., To encourage unsecured creditors to enter into an alternative repayment schedule or debt repayment plan with a financially distressed consumer outside of bankruptcy, Congress added § 502 (k)(1) pursuant to which an unsecured creditor's claim may be reduced by not more than 20% if the creditor refuses to negotiate a reasonable alternative payment schedule, provided the payment was 60% of the debt, proposed on behalf of a debtor by an approved agency. 11 U.S.C. § 502(k)(1)

QUESTIONS AND DISCUSSION

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