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

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.

1. 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:

1. 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").

2. 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.

3. 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.

4. 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 CFPA. 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 CFPA.

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.

5. 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.

6. 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.

7. CFPA Required Studies and Reports.

As mentioned above, the CFPA requires the Bureau to conduct a number of studies and reports related to its primary purposes. In addition, the CFPA 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 CFPA 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.”
- 2. 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, 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?
- 3. 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. 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.

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