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Legislative and Regulatory Developments and the Reverse Mortgage Counseling Industry

**Reverse Mortgage Counseling
Association (RMCA) Annual Conference
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Agenda

- Introduction
- HUD Developments
- Federal Rulemakings
- Dodd Frank and the Consumer Financial Protection Bureau
 - New Bureau of Consumer Financial Protection
 - Other Opportunities and Pitfalls
- State Legislative 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 reverse mortgage counseling agencies and lenders alike.

On top of that, other federal and state legislative and regulatory activity related to reverse mortgages has seemingly reached record levels, with overlapping and often conflicting regulations potentially applying to reverse mortgage counselors and counseling sessions, as well as reverse mortgages.



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
 - 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.



***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



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
- Authority does **NOT** Include Section 5 of the FTC Act or Credit Repair Organizations 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
- 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)



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 reverse mortgage 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



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)



State Legislative Developments

- Trends from 2010 to be on the look out for:
 - In-state and face-to-face continue to be considered
 - Minnesota, Massachusetts...
 - Requirements for Lenders to Provide Lists of Housing Counseling Agencies
 - Influence of HECM Protocol Requirements
 - Eligibility Requirements for Reverse Mortgages



State Legislative Developments (Continued)

- 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.



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 reverse mortgage housing counselors?
- 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 reverse mortgage counseling agencies.
- How will CFPB interact with HUD?
- What type of legal liability will plaintiffs seek to impose for reverse mortgage housing counseling?
 - Are you adequately insured?
- How will state laws continue to impact reverse mortgage counseling agencies?
- SAFE Act and state regulation of reverse mortgage counseling?



QUESTIONS AND DISCUSSION

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