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

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September 21, 2010, 12:30 pm – 2:00 pm ET  
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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 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)



## 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





## 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 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

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