

**VENABLE<sup>®</sup>** LLP

**State Regulatory Workshop:  
Legal and Regulatory Compliance Challenges and  
Opportunities for Credit Counseling Agencies**

**Association of Independent Consumer  
Credit Counseling Agencies (AICCCA)  
17<sup>th</sup> Annual Conference  
July 21, 2010, 9:30 – 11:30 am ET  
Four Seasons Hotel, Washington, D.C.**

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## IMPORTANT INFORMATION ABOUT THIS PRESENTATION

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*Starting Thursday, July 22, 2010 a copy of this presentation will be available for download at [www.Venable.com/ccds/publications](http://www.Venable.com/ccds/publications), along with articles on many of these topics.*



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# Introduction

- **What do Changes on the Federal Level Mean for State Law Compliance?**
  - **Dodd-Frank / Consumer Financial Protection Act**
    - **Bureau of Consumer Financial Protection**
  - **Proposed Debt Settlement Legislation**
  - **Federal Trade Commission**
    - Debt Relief Services Rulemaking
    - Mortgage Assistance Relief Services Rulemaking
    - Other Developments
- **Housing Counseling**
  - **SAFE Act Rulemaking/State Implementation**
  - **New Program Handbook**
- **BK Counseling and Education**
  - **EOUST Rulemakings**
- **DMP/Housing/BK: State Debt Adjusting Law and Related Developments**
  - **UDMSA**
  - **Other Developments**
  - **Enforcement Trends**
- **Compliance Challenges and Opportunities**



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# What Do Changes on the Federal Level Mean for State Law Compliance?



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*The President is poised to sign the Dodd-Frank Wall Street Reform and Consumer Protection Act that would, among other things, provide greater federal oversight of financial services provided to consumers – including, for the first time, consumer credit counseling agencies.*

*Updated: President Obama signed Dodd-Frank Wall Street Reform and Consumer Protection Act on July 21, 2010 shortly after this presentation was given.*



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# Consumer Financial Protection Act (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.





# Bureau of Consumer Financial Protection: Structure and Function

- Independent bureau of the Federal Reserve System
- A director with a 5-year term
  - Nominated by the President and approved by the Senate
- The primary functions of the Bureau are:
  - (1) conducting financial education programs;
  - (2) collecting, investigating, and responding to consumer complaints;
  - (3) 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;
  - (4) subject to specified criteria, supervising covered persons – including credit counseling agencies and other debt relief service providers – for compliance with federal consumer financial law, and taking appropriate enforcement action to address violations of federal consumer financial law;
  - (5) issuing rules, orders, and guidance implementing federal consumer financial law; and
  - (6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.



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## Bureau: 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



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# CFPA: Federal UDAP Authority

- 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 – but found in the FTC’s proposed amendments to the Telemarketing Sales Rule to address the sale of debt relief services



# CFPA: Authority Provided

- 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)
  - 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

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# CFPA: Enforcement

- 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 \$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.
  - No exemplary or punitive damages
- Criminal referrals to DOJ
- Whistleblower protection
- State attorneys general and regulators may also enforce the Dodd-Frank Act with consultation with the CFPB



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## CFPA: 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.



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# Debt Settlement



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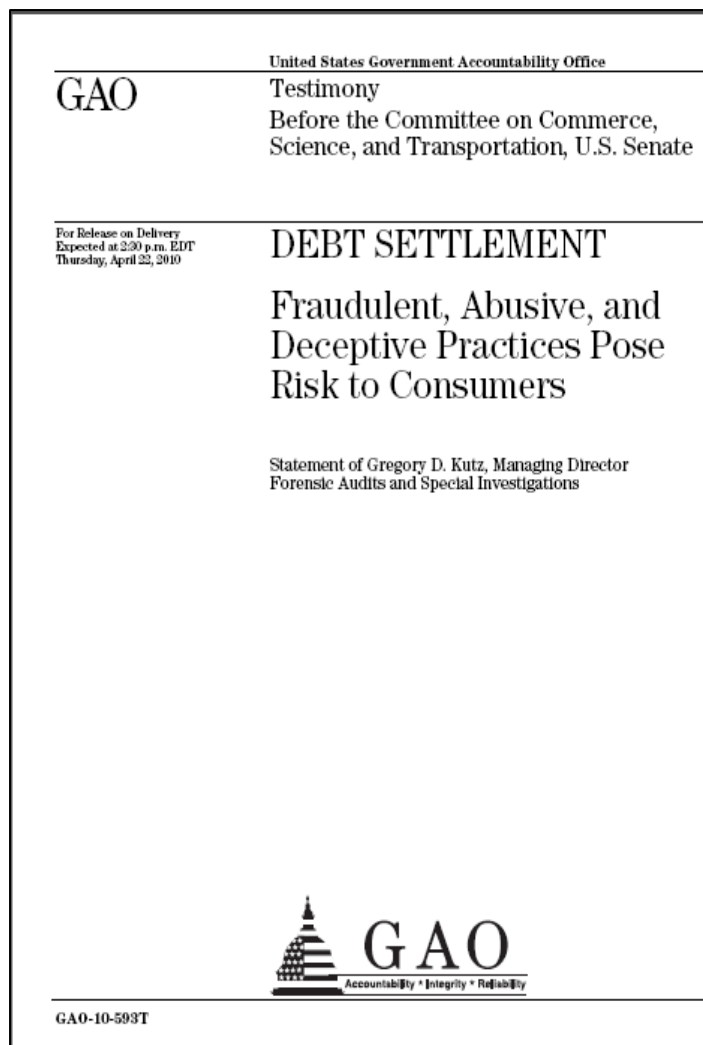
# Debt Settlement Consumer Protection Act

- Senator Schumer (D-NY) and Senator McCaskill (D-MO) filed their debt settlement amendment (based on their recently introduced "Debt Settlement Consumer Protection Act," S. 3264) to the financial services regulatory reform bill (S. 3217).
- The amendment and bill include:
  - Specific rules and prohibitions for debt settlement service providers
    - Fee Restrictions
    - Right of Cancellation
    - Disclosures
  - Private Right of Action for Violations
  - Grants the FTC express rulemaking authority for debt settlement services and debt relief services (broader).
- Specifically, the amendment (and the bill) provides:
  - an exception from the definition of "debt settlement provider" for nonprofit tax-exempt credit counseling agencies, i.e., "[a]n organization that is described in section 501(c)(3) and subject to section 501(q) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code" and
  - an exemption for the services provided by nonprofit tax-exempt credit counseling agencies from any rules prescribed by the Federal Trade Commission regarding any debt relief services that are not otherwise covered by the provisions of the Amendment.
- H.R. 5387 filed by Rep. Gutierrez (D-IL), Rep. Ellison (D-MN) and Rep. Moore (D.-WI) on May 25, 2010.

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# GAO Report on Debt Settlement



- GAO's investigation found that some debt settlement companies engage in fraudulent, deceptive, and abusive practices that pose a risk to consumers.
- 17 of 20 companies GAO called while posing as fictitious consumers say they collect fees before settling consumer debts--a practice FTC has labeled as harmful and proposed banning--while only 1 company said it collects most fees after it successfully settles consumer debt.
- GAO found some debt settlement companies provided fraudulent, deceptive, or questionable information to its fictitious consumers, such as claiming unusually high success rates for their programs--as high as 100 percent. FTC and state investigations have typically found that less than 10 percent of consumers successfully complete these programs.
- Other companies made claims linking their services to government programs.

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# Federal Trade Commission Developments



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# Federal Trade Commission Developments



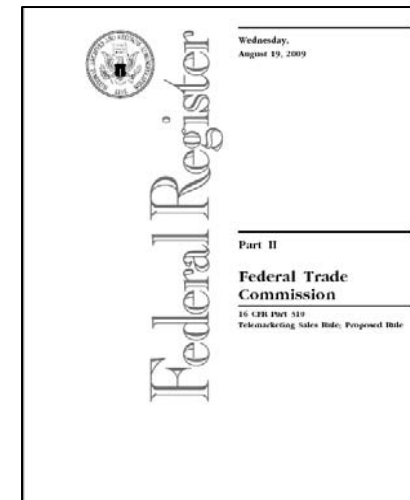
- Debt Relief Services Rulemaking (final rule expected within the next two months)
- Mortgage Rulemakings
- Updates on the FTC Red Flags Rule
- New Advertising Guidance – Testimonials (Blogs and Social Media Targeted)
- Push for Greater Rulemaking Authority
- Stepped-up Enforcement

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# FTC Targets Debt Relief Services and Mortgage Assistance Relief Services

- FTC rulemakings expected to be completed soon.
- No express coverage of *bona fide* nonprofit organizations
- **Proposed Amendment to the Telemarketing Sales Rule for Debt Relief Services**
  - Broad definition of "debt relief services"
  - Ban on "upfront" fees.
  - Disclosures
  - Misrepresentations
  - Covers inbound and outbound telephone calls
  - Attorney Exemption?
- **Mortgage Assistance Relief Services**
  - Ban on "upfront" fees.
  - Disclosures
  - Misrepresentations
  - Written contract requirements
  - Limited exemption for attorneys



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# Bankruptcy Counseling



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# Housing Counseling



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# 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 (now 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



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## Additional Housing Counseling Considerations

- Mortgage Foreclosure Consultant Protection Acts
  - Enforcement and Lawsuits
- State Reverse Mortgage Legislation
  - Minnesota, Massachusetts...
- Federal, State, and Private Plaintiff Enforcement
- Debt Adjusting Law and Related Considerations
- HUD Developments – New Policy Handbook



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# State Debt Adjusting Laws and Related Developments



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# Uniform Debt-Management Services Act

July 21, 2005 – July 21, 2010:

Five Years of the UDMSA



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# State Debt Adjusting Law Trends

(Approx. Numbers Provided)

	December 2005	February 2007	July 2008	July 2010
<b>States w/o Debt Adjusting Laws</b>	3	3	2	2
<b>States with Debt Adjusting Prohibitions w/limited or no Exceptions</b>	2	2	1	1
<b>States that Allow For-Profit and Non-Profit Entities to Engage in Debt Adjusting Activities</b>	28	30	36	39
<b>States with Licensing/Registration Requirements</b>	29	31	34	37 (including effective dates of 2010)
<b>States that Require Nonprofit Corporate Status (including (c)(3) status)</b>	18	16	12	9
<b>States that require 501(c)(3) Status</b>	9	7	2	1

\* For purposes of this chart, the term debt adjusting generally is defined to mean the entering into or making of a contract with a particular debtor where the debtor agrees to pay a certain amount of money periodically to the organization, and the organization, for consideration, agree to distribute, or distribute the same among specified creditors pursuant to an agreement or plan. It is further defined to mean the business or practice of any organization that holds itself out as acting or offering or attempting to act, for consideration as an intermediary between the debtor and his or her creditors for the purpose of settling, compounding or in anyway altering the terms of payment of any debt.

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## State Debt Adjusting Law and Related Developments

- Tennessee (UDMSA)
- Nevada (UDMSA)
- Indiana SB 328
- Kentucky HB 166
- Kansas HB 2668
- Delaware HB 232 (UDMSA Amendment)
- Mississippi SB 2427

**States to watch: Illinois, Maryland, New York, California and others.**

Types of statutes that are relevant grows: credit repair, reverse mortgage, mortgage consultants and more.

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## Investigations, Federal / State Law Enforcement Actions

- CFP Act and FTC Act and Related Statutes (e.g., CROA)
- State Consumer Protection Laws
- State Credit Services Organization Acts
- State Debt Adjusting Laws
- State Mortgage Foreclosure Consultant Laws
- Other State Marketing and Security Breach Laws (e.g., email)
- Regulatory Investigations Related to Gov't Program, Grant etc.



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## Private Lawsuits and Class Actions

### Where do they come from?

- Federal Credit Repair Organization Act
- State Credit Services Organization Acts
- State Debt Adjusting Laws (e.g., GA, SC, UDMSA states, and others).
- State Mortgage Foreclosure Consultant Laws
- Other State Marketing and Security Breach Laws (e.g., email)
- Contract Actions (Arbitration Provisions)
- Tort Law (Creditor Lawsuits)
- Racketeer Influenced and Corrupt Organizations Act (RICO) (treble damages)



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## QUESTIONS AND DISCUSSION

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