VENABLE® LLP

The Future of Credit Counseling Industry State and Federal Regulation: A New Uniform Debt-Management Services Act, Other State Laws, and Federal Regulation

Association of Independent Consumer Credit Counseling Agencies (AICCCA) 18th Annual Conference
July 21, 2011, 9:30 am – 10:15 am ET
Four Seasons, Washington, DC

Jeffrey S. Tenenbaum, Esq.
Jonathan L. Pompan, Esq.
Venable LLP, Washington, DC

VENABLE LLP

IMPORTANT INFORMATION ABOUT THIS PRESENTATION

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.

This presentation will be available at www.venable.com/ccds/publications starting on Friday, July 22, 2011

© 2011 Venable LLP

VENABLE LLP

Agenda

- Introduction
- State Law and Regulatory Developments
  - Common Themes in State Debt Adjusting Law Developments in 2011
  - Revised Uniform-Debt Management Services Act
  - Other Developments
- What does the new Telemarketing Sales Rule Mean for Credit Counseling?
- Bureau of Consumer Financial Protection
- Other Federal Developments
  - What's Next for the Federal Trade Commission?
  - Housing Counseling
  - Internal Revenue Code / Tax-Exemption
  - Bankruptcy Counseling
- Question and Answers

© 2011 Venable LLP

VENABLE LLP

Common Themes in State Debt Adjusting Law Developments in 2011

- Conforming State Debt Adjusting Statutes to Telemarketing Sales Rule
- Expansion of Debt Adjusting Statutes to Include Debt Settlement
- Additional Exclusions and Other Amendments to State SAFE Act Bills
- Rise in Bills to Generally Encourage Housing Counseling

© 2011 Venable LLP

VENABLE LLP

Conforming Debt Adjusting Statutes to Debt Relief Service Amendments in Telemarketing Sales Rule

- 4 Ways Relevant:

  (1) Advance Fee Ban: Timing and Collection of Fees

  (2) Disclosures

  (3) Additional Changes

  (4) NCCUSL UDMSA Revisions

© 2011 Venable LLP

VENABLE LLP

Revised Uniform Debt-Management Services Act

NCCUSL Amendments to UDMSA

- In 2010 the FTC adopted amendments to the Telemarketing Sales Rule; including:

  (1) a prohibition on debt-management service providers **receiving any compensation before the consumer has received a modification of debt**, and

  (2) a specification of the circumstances in which a credit-counseling agency or a debt-settlement company may **request or require a consumer to place funds in a bank account under the control of a person other than the consumer**.

- *"To avoid any inconsistency between [the UDMSA] and the newly revised federal law, in 2011 the Conference approved changes in the provisions that address the timing of collection of fees and the use of powers of attorney."*

© 2011 Venable LLP

VENABLE LLP

Conforming Debt Adjusting Statutes to Debt Relief Service Amendments to the TSR

- CO HB 1206 – conforming Colorado UDMSA
  - *"Provider may not **request or receive payment** of any fee or consideration until and unless (i) provider has settled the terms of at least one debt pursuant to **settlement agreement or other contractual agreement executed by individual**, (ii) individual has made at least one payment pursuant to agreement*
  - ***Fees must be** :*
    - ***proportional to total fee for settlement of all debt as the debt settled to all debt or***
    - ***a percentage of amount saved by settlement***

- IN HB 1528 – conforming Indiana Debt Management Services Act
  - *"Licensee may not **impose charges or receive payment** for debt management services until (1) **licensee and debtor** have agreed upon a plan and signed an agreement, and (2) at least one payment has been made to a creditor according to the plan."*
  - ***Allowable fees: Set up fee ($50; cannot be collected until one payment has been made to creditor according to plan); Service Fees (15% of amount debtor agrees to pay through licensee divided into equal monthly payments over contract term; not more than $75 in any month); Dishonored Check Fee ($25)***
- **Other notable changes:** updated disclosure requirements; ability to suspend license, additional requirements for fiscal responsibility of control persons

© 2011 Venable LLP

VENABLE LLP

Expansion of Debt Adjusting Statutes to Cover Debt Settlement

- **MO HB 661** – Regulation of Debt Adjusters – ***<u>signed into law July 8, 2011</u>***
  - Expands ability of debt adjusters to provide debt settlement plans
  - Adds disclosure requirements for debt settlement
  - Conforms statute with TSR restrictions on timing and collection of fees
- **TX SB 141** – Regulation of Debt Management Services Providers
  - Expanded definition of "debt management services"
  - Separate bonding according to whether organization offers a DMP or not
  - Fee caps - $100/debt consultation/education, monthly service fee of $10/account or $50, limitation on flat fees of 17% of total debt
- **MD SB 741** – "Maryland Debt Settlement Services Act"
  - Registration ($1,000 – initial and renewal)
  - Bond of $50,000 (if has surety account)
  - Fee caps – Service fee cap similar to TSR
- **ND HB 1038** – Regulation of Debt Settlement Services Providers
  - establishes licensure and other requirements for "debt settlement providers" but exempts tax-exempt credit counseling agencies
  - credit counseling agencies will still need to abide by bonding and required contractual provisions

© 2011 Venable LLP

State SAFE Act Developments Related to Mortgage Loan Originator ("MLO") Exclusions

•**HUD SAFE Act Final Rule**

Exempts tax-exempt housing counseling on several grounds from definition of "loan originator" but allows states to more broadly define this term by statute or interpretation

•**LA HB 492 – includes favorable exemption from licensure as MLO for:**

"Any nonprofit corporation that is providing financial education and counseling to consumers, is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code, is approved by the U.S. Dept of Housing and Urban Development (HUD) to provide housing counseling, and does not originate residential mortgage loans."

•**VA SB 786** – favorable exemption from definition of "mortgage loan originator" for "individuals employed by a housing counseling organization certified or approved by the U.S. Dept of Housing…[who] assist[s] borrowers by offering or negotiating the terms of a loan...if not otherwise engaging in activities of MLO"

•**MT HB 90** – removes express exclusion for "loss mitigation specialists" (regulator still has discretion to decide if activities meet the definition of MLO)

© 2011 Venable LLP

VENABLE LLP

Other Amendments to SAFE Act Bills

NOTE: Many states define "mortgage loan originator" (MLO) broadly and do not include an express exemption; however, still subject to interpretation of whether meet definition

- **AZ HB 2296** (process for otherwise exempt entity to obtain certificate of exemption to employ mortgage loan originator)
- **GA HB 239** (requires MLO to be covered under sponsoring entity's surety bond; expands circumstances in which licensee can be denied/revoked because of past criminal history)
- **NV AB 308** (conforming requirements of loan modification consultant with FTC mortgage assistance relief services regulations; cannot request or collect fee before homeowner executes a written agreement)

© 2011 Venable LLP

VENABLE LLP

Bills Encouraging Housing Counseling

- **HI SB 651** (new non-judicial foreclosure resolution program; requires owner/occupant to consult with approved housing counselor thirty days prior to dispute resolution session)
- **MD HB 728** (requires that Complaint to Foreclose include documentation describing options available to homeowner including housing counseling)
- **LA HB 249** (creating the Louisiana Housing Corporation which may create a program to provide free mortgage foreclosure counseling and education; may enter into agreement with "any public, private, or nonprofit entity to carry out any part of the mortgage foreclosure counseling and education program")

© 2011 Venable LLP

VENABLE LLP

Other Developments - Updates to State Money Transmission Statutes

- **ND HB 1130** – adds a new section to the North Dakota Century Code related to money transmitters (prohibiting enumerated acts and practices)
- **CA Money Transmitters DFI Opinion Letter** (Favorable)
- **Hawaii Money Transmitters Act Opinion Letter** (Adverse)

© 2011 Venable LLP

VENABLE LLP

Other Developments - CSOA

- **TX HB 2594** – licensure of credit services organizations that "*obtain for a consumer or assist a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan.*"
  - Note: Texas payday lenders typically operate under a CSO license
  - Note: Credit Services Act contains an exemption for 501(c)(3) organizations that is not changed by TX HB 2594

© 2011 Venable LLP

VENABLE LLP

State Debt Adjusting Law Trends

(Approx. Numbers Provided)

	December 2005	February 2007	July 2008	July 2010	July 2011
States w/o Debt Adjusting Laws	3	3	2	2	2
States with Debt Adjusting Prohibitions w/limited or no Exceptions	2	2	1	1	1
States that Allow For-Profit and Non-Profit Entities to Engage in Debt Adjusting Activities	28	30	36	39	39
States with Licensing/Registration Requirements	29	31	34	37 (including effective dates of 2010)	37
States that Require Nonprofit Corporate Status (including (c)(3) status)	18	16	12	9	9
States that require 501(c)(3) Status	9	7	2	1	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.

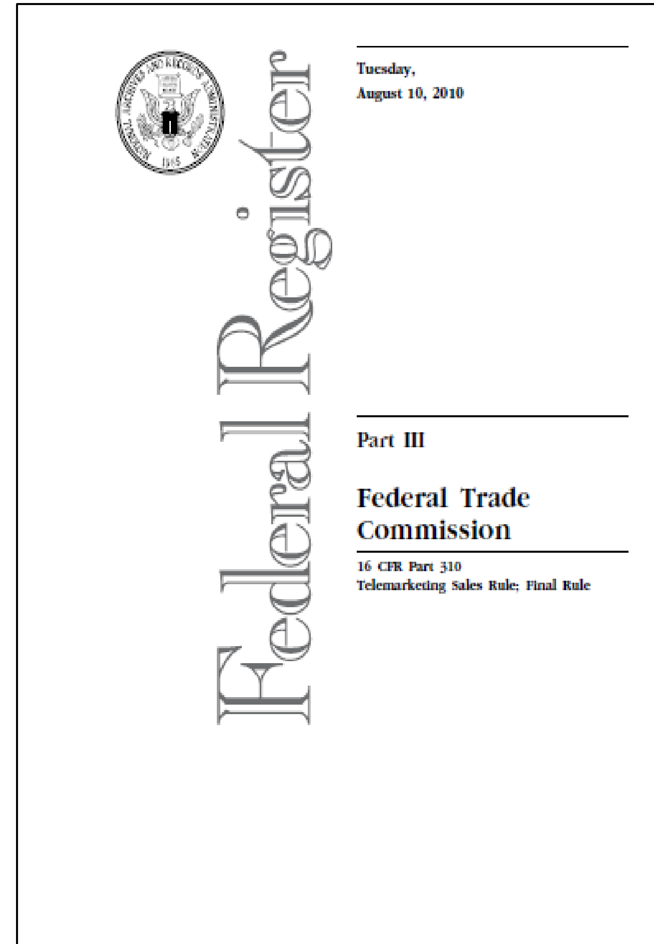
© 2011 Venable LLP

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

- 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 - Released on July 29, 2010

- Four Key Features:

  1. advance fee ban for debt relief services;
  2. require debt relief companies to make specific disclosures to consumers;
  3. prohibit them from making misrepresentations; and
  4. extends the Telemarketing Sales Rule to cover calls consumers make to these firms in response to debt relief advertising.


Federal Register

Tuesday,
August 10, 2010

Part III

Federal Trade Commission

16 CFR Part 310
Telemarketing Sales Rule; Final Rule

© 2011 Venable LLP

VENABLE LLP

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.

© 2011 Venable LLP

VENABLE LLP

Definition of Debt Relief Services

- **Definition of "debt relief service"** - "*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.*"

- **Services -** 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.*"

- **Products -** The Final Rule does not include "products" in the definition of "debt relief services," but the Commission notes 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.*"

© 2011 Venable LLP

VENABLE LLP

No Coverage of *Bona Fide* Nonprofits by the FTC…

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.

NOTE: **Dodd-Frank Act** amends the **Telemarketing and Consumer Fraud and Abuse Prevention Act** to provide for co-enforcement and rulemaking authority of the Telemarketing Sales Rule by the CFPB for providers of consumer financial products and services covered by the CFPA. What does this mean for *bona fide* nonprofits?

© 2011 Venable LLP

VENABLE LLP

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.
- **<u>What does this mean for a DMP provider?</u>**

© 2011 Venable LLP

VENABLE LLP

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.

© 2011 Venable LLP

VENABLE LLP

How does the advance fee prohibition apply to a DMP?

"CCAs renegotiate all of the consumer's eligible debts at one time, and creditors generally grant concessions immediately upon enrolling consumers in the DMP. Thus, CCAs do not renegotiate debts individually, and Final Rule § 310.4(a)(5)(i)(C) does not apply to them. CCAs commonly charge consumers not only an initial setup fee, but also periodic (usually monthly) fees throughout the consumer's enrollment in the DMP. Laws in most states cap these fees. Final Rule § 310.4(a)(5) prohibits CCAs from charging a set-up or other fee before the consumer has enrolled in a DMP and made the first payment, but it would not prevent the CCA from collecting subsequent periodic fees for servicing the account."

- (Internal citation omitted.) TSR Amended Rule 2010, 75 Fed. Reg. 48489 n.431 (Aug. 10, 2010). Footnote 431 to the SBP of the TSR is in connection with the statement, "For a DMP, the CCA must provide a debt management plan containing the altered terms and executed by the customer that is binding on all applicable creditors. The CCA also must have evidence that the consumer has made the first payment to the CCA for distribution to creditors."

© 2011 Venable LLP

VENABLE LLP

Important: Disclosures and Prohibited Misrepresentations

- Effective September 27, 2010.
- **Disclosures** - 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.
- **Prohibition on Misrepresentations** - The Final Rule 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.

© 2011 Venable LLP

VENABLE LLP

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

July 21, 2011 is the "Designated Transfer Date"

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

© 2011 Venable LLP

VENABLE LLP

CFPB Staff includes 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).

© 2011 Venable LLP

DIRECTOR

OFFICE OF THE DIRECTOR

Chief Operating Officer
Associate Director

- Response Center
- Operations & Facilities
- Procurement
- CTO
- CIO
- CFO
- Human Capital
- Inclusion
- Records and Privacy

Consumer Education & Engagement
Associate Director

- Financial Education
- Consumer Engagement
- Older Americans
- Service Members
- Students
- Community Affairs

Research, Markets & Regulations
Associate Director

- Research
- Regulations
- Card & Prepaid Markets
- Mortgage & Home Equity Markets
- Installment Lending Markets
- Deposit & Payment Markets
- Credit Information Markets

Supervision, Fair Lending & Enforcement
Associate Director

- Fair Lending
- Large Bank Supervision
- Non-bank Supervision
- Enforcement

General Counsel

- Principal Deputy GC
- Deputy GC
- Deputy GC

External Affairs
Associate Director

- Media Relations
- Legislative Affairs
- Small Business, Community Banks & Credit Unions
- Intergovernmental Affairs
- Ombudsman
- Consumer Advisory Boards

DRAFT
5/25/2011

© 2011 Venable LLP

VENABLE LLP

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**.

© 2011 Venable LLP

VENABLE LLP

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)

© 2011 Venable LLP

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**
- **NPRM Comments Due August 15, 2011 on Larger Participant and Debt Relief Services Market Definition**
- **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**

© 2011 Venable LLP

VENABLE LLP

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***

© 2011 Venable LLP

VENABLE LLP

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
- <u>State attorneys general may also enforce the CFPA with notice to the CFPB</u>
- <u>May enforce rules issued by the FTC to the extent such rules apply to a covered a person or service provider</u>
  - 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

© 2011 Venable LLP

VENABLE LLP

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.

© 2011 Venable LLP

VENABLE LLP

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.

© 2011 Venable LLP

VENABLE LLP

Specific Mandates/Limitations

- A rulemaking to limit mandatory arbitration
- CFPB prohibited from imposing usury limits
- Combine TILA and RESPA disclosures within one year (proposal released in May 2011)
- Issue regulations to enable a consumer to obtain information from a covered person

© 2011 Venable LLP

VENABLE LLP

Credit Repair Organizations Act and Other Litigation Risks

VENABLE LLP

Credit Repair Organizations Act

The **Credit Repair Organizations Act** became effective on April 1, 1997, and is directed to the credit repair industry.

The term "**credit repair organization**"—

(A)means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

(i) improving any consumer's credit record, credit history, or credit rating; or
(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

(B) does not include –

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

© 2011 Venable LLP

VENABLE LLP

Credit Counseling Agencies and CROA?

- In *Plattner v. Edge Solutions, Inc.,* 422 F.Supp.2d 969, 2006 WL 763651 (N.D. Ill. March 22, 2006) the court recognized, that "[w]hether [an apparent debt settlement] company is a credit repair organization under the CROA depends on the representations made [to consumers]." *Plattner*, 2006 WL 763651 at *4.

- *In re National Credit Mgt. Group, LLC*, 21 F.Supp. 2d 424 (D.N.J. 1998), wherein that court, in a case brought by the FTC, agreed with the FTC's position that certain educational and credit monitoring programs of a type offered by the credit counseling agency were governed by the CROA.

© 2011 Venable LLP

VENABLE LLP

Zimmerman v. Puccio, No. 09-1416 (1st Cir. 2010).

- Held that a tax-exempt, nonprofit credit counseling agency operated as a "credit repair organization" within the meaning of CROA and that certain principals of the organization were personally liable under CROA.

- 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.

© 2011 Venable LLP

VENABLE LLP

CROA: Requirements

- CROA requires full disclosure regarding consumer rights before any contract for credit repair services is executed. A written statement must be provided and signed by all prospective customers, and must be retained by the credit repair organization for at least two years after the statement is signed.

- Written Contract

- Notice of Cancelation Right

- Advance Fee Prohibition

© 2011 Venable LLP

VENABLE LLP

CROA: Prohibitions

The statutory scheme provides further protection for consumers with a list of prohibitions. CROA prohibits any person, credit repair organizations, as well as their employees and agents, from:

- misrepresenting the organization's services
- making or enticing consumers to make untrue or misleading statements either to the credit reporting agencies or to the consumer's creditors
- advising consumers to attempt to change their credit identities
- accepting payment or other valuable consideration for their services in advance of fully performing those services

© 2011 Venable LLP

VENABLE LLP

CROA: Penalties

- CROA includes civil penalties for violations and procedures for administrative enforcement by both the FTC and the states.

- CROA includes a private right of action.

© 2011 Venable LLP

VENABLE LLP

CROA: Waiver of Rights

A consumer cannot waive his rights under CROA.

- Any waiver of any protection afforded by CROA is treated as void, and contracts that are not in compliance with the Act's provisions may not be enforced by any federal or state court.

© 2011 Venable LLP

VENABLE LLP

CompuCredit Corp. v. Greenwood

- The Supreme Court has granted certiorari in *CompuCredit Corp. v. Greenwood* (No. 10-948), which presents the question: "Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.,* are subject to arbitration pursuant to a valid arbitration agreement."

- Of particular significance, a required disclosure provision prescribes that the written statement to consumers' state:

"You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act."

- The "right to sue" described in Section 1679c(a) is found in CROA's civil liability provision, which states: "Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute
- Resolves split between Ninth Circuit's (AK, CA, HI, ID, MT, NV, OR) conclusion in CompuCredit with decisions of the Third (DE ,NJ, PA) and Eleventh Circuits (AL, FL, GA)

© 2011 Venable LLP

VENABLE LLP

AT&T Mobility LLC v. Concepcion

- The five-to-four ruling, in the case of *AT&T Mobility LLC v. Concepcion*, stated that “[a]rbitration is poorly suited to the higher stakes of class litigation.” The momentous opinion recognizes that arbitration is dependent on contractual consent and that arbitration clauses should be enforced as written, even when they include certain types of class-action waivers.

- *Concepcion* offers support to organizations with customers – in California and nationwide – that seek to use contractual arbitration clauses with class-action waiver provisions in order to provide a fast, fair and efficient way to resolve disputes on a voluntary basis and avoid class actions.

- The risk of consumer class actions may be substantially reduced or possibly eliminated with the use of an appropriately drafted and implemented arbitration provision and class-action waiver.

© 2011 Venable LLP

VENABLE LLP

Other Federal Developments

- **Other Federal Developments**
  - **Federal Trade Commission**
  - **Housing Counseling**
    - **SAFE Act Final Rule**
  - **Internal Revenue Code / Tax-Exemption**
  - **Bankruptcy Counseling**
  - **Less-than-Full Balance Debt Repayment Plans**

© 2011 Venable LLP

VENABLE LLP

QUESTIONS AND DISCUSSION

Jeffrey S. Tenenbaum, Esq.

jstenenbaum@venable.com

(202) 344-8138

Jonathan L. Pompan, Esq.

jlpompan@Venable.com

(202) 344-4383

Venable LLP

575 7th Street, N.W.

Washington, DC 20004

www.Venable.com

1-888-Venable

To view Venable's index of articles and PowerPoint presentations on related legal topics, see www.Venable.com/ccds/publications.

© 2011 Venable LLP