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Jonathan L. Pompan

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January 2013

### 2013 Outlook for Credit Counseling: A Legal and Regulatory Perspective

*The Independent Counselor*

As the start of 2013 is upon us, nonprofit credit counseling agencies will be trying to anticipate the needs of their communities, by knowing what to expect in the New Year. We don't have a magic eight ball or special insight into the future, but by looking backward, we think it's possible to help understand what's on the legal and regulatory horizon, as you plan for your agency in 2013. We selected five areas that caught our attention in 2012; some focused on specific announcements, others on trends. Each demonstrates the ways in which the legal and regulatory landscape continues to change.

#### Joint CFPB and State Effort to Police the Debt-Relief Industry

The Consumer Financial Protection Bureau ("CFPB") is in the midst of a comprehensive effort to police the debt-relief industry. Even though aspects of the CFPB remain a work in progress, the CFPB has demonstrated that it will not wait until it has supervision authority in a particular market or specific examination guidance before holding debt relief providers accountable.

Just as 2012 was coming to a close, the CFPB announced that it brought its first joint enforcement action with state Attorneys General against a debt-relief service provider that allegedly failed to help consumers settle their payday-loan debts and charged fees in advance of providing services. The CFPB alleged that the company's activities violated the Federal Trade Commission's Telemarketing Sales Rule, the Consumer Financial Protection Act, and the laws of various states. The states of Hawaii, New Mexico, North Carolina, North Dakota, and Wisconsin all joined the CFPB's investigation and lawsuit to enforce their own laws. The company was shut down and the company, along with its principal, was ordered to return fees to consumers and pay a penalty.

The CFPB also has stated that it is scrutinizing debt-relief service provider partners, including those who facilitate their conduct and who may also run afoul of the federal consumer financial protection laws. This enforcement action, along with two earlier in the year against mortgage loan modification providers, were attention grabbing. In addition, there are other recent CFPB developments that have as deep, if not deeper, implications that are discussed below.

#### Scrutiny of Relationships with Third-Party Service Providers

Working with third-parties may allow for operational efficiency, but can present a broad range of risks, including compliance risks, reputation risks, operational risks, and transaction risks. Federal and state regulators are increasingly sounding the alarm that they will hold providers responsible for the actions of their affiliates and service providers. Indeed, the CFPB published an entire bulletin on the topic. Bottom line, the CFPB expects providers to demonstrate compliance for each of their product lines, marketing practices, and third-party affiliates and/or vendors. Moreover, the CFPB may seek to hold providers and third-party affiliates and/or vendors responsible for legal compliance.

#### The "Writing on the Wall:" Don't Ignore the CFPB Website and Blog Posts

The CFPB has yet to finalize its "larger participant" rulemaking to initiate widespread supervision over larger credit counseling agencies and other debt relief services providers. In 2013 that may change and the sector may face enhanced regulatory pressure. In any event, the CFPB has made a number of its expectations clear and provided a great deal of information -- on its website and blog -- already that sheds light on what it expects from institutions that fall under its jurisdiction, including credit counseling agencies. While some of the material is geared for Bureau examination staff, it provides a good overview of the ways enforcement staff may approach an investigation. As a practical matter, it also serves as a guide on how to perform a risk assessment and gap analysis to determine where the attention of the compliance department and others may be needed. Finally, don't ignore the consumer

outreach and complaint materials.

### **IRS Scrutiny Will Continue; Examinations of Housing Counseling Agencies are Coming**

Back in February 2012, the Internal Revenue Service's ("IRS") Exempt Organizations division announced it had begun to focus on the activities of mortgage foreclosure assistance organizations, which would include housing counseling, to determine whether they are fulfilling their exempt purpose, and whether they are complying with the requirements of Section 501(q) of the Internal Revenue Code. There is no precise timeline, and as many of us well know from the last eight years, the IRS often moves quietly. In recent weeks the IRS has assembled a working group that is now up and running and comprised of many of the people who oversaw the credit counseling compliance project in 2004. As you may be aware, the IRS's credit counseling compliance project resulted in the IRS examination of hundreds of credit counseling agencies and the reported revocation or proposed revocation of up to 80% of the entire industry as measure by revenue. Agencies that are involved in housing counseling can expect the IRS to begin correspondence examinations within the next 12 to 24 months. As such, housing counseling agencies need to be prepared and stay tuned.

### **Antiquated State Laws Restrict Services**

The past year wasn't big for state debt adjusting law changes, which was welcome news for many, after a dizzying number of changes starting in 2004. But, many believe that state debt adjusting laws are still in need of being refreshed. For example, many of the laws restrict the services that can be offered to consumers; yet many agencies long to provide more and different services to consumers. On top of this, some state laws contain restrictions on lending (also found under the Internal Revenue Code) that may hamper assisting consumers with affordable homeownership. There are also loopholes and other gaps that need to be filled in some states, as well as tweaks that should be made to help with uniformity. Based on past history, counseling agencies will have to demand change given the needs of consumers and look to avoid unintended consequences. It might be an uphill climb, but there will be no reason for state legislatures to change the status quo now, if they haven't already, without strong justification. In the meantime, the recent CFPB enforcement action taken with state Attorneys General reflects a level of cooperation that hasn't been seen before and reinforces the importance of state compliance.

Articles and presentations on many of the above topics are available on our [website](#).

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*For more information, please contact **Jonathan L. Pompan** at 202.344.4383 or [jlpompan@Venable.com](mailto:jlpompan@Venable.com).*

*Jonathan L. Pompan, a partner in the Washington, DC office of Venable LLP, co-chairs the firm's Consumer Financial Protection Bureau Task Force. His practice focuses on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of clients, such as nonbank financial products and services providers, nonprofit organizations, and trade and professional associations, before the CFPB, Federal Trade Commission, and state Attorneys General and regulatory agencies.*

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