

VENABLE[®]_{LLP}

Proactive Strategies for Minimizing Legal Risks in Providing Credit Counseling and Related Services

Association of Credit Counseling Professionals
Spring 2012 Conference
May 10, 2012, 9:15 am– 10:30 am ET
Hyatt Regency, Minneapolis, MN

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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***



Introduction

- § Federal and state laws governing consumer credit counseling agencies continue to evolve and create potential pitfalls and new compliance requirements.

- § In response, the industry has responded with self regulation and many agencies limit their activities due to fear of crossing the lines set by regulators, law enforcement, and the Internal Revenue Service.



What's the cost of noncompliance?



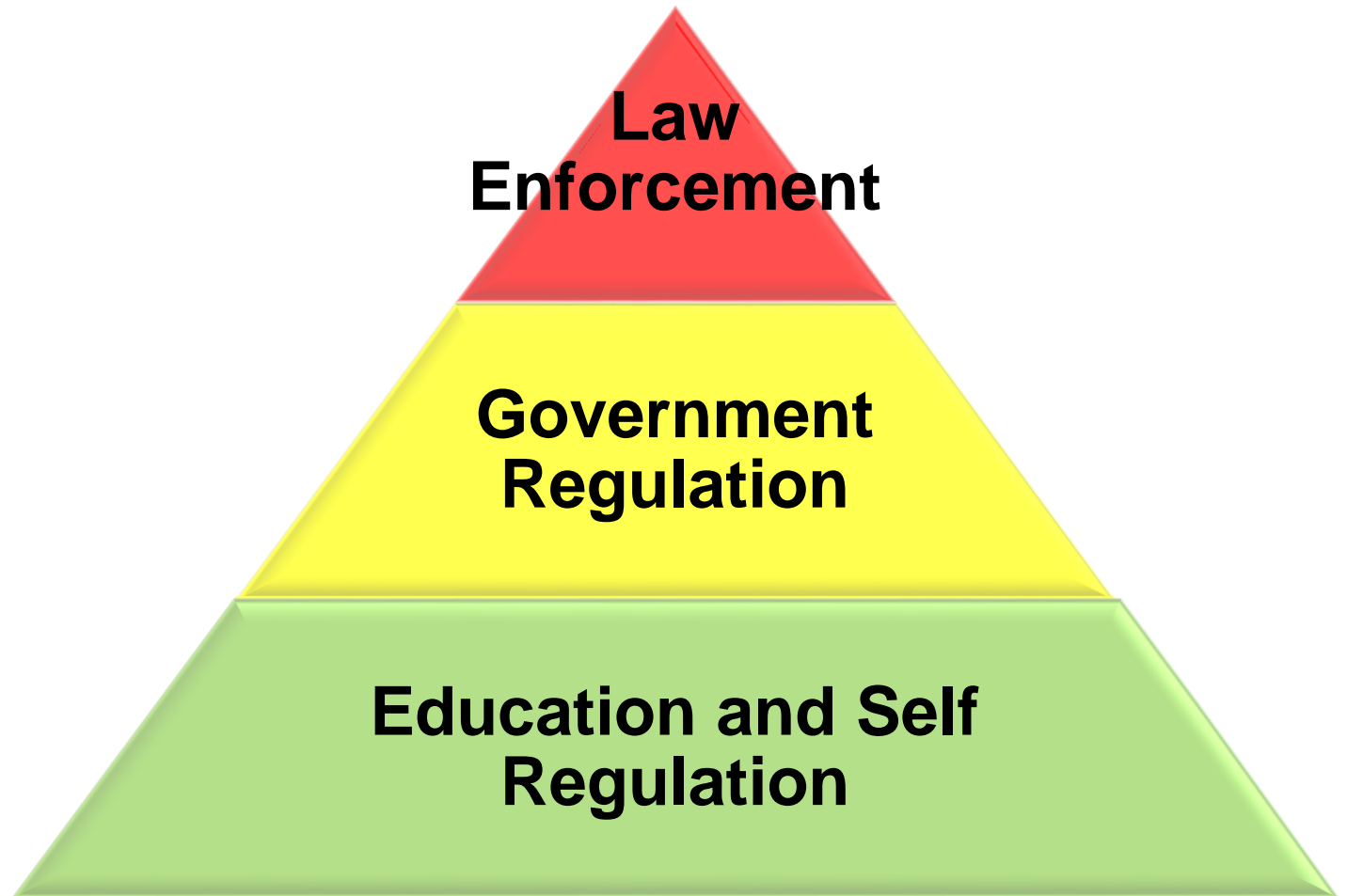
§ In today's rapidly changing regulatory environment companies are confronted by a growing number of compliance challenges including difficulty from a resource perspective to address the many changes concurrently

§ Companies that invest in ongoing monitoring and conduct frequent monitoring as part of a mature compliance framework can drastically reduce the business and financial consequences associated with noncompliance

§ In addition to immediate and short-term impacts such as monetary losses, litigations and brand damage, companies also risk negatively impacting their ratings, which in turn can affect permissions required to execute key corporate growth strategies, such as acquisitions



The Consumer Protection Pyramid



**Consumer Financial Protection
Bureau:
Preparing for Enforcement
Scrutiny and Potential
Supervision and Examination**



Areas of Focus by the CFPB related to Credit Counseling

- § Unfair, Deceptive and Abusive Acts and Practices
- § Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.)
- § Fair Credit Reporting Act (15 U.S.C. 1681 et seq.)
- § Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);
- § Gramm-Leach-Bliley Act of 2009
- § S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);
- § Section 626 of the Omnibus Appropriations Act of 2009, Public Law 111-8
- § Telemarketing Sales Rule (16 CFR Part 310)
- § Use of Prenotification Negative Option Plans (16 CFR Part 425)
- § Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (16 CFR Part 429)
- § Internal Revenue Code* (may report to the IRS)
- § State Statutory and Regulatory Requirements (may report to state AGs)



What's happening at the CFPB re Nonbank Supervision?

§ CFPB May Publish Debt Relief Services “Large Participant” NPRM Prior to July 21, 2012

- Has already announced “Larger Participant” NPRM for Debt Collection and Credit Bureaus
 - Expectation that audits of large participants will commence shortly after the rule is finalized (Late Summer-Fall 2012)
 - Audits may likely be conducted similar to other types of financial institutions that are currently regulated at the federal level or pursuant to federal statute
- **Attorney-Client Privilege and Attorney Work Product Considerations—CFPB Rulemaking Efforts**



CFPB Supervision and Examination

- § The statutory frameworks for supervision of large depository institutions and their affiliates and for non-depository consumer financial service companies are largely the same.

- § The purpose of supervision, including examination, to:
 - assess compliance with **Federal consumer financial laws**,
 - obtain information about activities and compliance systems or procedures, and
 - detect and assess risks to consumers and to markets for consumer financial products and services;

- The requirement to coordinate with other Federal and state regulators; and

- The requirement to use where possible publicly available information and existing reports to Federal or state regulators pertaining to supervised entities.



Supervision Process Principles

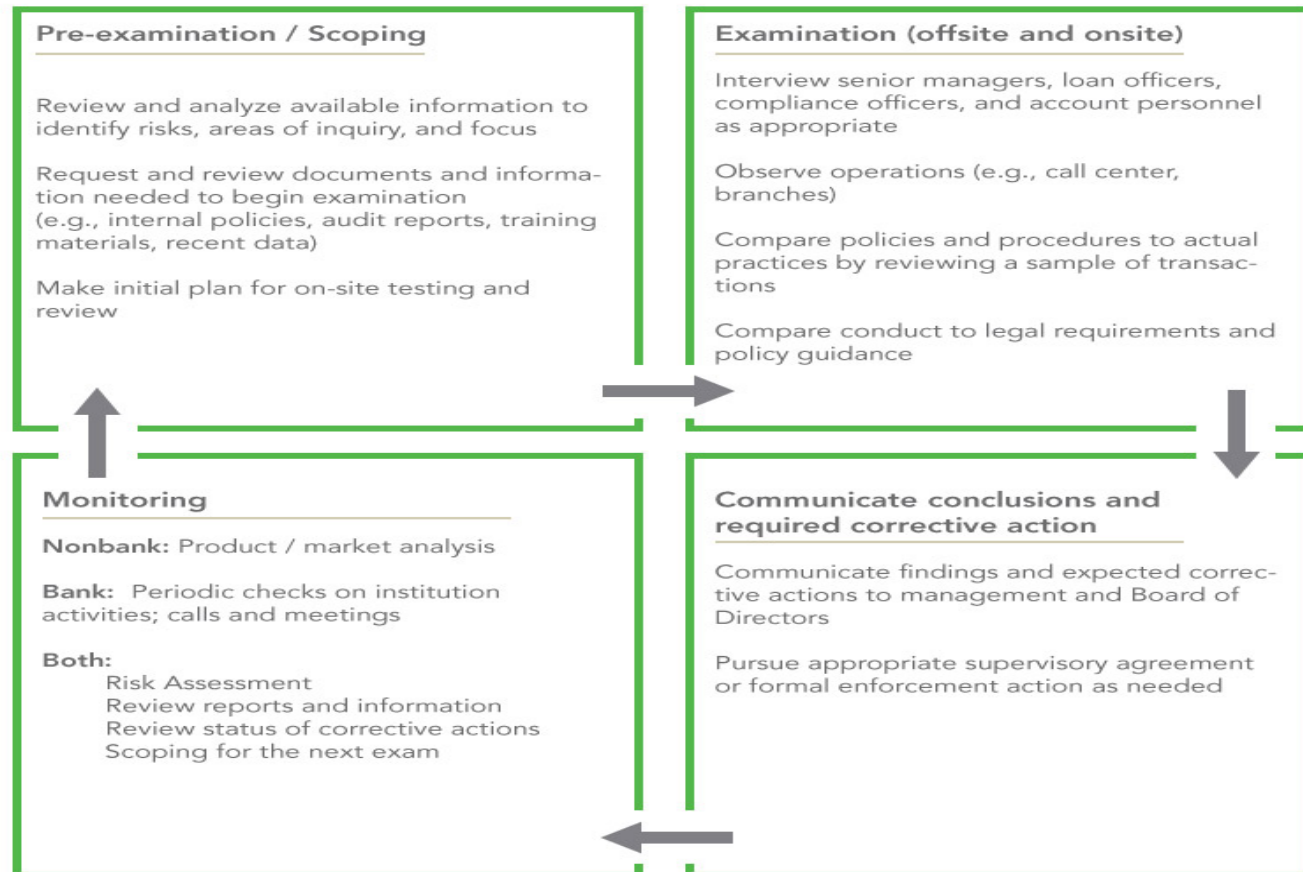
- § **Consumer Focus:** CFPB will focus on an institution's ability to detect, prevent, and correct practices that present a significant risk of violating the law and causing consumer harm

- § **Data Driven:** Supervision staff (examiners and analysts) will use data from a wide range of sources: data obtained from the entity and through direct observation during monitoring and examination; information provided by the CFPB's Research, **Markets** and Regulations and Consumer Education and Engagement divisions, the Office of Fair Lending and Equal Opportunity, the **Enforcement** division, Consumer Response Center, and **Offices addressing the special needs of students, Older Americans, Service members, and the underserved; and other state and Federal regulatory agencies.**

- § **Consistency:** CFPB will use the same procedures to examine all supervised entities that offer the same types of consumer financial products or services, or conduct similar activities

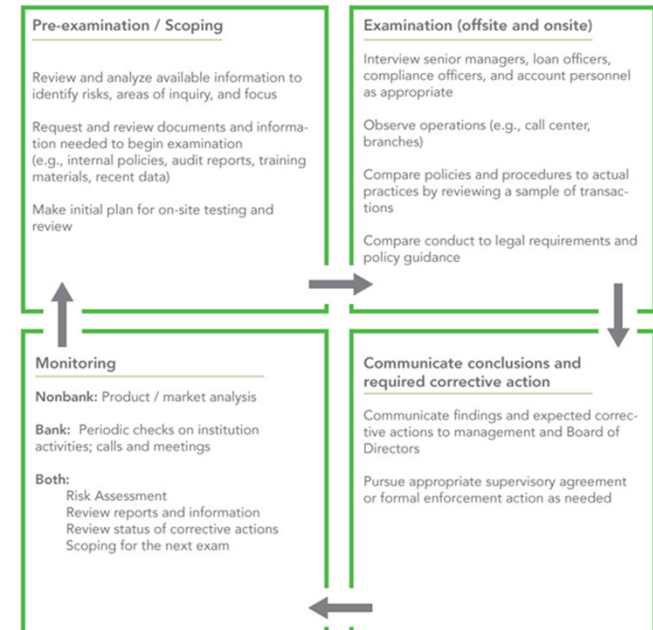


CFPB Examination Cycle



CFPB Supervision and Examination Manual

- § The first part describes the supervision and examination process.
- § The second part contains examination procedures, including both general instructions and procedures for determining compliance with specific regulations.
- § The third part presents templates for documenting information about supervised entities and the examination process, including examination reports.



CFPB Examination Steps

- § Collect and review available information (from within the CFPB, from other Federal and state agencies, and from public sources), consistent with statutory requirements;
- § Request and review supplementary documents and information from the entity to be examined;
- § Develop and obtain internal approval for a preliminary risk focus and scope for the onsite portion of the examination;
- § Go onsite to observe, conduct interviews, and review additional documents and information;
- § Consult internally if the examination indicates potential unfair, deceptive, or abusive acts or practices; discrimination; or other violations of law;
- § Draw preliminary conclusions about the regulated entity's compliance management and its statutory and regulatory compliance;
- § Consult internally about follow-up corrective actions that the institution should take, whether through informal agreement or a formal enforcement action, if warranted by findings;
- § Draft the examination report;
- § Obtain appropriate internal review and approval for the examination work and draft examination report;
- § Share the draft report with the prudential regulator and obtain and consider any comments they may offer, consistent with statutory requirements; and
- § After final internal clearance, finalize and transmit the report to the supervised entity.
- § During the examination, the Examiner in Charge will communicate with appropriate supervised entity personnel about preliminary findings and conclusions.
- § CFPB will seek cooperation from the entity to correct any problems identified.



CFPB Enforcement Authority

§ CFPB is authorized to conduct investigations to determine whether any person is, or has, engaged in conduct that violates Federal consumer financial law.

§ Investigations may be conducted jointly with other regulators, and may include:

- subpoenas or civil investigative demands for testimony,
- responses to written questions,
- documents, or
- other materials



CFPB Enforcement Authority (cont'd)

- § Rescission or reformation of contracts.
- § Refund of money or return of real property.
- § Restitution.
- § Disgorgement or compensation for unjust enrichment.
- § Payment of damages or other monetary relief.
- § Public notification regarding the violation.
- § Limits on the activities or functions of the person against whom the action is brought.
- § Civil monetary penalties (which can go either to victims or to financial education).



CFPB Referrals from Exams

- § **Criminal Wrongdoing** – Department of Justice

- § **Tax Law Non-Compliance** - The CFPB is also required under the Act to refer information identifying possible tax law non-compliance to the Internal Revenue Service (IRS).



CFPB Exam Process

- § For most full-scope examinations, the Examiner in Charge, or designee, contacts the supervised entity's management approximately 60 days prior to the scheduled onsite date for the examination to arrange either a telephone or in-person discussion of the examination Information Request.
- § The principal purpose of the discussion is to gather current information to ensure that the request is tailored to what is necessary to properly conduct the examination of that particular institution.
- § Examination – telephone, mail, in-person, combination
- § Closing Meeting
- § Examination Rating – 1 – 5 (1 is highest rating / lowest risk)
- § Examination Report – Corrective Action
- § Board of Directors / Principals Meeting



What will the CFPB be looking for?

§ Compliance Management

System: A compliance management system is how a supervised entity:

- Establishes its compliance responsibilities;
- Communicates those responsibilities to employees;
- Ensures that responsibilities for meeting legal requirements and internal policies are incorporated into business processes;
- Reviews operations to ensure responsibilities are carried out and legal requirements are met; and
- Takes corrective action and updates tools, systems, and materials as necessary.

Checklist

- q Board and management oversight;
- q Compliance program
 - q Policies and procedures,
 - q Training, and
 - q Monitoring and corrective action.
- q Training
- q Response to consumer complaints
- q Compliance audit.



Unfair, Deceptive or Abusive Practices

- § Under the Consumer Financial Protection Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice.

- § The Act also provides CFPB with rule-making authority and, with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with **any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.**

- § In addition, CFPB has supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services



Unfair Acts and Practices Defined

- § The standard for unfairness in the CFPA is that an act or practice is unfair when:
1. It causes or is likely to cause substantial injury to consumers,
 2. The injury is not reasonably avoidable by consumers, and
 3. The injury is not outweighed by countervailing benefits to consumers or to competition

Checklist

- q Does an act or practice hinder a consumer's decision-making.
- q The injury must not be outweighed by countervailing benefits to consumers or competition.
- q To be unfair, the act or practice must be injurious in its net effects — that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.



Deceptive Acts or Practices Defined

A representation, omission, act, or practice is deceptive when

1. The representation, omission, act, or practice misleads or is likely to mislead the consumer,
2. The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances, and
3. The misleading representation, omission, act, or practice is material

Checklist

- q Acts or practices that may be deceptive include: making misleading cost or price claims; offering to provide a product or service that is not in fact available; using bait-and-switch techniques; omitting material limitations or conditions from an offer; or failing to provide the promised services.
- q Is a representation, omission, act, or practice likely to mislead:
 - q Is the statement prominent enough for the consumer to notice?
 - q Is the information presented in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?
 - q Is the placement of the information in a location where consumers can be expected to look or hear?
 - q Finally, is the information in close proximity to the claim it qualifies?



Abusive Acts or Practices Defined

- § 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 its 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.

Examples

- § The TSR prohibits as an abusive practice requesting or receiving any fee or consideration in advance of:
 - debt relief services;
 - obtaining any credit repair services;
 - recovery services, and
 - offers of a loan or other extension of credit, the granting of which is represented as “guaranteed” or having a high likelihood of success



UDAAP Checklist

- § To initially identify potential areas of UDAAP concerns, the CFPB will obtain and review copies of the following to the extent relevant to the examination:
- q Training materials.
 - q Lists of products and services, including descriptions, fee structure, disclosures, notices, agreements, and periodic and account statements.
 - q Procedure manuals and written policies, including those for servicing and collections.
 - q Minutes of the meetings of the Board of Directors and of management committees, including those related to compliance.
 - q Internal control monitoring and auditing materials.
 - q Compensation arrangements, including incentive programs for employees and third parties.
 - q Documentation related to new product development, including relevant meeting minutes of Board of Directors, and of compliance and new product committees.
 - q Marketing programs, advertisements, and other promotional material in all forms of media (including print, radio, television, telephone, Internet, or social media advertising).
 - q Scripts and recorded calls for telemarketing and collections.
 - q Organizational charts, including those related to affiliate relationships and work processes.
 - q Agreements with affiliates and third parties that interact with consumers on behalf of the entity.
 - q Consumer complaint files.
 - q Documentation related to software development and testing, as applicable.
 - q Management Policies and Procedures
 - q Transaction testing
 - q Interviews with consumers



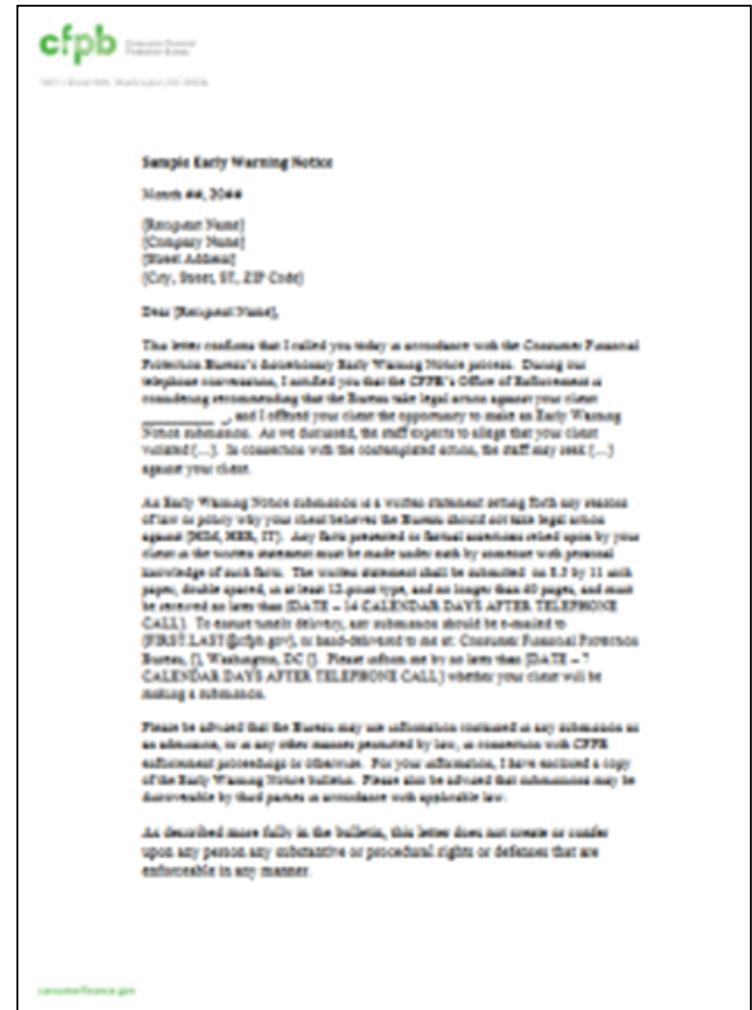
CFPB Enforcement

- § 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 \$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

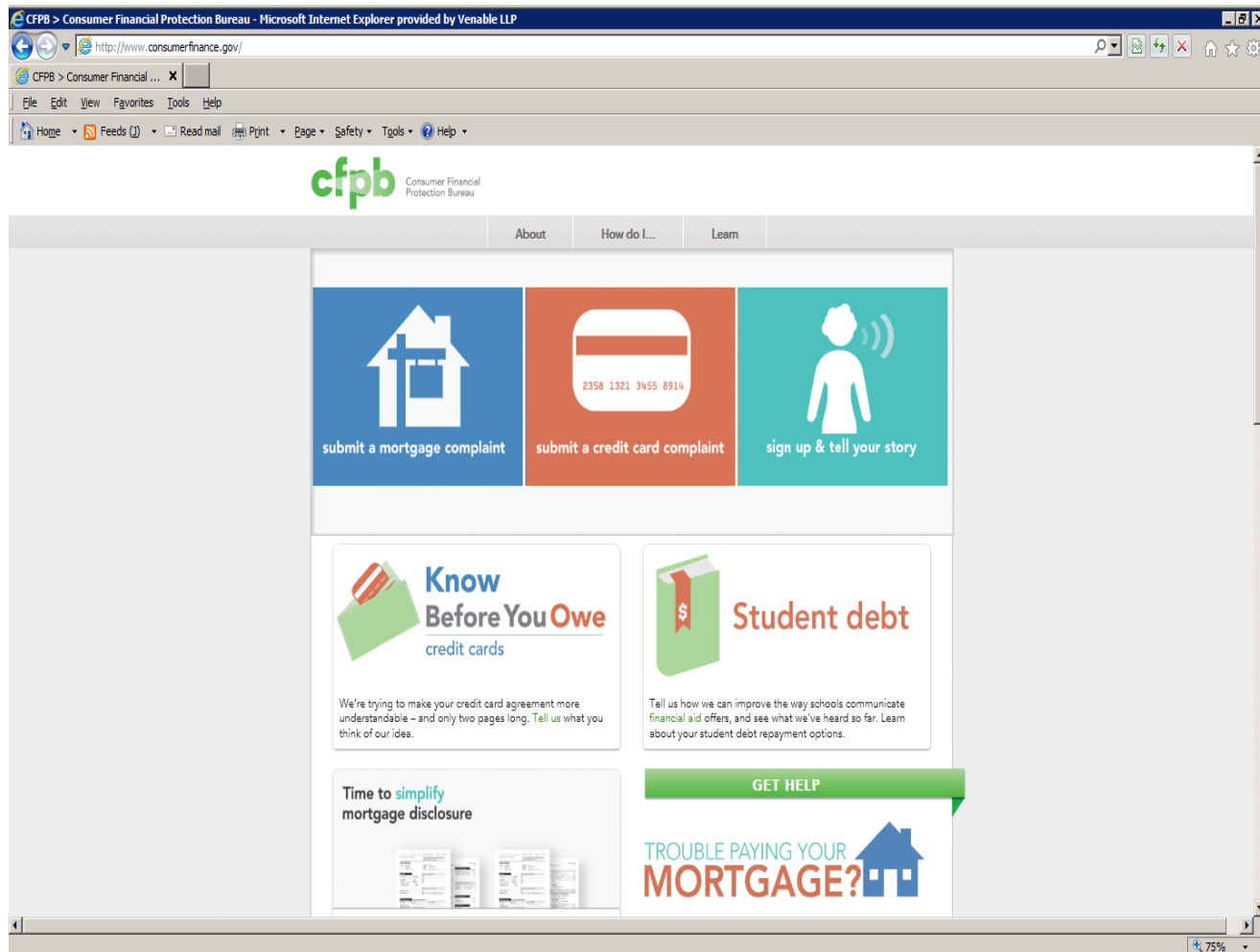


Early Warning Notice of Potential Enforcement

§ The *Early Warning Notice* is not required by law, but CFPB believes it will promote even-handed enforcement of consumer financial laws. The decision to give notice in particular cases is discretionary and will depend on factors such as whether prompt action is needed.



What else is the CFPB up to?



Director

Office of the Director



DRAFT
9/21/2011





Student Loan, Servicemembers and Older American Initiatives



Student debt
repayment assistant

Know your options

Know
Before You Owe
student loans



**Servicemembers
and veterans**

Plan your future and
protect your finances




**Older
Americans**

Navigate financial
challenges safely



CFPB & DOE “Know Before You Owe: Student Loans”



Know Before You Owe
student loans

This is a financial aid shopping sheet “thought starter” – an example (not a proposal) of how schools might improve the information they present to prospective students and their families. Tell us what you think of it. [More information about this project.](#)

University of the United States (UUS)
Private 4-year

How to pay for college Prepared for Abigail Adams, first year student

How much will it cost each year?

TOTAL COST FOR FULL-TIME ATTENDANCE	\$ 29,000 / yr
Tuition and Fees	\$ 21,000
Housing and Meals	\$ 5,000
Books and Supplies	\$ 2,000
Transportation and other personal expenses	\$ 1,000
TOTAL GRANTS AND SCHOLARSHIPS	\$ 11,000 / yr
Grants from your school	\$ 5,000
Federal Pell Grant	\$ 4,500
Grants from your state	\$ 500
Other scholarships you can use	\$ 1,000

What you will pay for one year: **\$ 18,000 / yr**

How does your cost compare?

4-year public school average	\$9,819
U.S. average cost	\$16,190
Your cost	\$18,000
4-year private school average	\$25,343

UUS student loan default rate
The percentage of students from this school who defaulted on their Federal Stafford loans within the first 3 years of repayment.

U.S. graduation rates
The percentage of students who graduate within 4 years.

U.S. retention rates
The percentage of non-graduating students who re-enroll the following year.

What are your loan and work study options?

FEDERAL LOANS THAT YOU'RE ELIGIBLE FOR	\$ 8,000 / yr
Pell Grant	\$ 2,500
Subsidized Stafford Loan	\$ 3,000
Unsubsidized Stafford Loan	\$ 2,500
FEDERAL WORK STUDY	\$ 4,000 / yr
PRIVATE STUDENT LOANS	\$ 6,000 / yr

After graduation, how much will you owe?

ESTIMATED MONTHLY PAYMENT FOR FEDERAL LOANS	\$ 411 / mo
Estimated total federal loan debt	\$ 37,000
ESTIMATED MONTHLY PAYMENT FOR PRIVATE LOANS	\$ 297 / mo
Estimated total private loan debt	\$ 26,000
YOUR TOTAL ESTIMATED DEBT	\$ 63,000
Your estimated monthly payment for all loans	\$ 708 / mo

University of the United States (UUS)
Financial Aid Office
123 Main Street
Anytown, ST 12345
(123) 456-7890
Financial@UUS.edu

For further explanation and next steps, visit <http://www.uus.com/school/personalurl>

[\[See the shopping sheet as a PDF.\]](#)

You have 2000 characters remaining.



University of the United States (UUS)
Private 4-year

Example only, fictional data

How to pay for college Prepared for Abigail Adams, first year student

How much will it cost each year?

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“Know Before You Owe: Student Loans”



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Private 4-year


Example only.
Fictional data.

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UUS student loan default rate

The percentage of students from this school who defaulted on their Federal Stafford loans within the first 3 years of repayment.



UUS graduation rates

The percentage of students who graduate within 6 years



UUS retention rates

The percentage of non-graduating students who re-enroll the following year



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 Financial Aid Office
 123 Main Street
 Anytown, ST 12345
 (123) 456-7890
 FinancialAid@uus.edu

For further explanation and next steps, visit <http://www.uus.com/school/persona/ur/>

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Page 30

CFPB Solicits Whistleblowers

“We are providing whistleblowers and other knowledgeable sources with a direct line of communication to the CFPB,” said Rich Cordray, Assistant Director of Enforcement for the CFPB. “Their tips will help inform Bureau strategy, investigations, and enforcement. And they will help us fulfill our commitment to consumers.”

The whistleblower channels announced include an email address, whistleblower@cfpb.gov, and a toll free “tips hotline” at (855) 695-7974. And soon, an online tips portal accessible through its website.

The consumer finance whistleblower protections have significant implications for legal and regulatory compliance and raise a number of challenges for providers of consumer financial products and services. Covered employers will need to consider such issues as:

- How to maintain legal and regulatory compliance with consumer financial protection laws and regulations;
- How to ensure that, to the extent there is a violation of consumer financial protection law or regulations, an employee will take advantage of internal reporting mechanisms as opposed to bypassing such mechanisms and going straight to the CFPB;
- How to conduct internal investigations without encouraging whistleblowers; and
- How to successfully mediate any problems discovered.



CFPB Regulation of Private Student Loans

§ Nonbank Supervision Examination of Private Student Lenders

CFPB Consumer Laws and Regulations

TILA

Subpart F – Special Rules for Private Education Loans Special Disclosure Requirements for Private Education Loans (§ 226.46)

The disclosures required under Subpart F apply only to private education loans. Except where specifically provided otherwise, the requirements and limitations of Subpart F are in addition to the requirements of the other subparts of Regulation Z.

A private education loan means an extension of credit that:

- Is not made, insured, or guaranteed under title IV of the Higher Education Act of 1965;
- Is extended to a consumer expressly, in whole or part, for postsecondary educational expenses, regardless of whether the loan is provided by the educational institution that the student attends; and
- Does not include open-end credit or any loan that is secured by real property or a dwelling.

A private education loan does not include an extension of credit in which the covered educational institution is the creditor if:

- The term of the extension of credit is 90 days or less; or
- An interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the credit is payable in more than four installments.

Content of Disclosures (§ 226.47)

Disclosure Requirements

This section establishes the content that a creditor must include in its disclosures to a consumer at three different stages in the private education loan origination process:

- 1) Application or Solicitation Disclosures – With any application or solicitation;
- 2) Approval Disclosures – With any notice of approval of the private education loan; and
- 3) Final Disclosures – After the consumer accepts the loan. In addition, Section 226.48(d) requires that the disclosures must be provided at least three business days prior to disbursement of the loan funds.

Rights of the Consumer

The creditor must disclose that, if approved for the loan, the consumer has the right to accept the loan on the terms approved for up to 30 calendar days. The disclosure must inform the consumer that the rate and terms of the loan will not change during this period, except for changes to the rate based on adjustments to the index used for the loan and other changes permitted by law. A consumer also has the right to cancel the loan, without penalty, until midnight of the third business day following the date on which the consumer receives the final disclosures.



CFPB Servicemember and Veteran Initiatives



Servicemembers
and veterans
Plan your future and
protect your finances

Repeat Offenders Against Military Database (ROAM) - joint effort with state Attorneys General and the Department of Defense to combat scams directed at servicemembers, veterans, and their families. ROAM is intended to track companies and individuals who repeatedly target the military community. Law enforcement officials across the country, including state Attorneys General, United States Attorneys, local officials, and Judge Advocates (JAGs), will be able to contribute to and search the database.

§ Led by Holly Petraeus, Assistant Director for Servicemember Affairs

§ Focused on unique financial challenges of servicemembers and veterans

- Lending
- Affinity Programs
- Opportunities

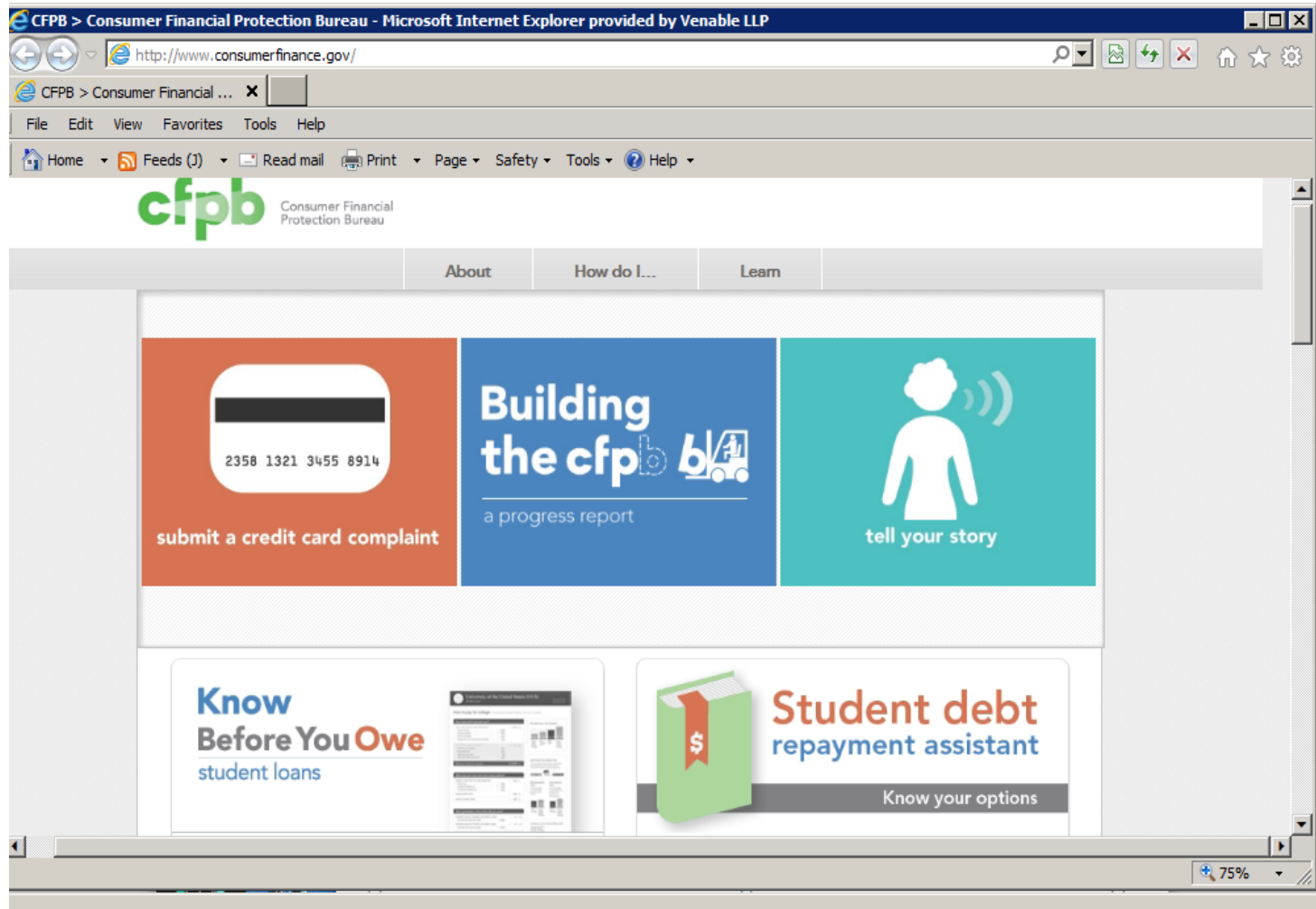
The CFPB's Objectives

- § To ensure that consumers have timely and understandable information to make responsible decisions about financial transactions;
- § To protect consumers from unfair, deceptive, or abusive acts or practices, and from discrimination;
- § To reduce outdated, unnecessary, or overly burdensome regulations;
- § To promote fair competition by enforcing the Federal consumer financial laws consistently; and
- § To advance markets for consumer financial products and services that operate transparently and efficiently to facility access to innovation.




What is the CFPB doing?

§ February 2011 – “Open for Suggestions”



What is the CFPB doing? (Cont'd)

Credit CARD Act Conference



Overview

One year ago today, on February 22, 2010, many of the provisions of the Credit Card Accountability, Responsibility, and Disclosure Act (CARD Act) took effect.

When the CARD Act was signed into law in May 2009, it was clear the credit card market was in need of serious reform. Congress concluded that certain practices in the credit card industry were not fair and transparent to consumers, and the CARD Act passed with very strong bipartisan support in both the House and the Senate. As President Obama said when he signed the CARD Act into law, the Act was intended to uphold "basic standards of fairness, transparency, and accountability."

Later this summer, the new Consumer Financial Protection Bureau (CFPB) will assume responsibility for administering the CARD Act. To help guide it in performing these responsibilities, the CFPB has convened a conference, *The CARD Act: One Year Later*. To provide a factual basis for the discussion, the CFPB conducted a voluntary survey of the nine largest card issuers, who together represent approximately 90 percent of the credit card marketplace, about their current practices and future plans. Several other studies were also developed for this conference, including a report by the Office of the Comptroller of the Currency (OCC) that looks specifically at changes in the pricing practices of card issuers. To explore the impact of the CARD Act's new disclosure requirements on the consumer experience, the CFPB also commissioned a survey of cardholders.

These studies demonstrated that one year after the effective date of many provisions of the CARD Act, industry practices have changed in four significant ways.

- The long-standing practice of hiking interest rates on existing cardholder accounts has been dramatically curtailed.
- The amount of late fees consumers are paying has been substantially reduced.
- Overlimit fees have virtually disappeared in the credit card industry.
- Consumers report that their credit card costs are clearer, but significant confusion remains.

Interest Rate Hikes Dramatically Curtailed

Background: Prior to the enactment of the CARD Act, it was quite common for credit card companies to raise customers' interest rates, including the rates applied to existing balances. Often the hike was put into effect with little or no advance notice. The CARD Act has two provisions to address increases in interest rates:

1

- § Recent Trends in the Credit Card Industry – Argus Information & Advisory Services.
- § The Supply of Credit in the Card Market – Comperemedia
- § Credit Card Profitability Under Pressure – Credit Suisse
- § Origination Metrics – Experian
- § Reframing Behavior: The Impact of the CARD Act on Cardholder Repayment Rates – Gartenberg
- § Impact on Pricing and Fees – OCC
- § Consumer Perceptions and Reactions to the CARD Act – Synovate
- § A Perspective on Credit Card Usage and Consumer Performance – TransUnion



After a year of the Credit CARD Act...

- § In 2010, that trend turned around. Credit card marketing expanded and credit standards were relaxed, although the level of marketing has still not returned to pre-recession levels and credit standards are tighter than they were before the recession began.
- § While the overall cost of credit has remained constant, overall credit use has decreased. The total amount of credit card debt declined in 2009 and again in 2010, with a cumulative decline of 15 percent.
- § The average bankcard debt per cardholder declined from roughly \$3,500 in 2007 to approximately \$2,750 in 2010. The decrease was the result of both higher levels of “chargeoffs” – debt that card issuers write off as uncollectible – compared to 2007 and lower new balances than in 2007.
- § The decrease was concentrated in the near prime and subprime segments.

Source: CFPB Credit CARD Act Report



What is the CFPB doing? (Cont'd)

May 2011

§ “Know Before You Owe” – Mortgages



§ An effort to combine two federally required mortgage disclosures into a single, simpler form that makes the costs and risks of the loan clear and allows consumers to comparison shop.

- Several rounds of testing
- 3 rounds of web input so far
- Over 18,000 comments on the form



Know Before You Owe - Mortgages

SELECT A FORM

Here are two disclosure forms for the same loan product.


Which format would you prefer for your customer to use at closing to describe final loan terms and closing costs?

You can see larger versions of the forms by clicking the images below, or using the links to PDF versions beneath each form. When you've decided, use the buttons beneath the forms.


"Ironwood"

"Hornbeam"

OR

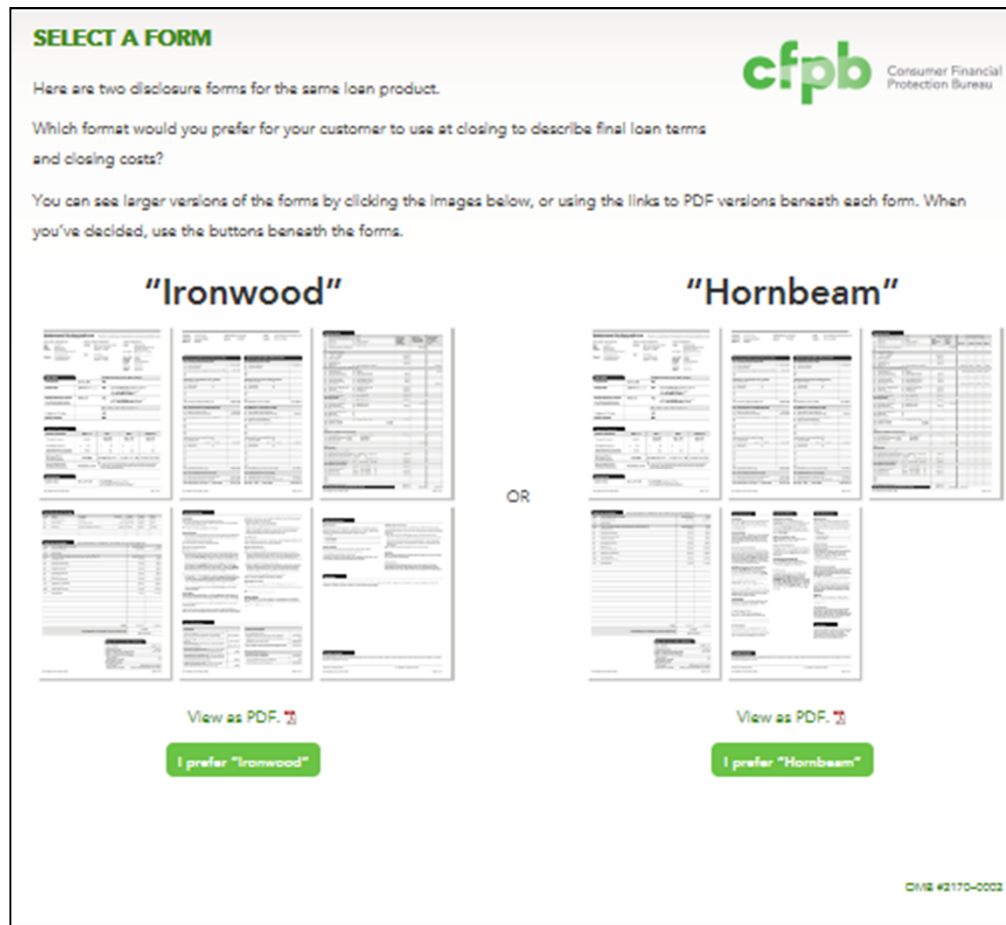
View as PDF. 

I prefer "Ironwood"

View as PDF. 

I prefer "Hornbeam"

CIVIC #2170-0002

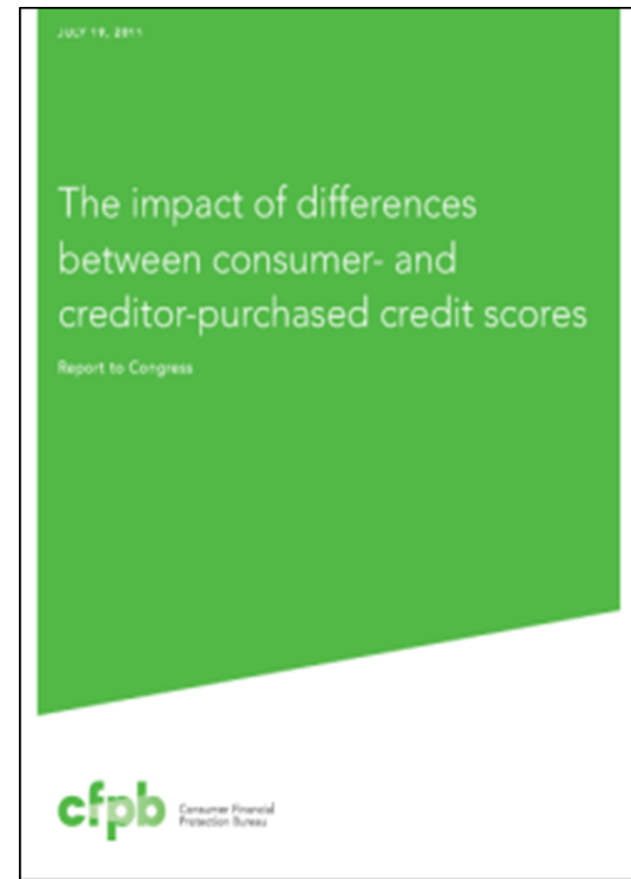


Additional Reports

Remittances



Credit Scores



What's next at the CFPB?

- ü *Reverse Mortgage Counseling Report*
- ü *Nonbank Rulemaking on Debt Relief Services*
- ü *Private Student Loans*
- ü *Investigations and Enforcement*





CFPB > Consumer Financial Protection Bureau - Windows Internet Explorer

http://www.consumerfinance.gov/

File Edit View Favorites Tools Help

Google cfpb Search

UDAAP Examination ... CFPB > Consum... x

An official website of the United States Government (855) 411-2372

cfpb Consumer Financial Protection Bureau

HOME INSIDE THE CFPB GET ASSISTANCE PARTICIPATE REGULATION **SUBMIT A COMPLAINT**

How will you pay for college?

Students and families across the country are sifting through acceptance letters and financial aid information. Borrowing for school is a big decision, but you don't have to make it alone. We are testing a new [Financial Aid Comparison Shopper](#) to help students make smart choices about student loans.

[Learn more and compare schools side-by-side.](#)

Submit a complaint

Check the status of your complaint

Tell your story
Tell us your story, good or bad, about your experience with consumer financial products.

Whistleblowers
Confidentially report any wrongdoing you have observed.

Continuing our promise of diversity

MAY 9
New HAMP
military hom

Today is my first day as the Director of the Office of Minority and Women Inclusion at the

close menu

http://www.consumerfinance.gov/complaint

Internet | Protected Mode: On 100%

Arbitration and Class Action Waivers



AT&T Mobility LLC v. Concepcion

- § The 5-4 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.



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;



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.



CompuCredit Corp. v. Greenwood

- § The Supreme Court 8-1 decision, in *CompuCredit Corp. v. Greenwood*, claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, may be subject to mandatory arbitration pursuant to a valid arbitration agreement.”
- § The basics of *CompuCredit*.
- Although respondents’ credit card agreement required their claims to be resolved by binding arbitration, they filed a lawsuit against petitioner CompuCredit Corporation and a division of petitioner bank, alleging, *inter alia*, violations of CROA.
 - The Federal District Court denied the defendants’ motion to compel arbitration, concluding that Congress intended CROA claims to be nonarbitrable. The Ninth Circuit affirmed.
 - *Supreme Court Decision* - Because CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the Federal Arbitration Act (FAA) requires the arbitration agreement to be enforced according to its terms.



***CompuCredit* (cont'd)**

§ 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)



Strong Support for Arbitration

- § The Supreme Court ruled in *CompuCredit* that because CROA is silent on whether claims under the statute can proceed in an arbitration forum, the Federal Arbitration Act (“FAA”) requires the arbitration agreement to be enforced according to its terms. Writing for the majority, Justice Antonin Scalia said, “[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest.”
- § With regard to the CROA disclosure statement’s description of the “right to sue,” the Court reasoned that it was not misleading because it did not describe precisely that a suit in court has to be preceded by an arbitration proceeding. “The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman—which necessarily means that it will be imprecise,” the Court explained. The Court noted, “we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.”
- § The Court concluded, “[t]hat Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the ‘right to sue’ phrase in the disclosure provision, and the references to ‘action’ and ‘court’ in the description of damages recoverable, is unlikely.”
- § Justice Ruth Bader Ginsburg dissented. She wrote, “Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words ‘right to sue’ to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.”



Important Not all Arbitration Provisions and Class-Action Waivers will be Upheld

- § Not all blanket mandatory arbitration clause and class-action waivers within consumer agreements will automatically result in enforcement of the arbitration provision.
- Is it consumer-friendly?
 - Does it allow for cheap and expeditious resolution?
 - Individualized?
 - It is it written in plain English?
 - Implemented in a way that allows the consumer to understand and consider the provisions before agreement?
 - Opt-out ?
 - Otherwise fair and reasonable?



What's on the Horizon?

- § Consumer groups already on the offensive; CROA could be amended (in a negative way)
- § Intersection of State Laws and *CompuCredit*?
- § CFPB report to Congress, ability to prohibit prospective mandatory arbitration in consumer financial services agreements.
- § Review consumer facing agreements (e.g., DMP, housing, bankruptcy, etc.; website, social media, etc.)
- § Carefully assess any current arbitration provisions and class-action waivers; are they consumer friendly? (don't automatically assume they will be upheld)
- § Update dispute resolution provisions, if needed.



Tax-Exemption Challenges



Tax-Exempt Credit Counseling Organizations from Strength to Strength

- § A tax-exempt credit counseling organization cannot solicit contributions from consumers during initial counseling process, or while a consumer is receiving services from the organization this prohibition does not affect government or foundation grants and contributions from individuals who are not customers.
- § HUD Housing Counseling Program
- § Tax-Exempt Community Development
- § Certain Loan Programs
- § Exemptions: FDCPA (possibly limited), CROA, state foreclosure consultant statutes, CFPB MARS Rule, and more



Bankruptcy Counseling Challenges



EOUST QSR's Scrutinize Approved Agencies

38076 Federal Register / Vol. 71, No. 128 / Wednesday, July 5, 2006 / Rules and Regulations

DEPARTMENT OF JUSTICE

28 CFR Part 58

[Docket No. EOUST 100]

RIN 1105-AB17

Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies and Approval of Providers of a Personal Financial Management Instructional Course by United States Trustees

AGENCY: Executive Office for United States Trustees, Justice.

ACTION: Interim final rule.

SUMMARY: This interim final rule ("rule") sets forth the proposed application procedures to be used by United States Trustees for approval of nonprofit budget and credit counseling agencies ("agencies") and for approval of providers of a personal financial management instructional course ("providers") under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Under the BAPCPA, individual debtors are required to consult with approved agencies to receive a briefing on the opportunities for credit counseling and a budget analysis, within 180 days before filing for bankruptcy relief, and to consult with approved providers of a personal financial management instructional course, after filing for relief, before receiving a discharge of their debts. The BAPCPA also sets forth procedures and standards for the United States Trustees to use in approving agencies and providers for subsequent inclusion on a publicly available agency list and provider list in each federal judicial district where they are deemed qualified to counsel or instruct individuals.

DATES: Effective Date: July 5, 2006.
Comment Date: Comments due by September 5, 2006.

ADDRESSES: Comments on the rule should be submitted by e-mail to ust.cedofrules.comments@usdoj.gov, by telefax to 202-514-4100, or by postal mail to: Executive Office for United States Trustees ("EOUST"), Credit Counseling Application Processing, 20 Massachusetts Ave., 8th floor, Washington, DC 20530. To ensure proper handling, please reference EOUST Docket No. 100 on your correspondence. You may view an electronic version of this proposed rule at www.regulations.gov. You may also comment via the Internet using the www.regulations.gov comment form for this regulation. When submitting comments electronically you must

include EOUST Docket No. 100 in the subject box. Comments filed after the end of the comment period may be considered to the extent feasible.

Comments received are public records.

SUPPLEMENTARY INFORMATION: This rule implements the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (enacted April 20, 2005), Public Law 109-8, sections 106(a), 119 Stat. 37 (codified at 11 U.S.C. 109(h)) and 106(a)(1), 119 Stat. 38 (codified at 11 U.S.C. 111(a)-(e)). Under the BAPCPA, which became effective on October 17, 2005, individual debtors are required to consult with approved agencies to receive a briefing on the opportunities for credit counseling and a budget analysis, within 180 days before filing for bankruptcy relief. 11 U.S.C. 109(h)(1). Debtors are also required to participate in a personal financial management instructional course with approved providers to receive instruction on how to establish and maintain a budget, how to manage one's money, and how to use credit wisely. The debtor will not be granted a discharge if this instruction is not obtained. 11 U.S.C. 727(a)(11), 1328(j)(1), 1141(d)(3)(c).

11 U.S.C. 111(b) provides that, in applicable jurisdictions, the United States Trustee shall only approve an agency or provider after the United States Trustee has thoroughly reviewed, under the standards set forth in BAPCPA, the qualifications of the agency or provider and the services that will be offered by such agency or provider, and has determined that such agency or provider fully satisfies the standards. The United States Trustee may require such agency or provider that has sought approval to provide information with respect to such review.

According to the new Bankruptcy Code provision, 11 U.S.C. 111, the United States Trustee shall only approve an agency that demonstrates that it will provide qualified counselors, maintain adequate provision for safeguarding and payment of client funds, provide adequate counseling with respect to client credit problems, and deal responsibly and effectively with other matters relating to the quality, effectiveness, and financial security of the services it provides.

Under 11 U.S.C. 111, the United States Trustee shall only approve a provider that demonstrates that it will provide trained personnel with adequate experience and training in providing effective instruction and, in providing debtor education and teaching methodologies designed to assist debtors in understanding personal

financial management, provide adequate facilities situated in reasonably convenient locations where the instructional course is offered, except that such facilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective, and prepare and retain reasonable records to permit evaluation of the effectiveness of such instructional course by the EOUST and the United States Trustee.

As Congress stated in its conference report, "the purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors * * * the bill requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences * * * the bill also penalizes a creditor who unreasonably refuses to negotiate a pre-bankruptcy debt repayment plan with a debtor." H.R. Rep. 109-31, pt. 1 at 2.

By submitting an application, an agency or provider is declaring under penalty of perjury that the information on the application is true, correct, accurate, and complete.

The remaining requirements set forth in the amending regulatory text are self-explanatory. In determining whether an agency or provider meets the qualifications for approval and inclusion on the approved list, the EOUST and United States Trustee may rely on the application submitted by the agency or provider.

The application form that credit counseling agencies must use to apply for approval under these regulations is EOUST-CCL, "Application for Approval as a Nonprofit Budget and Credit Counseling Agency," which is available on the EOUST's Web site along with the instructions. The application form that providers of an instructional course must use to apply for approval under these regulations is EOUST-DEI, "Application for Approval of Provider of a Personal Financial Management Instructional Course," which is also available on EOUST's Web site along with the instructions. Completed and signed credit counseling application forms should be mailed to the EOUST, Credit Counseling Application Processing, 20 Massachusetts Ave., 8th Floor, Washington, DC 20530. Completed and signed debtor education provider applications, forms should be mailed to the EOUST, Debtor Education Processing, 20 Massachusetts Ave. 8th

- § QSR Activity has increased within the last year. Areas of focus:
- § An agency must "[a]void any conduct or transactions that generate or create the appearance of generating a private benefit for any individual or group related or connected to the Agency."
- § Interactive counseling



New Congressional Scrutiny



Tax-Exempt Organizations the Focus of Upcoming Hearings

- § The House of Representatives Ways and Means Subcommittee on Oversight announced on March 9, 2012 that it will hold a series of hearings on the tax-exempt sector and IRS oversight of tax-exempt activities.
- § The first hearing will take place on Wednesday, May 16, 2012; additional hearing dates have not been announced by the Subcommittee.

What is the focus?

The announcement suggests a far-reaching inquiry is about to begin, with reference to a number of specific areas, including

- § the IRS's colleges and universities compliance project,
- § the impact of the Form 990 redesign, and
- § the connection between good governance and tax-law compliance.

In addition, the announcement indicates that the hearing will review the history of **recent legislative changes** to the tax code dealing with tax-exempt organizations and what prompted those changes



QUESTIONS AND DISCUSSION

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