The Independent Counselor

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eNEWSLETTER OF THE ASSOCIATION OF INDEPENDENT CONSUMER CREDIT COUNSELING AGENCIES

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What Should We Expect Now That The Election Is Decided

By David C. Jones, AICCCA President

We will have a new administration and a new Congress in place in just over two months. How will that affect us and the debt-burdened consumers we serve? What should we expect to see happen first? What are the big-ticket items that we need to watch for? Here's my take on it:

The Economy- This will be the first target of the new administration. We must get money moving again and we must get some much-needed stability into the markets (both nationally and internationally). Look for the early naming of a Secretary of the Treasury and the forming of new regulations designed to control Wall Street. The new administration will have to capitalize on a wave of consumer confidence that is likely to be with us initially. To keep that confidence moving, real identifiable changes will have to be proposed and signed into law. If this is done during the first quarter of 2009, there is an excellent chance that it will be successful.

Also look for other changes that are intended to improve the economy, i.e.; reduce the deficit, balance the budget, control spending, and stop waste. One such target is the Medicare Provider network that the new administration has tagged as wasteful and "no better than basic Medicare." That could mean big changes for our senior clients depending on how it's done and how quickly. There will be other changes in health care across the board will likely to affect everyone. These may be tough to deal with.

Another area is taxation. Look for major changes here. The major overhaul that is expected may not directly affect the majority of our clients but the indirect affect could be significant. With the right advisors (I'm not sure if Warren Buffet and Alan Greenspan are necessarily the right ones-maybe Michael Bloomberg is available), we may see some improvements. This will be a delicate balancing act that may have some bitter pills associated with it.

Also look for changes in credit card regulations. The House-sponsored bill that introduced a Debtor's Bill of Rights will be echoed by a companion Senate bill. The result will be more consumer-friendly regulations governing credit cards and credit card billings.

The War- There is no doubt that visible and immediate changes will be made. The ultimate affect will shift concentration from Iraq to Afghanistan but with an overall reduction in troop strength and expense. This will serve to continue the hopeful and positive consumer mood that presently exists.

Foreclosures- This is another area that requires immediate attention. It is likely that there will be far-reaching legislation to further ease this problem and the overall housing market decline. There will be big changes here that most lenders will oppose. Hopefully, this will result in the positive result that the country, and our clients so desperately need.

Bankruptcy Reform-The Democratic Party has been critical of the credit counseling provisions of the BAPCPA in the past. There is some likelihood that changes may be introduced to modify or erase those provisions.

Overall, I believe that we are in a good position to continue our services to our clients in a supportive environment. We'll be needed more than ever as these changes take effect.

Registration Now Available for AICCCA's 16 Mid-Winter Conference to be held at The Palms South Beach in Miami Florida, January 21-23, 2009

Click here for **ONLINE REGISTRATION FORM**

Some of our featured speakers/topics include:

- **Faith Schwartz**, HOPE NOW Alliance, "Options for Housing Renegotiations"
- **Michael Kerr**, The National Conference of Commissioners on Uniform State Laws (NCCUSL), "The Uniform Debt Management Services Act: 2008 Changes and 2009 Legislative Update"
- **Rigo Carballo**, Florida Office of Financial Regulation, "Pros and Cons of Reverse Mortgages"
- **Travis Plunkett** (invited), Consumer Federation of America, "The Debt Settlement Industry and the Impact on Credit Counseling"
- **Jonathan Pompan** of Venable LLP, Moderating Panel Discussion on "Less Than Full Balance DMP's and Other Alternatives for Consumers"
- **Gina McCullough**, Novadebt and Chris Carson, Bureau Veritas, "Catching Up With Quality"
- **Ken Scott**, Ken Scott Communications, "The Ins and Outs of Standing Out in a Crowded Market"
- Eight Different Creditor Breakout Sessions (confirmed to date: Discover, HSBC, Capital One, and Resurgent Capital Services)
- All Registrations include a Reception & Dinner Cruise on the Venetian Lady Yacht on Thursday, January 22, 2009

We have a special reduced rate of $209 until December 19, 2008 or until the block is sold out, whichever comes first, so reserve your room early before the block fills up!

For hotel reservations call 1-800-550-0505, ask for the "AICCCA" block of rooms.

Public Relations News

Dave Jones was interviewed by Kathy Kristoff, syndicated columnist for the *Los Angeles Times*. Kristoff addressed the issue of common financial mistakes and how to fix them in her column where she also interviewed Bruce McClary of Clearpoint Financial Solutions.

Dave was quoted in the article saying, "We have customers who are living paycheck to paycheck, but they're buying two cups of Starbucks coffee every morning, renting movies at Blockbuster and going to fast-food places for lunch. It adds up really quickly."

The article appeared in nine other major newspapers including *Newsday* and the *Fort Worth Star Telegram*.

A Legal Issues Primer for Credit Counseling Agencies

By Jonathan L. Pompan, Esq.

In order to thoroughly understand their legal requirements and pitfalls, credit counseling agencies must first have a basic understanding of the federal and state laws that apply to the activities of their companies. The following brief primer on the laws affecting credit counseling is intended to provide an introduction to many of the key federal and state laws as they apply to the particular organizational and operational characteristics of these companies.

- **Bank Secrecy Act:** The Bank Secrecy Act[1] ("BSA") requires, with limited exception, a "money service business" ("MSB") to register with the Financial Crimes Enforcement Network ("FinCEN") Department of the U.S. Treasury. The BSA defines "money service business" as, among other entities, a "money transmitter."[2] Whether a person, including a provider of debt management plans and debt settlement companies, is a money transmitter for BSA purposes is a matter of facts and circumstances. Note that the BSA analysis is separate and distinct from any analogous state money services business act analysis.
- **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005:** The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), which was enacted on April 20, 2005, requires all individual debtors who file bankruptcy on or after October 17, 2005 to undergo credit counseling within six months prior to filing. The debtor also must complete a financial management instructional course after they file for bankruptcy. With certain exceptions, an individual is not eligible to file for bankruptcy without completing credit counseling, and is not eligible to receive a bankruptcy discharge without completing a financial management instructional course. For the pre-filing counseling mandated by the law, tax-exempt status under Section 501(c)(3) is not required for approval as a budget or credit counseling agency under the BAPCPA, however, nonprofit status (typically incorporation as a nonprofit corporation) is a prerequisite, among other business, a money transmitter is required to file reports of suspicious activity to the U.S. Treasury Department and comply with various reporting and record-keeping requirements, and must implement anti-money laundering programs. requirements. For the pre-discharge education mandated by the BAPCPA, providers of financial management instructional courses can be either nonprofit or for-profit entities. The U.S. Trustee and Administrative Office of the U.S. Courts administer the approval (and renewal) process for budget and credit counseling agencies and providers of debtor education courses according to criteria set forth in the law.
- **Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003:** The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003[3] ("CAN-SPAM Act") establishes requirements for those who send unsolicited commercial email, including requirements to include electronic opt-out notice requirements, to include the sender's mailing address, and identifying the email as an "advertisement or solicitation," among others. Violators of the CANSPAM Act are subject to civil fines and penalties and potential criminal prosecution.
- **Credit Repair Organizations Act:** The Credit Repair Organizations Act[4] ("CROA") prohibits false or misleading representations and requires certain affirmative disclosures in the offering or sale of "credit repair" services. CROA bars "credit repair" companies from demanding advance payment; requires that "credit repair" contracts be in writing; and gives consumers certain contract cancellation rights, among other requirements. The definition of credit repair has been interpreted broadly. Section 501(c)(3) organizations are excluded from regulation under the CROA.[5] A number of states have enacted similar statutes, often called "Credit Services Organization Acts," that are enforced by state Attorneys General. The state laws usually have all of the features of CROA, but also may encompass more services (and products), require registration and bonding, in addition to including advanced fee prohibitions that may only apply in certain circumstances. Not all state credit repair statutes exempt tax-exempt 501(c)(3) nonprofit organizations from regulation. CROA enforcement is an active area for the FTC and for plaintiffs' and class action lawyers.
- **Debt Adjusting Laws:** The most comprehensive legislative efforts to regulate debt adjusters – e.g., debt management plan providers, debt settlement companies, debt negotiators – have occurred at the state level. Often state debt adjusting statutes are hybrids of money transmission laws and consumer protection laws. Nearly every state has some type of statute that regulates the practice of "debt adjusting," but the substantive requirements of these statutes vary from state to state. More than half of the states have enacted some type of registration or licensing requirement for debt adjusters that do business in their states. In addition, the most common substantive provisions include fee caps, requirements to post bonds, prohibitions on certain activities (e.g., making loans, compensated referrals, etc.), and the ability of state regulators to examine the provider for compliance. Notably, not all of the statutes will necessarily apply to the debt adjusting activities of every company. Also, not every debt adjusting statute will permit for-profit or nonprofit companies without tax-exempt 501(c)(3) status to operate. However, in an ever-increasing number of states, the statutory and regulatory requirements are allowing both for-profit and nonprofit companies to operate. (Only two states – Connecticut and Wyoming – now require tax-exempt 501(c)(3) status to operate, but a number more still require "nonprofit" status.) The penalties for violating debt adjusting statutes vary from state to state, but typically are quite significant. Non-compliance can lead to significant fines and penalties, injunctions, orders for consumer restitution, and potentially imprisonment. In addition, a number of state debt adjusting laws include private enforcement rights.
- **Fair Debt Collection Practices Act:** The Fair Debt Collection Practices Act[6] (the "FDCPA") regulates third-party debt collectors. The FDCPA prohibits debt collectors from employing deceptive or abusive conduct in the collection of consumer debts incurred for personal, family or household purposes. Such collectors may not, for example, contact debtors at odd hours, subject them to repeated telephone calls, threaten legal action that is not actually contemplated, or reveal to other persons the existence of debts. Generally, the FDCPA applies to companies that collect debts for another person. The FDCPA exempts "any nonprofit organization, which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors."[7]
- **Federal Trade Commission Act and "Mini-FTC Acts":** The Federal Trade Commission Act[8] (the "FTC Act") prohibits deceptive or unfair trade practices. Deceptive acts include misrepresentations of material facts regarding a product or service as well as omissions of information that would be material to a consumer's decision to purchase the product or service. The FTC has developed standards as to what it considers an unfair or deceptive practice through regulations as well as through the legal actions it has brought against credit counseling agencies, debt settlement companies, and related service providers. In order to be compliant with the FTC Act, advertising must not be misleading or deceptive, and advertisers must have substantiation for any claims made about their products or services. Most states have enacted "mini-FTC acts" – consumer protection statutes that are enforced by state Attorneys General and resemble the FTC Act in whole or in part; these laws also may expressly incorporate the FTC's regulations by reference.[9]
- **Internal Revenue Code Section 501(c)(3):** Traditionally many credit counseling agencies ("CCAs") are nonprofit corporations exempt from federal corporate income tax under Section 501(c)(3) of the Internal Revenue Code (the "Code"). (Note that "nonprofit" status comes merely from incorporating as a nonprofit, nonstock corporation under state law). Federal tax exemption under Section 501(c)(3) is recognized only after a rigorous application and approval process through the Internal Revenue Service. In addition to the basic tax-exemption requirements under Section 501(c)(3), credit counseling agencies that seek to be tax exempt under Section 501(c)(3) also are required to meet the express requirements of new Code Section 501(q) (see below) in order to qualify.
- **Internal Revenue Code Section 501(q):** Enacted in 2006, Internal Revenue Code 501(q) provides a number of specific requirements for would-be 501(c)(3) credit counseling agencies regarding operational activities, governance, ownership interests, expenditures, and revenues, among other requirements. These rules are intended to ensure that no substantial part of the activities of a credit counseling agency is in furtherance of a non-exempt purpose and that the organization is providing substantial educational benefits to the public. Further, it should be noted that Section 501(q) effectively codifies into law the principle that a DMP program can, depending on its operation, be an integral part of a credit counseling agency's tax-exempt educational mission.[10]
- **Money Services Business Acts / Money Transmission Laws:** State Money Services Business Acts or money transmitter statutes are not uniform, but generally work in the same way. They are usually under the auspices of the state banking or financial institutions department and cover, among other activities, the paper and electronic transmission of money by a licensed money transmitter and/or such licensed money transmitter's authorized distributors. Substantive requirements include bonding, examination and compliance with money laundering screening. Under certain circumstances, failure to obtain a required state license to operate a money services business also can result in a violation of 18 U.S.C. § 1960, which requires "Money Service Businesses" to be registered with the federal government.[11]
- **Pension Protection Act of 2006:** The Pension Protection Act of 2006 establishes additional standards and requirements for credit counseling agencies, codified as Section 501(q) of the Internal Revenue Code (the "Code"), to qualify for recognition of federal taxexempt status under Code Sections 501(c)(3) and 501(c)(4), with the tighter standards reserved for Section 501(c)(3) organizations. These standards are in addition to existing tax exemption requirements Code Section 501(c)(3). For additional details on Section 501(q), see the discussion above.
- **State Nonprofit Corporation Laws:** Nonprofit organizations are incorporated under state law. Nonprofit organizations are barred from distributing their net earnings to individuals who control the organization. Similarly, they are barred from accumulating equity appreciation for private benefit. Nonprofit organizations have chosen to undertake programs to benefit members and the public rather than private individuals. Therefore, their earnings must, by law, be dedicated to furthering the purposes for which they were organized. Nonprofit organizations have no shareholders and pay no dividends; all earnings are "reinvested" in the organization in furtherance of its nonprofit purposes.[12] Violations of state nonprofit corporation laws generally may be enforced by state Attorneys General.
- **Telephone Consumer Protection Act / FTC Telemarketing Sales Rule:** Outbound telemarketing calls that many companies make to leads generated through websites are subject to federal and state laws and regulations that govern telemarketing, including the Telephone Consumer Protection Act[13] (the "TCPA"). These laws and regulations cover a number of issues, including do-not-call ("DNC") requirements; requirements that apply to calls placed to cell phone numbers; disclosure requirements that affect what a sale representative may say at the beginning and during a call; restrictions on the use of automated dialing systems; caller ID requirements; and other requirements. In addition to government enforcement, consumers may enforce certain provisions of the TCPA. A number of states also require certain companies who make outbound telemarketing calls to register or obtain a license before making such calls. Some of these states also have bonding requirements.
- **The Gramm-Leach Bliley Act:** The Gramm-Leach Bliley Act[14] ("GLBA") requires, among other things, the FTC to issue regulations to ensure that financial institutions protect the privacy of consumers' personal financial information. Generally, financial institutions must develop and give annual notice of their privacy policies to their customers. Additionally, financial institutions must give notice and provide an opportunity for consumers to opt out of any disclosure of the consumer's personal financial information to an unaffiliated third party. Under the GLBA, the FTC also has issued regulations that require the safeguarding of personal financial information. The GLBA also limits the sharing of account number information for marketing purposes.
- **Unauthorized Practice of Law:** The unauthorized practice of law ("UPL") is prohibited in virtually every state and is classified as a criminal act in many states, punishable by fines and/or imprisonment. States that do not criminalize UPL typically remedy a violation by requiring a non-lawyer to disgorge all profits received from the UPL. Most definitions of UPL specifically prohibit a non-lawyer from providing legal advice because the provision of legal advice is inherent to the practice of law. Some states consider providing certain debt management and/or debt settlement services to constitute the UPL.

Conclusion

Credit counseling agencies are required to comply at all times with a complex patchwork of overlapping and interconnecting laws and regulations – including those described above, along with many, many others – in order to maintain legal and regulatory compliance. How these laws apply to your particular type of business will depend upon a number of factors, including the business model, location of customers, and available statutory exemptions and interpretations, among other factors. Each business model has its own special characteristics, so the key is to identify the laws and regulations that apply to your company – and then to comply accordingly.

For more information, contact Jonathan L. Pompan at 202/344-4383, or at jlpompan@venable.com.

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

This article 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.

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[1] 31 U.S.C. § 1051 et seq.

[2] 31 C.F.R. § 103.11(uu)(3)-(5). As a Bank Secrecy Act money service

[4] 15 U.S.C. §§ 1679-1679j.

[5] Courts have split into two lines when interpreting CROA's Internal Revenue Code Section 501(c)(3) exemption. The first employs a onepart test under which section 501(c)(3) status is dispositive. The second requires courts to engage in a two-step analysis to verify: (1) that the organization meets the eligibility requirements of section 501(c)(3); and (2) that the organization actually operates as bona fide nonprofit organization. C.f., Limpert v. Cambridge Credit Counseling Corp., 328 F. Supp. 2d 360, 365 (E.D.N.Y. 2004) ("the Court will accept these two Defendants' statuses as 501(c)(3) organizations exempt from both taxes and the CROA, at face value, and dismiss the CROA claims against them"), with Zimmerman v. Cambridge Credit Counseling Corp., 409 F.3d 473, 475-79 (1st Cir. 2005) (plaintiff's allegations that a section 501(c)(3) defendant did not operate as a nonprofit because its "primary purpose was to make money for its owners and operators" was sufficient to avoid dismissal of CROA claims), and Baker v. Family Credit Counseling Corp., 440 F. Supp. 2d 392, 406 (E.D. Pa. 2006) (allegation that a section 501(c)(3) defendant did not operate as a nonprofit because its purpose was to generate revenues for affiliated for-profit entities, which were also defendants, was sufficient to avoid dismissal of CROA claims).

[6] 15 U.S.C. §§ 1692-1692o.

[7] 15 U.S.C. § 1692a(6)(E).

[8] 15 U.S.C. § 45.

[9] Every state has at least one statute prohibiting false advertising. Many states follow the Uniform Unfair Trade Practices Act and/or the Uniform Deceptive Trade Practices Act. These statues generally prohibit "unfair and deceptive" acts (akin to the Federal Trade Commission's Enforcement Charter); passing off; misrepresenting the source, origin, quality or newness of a product; bait and switch advertising; disparagement; and false price comparisons.

[10] Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006 (JCX-38-06 at 319), August 3, 2006.

[11] See U.S. v. Velastegui, 199 F.3d 590 (2nd Cir. 1999).

[12] "Nonprofit" status refers to incorporation status under state law; "tax-exempt" status refers to federal income tax exemption under the Internal Revenue Code.

[13] 47 U.S.C. § 227.

[14] Pub. L.106-102, 113 Stat.1338, codified in relevant part at 15 U.S.C. §§ 6801-6809 and §§ 6821-6827.

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AICCCA's Members operate over 250 individual offices in 38 States which includes some of the largest agencies in the United States. AICCCA members represent over 630,000 consumers on active debt repayment plans and we counsel and train many times that number annually. All our members are Non-Profit agencies.