Message from the Chair

The Consumer Financial Services Committee continues to be very active. This already is the fifth issue of the CFSC eNewsletter. My report focuses on the CFSC's upcoming meetings and many of its accomplishments during 2005. As always, I would be glad to answer any questions that you may have about the Committee or its meetings, publications, programs, projects and other activities. Please contact me at jlanger@dlitlaw.com

CFSC 2006 Winter Meeting in Park City (January 7-10, 2006)

Please join fellow CFSC members and others at the CFSC's 2006 Winter Meeting in Park City, Utah at the Park City Marriott Hotel. Although advance meeting registration has expired and special ABA hotel rates no longer are in effect at the backup hotel, the Yarrow Resort Hotel (the Marriott is sold out), you still can register on-site and attend the meeting. [Click here for Yarrow Hotel reservation information] The meeting begins on Saturday, January 7 with an off-site Welcome Reception from 6:30 to 8:00 p.m. generously sponsored by the Salt Lake City and Park City law firm of Van Cott, Bagley, Cornwall & McCarthy, P.C. Thanks to Van Cott partner and long-time Committee member Tom Billings for arranging the reception and this sponsorship. The Committee Dinner will be held on Monday night, January 9. Our meetings begin on Sunday, January 8 at 7:00 a.m. and conclude on Tuesday the 10th at 11:00 a.m. [Click here for the Meeting Schedule] We will have an outstanding set of subcommittee meetings and special presentations, and CLE credit is available for all substantive sessions. Among the presentations are:

- "Internal Compliance Measures for Data Security," by the Compliance Management and Privacy Subcommittees;
- "State Litigation on Unearned Credit Insurance Premiums," by the Federal and State Trade Practices Subcommittee;
- "State Bank Preemption," by the Preemption and Federalism Subcommittee;
- "Regulatory Redlining," by the Access to Services Subcommittee;
- "Class Action Settlements, Settlement Classes, Collusion and Reverse Auctions," by the Litigation and Arbitration Subcommittee;
- "RESPA Reform: Do TILA and RESPA Clash?," by the Housing Finance and RESPA and Truth in Lending Subcommittees and

I hope to see as many of you as possible at the Meeting.

Section Spring Meeting in Tampa (April 6-8, 2006)

The CFSC will meet during the Spring Meeting from Thursday, April 6 (beginning at 8:30 a.m.) through Saturday, April 8 (ending at 12:30 p.m.) at the Tampa Marriott Waterside Hotel & Marina. To ensure that you secure a room at the Marriott, plan to make

your reservations soon. [Click here for Spring Meeting hotel reservation and meeting registration information] The CFSC will be the primary sponsor of two programs and a Committee Forum and a co-sponsor of two more programs and a Forum. Program information and the CFSC meeting schedule will be posted on the CFSC website soon.

ABA Annual Meeting in Honolulu (August 4-7, 2006)

The CFSC’s meeting dates have not yet been determined by the Section, but I will provide this information to you once I receive it. The CFSC’s meetings will be held at the Marriott Waikiki Beach Resort & Spa. [Click here for Annual Meeting hotel reservation and meeting registration information] Due to limited meeting space and to encourage members to combine meetings with a vacation, only eight of the 12 CFSC substantive subcommittees will be holding meetings, and the CFSC will sponsor only one program.

Committee Accomplishments During 2005

**Annual Survey of Consumer Financial Services Law in The Business Lawyer**
We publish the Annual Survey of Consumer Financial Services Law each year in *The Business Lawyer*. [More...]

**Membership Matters**
This year, the Membership Subcommittee has focused mostly on increasing the level of participation by in-house lawyers and the number of and level of participation by lawyers of color and other minority lawyers. [More...]

**Pro Bono Projects**
The following is a report on the Committee’s most important pro bono projects:

1. **Financial Literacy Education.** The Committee continues to direct its pro bono efforts toward promoting financial literacy through consumer education. This project has been our most effective and successful project to date in terms of both the work accomplished and the number of volunteers who have contributed (over 50). [More...]

**Other Accomplishments**
1. **Article on Home Banking Services Agreement.** The CFS Committee and the Cyberspace Law Committee approved an article on a model Home Banking Services Agreement prepared by members of these two Committees under Coordinating Editor and CFSC member John Lee. (The Task Force to develop such an Agreement initially was formed in 1997 by the seven member Committees of the Joint Electronic Financial Services Subcommittee, which was disbanded a couple of years ago.) [More...]

**Jeffrey I. Langer**
Dreher Langer & Tomkies L.L.P.
Chair, Consumer Financial Services Committee
ABA Section of Business Law
Meeting Notes

Information Security and Dealing with Security Breaches
Joan P. Warrington

The Consumer Financial Services Committee sponsored a program at the Annual American Bar Association Meeting with the Banking Law and Cyberspace Law Committees on Information Security and Dealing with Security Breaches. The program was moderated by Joan Warrington, Morrison & Foerster, LLP; Robert Ledig, Fried, Frank, Harris, Shriver & Jacobson LLP; and David Wiese, Tyler, Cooper & Alcorn LLP. The panel was composed of a diverse group of speakers from state and federal government and private practice and included Julie Brill, Assistant Attorney General for the state of Vermont; Montserrat Miller, Counsel to Senator Feinstein, Senate Judiciary Committee; Joel Winston, Assistant Director, Division of Privacy and Identity Protection, Federal Trade Commission; and L. Richard Fischer, Morrison & Foerster LLP. The program was later repeated in October as an ABA videoconference.

2005 has unfortunately been a banner headline year for information security breaches, with some commentators estimating that over 40 million records were compromised during the year. The panelists commented from their varying perspectives on how data security breaches should be handled and who should be covered. Julie Brill strongly advocated federal legislation that would not pre-empt state laws and would cover data brokers. On the other hand, Rick Fischer commented on the difficulty for businesses to comply with numerous state data security breach disclosure laws having different breach triggers and notice provisions and cautioned that extending the same data use standards and consumer rights applicable to consumer reporting agencies to data brokers could be very burdensome. Joel Winston commented on the FTC’s extension of the unfairness doctrine to information security breaches in the BJ’s Wholesale Club settlement. Montserrat Miller discussed the different approaches being discussed in Congress and accurately predicted that federal legislation would be unlikely in 2005. The panel also discussed the pros and cons of security freezes on consumer reports, whether they would help consumers or only make it more difficult for consumers to consummate credit purchases.

More...

Latest Updates

The New Uniform Debt-Management Services Act
Carla Stone Witze

In 2005, the National Conference of Commissions on Uniform State Laws approved the Uniform Debt-Management Services Act to address problems that have arisen in the credit counseling business. UDMSA will be introduced in state legislatures this year and will enable states to take a uniform approach to regulating a business that generally is national in scope. The 2005 Bankruptcy Code Amendments, which require credit counseling assistance prior to Chapter 7 filing, and several state laws that require credit counseling in connection with high cost
mortgages and payday loans, have made adoption of the UDMSA urgent.

**What Is Debt Management?**

The UDMSA regulates 2 separate services offered to consumers in financial distress: credit counseling and debt settlement.

Credit counseling agencies help consumers with budgeting skills and enroll consumers in debt management plans. The goal of a debt management plan is to pay the full principal through regular, smaller monthly payments. Today’s debt management plan generally debits a consumer’s total monthly payments to the consumer’s unsecured creditors from the consumer’s deposit account and then disburses payments to the consumer’s creditors. After a consumer has made several DMP payments, creditors typically give “concessions” in the form of reduced interest rates or forgiven late and other charges.

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**Washington Update**

Frank Salinger

As of today (December 19) the Senate is still in session as it attempts to deal with both the budget and the thorny issues around renewing the USA Patriot Act. While this has been a busy legislative year (between Hurricane Katrina, Iraq war resolutions and a new Chief Justice), consumer financial services legislation remains unfinished.

**DATA BREACH LEGISLATION**

This has been a year dominated by reports of data breaches—followed by the inevitable Congressional oversight hearings. While at least 20 states will enact data breach legislation (often with conflicting notices), to cut to the chase, no federal legislation passed this year. Unfortunately it is equally unlikely, given the congressional calendar, that any federal legislation will be enacted in the first quarter of 2006.

Part of the delay is the unhappy confluence of a complicated issue (legislation must balance the need to deal with previously unregulated entities without overburdening currently regulated entities) with the arcane world of overlapping congressional committee jurisdiction. That’s why the financial services-related, judiciary, and commerce-related committees are considering different bills with different approaches.

Each of these must be reconciled—a time consuming process fraught with political tradeoffs.

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**Preemption and Federalism Subcommittee**

Ralph T. Wutscher

The Preemption and Federalism Subcommittee meeting at the 2005 Annual Meeting in Chicago consisted of presentations by Gary Feinerman (Solicitor General, Office of the Illinois Attorney General) and Alan Kaplinsky (Ballard Spahr) regarding BankWest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005) (vacated on Dec. 28, 2005 pending rehearing en banc), and by Ralph Wutscher (Noonan & Lieberman) regarding comments submitted and other
developments in connection with the Financial Services Roundtable's Petition to the Federal Deposit Insurance Corporation for Rulemaking to Preempt Certain State Laws regarding interstate activities of insured state banks. The presentations were followed by panel discussion and questions.

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Pro Bono
John L. Ropiequet

The Consumer Financial Services Committee's pro bono efforts continue with the promotion of financial literacy through its website Safeborrowing.com. Members will soon add to the website content applicable to the area of automobile transactions. The website will identify helpful resources from a number of industry groups and also provide guidance to consumers as they search for information related to automobile transactions. Topics such as automobile financing, new vs. used cars, buying vs. leasing, ancillary products, and others will be covered. Plans are underway to further expand the site to include topics such as credit cards, deposit accounts, gift cards, and consumer finance scams. This expansion will help the Committee reach its goal of providing to consumers the tools to engage in “Safe Borrowing.” Special thanks to John Ropiequet, Nathan Bowden, and Scott Johnson for their hard work so far. If you are interested in helping with the site, and in particular helping with financial literacy as it relates to credit cards, please contact Scott Johnson at sjohnson@franzen-salzano.com.

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Committee Accomplishments During 2005

Annual Survey of Consumer Financial Services Law in *The Business Lawyer*

We publish the Annual Survey of Consumer Financial Services Law each year in *The Business Lawyer*. The 2005 Survey was published in the February 2005 issue. The 2006 Survey was submitted to the Section editors in mid-October, 2005, and is expected to be published in the February 2006 issue of *The Business Lawyer*. At the direction of the Business Law Section leadership, we successfully shortened the length of the 2006 Survey by about 60 pages from that of the 2005 Survey without any loss in the depth of coverage. We are proud that the Annual Survey generally is acknowledged as the premier survey of consumer financial services law.

Membership Matters

This year, the Membership Subcommittee has focused mostly on increasing the level of participation by in-house lawyers and the number of and level of participation by lawyers of color and other minority lawyers. We have developed a targeted in-house counsel recruitment piece explaining the benefits of ABA, Section and CFSC membership, which was made available at the Annual Meeting and will be used in connection with the upcoming Winter Meeting. At the request of a number of in-house lawyers, we also have asked speakers not to assume that everyone in the audience is an expert in the subject being discussed. Also, we have asked each Committee member to invite an in-house lawyer to the Winter Meeting.

In terms of increasing diversity, we have several initiatives to increase diversity within the Committee in place or in development. To increase membership and involvement of minority lawyers, we have identified other bar associations to which minority lawyers may belong (such as race or ethnicity-specific bar associations) in order to target members of such associations who might have an interest in consumer financial services law. In addition, we have asked Committee members to identify and email to the Membership Subcommittee leaders (Julie Caggiano ([Julie.Caggiano@AegisMtg.com](mailto:Julie.Caggiano@AegisMtg.com)) and Joe Looney ([jlooney@hudco.com](mailto:jlooney@hudco.com))) contact information on minority lawyers practicing consumer financial services law so that we can recruit them as members and speakers.

Richik Sarkar ([rsarkar@ulmer.com](mailto:rsarkar@ulmer.com)), the CFSC Liaison to the Section Diversity Committee, is working with the Membership Subcommittee leaders on these initiatives. In addition, Committee member Cathy Brennan ([cbrennan@hudco.com](mailto:cbrennan@hudco.com)) is the Chair of the Lesbian, Gay, Bisexual and Transgender Subcommittee of the Section Diversity Committee. The CFSC Membership Subcommittee leadership has discussed with Cathy how we can increase LGBT representation on the Committee and participation in our various meetings and activities.
Julie, Joe, Richik and Cathy would welcome your ideas on advancing these membership initiatives.

Finally, we submitted an article for the December 2005 issue of the Section Young Lawyer Forum Newsletter detailing Committee highlights, including our Committee description (Mission Statement) [Click here for the CFSC Mission Statement, which is on the CFSC homepage], the upcoming Winter Meeting, current Committee pro bono projects and our Annual Survey of Consumer Financial Services Law.

**Pro Bono Projects**

The following is a report on the Committee’s most important pro bono projects:

1. **Financial Literacy Education.** The Committee continues to direct its pro bono efforts toward promoting financial literacy through consumer education. This project has been our most effective and successful project to date in terms of both the work accomplished and the number of volunteers who have contributed (over 50).

Since mid-July 2005, or in some cases earlier in or throughout 2005, Committee pro bono volunteers have done or have made plans to do the following:

- Committee member Dan Tyson coordinated and the Committee co-sponsored a well-received workshop on combating predatory lending practices at the 2005 ABA Business Law Section Equal Justice Conference.

- CFSC member Rhonda Daniels has assembled a panel of volunteers to act as a speakers’ bureau to make financial literacy presentations in their local high schools around the country and to answer inquiries to the “contact us” link on the Committee’s Safeborrowing.com financial literacy/consumer education website. At the Committee’s upcoming Winter Meeting, Rhonda and Committee member Terry Franzen will make a mock financial literacy education presentation to help the volunteers understand the content and style of the presentations that they should be making in their communities. Rhonda and Terry will employ materials developed by organizations that have been involved in financial literacy training and education for a number of years.

- Committee members contacted other websites to arrange for reciprocal links to Safeborrowing.com under the leadership of Trish Obara.

- Also, CFSC members created additional enhancements to Safeborrowing.com with respect to auto financing under the leadership of Scott Johnson and Nathan Bowden.

2. **Pro Bono/Hurricane Relief Project: Section’s Debt Deferment Working Group.** The Debt Deferment Working Group, under the leadership of CFSC members Elena Lovoy and John Ropiequet (CFSC Liaison to the Section Pro Bono Committee) prepared an "informational brochure" to provide guidance to attorneys who are working with individuals and small business owners in assisting these individuals and businesses in...
getting their financial affairs in order following the devastation caused by Hurricanes Katrina and Rita. The brochure, which Elena drafted, is entitled "Guidance for Consumers and Small Businesses in Alabama, Louisiana and Mississippi Regarding Debt Deferment Options after Hurricanes Katrina and Rita." It was posted at http://www.abanet.org/dch/committee.cfm?com=CL999100 in October 2005. [Include link to this website] Prior to posting the brochure on-line, the Working Group obtained feedback on a draft of the brochure from others, including an attorney involved in local pro bono relief efforts.

The brochure was designed to be a summary guide -- and not an exhaustive recitation of the debt deferment policies of every financial institution in the affected areas and of the federal agencies. The Working Group contacted a number of financial institutions in the affected areas. Since the debt deferment options available from each financial institution and to each customer will necessarily vary on a case-by-case basis, however, the Working Group elected to provide only general guidance in the brochure. The brochure provides a definition of "debt deferment" and links to various state and federal agencies, state bar associations and other sources for guidance on debt deferment options for consumers and small businesses. The brochure will be updated to reflect new guidance as available.

3. NCCUSL Drafting Committee on Uniform Debt-Management Services Act. Committee member Carla Witzel has been the ABA/Section Advisor to this Drafting Committee of the National Conference of Commissioners on Uniform State Laws. Carla’s article on the Drafting Committee’s work and the adoption of the Uniform Debt-Management Services Act appears in this issue of the eNewsletter. The CFS Committee was pleased to participate on behalf of the ABA and the Section in the drafting process, and had considerable input into the Uniform Law. The CFSC (through Carla) expects to remain active in the effort to have the Uniform Law enacted in as many states as possible.

Other Accomplishments

1. Article on Home Banking Services Agreement. The CFS Committee and the Cyberspace Law Committee approved an article on a model Home Banking Services Agreement prepared by members of these two Committees under Coordinating Editor and CFSC member John Lee. (The Task Force to develop such an Agreement initially was formed in 1997 by the seven member Committees of the Joint Electronic Financial Services Subcommittee, which was disbanded a couple of years ago.) This article, which expresses the banking industry’s perspective, is scheduled to be published in the February 2006 issue of The Business Lawyer. A companion article expressing a contrary view (including the consumer perspective) on the Agreement, co-authored by four consumer advocates (two of whom are CFS Committee members), has been submitted for possible publication as a “counter commentary” in the February 2006 issue. If it is accepted for publication, due to timing issues, both articles may not be published until the May 2006 issue of TBL. In addition, the authors of the initial article are preparing a reply to the “counter commentary” that should be published in TBL as well.

2. CFS Law Portions of Programs on Banking Law. The CFSC participated with Banking Law Committee in planning and conducting the National Institute on Banking
Law II (September 29-30, 2005 in Chicago) and Banking Law Basics (October 24-26, 2005 in Boston). Each conference included segments on consumer financial services law.

3. Presentation of Two CLE Audio/Videoconferences Since the 2005 Annual Meeting. The CFS Committee (under Committee member Elizabeth Yen’s direction) presented a conference entitled “Avoiding Enforceability Issues in Consumer Contracts” on August 11, 2005. Also, the CFSC (due to the efforts of Committee Vice-Chair Joan Warrington), the Cyberspace Law Committee and the Banking Law Committee co-sponsored an updated, truncated version of the CFSC-sponsored Annual Meeting program entitled “Information Security and Dealing With Security Breaches” on October 25, 2005.

4. Subcommittee Consolidation and Leadership Changes. Based on a recommendation of the CFSC Long-Range Planning Subcommittee leadership (Robert Cook and Forrest Stanley), effective after the 2005 Annual Meeting, I discontinued the Alternative Dispute Resolution Subcommittee and transferred its subject matter to the renamed Litigation and Arbitration Subcommittee. (Previously, there was a Consumer Litigation Subcommittee.) Muzette Hill of Ford Motor Credit recently resigned as Vice-Chair of the Federal and State Trade Practices Subcommittee. Andrew Smith, who recently joined Morrison & Foerster LLP from the Federal Trade Commission, has replaced Muzette and is working with Subcommittee Chair Jean Noonan. Andrew has spoken at a number of CFSC meetings, and I know that he will make a significant contribution to the Committee.
Information Security and Dealing with Security Breaches

The Consumer Financial Services Committee sponsored a program at the Annual American Bar Association Meeting with the Banking Law and Cyberspace Law Committees on Information Security and Dealing with Security Breaches. The program was moderated by Joan Warrington, Morrison & Foerster, LLP; Robert Ledig, Fried, Frank, Harris, Shriver & Jacobson LLP; and David Wiese, Tyler, Cooper & Alcorn LLP. The panel was composed of a diverse group of speakers from state and federal government and private practice and included Julie Brill, Assistant Attorney General for the state of Vermont; Montserrat Miller, Counsel to Senator Feinstein, Senate Judiciary Committee; Joel Winston, Assistant Director, Division of Privacy and Identity Protection, Federal Trade Commission; and L. Richard Fischer, Morrison & Foerster LLP. The program was later repeated in October as an ABA videoconference.

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Finally, the group noted the emergence of private sector efforts to stem information security breaches. The large credit card sponsoring entities, JCB, Discover, American Express, Diner’s Club, MasterCard and Visa have sponsored the Payment Card Industry Data Security Standard (available at http://www.usa.visa.com/download/business/accepting_visa/ops_risk_management/cisp_PCI_Data_Security_Standard.pdf), which apply to members, merchants and service providers that store, process or transmit cardholder data. All system components, including network components, servers and applications included in or connected to the cardholder data environment, e.g. firewalls, switches, routers, wireless access points and web applications, are covered. Visa, for example, now requires annual on-site security audits for its large merchants and is in the process of implementing sizeable fines for failure to comply.
As the number of security breaches has grown, can litigation be far behind? Of course not. State Attorneys General have been increasingly active in dealing with security breaches. For example, the Ohio State Attorney General sued DSW to require it to notify Ohio residents of the security breach that occurred at DSW. The Ohio State Attorney General alleged that DSW had committed an unfair or deceptive act or practice under Ohio law when it failed to notify all affected consumers of a theft of personal information. (Ohio v. DSW, Inc., Ohio Misc., No. 05CVH06 6128, complaint filed June 6, 2005). Forty-four State Attorneys General are investigating the CardSystems breach. (Letter from the Nat’l Assoc. of Attorneys General to CardSystems Solutions, Inc. (June 28, 2005) available at http://www.atg.wa.gov/pubs/SecurityBreach.pdf). A consumer class action has been filed against CardSystems in California. (Parke v. CardSystems Solutions, Inc., Cal. Sup. Ct., No. CGC-05-443634, complaint filed June 27, 2005). The Federal Trade Commission extended the unfairness doctrine to security breaches in the BJ’s Wholesale Club matter and brought a number of actions to enforce the Gramm-Leach-Bliley Act Safeguards Rule. For example, the FTC charged Nationwide Mortgage Group and Sunbelt Lending Services, Inc. with Safeguards Rule violations. The FTC’s consent order against BJ’s was the result of the FTC’s complaint that BJ’s had committed unfair acts and practices when it failed to implement reasonable procedures to protect its customers’ credit and debit card information. The consent order requires BJ’s, for example, to implement a comprehensive security program that is reasonably designed to protect the security, confidentiality and integrity of consumers’ personal information. (The FTC’s Decision and Order is available at http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf).

Finally, commercial litigation to allocate responsibilities for losses caused by security breaches is beginning. Two banks and a credit union filed suits against BJ’s, claiming that they were third-party beneficiaries of Visa’s security rules and therefore entitled to damages from BJ’s for its breach of those rules. (For example, Sovereign Bank v. BJ’s Wholesale Club, Inc., M.D. Pa., No. 1:CV-05-1150, Oct. 18, 2005). The banks and credit union asked for damages to cover the cost of reissuing cards to their customers whose credit card accounts were compromised by the BJ’s security breach. BJ’s, in turn, sued IBM for providing faulty equipment; however, BJ’s claim against IBM was dismissed. (Pennsylvania State Employees Credit Union v. Fifth Third Bank, M.D. Pa., No. 1:CV-04-1554, Oct. 18, 2005).

Commercial litigation, where costs are more easily quantifiable than in consumer litigation, may be the wave of the future. Stay tuned -- information security and dealing with security breaches will continue to be important issues in 2006. Every CFSC meeting will have a privacy and data security component and programs are being planned for the Spring and Summer meetings.
THE NEW UNIFORM DEBT–MANAGEMENT SERVICES ACT

In 2005, the National Conference of Commissions on Uniform State Laws approved the Uniform Debt-Management Services Act to address problems that have arisen in the credit counseling business. UDMSA will be introduced in state legislatures this year and will enable states to take a uniform approach to regulating a business that generally is national in scope. The 2005 Bankruptcy Code Amendments, which require credit counseling assistance prior to Chapter 7 filing, and several state laws that require credit counseling in connection with high cost mortgages and payday loans, have made adoption of the UDMSA urgent.

What Is Debt Management?

The UDMSA regulates 2 separate services offered to consumers in financial distress: credit counseling and debt settlement.

Credit counseling agencies help consumers with budgeting skills and enroll consumers in debt management plans. The goal of a debt management plan is to pay the full principal through regular, smaller monthly payments. Today’s debt management plan generally debits a consumer’s total monthly payments to the consumer’s unsecured creditors from the consumer’s deposit account and then disburses payments to the consumer’s creditors. After a consumer has made several DMP payments, creditors typically give “concessions” in the form of reduced interest rates or forgiven late and other charges.

Credit counseling agencies are supported by fair share payments made by creditors, historically a percentage of the amount repaid to the creditor, and by consumer fees. Most of the existing credit counseling agencies have been organized as tax exempt entities to qualify for creditor payments and because many state laws prohibit debt adjustment, with exemptions from the prohibitions for tax exempt organizations, among others.

Debt settlement companies, on the other hand, negotiate with creditors to settle consumer debts for less than the full amount of the consumer’s debt. The consumer is counseled to save up a war chest, and then the debt settlement company makes an offer to the creditor on the consumer’s behalf to settle the debt. Debt settlement companies may or may not control the consumer’s funds. Debt settlement companies are organized as taxable entities.

Why Was a Uniform Law Needed?

In the past 10 years, consumer debt has more than doubled. Between 2000 and 2003, the number of credit counselors more than doubled. Millions of people contact credit counseling agencies each year. The endorsement of credit counseling by state and federal legislatures assumes that, in fact, credit counseling benefits the consumer, but in 2003, this assumption began to be seriously questioned.
In their 2003 report, *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, the National Consumer Law Center and the Consumer Federation of America allege that debt management plans are increasingly expensive to consumers, educational and other services are not being provided by credit counselors and consumers are inappropriately enrolled in debt management plans. In addition, the report questions whether credit counseling agencies serve educational or charitable purposes and deserve tax exempt status. The Internal Revenue Service also issued a report examining abuses in the credit counseling industry in 2003. The Federal Trade Commission took action against several counseling agencies for engaging in unfair and deceptive trade practices and, finally, the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, United States Senate, began an investigation into the credit counseling industry in September 2003, resulting in its 2005 report on *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling*.

As a result of these concerns, the Internal Revenue Service currently is in the process of revoking the tax exempt status of over 50% of the industry, based on the number of debt management plans. In addition, United States Senate Bill 2020, the Tax Relief Act of 2005, proposes to limit the income credit counseling agencies may derive from debt management plans to 25% of overall income. If enacted, this restriction could drive the remaining tax exempt credit counselors out of business. All of this is happening at the same time that the Bankruptcy Code Amendments and state laws will require more consumers than ever to seek the services of non-profit credit counseling agencies.

**How Does UDMSA Help?**

No comprehensive federal law regulates credit counseling agencies or debt settlement companies. The federal Credit Repair Organization Act regulates organizations claiming to offer “credit repair services,” but unless debt management plans are marketed as a means to improving the consumer’s credit history, credit record or credit rating, most credit counselors do not offer credit repair services and are not subject to the CROA.

The states have a hodge podge of laws concerning debt management. Most state laws either prohibit or regulate debt management. Some states prohibit it, except for certain categories of persons, including, in some states, non-profit credit counselors. Other states license and regulate credit counselors, others license and regulate debt settlement companies and others license and regulate both. Most states that license and regulate set maximum fees for the activity. Some states have no law at all.

Faced with imminent loss of over half of the tax exempt credit counseling agencies, and possible loss of all of the tax exempt credit counseling agencies, many states with prohibitory laws will need to take immediate action. States that permit only tax exempt credit counseling will need to authorize for profit providers. Otherwise, credit counseling may not be available. The UDMSA fills an urgent need.

**Highlights of the UDMSA**
The UDMSA accommodates both for profit and tax exempt debt management services providers. The UDMSA regulates providers who enter into agreements with individuals to create plans. Provided that the individual is a natural person, the Act will apply, whether or not the debts involved are for business or consumer purposes. A number of businesses, including banks and their regulated affiliates, are exempt.

To provide debt management services to a state resident, the provider must be registered or licensed within the state. To register, the applicant must provide the regulatory authority with comprehensive background information, maintain insurance, post a surety bond, and meet levels of competency.

With respect to entering an agreement with the consumer, the UDMSA specifies certain important disclosures and terms of the agreement. Maximum fees are specified. A number of consumer protections are required. The UDMSA requires providers: to act in good faith; to maintain toll-free communications that permit clients to speak with a counselor during business hours; and to determine that the debt management plan is suitable for the consumer. Consumer funds must be held in a trust account.

Both private and public enforcement, including recovery of minimum, actual and punitive damages, are included.

Because many providers offer services on a nationwide basis, the UDMSA has very clear rules on which state law applies to particular transactions.

Closing

The Consumer Financial Services Committee was well represented during the drafting process. Michael M. Greenfield was the reporter and I served as the American Bar Association Advisor. I have the pleasure of representing tax exempt and for profit credit counselors and a debt settlement company and am very familiar with the challenges facing debt management service providers. If anyone has questions about the UDMSA, credit counseling or debt settlement, feel free to get in touch with me at cwitzel@gfrlaw.com.
WASHINGTON UPDATE

As of today (December 19) the Senate is still in session as it attempts to deal with both the budget and the thorny issues around renewing the USA Patriot Act. While this has been a busy legislative year (*between Hurricane Katrina, Iraq war resolutions and a new Chief Justice*), consumer financial services legislation remains unfinished.

DATA BREACH LEGISLATION

This has been a year dominated by reports of data breaches—followed by the inevitable Congressional oversight hearings. While at least 20 states will enact data breach legislation (*often with conflicting notices*), to cut to the chase, no federal legislation passed this year. Unfortunately it is equally unlikely, given the congressional calendar, that any federal legislation will be enacted in the first quarter of 2006.

Part of the delay is the unhappy confluence of a complicated issue (*legislation must balance the need to deal with previously unregulated entities without overburdening currently regulated entities*) with the arcane world of overlapping congressional committee jurisdiction. That’s why the financial services-related, judiciary, and commerce-related committees are considering different bills with different approaches. Each of these must be reconciled—a time consuming process fraught with political tradeoffs.

Overhanging this is industry’s desire for federal preemption—always an issue when it comes time to round up votes (*although many think Federalism was pretty much decided at Appomattox*).

REGULATORY RELIEF

Another hardy perennial, regulatory relief bill has again passed the House—as it did in the last Congress. This year’s legislation is entitled the “Financial Services Regulatory Relief Act of 2005” (H.R. 3505).

Many of the provisions in this bill were sought by federal banking agencies and the Conference of State Bank Supervisors, hence it has been described by some on the Hill as “Regulators’ Relief.” Among these include removing restrictions on interstate branching, allowing payment of interest on business checking, and clarifying that state banking regulators are the primary contact for safety and soundness supervision.

Perhaps the most notable provision for most bankers is that which streamlines the process by which banks may be exempted from filing currency transaction reports if the customer is well-known and in a business which normally involves large amounts of cash.

In the consumer credit area, one provision prohibits the application of the federal banking regulators guidance on minimum credit card payments to accounts opened prior to the passage of H.R. 3505.
The bill faces a murky future in the Senate, largely because the House bill restricted the industrial loan charter. I expect the Senate will craft legislation that focuses on industry-to-agency relationships while avoiding the internecine struggles (such as those that pit conventional banks versus industrial loan companies); perhaps by dropping interstate branching provisions.

SUBPRIME MORTGAGE LENDING

As reported in the last eNewsletter, in May, the House Financial Institutions and Housing Subcommittees held a joint hearing on two bills designed to curb predatory mortgage lending practices. One bill, generally supported by industry, H.R. 1295, sponsored by Representatives Ney (R-OH) and Kanjorski (D-PA) is generally supported by industry; the other, H.R. 1182 sponsored by Representatives Miller (D-NC) and Watt (D-NC) has the support of consumer advocates. The bills are very different with H.R. 1295 providing federal preemption of state and local laws.

While industry had hoped for a mark-up (the process wherein a committee considers amendments and prepares a bill for eventual passage) this year, it never materialized. Congressional staff is hopeful one may occur next March. As of yet, there are no comparable Senate bills.

OVERSIGHT ISSUES

Although not necessarily leading to legislation, the Congressional oversight function should not be minimized. For those seeking insight into future legislative trends and to see what industry and consumer advocates alike view as top priorities, reviewing testimony is a valuable source. It is available on-line at the committee web sites. Along with hearings on all of the legislative issues discussed above, some of relevant issues which have been the subject of hearings include:

- Credit Card Data Processing: How Secure Is It? (in the House Financial Services Committee)
- Improving Land Title Grant Procedures for Native Americans (in the House Financial Services Committee)
- Examining the Financial Services Industry’s Responsibilities and Role in Preventing Identity Theft and Protecting Sensitive Financial Information (in the Senate Banking Committee)

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This periodic eNewsletter can only give a broad overview. Both the House Financial
Services and Senate Banking Committees have useful websites and I urge you to check them regularly. Most of the financial trade associations have comprehensive, although naturally specialized, reporting on their websites and many provide much of their non-confidential content to the casual browser.