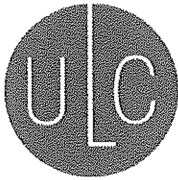

Uniform Law Commission

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October 14, 2009

Federal Trade Commission
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600 Pennsylvania Avenue, NW
Washington, DC 20580
-Submitted via electronic form-

Re: Telemarketing Sales Rule – Debt Relief Amendments, R411001
https://secure.commentworks.com/ftc-TSRDebtRelief

The Uniform Law Commission appreciates the opportunity to comment in this letter on the proposal by the Federal Trade Commission ("FTC") to amend the Telemarketing Sales Rule, 16 C.F.R. Part 310 ("TSR"), to address the sale and marketing of debt relief services.

The ULC applauds the FTC's interest in regulating the debt relief industry. A national regulatory overlay could complement the ULC's goal to implement uniform laws on this subject in every jurisdiction. Federal regulation would be particularly helpful with respect to advertising and telemarketing by debt relief providers. We believe that integrated state and federal regulation of this industry is important for consumers, regulators, and the industry itself, and have of number of suggestions to that end.

About the Uniform Law Commission

The Uniform Law Commission (ULC), now in its 118th year, is comprised of more than 300 lawyers, state legislators, judges, legislative services directors, and law professors, appointed by the states and territorial governments, and is unaffiliated with any political party or interest group. While best known as the drafters of the Uniform Commercial Code, ULC commissioners draft and seek nation-wide enactment of uniform and model laws on a variety of subjects where uniformity is desirable and practicable. The ULC recognizes the need to regulate the debt relief industry, and has responded by promulgating the Uniform Debt-Management Services Act (UDMSA) for enactment in all member jurisdictions. The UDMSA and other information about the ULC may be found at www.nccusl.org.

About the Uniform Debt-Management Services Act

The UDMSA provides comprehensive regulation of the debt relief industry at the state level. During its drafting process, the UDMSA committee recognized that debt relief firms have varying business models. Consequently, the uniform act was drafted to regulate both firms that advocate making periodic payments to a client's creditors in exchange for concessions such as a reduction in interest rate or repayment period (the "debt-management" or "DMP" model), and firms that advocate a reduction in the principal amount of debt owed, typically in exchange for a lump sum (the "debt-settlement" model).

The UDMSA requires all debt relief providers to register with the state, maintain insurance, make significant application disclosures, post a surety bond, and where applicable keep client assets in a separate trust account. The uniform act also requires certification of debt counselors, mandates pre-contract disclosure of all fees and potential consequences, and sets strict limits on the fees that may be charged. The UDMSA is applicable to both for-profit and non-profit debt relief providers.

To date, the UDMSA has been adopted in Colorado, Delaware, Nevada, Rhode Island, Tennessee, and Utah. It was also introduced in Connecticut, Maine, Minnesota, Missouri, New Mexico, New York, Texas, and Washington during the 2009 legislative session, and may yet be enacted this year in some of those states. In 2010, the act is likely to be considered again in those states, as well as in Florida, Michigan, New Jersey, Oklahoma, Pennsylvania, South Dakota, West Virginia, the District of Columbia and the U.S. Virgin Islands. This activity list may expand as the 2010 state legislative session draws closer.

The UDMSA and the Proposed Amendments to the Telemarketing Sales Rule

A. Regulation of various means of communication.

The ULC applauds the FTC's initiative to regulate the debt-relief industry at the federal level. However, because the proposed regulations under the Telemarketing Sales Rule (TSR) are limited in scope, not all debt relief transactions would be regulated. Specifically, it is our understanding that debt relief firms doing business with consumers solely on a face-to-face basis or via the Internet would not be subject to the proposed federal rules. Because a large and growing segment of debt relief firms conduct business over the Internet, leaving these transactions unregulated leaves many consumers at risk.

In contrast, the UDMSA relies on the traditional police power of states to regulate debt relief firms. A debt relief provider conducting business in a state that adopts the UDMSA is subject to its provisions regardless of the means used to communicate with consumers. All providers are required to register with the designated regulator, submit to service of process, and post a surety bond prior to offering services to residents of an enacting state. State administrators

can regulate all debt relief transactions whether they happen on the telephone, on the Internet, or in a face-to-face meeting.

We would strongly urge the FTC to expand the scope of its proposed regulations to cover internet and face-to-face transactions.

B. Regulation of various forms of business.

It is also our understanding that debt relief firms organized as non-profit entities would be exempt from the proposed TSR regulations. As noted in the supplementary information published in conjunction with the proposed rules, the Internal Revenue Service has had some recent success in revoking the tax-exempt status of problematic "non-profit" debt relief agencies. However, relying on the IRS to investigate non-profit debt relief providers leaves the customers of those firms unprotected by federal regulation until such tax-exempt status is revoked – an administrative process that may take a significant period of time and may not provide direct relief to consumers in any event.

Thirteen states currently allow only non-profit agencies to provide debt relief services. Accordingly, a large number of debt relief providers have organized as non-profits, particularly the larger firms that do business in multiple states. The tax status of a debt relief provider, however, is no guarantee of its suitability. As the FTC is well-aware, AmeriDebt was a tax-exempt organization, and as the FTC's own website states: "[j]ust because a debt negotiation company describes itself as a "nonprofit" organization, there's no guarantee that the services they offer are legitimate."[1]

The UDMSA is drafted in such a way as to allow enacting states to choose whether to allow for-profit debt relief firms to operate, or to restrict registration to non-profit firms only. None of the states that have enacted the UDMSA so far have chosen to restrict operation to non-profits. Moreover, apart from the experience with the UDMSA, the clear trend in adopted (and pending) state regulation of debt relief services has been a move towards tax-status neutrality. In the past two years three states, Maine, Maryland, and Idaho, have amended their existing laws to allow for-profit firms; Delaware did so in its adoption of the UDMSA.

We would strongly urge the FTC to expand the scope of its proposed regulations to cover both for-profit and non-profit debt relief providers.

C. Regulation of various types of marketing firms.

The Uniform Law Commission strongly supports the FTC's interest in regulating lead-referral providers. These marketing firms do not contract with consumers directly, so state regulators have difficulty enforcing claims against them. Many of the advertisements used to solicit

[1] http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre26.shtm

debtors do not provide the name of the debt relief provider, or even the name of the entity doing the soliciting. The FTC, with its regulatory expertise regarding advertising and telemarketing claims, is in a better position than state regulators to regulate these firms, particularly when the marketing activity crosses state lines.

D. Registration of debt relief providers.

The proposed amendments to the TSR would not require registration or licensing as a prerequisite for providing debt relief services. In contrast, state regulation of debt relief firms generally requires licensing or registration. Under the UDMSA, the registration process includes disclosure of all relevant aspects of the subject company, including the identification of all officers and directors, results of criminal background checks, audited financial statements, marketing materials, evidence of accreditation, and evidence of sufficient insurance against fraud.[2] The registration must be renewed annually with current data.[3]

Registration is vital for effective enforcement. By maintaining a central registry of debt relief firms, state regulators can initiate regular audits and respond quickly to consumer complaints. The UDMSA gives state regulators broad authority to investigate registered firms, and specific authority share information obtained during an examination with federal agencies, including the FTC.[4]

E. Remedies for Violations

The UDMSA provides for a wider range of remedies, both civil and criminal, than is generally available under existing federal law. For example, the state administrator may issue cease and desist orders, order restitution, issue civil penalties up to $20,000 for each violation, and recover reasonable costs of enforcement, including attorney's fees.[5] The administrator may also suspend, revoke, or deny renewal of a debt relief provider's registration for a single material violation of the act.[6] The UDMSA also specifically authorizes private enforcement, with treble damages for recovery of improper payments, and punitive damages permitted when appropriate.[7] Finally, the state regulator may refer cases to the state Attorney General for criminal enforcement under the UDMSA as well as state unfair and deceptive practices acts.[8] In addition, debt relief firms registered under the UDMSA are required to post a surety bond and to maintain significant insurance against risks of dishonesty, fraud, theft, and other misconduct on the part of the applicant or a director, employee, or agent of the applicant[9].

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[2] UDMSA §§ 5, 6.
[3] UDMSA § 11.
[4] UDMSA §§ 32(b), 32(d).

[5] UDMSA § 33.
[6] UDMSA § 34(b)(2).
[7] UDMSA § 35.
[8] UDMSA § 32(a).
[9] UDMSA § 5(b)(4); § 13.

F. Fees

The proposed TSR amendments would eliminate up-front fees entirely. The UDMSA drafting committee likewise recognized that debt settlement firms often charge excessive up-front fees, to the detriment of consumers and to the viability of their efforts to avoid bankruptcy. But the commissioners further recognized that legitimate debt settlement providers incur significant costs prior to settlement. Therefore, the drafters chose to limit, rather than prohibit, setup fees.

The drafters of the UDMSA took note of the fact that debt settlement providers, unlike most DMP providers, receive no income from creditors (i.e. "fair share" revenue) and do not collect a portion of a monthly consolidated payment stream. Accordingly, while the act applies the same registration, bonding, disclosure, and relief provisions to both kinds of firms, it differentiates between the two with regard to maximum fees.

Under the UDMSA, a debt settlement provider may charge the lesser of $400, or 4% of the amount of debt in the plan at its inception. This effectively limits advance fees to $400 for any debtor with at least $10,000 in unsecured debt.[10] The UDMSA further requires that any such fee may not be charged until the consumer has signed a contract with appropriate disclosures, been provided with a financial analysis that shows the plan is suitable, and been provided with a reasonable education about the management of personal finance.[11] Finally, the UDMSA requires a debt settlement provider to refund 65% of the advance fee if the consumer terminates the agreement prior to settlement.[12] The act also imposes an overall fee cap[13] of 30% of the amount saved by the consumer (inclusive of all fees, including set up, monthly fees, settlement fees and so forth).

Another provision of the UDMSA sets maximum fees for firms that set up debt management plans, involving periodic payments to creditors. Any such firm may not charge more than $50 for an initial consultation, and $10 per month per creditor, not to exceed a maximum of $50 per month.[14]

The UDMSA drafting committee recognized that not all plans are appropriate for all consumers. Those debtors that can afford to make regular monthly payments may be best served by working with debt management firms. Those debtors that cannot afford flat monthly payments

[10] UDMSA § 23(d)(2).
[11] UDMSA § 17.
[12] UDMSA § 19(d)(1)(B).
[13] In several states (CO, TN, NV, UT) an alternate fee cap of 17% -18% of the amount of debt included in the plan at inception was also approved in statute. Under these enactments of the UDMSA, however, if a flat-fee model is used it must be collected in equal monthly payments over at least half the term of the plan.
[14] UDMSA §23(d)(1).

may benefit from working with debt settlement firms as an alternative to bankruptcy. Many consumers may be better off seeking discharge in bankruptcy. A regulation that prohibits advance fees entirely risks driving some firms out of business, resulting in less competition in the industry, and fewer choices for consumers. The committee believes that the UDMSA protects consumers from excessive fees while allowing legitimate debt relief providers to cover initial expenses.

Recommendations

A national regulatory overlay would support the ULC's goal to implement uniform laws in every jurisdiction, particularly with respect to advertising and telemarketing. However, the ULC also believes that state regulation will remain a vital component of the overall regulatory plan. Therefore, the proposed FTC regulations should work in concert with the UDMSA and other state laws to protect all consumers from deception and abuse, while providing a consistent legal framework for state regulators and for legitimate debt relief providers. In support of that goal, the ULC respectfully offers the following recommendations to the commission.

1. **Expand the scope of the proposal to cover Internet solicitations and to apply the same regulatory framework to both for-profit and non-profit debt relief providers.**

Much of the advertising for debt relief firms and related lead-generation companies direct consumers to websites, rather than phone numbers, and a large and growing segment of the debt relief industry is conducted over the Internet. We suggest that limiting the application of the proposed regulations to telephone contacts would a mistake. The FTC is better able than states to address misleading marketing, and much of that marketing is conducted over the Internet. The ULC recommends that the FTC regulate not only telemarketing, but all debt relief marketing, with a consistent set of consumer protection rules.

A large portion of the debt relief industry is composed of non-profit entities. Not only have non-profit entities been charged with some of the most egregious abuses, but in some states, non-profits are the only entities legally permitted to provide debt relief services. Therefore, regulations that are inapplicable to non-profit entities likely would be ineffective. The ULC recommends that federal regulations should apply equally to for-profit and non-profit debt relief providers. If certain subjects are beyond the regulatory authority of the FTC, those matters would be better regulated at the state level.

2. **Defer to state law with regard to registration requirements, direct consumer protections, and fee regulation.**

State administrators have the ability to build and maintain a registry of debt relief providers, with all of the information necessary to ensure sound practices and effective oversight. States are in a better position to enforce consumer complaints about excessive fees, abusive practices,

and non-disclosure of relevant contract terms. Finally, state administrators have a wider range of remedies available to deter and punish fraudulent conduct, and to provide restitution when necessary. For all of these reasons, the ULC recommends that state law remain the primary vehicle for regulation of these subject matters.

3. Enact proposed advertising and telemarketing reforms

The ULC recognizes that the FTC is in a better position to regulate advertising and telemarketing practices than most state administrators. The proposed amendments regarding deceptive and abusive telemarketing practices could work in concert with the UDMSA to provide appropriate and comprehensive regulation of the debt-relief industry.

The regulations go further than the UDMSA in reaching lead generation firms that solicit debtors for debt relief providers but provide no direct consumer services themselves. The ULC whole-heartedly supports this additional regulation.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

Michael R. Kerr
Legislative Director
Uniform Law Commission