UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Telemarketing Sales Rule – Debt Relief Amendments	)	R411001

COMMENTS OF CAREONE SERVICES, INC., ON PROPOSED AMENDMENTS TO THE TELEMARKETING SALES RULE TO ADDRESS THE SALE OF DEBT RELIEF SERVICES

CareOne Services, Inc., ("CareOne") is pleased to file these comments pursuant to the Federal Trade Commission's ("FTC" or "Commission") request for public comments concerning the proposed amendments to the Telemarketing Sales Rule ("TSR") to address the sale of debt relief services. The FTC is proposing important consumer safeguards at a time when a great number of consumers are struggling to manage their unsecured debts.

CareOne supports the proposed Rule. The disclosures, prohibitions and advance fee ban will compliment state law protections and help define the debt relief industry and its important services for the benefit of consumers.

Background

CareOne is a national debt relief services company and one of the largest taxable providers of credit counseling and Debt Management Plans ("DMP"). Founded in 2002, CareOne provides credit counseling and debt management services in 37 states. CareOne is fully licensed and/or authorized to provide these services under state law. Services are available to consumers 24/7 via the Internet, email and telephone.

We understand that for our services to help consumers succeed, the debt challenges of each our customers must be addressed efficiently and fairly. And the services must also be appropriate for the particular situation of each individual in need of assistance.

Our track record of service to customers is evidence of our commitment to quality and the people we serve. In the past seven years:

- Over 700,000 consumers have called for counseling assistance
- Over 225,000 customers enrolled in a Debt Management Plan

- Nearly 700,000 customer service calls have been made
- Over 9 million creditor payments were processed
- Nearly $650 million in payments have moved from consumers to their creditors
- Less than 35 Better Business Bureau ("BBB") complaints were filed in the last year on approximately 70,000 new customers. All complaints have been successfully resolved. CareOne maintains an "A+" rating with the BBB.

Debt relief services are exceedingly valuable to consumers struggling to manage unsecured debt when those services are well-regulated, the terms are fully disclosed and the pricing is fair. We support strong regulation and licensing requirements at the state level, and believe there should be a minimum federal standard, perhaps based on the Uniform Debt Management Services Act ("UDMSA"), that states could enhance if they chose to do so.

CareOne has been active for many years in supporting the adoption of state laws that establish a strong regulatory environment that focuses on regulating the terms of services offered by providers rather than regulating based on the tax status of a provider. We believe that should be the regulatory approach of the FTC as these Rules are further developed.

The CareOne Model

CareOne has traditionally provided consumers with credit counseling and Debt Management Plan ("DMP") services. In 2009, CareOne began piloting a debt settlement program designed for consumers who do not qualify for a DMP and are not candidates for bankruptcy. We believe the model we are employing in this pilot represents a consumer-focused service that is beneficial to those in need.

We began exploring direct debt settlement services because creditors that we have worked with for many years have demonstrated a growing acceptance of settlement offers in recognition of the growing population of consumers who cannot afford a DMP and yet are not candidates for bankruptcy. Additionally, we believe that the debt settlement market today is predominantly operating on a short-sighted, flawed business model that places benefits to the provider ahead of the needs of the consumer. We also believe that because most consumers do not understand the benefits and downfalls of different debt relief services, a provider, such as CareOne, that offers services across the spectrum of need, can better address the individual nature of each consumer's debt situation.

We commend the FTC for broadly defining debt relief services to include debt management plans and debt settlement arrangements. This approach recognizes that consumers' needs vary and the protections afforded under the Rule should apply broadly to services available to assist with managing consumer debt.

For many years, the DMP services offered by debt relief providers have been well-regulated to protect consumers from high fees and to provide appropriate disclosures about the nature of the services being offered. Debt settlement protections must catch up with the regulation of traditional debt relief services, such as credit counseling and DMPs. Effectively addressing debt settlement services is the most critical objective of the proposed Rule.

We believe any offer of debt settlement services to a consumer should be based on the following tenets:

Suitability – When a debt relief product is the right path for a consumer, only those who cannot afford or qualify for a DMP should be offered debt settlement services. Often, when a consumer seeking debt relief services calls a debt settlement company they get nothing other than a debt settlement service. Each consumer's situation is unique and therefore must have an unbiased evaluation to determine which, if any, service is appropriate to address his or her needs.

Affordability – The fees charged for debt relief services should be tied to the benefit of the service and the cost of delivering the expected outcome. Fees for DMPs are well-regulated at the state level and reflect an accepted level that is tied to the relative benefit and cost of the service. Debt settlement fees are mainly unregulated (only 15 states currently specify debt settlement fees) and while the total cost may reflect the cost of providing the service, there is a point at which the level of fees can harm the consumer and create a disincentive for the provider to deliver on the promised outcome.

The UDMSA fee structure is thoughtfully constructed and balances the cost of providing the service with the benefit to the consumer. For settlement, it generally tracks the DMP fee structure, allowing a nominal set-up and monthly maintenance fee and ties the bulk of the compensation and cost recovery for the provider to demonstrated success for the consumer. Total fees are capped at an appropriate level commensurate with the service provided.

Transparency – Consumers who contact a debt relief provider are often seeking a quick solution to a chronic debt problem. As such, many consumers who engage in debt relief services may either buy something they do not fully understand or not realize the difficulty associated with achieving their desired objective. Only when consumers understand the burdens, difficulties and costs of the debt relief services that address their needs should they make an educated decision to engage the service. Any offer of debt settlement should be presented with "plain-English" disclosures on the terms and impact of debt relief services being offered.

Safeguards for Consumers

CareOne supports the safeguards in the proposed Rule. The disclosure and misrepresentation provisions will help ensure that consumers fully understand the nature of the service they are receiving. The safeguards are both appropriate and necessary.

The proposed Rule includes strong consumer protections that if adopted and enforced will ensure consumers receive assistance that is beneficial to their needs. The Rule's requirements and prohibitions rightfully focus on the area of the most egregious abuses – debt settlement services.

The debt settlement industry, as a subset of debt relief providers, has operated mainly outside of laws and regulations intended to protect consumers and police the conduct of providers. Ease of entry into the market, due to exemptions and loopholes in the state statutory and regulatory framework, has enabled some entrants to focus on quick gains rather than legitimate service to customers. As such, business models have been developed that taint the entire industry in the eyes of many consumers and regulators.

A wave of tough state debt management laws and increased federal oversight over the past several years has helped clean up the debt management side of the debt relief industry. 2009 was the first year of a growing wave of legislation and regulation focused on the debt settlement side of the industry. That is a positive trend.

<u>Advance Fee Ban</u>

The most controversial provision in the proposed Rule is the one which is likely to have the greatest impact: the advance fee prohibition. Receiving the service a consumer has purchased is a basic tenet of commerce. However, the predominant business model of the debt settlement industry has been based on significant up-front fees that make it difficult for consumers to amass funds for a settlement while enduring extended creditor collection efforts. The model also removes all incentive for a provider to reach a successful settlement with a creditor. As such, consumers often pay high fees for services they never receive. This approach is unacceptable making this model unsustainable.

Compensation for providers should be linked to success for consumers. The fairest model for consumers creates an incentive for providers to perform the promised service as quickly and effectively as possible – speed to a successful settlement benefits the consumer, creditor and provider. The proposed advance fee ban will effectively align the interests of consumers and providers, ultimately producing the intended outcome of prompt settlement of consumer debts and fair compensation for services rendered.

The advance fee ban would not only address consumer abuse issues prevalent today, but would help shape the future of the debt relief industry. CareOne has analyzed the impact of the advance fee ban in the proposed Rule and has determined that we could effectively provide debt settlement services under this model.

We believe that debt settlement fees, once earned, should be calculated as a percentage of saving realized by the consumer. Such arrangements incent providers to obtain the best possible settlement for a consumer – the more a consumer saves, the more a provider makes in fees. This win-win scenario, which fully aligns the incentives for the consumer and the provider, is the only sustainable business model for the debt settlement industry.

The combination of an FTC Rule prohibiting advance fees and appropriate state law fee limitations represents a sound approach to regulating debt settlement services on the federal and state levels. To that end, states should aggressively adopt fee structures that are reasonable for the provision of debt settlement services. Since the advance fee prohibition would allow the accrual of fees, it is important that state laws governing fees reflect a success-based model, such as that contained in the UDMSA, to limit the fees that can be accrued prior to obtaining a settlement. The UDMSA contains an appropriate fee structure for less-than-full-balance settlement plans as well as for DMPs.

Should the FTC determine that an advance fee ban is overly burdensome on the industry, a fee model such as that included in the UDMSA which appropriately caps total fees and "backloads" the bulk of provider compensation would dramatically reduce consumer abuses associated with debt settlement.

<u>Funds Held in Trust for the Benefit of Consumers</u>

The Commission's comments to proposed Section 301.4(a)(5) clarify that the ban on receiving payment of advance fees is not intended to prevent consumers from escrowing fees to be used later to pay the provider for services, so long as the provider does not take any fee from funds held in escrow until the services have been delivered.[1] Debt relief service providers offer a variety of approaches to

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[1] *74 Fed. Reg. at 42009 (8/19/2009)*

helping consumers save and then move funds to creditors. The Rule should further clarify that none of these approaches are prohibited, so long as no fee is taken from funds held in escrow until services have been delivered.

Most state debt management laws, including the UDMSA, have required providers to establish a customer trust account in an FDIC-insured institution, to be used only for customer funds, and not for provider funds. Most of these accounts are titled as "[Provider Name], funds held for the benefit of customers." The provider acts as a fiduciary of these funds. The funds are "owned" by the customer, not the provider, and, accordingly, each customer's funds are insured separately by the FDIC. The funds are not subject to claims of the provider's creditors.

Typically, customer funds are debited from the customer's main bank account through the Automated Clearing House system, deposited in the trust account, and then the provider arranges for the funds to be transferred to the customer's creditors, and at the same time, the provider's earned fees are debited from the trust account and, only then, transferred to the provider's operating account.

Most (29) state laws permit this same approach to be used by debt settlement providers. Again, the provider acts as a fiduciary, holding customer funds in a trust account in an FDIC-insured institution until a settlement is reached and then transferring the funds to the creditor. Earned provider fees are debited from the account. The funds are "owned" by the customer, not the provider, and, accordingly, each customer's funds are insured separately by the FDIC. At any time before the transmission of funds to creditors, a customer may require the provider to return the funds to the customer.

Some providers arrange for a third party to act as the fiduciary of customers' funds. Again, the funds are "owned" by the customer, not the provider. The provider is authorized to debit the account for the provider's earned fees and is authorized to electronically transfer funds to creditors when a settlement is reached.

The third approach is for the customer to establish the customer's own savings account in a financial institution. The provider is authorized to debit earned fees through the Automated Clearing House electronic funds transfer system and is authorized to initiate electronic payments from the savings account only when a settlement is reached.

We assume that each of these approaches is consistent with the Rule, so long as any fees or consideration are taken by the provider only after services are rendered. We believe that the Rule should so clarify.

Service Suitability

One of the greatest concerns about abuse of consumers in the debt relief industry relates to whether consumers are appropriately placed into plans that represent the most suitable approach for addressing their debt problems. The proposed Rule falls short in this regard.

The Rule should guard against providers enrolling consumers in plans that are not right for them merely because that is the only service the providers offer. If consumers call a debt settlement company, they are most likely going to be enrolled in a debt settlement product. Conversely, a debt management plan provider may enroll a consumer into a DMP when a settlement or another option may be more suitable.

Providers should be required to disclose that other debt relief options may be more appropriate for the consumer and to attest to and document the suitability of the service sold to the consumer.

CareOne's experience in dealing with hundreds of thousands of consumers show that roughly one-third of those who contact us need nothing more than budgeting assistance to help them better manage their financial situation. We provide this service along with all our educational offerings – at no charge. Approximately 40 percent are candidates for a DMP (enrollment rates range between 25-30 percent). We find that approximately 20 percent are candidates for debt settlement plans and for roughly 5 percent bankruptcy is the most appropriate option.

As one of the largest national providers, we believe this service segmentation is representative of the market overall. Absent a suitability test, a large percentage of consumers may be "shoehorned" into programs that are not right for them.

Proposed Rule and its Application

Exclusion of Non-Profits

While we support the proposed safeguards included in the proposed Rule, we have significant concerns about its effectiveness because the FTC is unable to apply the proposed TSR amendments to nonprofit debt relief providers.

Eighty-eight percent[2] of the debt relief industry, which advertises, markets, sells and enrolls consumers into Debt Management Plans (DMPs), consists of nonprofit providers. State laws permit nonprofits to provide debt settlement services.

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[2] AADMO National Survey of Debt Management Organizations (July, 2009)

These nonprofit organizations interact with consumers, charge and collect fees and offer debt relief services in manners similar to for-profit debt relief providers. A review of 275 nonprofit debt relief providers shows combined revenues of nearly $1.5 billion[3] over the past two years. This revenue is generated from consumer fees for debt relief services and payments from creditors in support of debt relief activities. This figure represents revenue from less than one-third of the estimated 1,000[4] nonprofit debt relief providers.

States, which have historically been the regulators of the debt relief industry, recognize the impact of the longstanding involvement of nonprofit providers in this market. More than one-half of states have updated their debt relief laws over the past five years. Nearly every state has considered legislation that would modernize the regulation of this industry. No state that has enacted new laws governing this industry has a structure that treats for-profits and nonprofits differently regarding consumer protections and fees for services. In fact, states rightfully focus regulation on the service being provided with no differentiation based on the tax status of the provider. To adopt a federal Rule that establishes a regulatory structure for one category of providers and not another will reverse the great progress made at the state level to deal with all debt relief providers equally.

The FTC's inability to apply this Rule to nonprofits, which generates billions of dollars in fees from consumers of debt relief services, calls into question the practical effectiveness of the Rule and fairness in not treating all entities offering the same services in the same way. As a result, given its limited jurisdiction, there is a genuine question whether the FTC is the appropriate regulator of the debt relief industry.

<u>Prior to promulgating rules for the debt relief industry, we encourage the FTC to first obtain statutory authority from Congress that would permit the application of these rules to nonprofit providers.</u>

The two largest associations representing the *nonprofit* debt relief industry, the National Foundation for Consumer Credit ("NFCC") and the Association of Independent Credit Counseling Agencies ("AICCCA") have been actively working with creditors to develop and market a less-than-full-balance debt settlement program. In October 2008, the Consumer Federation of America, and the Financial Services Roundtable wrote the Comptroller of the Currency seeking to establish a "test" debt settlement program involving "credit counseling agencies...and virtually

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[3] Internal Revenue Service Form 990 most recent two year total revenues of 274 501(c)(3) tax exempt debt relief providers

[4] Internal Revenue Service Office of Chief Counsel Memorandum # 200431023

all of the largest national credit card banks" if the Comptroller agreed to provide preferential treatment to creditors regarding the financial status of the debt settled.[5]

Additionally, the NFCC and AICCCA have worked with creditors to develop less-than-full-balance debt settlement plans. Several of their large national members are offering these plans today.

In some form or another, debt settlement appears to be the future of the nonprofit industry:

> *"While the expanded concessions offered by creditors in response to the Call to Action will enlarge the universe of consumers who qualify for DMPs, it does not meet the needs of every client. We need to design new strategies for those who do not want to file for bankruptcy, but for whom the DMP is not a workable solution.*
>
> *Accordingly, the NFCC plans to field consumer research to ensure that any new products and programs match up with what will help the most consumers especially during these trying times."*[6]
>
> *Susan Keating*
> *President & CEO*
> *NFCC*
>
> *"The right answer for the future continues to be a widely accepted form of Less-Than-Full-Balance product. We are continuing to work along with many of you to bring this option to full realization. Bank of America and Chase have made a good start but much more needs to be done. This will be good for creditors, consumers, and our industry when it is implemented."*[7]
>
> *David Jones*
> *President, AICCCA*

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[5] Letter from CFA and FSR to OCC, October 29, 2008
http://www.fsround.org/policy/regulatory/pdfs/OCCRepaymentPlanLetter10_28_08.pdf

[6] 2009 State of the Credit Counseling and Financial Education Sector Address, September 14, 2009 at 9
http://www.nfcc.org/NewsRoom/speeches/files/SC_Keating09State_CreditCounselingFinancialEducationSectorAddress.pdf

[7] *The Independent Counselor*, President's Corner, October 2009
http://www.aiccca.org/enews/AICCCA%20eNews%20multi%20page%20Sept29.pdf#nameddest=President

It is not surprising that these organizations are actively and aggressively opposing the application of the Rule and any regulatory authority Congress may grant under the proposed Consumer Financial Protection Agency ("CFPA") to nonprofit credit counseling and debt relief providers.[8]

Failing to apply the Rule uniformly to debt relief providers could prompt a new cycle of abuse by nonprofit debt relief providers. History has proven that well intended exemptions can give rise to unintended abuses. In the 1950s, most states outlawed or regulated debt pooling because of abusive practices by for-profit entities that were misleading consumers and profiting at their expense. The majority of these laws established a broad exemption for nonprofit entities. The abuses evident in the nonprofit credit counseling industry during the past several years were a direct result of these exemptions.

History can repeat itself. We urge the FTC to consider the impact of this limitation and ensure that any Final Rule covers the entire debt relief industry equally and fairly.

Conclusion

CareOne strongly supports the proposed Rule. Its requirements and prohibitions, if applied to the entire debt relief industry, would have a positive impact on consumer protection and help shape the future of the industry. We are skeptical that the intended impact will occur given the current inapplicability of the Rule to nonprofits. Not only would this be an unfair application of regulation to an industry, it could prompt the development of another wave of nonprofit providers intent on maintaining a business model that operates outside of regulation.

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We thank you for your consideration of our comments. We appreciate the challenge faced by the Commission to establishing fair and uniform ground rules.

Respectfully submitted by:

Michael F. Croxson /
President
CareOne Services, Inc.

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[8] Filings on FTC NPRM for Debt Relief Services, Summary of Communications Placed On the Public Record Pursuant to Commission Rule 1.26(b)(5), 16 C.F.R. 1.26(b)(5)
http://www.ftc.gov/os/comments/tsrdebtrelief/090910communicationsummary.pdf