Association of Independent Consumer Credit Counseling Agencies
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By E-filing to https://secure.commentworks.com/ftc-TSRDebtRelief

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex T)
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: Telemarketing Sales Rule-Debt Relief Amendments-R411001

Dear Commissioners:

I am writing on behalf of the Association of Independent Consumer Credit Counseling Agencies (AICCCA) in regard to the Notice of Proposed Rulemaking (NPR) issued by the FTC (the "Commission") on July 30, 2009 concerning proposed amendments to the Telemarketing Sales Rule (TSR) to address the sale of debt relief services, including debt settlement services.

AICCCA member credit counseling agencies (CCAs) currently provide counseling and education to millions of U.S. consumers, and presently serve about 500,000 clients repaying their unsecured debts through legitimate Debt Management Plans (DMPs). Together, these agencies are currently returning approximately $2.4 billion annually in consumer payments to the nation's creditors while providing consumers with a financial restructuring option outside of the bankruptcy system. Many of AICCCA's members have been certified by the Executive Office for United States Trustees (EOUST) to provide both pre-filing counseling and pre-discharge education services as required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), as well as approved by the Department of Housing and Urban Development (HUD) to be providers of certified housing counseling.

AICCCA's bylaws require all of its member agencies to operate as tax-exempt entities under Section 501(c)(3) of the Internal Revenue Code and as such they are subject to initial approval and stringent continuing oversight, including the possibility of audit, by

the Internal Revenue Service (IRS). AICCCA member agencies are also subject to multiple state laws and accompanying regulation throughout the nation.

AICCCA has championed fair pricing, stringent ethical guidelines, and consumer protection standards governing the activities of its members. Seven years ago, AICCCA's self-regulatory approach was strengthened when it instituted independent agency accreditation requirements through the International Standards Organization. That accreditation to ISO-9001 includes thorough annual Code of Practice audits and represents the most rigorous, independent, audit-based accreditation and oversight in our industry today. This independent third-party accreditation is combined with an equally independent certification of all agency counselors by the Institute for Personal Finance-AFCPE as well as the Center for Financial Certifications. Together, AICCCA member accreditation plus counselor certification provide significant assurances for consumers needing credit counseling services that they will be treated fairly and competently.

Executive Summary

AICCCA member CCAs see the victims of debt settlement scams on a regular basis and applaud the FTC's initiative in proposing these amendments to the TSR.

Due to ongoing Congressional consideration of establishing a new CFPA, we strongly urge that the proposed definition of "debt relief service" provide an explicit exemption for nonprofit entities.

We support the proposed TSR amendments that would require material disclosures and ban material misrepresentations in the offering of debt relief services, including debt settlement.

We support the broad proposed ban on collecting a fee for a debt settlement service until the provider can provide written documentation that the promised result has been achieved, with such support premised upon the hope that the final Rule adopted by the FTC provides the explicit exemption for nonprofit entities that we are urging it to adopt.

AICCCA Members Regularly Witness the Harm Done to Consumers by Unscrupulous For-Profit Debt Settlement Firms

AICCCA members are regularly contacted by consumers who have suffered the "irreparable injury" noted in the NPR as a result of unscrupulous practices engaged in by some for-profit debt settlement entities. These victims have been advised to cease making payments to their creditors and have made substantial payments to the service provider in advance of receiving any relief. They have not received realistic disclosures and have often been provided with substantial misrepresentations regarding the realistic ability of these entities to provide help. As a result, these consumers incur greater damage to their credit histories, are subjected to late and penalty fees by creditors, and are usually left in a substantially worse position than if they had used legitimate credit counseling services.

In most cases their financial position has been so badly damaged that legitimate CCAs are unable to provide assistance, and often the only recourse left to these victims is a bankruptcy filing.

Given our experience with these victims of illegitimate debt settlement and other debt relief services, AICCCA strongly supports FTC utilization of its existing statutory authority to crack down on such unconscionable abuses.

The Need for an Explicit Exemption for Tax-Exempt Credit Counseling Agencies

As is conspicuously noted in the NPR, non-profit entities are exempt from the jurisdiction of the FTC Act and, by extension, the TSR. As the NPR explains: "Thus, legitimate nonprofit credit counseling agencies that conduct telemarketing campaigns on their own behalf will not be subject to the amended Rule". Absent that statutory exemption, the broad definition of "debt relief service" proposed at section 310.2(m), in combination with the fact that many nonprofit CCAs are contacted telephonically by prospective clients in response to their own advertisements or through referral services offered by AICCCA and other industry trade groups, would clearly sweep in almost all CCAs. Were this to happen they could be subject to duplicative and unnecessary regulations and this in turn would generate substantial unnecessary compliance costs that would consume financial and human resources that could otherwise be devoted to assisting clients facing fiscal distress. Such broad coverage would not only affect existing CCA client services but could also affect future potential products, such as the less than full balance debt management plans (DMPs) contemplated by Congress when it enacted Section 502(k) of the Bankruptcy Code in 2005. That provision allows a court to reduce a creditor's claim if it has unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on the debtor's behalf by a CCA overseen by the Department of Justice's (DOJ) EOUST; that would have provided repayment of at least 60 percent of an unsecured consumer debt. While such DMP settlement plans are not yet available due to banking regulator accounting standards we are hopeful that such a legitimate product will be permitted in the future as it would be of great benefit to both consumers and lenders.

Under other circumstances the FTC Act's statutory exemption for non-profit entities would be sufficient to allay our concerns. However, pending legislation (H.R. 3126) now being considered by Congress would establish a Consumer Financial Protection Agency (CFPA), and most of the bank regulatory agencies' and the FTC's existing authority over financial products and services would be transferred to it. However, unlike the FTC Act, the current version of the CFPA proposal does not exempt non-profit entities, including tax-exempt CCAs operating in compliance with Section 501(c)(3) of the Internal Revenue Code. Thus, there is a substantial possibility that the FTC's enforcement authority through the TSR as it relates to financial products and services may be transferred to the CFPA without being accompanied by the FTC Act's exemption for non-profit CCAs. H.R. 3126 would grant the CFPA virtually unlimited authority to adopt new regulation of the non-profit credit counseling and financial education sector absent any substantial guidance from or limitation by Congress. The CFPA's authority would go beyond the current powers of the Federal Trade Commission, which can only pursue

unfair and deceptive practices engaged in by for-profit providers of such services; while the FTC has brought actions against providers claiming non-profit status those actions are generally based upon a charge that they are fraudulently misrepresenting their true status as for-profit entities.

We therefore urge the FTC to take a "belts and suspenders" approach to this possibility by amending the definition of "debt relief service" to clarify that it only encompasses services offered by for–profit entities. This modest amendment, which simply restates the FTC Act exemption, will assure that if partial enforcement of the TSR is transferred to the CFPA it will not automatically sweep in non-profit CCAs.

As described in detail in the NPR, non-profit CCAs are already subject to a broad array of state and federal statutes and regulation to assure that they operate in a manner that serves consumers.

AICCCA member agencies are subject to stringent state regulation in every state in which they operate. In 2005 the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Debt Management Services Act to strengthen and make uniform this system of state regulation, and many states have now adopted, or are in the process of adopting, new legislation based upon that standard. Unfortunately, most states have adopted some variations from the model Act and this increases compliance costs for non-profit agencies operating on a multi-state basis.

Non-profit credit counseling and financial education agencies generally operate as tax-exempt Section 501c3 organizations – and all AICCCA member agencies are required to have such tax-exempt status -- and as such are subject to strong oversight and potential audit by the Internal Revenue Service, and to revocation of tax-exempt status for violation of tax law requirements. In 2006 Congress enacted new provisions of the Internal Revenue Code that clarify and strengthen the requirements for continued retention of tax-exempt status and that assure that tax-exempt agencies put client needs first.

In addition, many AICCCA members are subject to continuing annual re-approval and extensive oversight by the DOJ/EOUST as approved providers of the pre-bankruptcy counseling or pre-discharge financial education required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Congress clearly believes that those standards remain sufficiently stringent, as the recently enacted Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009 requires all credit card issuers to establish and maintain a toll-free telephone number to refer consumers with credit problems to such DOJ/EOUST-approved agencies.

Finally, many of our member agencies also function as Department of Housing and Urban Development (HUD) certified housing counselors, and must satisfy that agency's approval and continuing oversight standards.

And, of course, any CCA that fraudulently holds itself out as a non-profit entity while operating in a for-profit manner is subject to FTC jurisdiction and enforcement, as has been illustrated by six separate cases filed by the FTC since 2003.

Summing up, our members are already subject to an extensive and interwoven tapestry of state and federal regulation that constitutes a substantial compliance burden on non-profit service providers. Just two years ago there were more than 800 non-profit credit counseling agencies serving United States consumers but that number has dramatically shrunk to just over 300 today, and we believe that compliance requirements are a substantial cause of this reduction.

Every additional dollar spent on compliance with such potential new regulation will be funds that are unavailable to pursue our primary mission of assisting financially distressed American families. Absent an explicit exemption provided for tax-exempt entities in the proposed amendments to the TSR, a transfer of FTC authority to the CFPA could expose the full gamut of legitimate CCA activities to restrictions under the amendment – a result the FTC does not intend or contemplate but that could nonetheless occur. It could also expose non-profit CCAs to certain prohibitions on practices that are entirely appropriate for largely unregulated for-profit entities but that would place severe fiscal restraints on already struggling non-profit entities. At a time when unprecedented numbers of Americans are seeking assistance from our member agencies, and as creditors, state and local government, and charitable organizations are curtailing their own financial support for our activities, an additional regulatory burden could have a highly negative impact on our members and could divert substantial resources and attention from their primary task of helping Americans avoid or deal with household financial crises.

<u>Proposed Rule Changes Relating to Material Disclosures and Misrepresentations</u>

AICCCA generally supports the proposed amendments to Section 310.3(a)(1) at clause viii. These provisions would, in the sale of any debt relief service, prohibit the failure to disclose material information in a clear and conspicuous manner. Items covered include the amount of time necessary to achieve represented results; key factors involved in making settlement offers to multiple creditors; the fact that many creditors will not enter into settlement agreements, or may pursue collection efforts; that utilization of the service may lead to damaged credit histories, litigation, and penalty fees; and that any money saved may be treated as taxable income to the consumer.

We also support the proposed amendment to section 310.3(a)(2) at clause x, which would bar material misrepresentation of any material aspect of a debt relief service. These include such key factors such as the amount of money and time required to settle a debt, effect on creditworthiness, and the percentage of customers who actually achieve the represented results.

Consumers cannot possibly make an informed and intelligent choice regarding the use of a debt settlement service unless they receive full disclosure of material facts and are

protected against material misrepresentations. These proposed amendments further the goal of assuring that consumers have accurate and comprehensive information prior to any decision to engage with such a service.

Ban on Advance Payment

We support the proposed ban on requesting or receiving payment of any fee or consideration for a debt relief service before the consumer has been provided with documentation in the form of a settlement agreement, DMP, or other valid contractual agreement that a particular debt has been renegotiated, settled, reduced or otherwise altered.

This ban will protect consumers against paying for promised benefits that may prove entirely illusory, and will force debt settlement providers to actually deliver on their promises if they wish to be compensated.

Our support for this ban is premised upon the final Rule adopted by the FTC providing an explicit exclusion of non-profit debt relief providers, especially tax-exempt providers subject to IRS regulations and audit. Some non-profit CCAs now charge a modest setup fee to cover the cost of initial administrative expenses and of initiating contact with the client's creditors, and securing their agreement for the client to enter into a DMP. Unlike for-profit debt settlement services, who may deliberately misrepresent the inclination of creditors to agree to any reduction in principal amount owed in return for payment of the remaining balance, non-profit CCAs have long-established working relationships with creditors and are knowledgeable about their willingness to enter into DMPs. As a result, AICCCA member CCAs and other legitimate non-profit providers of DMPs are able to confidently advise clients regarding their eligibility for a DMP. Such setup fees may also be appropriate for less than full balance DMPs at such time that banking regulations permit their general availability. In the unfortunate circumstance that the FTC declines to provide such an explicit non-profit exclusion we would urge it to retain the advance fee ban for a debt settlement service while recognizing that certain modest setup fees may be reasonable and appropriate to defray the administrative costs of entering a client into a DMP, and providing additional guidance on the circumstances in which such fees may be permissible. Without such clarification non-profit CCAs already operating under tight fiscal constraints may face additional burdens to the detriment of their clients.

Conclusion

Unlike legitimate non-profit CCAs, certain for-profit debt settlement entities have preyed upon and caused substantial harm to vulnerable consumers by promising unrealistic results, failing to make material disclosures and engaging in material misrepresentations, and collecting large up-front fees for services that are unlikely to be provided. AICCCA applauds this FTC initiative to crack down on such insupportable practices.

However, given the uncertainty regarding whether Congress may vest regulatory and enforcement authority over financial products and services, including credit counseling,

in the proposed CFPA we strongly urge the FTC to include an explicit exemption for non-profit entities in its proposed definition of debt relief service that carries forward the existing statutory exemption in the FTC Act.

Thank you for your consideration of our views in this important consumer protection matter.

Sincerely,
David Jones
President