October 26, 2009

DebtShield

Submitted electronically via https://secure.commentworks.com/ftc-TSRDebtRelief

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

Re: Telemarketing Sales Rule – Debt Relief Amendments, R411001

Ladies and Gentlemen:

Debt Shield, Inc. ("Debt Shield") appreciates this opportunity to comment on the Federal Trade Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") and proposed amendments to the Telemarketing Sales Rule, 16 CFR Part 319 ("TSR") targeting debt relief service providers, as published in the Federal Register on August 19, 2009.[1]

By way of background, Debt Shield is a debt settlement company located in Columbia, Maryland that was incorporated in 2003 and employs around 100 people. Debt Shield is a member of The Association of Settlement Companies ("TASC") and the United States Organizations for Bankruptcy Alternatives ("USOBA"). Each year, Debt Shield and its employees donate thousands of dollars and many hours of time to charitable organizations and community groups.

Debt Shield wholeheartedly supports fair, reasonable regulation of the debt relief services industry. Debt Shield's track record based upon its legislative efforts on both a federal and state level evidence Debt Shield's support of reasonable regulation. However, Debt Shield opposes several of the proposed amendments to the TSR ("Proposed Amendments") and does not believe the adoption of the Proposed Amendments is in the best interest of debt settlement companies, the Commission, the states or, most importantly, consumers.

As described in more detail below, Debt Shield's opposition to the Proposed Amendments can be summarized as follows:

1. Objections to the Commission's unfairness analysis supporting the advance fee ban:
    a. charging of advance fees does not cause substantial injury to consumers;
    b. the potential countervailing benefits of charging advance fees outweigh the potential harm to consumers; and
    c. the purported harm to consumers who pay advance fees.
2. The Commission lacks the authority to adopt the Proposed Amendments aimed at banning advance fee payments.
3. The Proposed Amendments are unnecessary in light of applicable state law and conflict with existing state law
    a. Certain aspects of Proposed Amendments to §§310.3(a)(1)(viii)(A) and 310.3(a)(1)(viii)(B) are unfair and unreasonable; and
    b. The Proposed Amendments conflict with state laws and trigger federalism implications

While Debt Shield understands brevity can often be a virtue, we also believe that in order for the Commission and other interested parties to fully appreciate and understand the scope and impact of the Proposed Amendments, it is first necessary to discuss our current economic climate, the different debt relief options available to American consumers today, and why debt settlement is a viable and extremely valuable debt relief option for debt laden consumers who would otherwise be faced with an even greater financial and emotional burden and most likely forced into bankruptcy. Debt Shield thanks the Commission in advance for taking the time to read Debt Shield's comment, despite the length thereof.

I. American Debt Crisis

A. The Great Recession

"Since we last met here, the world has been through the most severe financial crisis since the Great Depression."

- Federal Reserve Chairman Ben Bernanke (Sept. 15, 2009)[2]

Despite possible indications of economic improvement, the state of unemployment in this country continues to look grim.

In September, the unemployment rate rose to 9.8% — a 26-year high — and the number of unemployed Americans increased to 15.1 million, about twice the number at the start of the recession.[3] Experts believe the unemployment rate will peak next year at about 10%.[4] Employees cut fewer jobs than expected in June, but instead of being a sign of economic recovery, this may be because previous cuts were so deep that there were fewer workers left to lay-off.[5]

The average length of unemployment is now over 26 weeks, the highest reading ever tracked by the Labor Department.[6] The number of people unemployed for more than six months reached a record high of 5.4 million.[7]

Even if employers are now cutting fewer jobs, those who are already unemployed are unaffected by this silver lining. Most economic experts agree that for the millions of people out of work, signs of economic improvement are little consolation:

- "The labor market is in the process of turning around, but it is going to be agonizingly slow. Most Americans won't detect it anytime soon," said Bernard Baumohl, chief global economist for the Economic Outlook Group.[8]

- According to Federal Reserve Chairman Ben Bernanke, "the economic recovery is likely to be relatively slow at first, with unemployment declining only gradually from high levels."[9]

- While economic conditions may not be as bad as they were 6 to 12 months ago, the recovery is expected to start off slow and weak, according to Sean Snaith, an economics professor at University of Central Florida.[10]

In 2009, the jobless rate has increased in all 50 states and Washington, D.C.[11] proving this is not an isolated problem. Since the recession began (in Dec. 07) the total number of unemployed Americans rose by a total of 7.6 million.[12]

In addition to the millions of unemployed Americans, an assessment of America's debt crisis is incomplete without also accounting for the underemployed. The number of people who could not find fulltime employment, or had their hours cut, remained at about 9.2 million, double the number since the start of the recession.[13]

At the same time, foreclosures and home loan delinquencies continue to rise. The percentage of loans in foreclosure and loans 90 days or more past due both set record highs. The delinquency rate on home loans rose to 9.24, which was the highest recorded by the Mortgage Bankers Association. This figure was up 12 points from the first quarter 2009 and up 283 points from one year ago.[14]

The Center for Responsible Lending found that foreclosures significantly affect the property values of neighboring homes, meaning that foreclosure can affect entire neighborhoods, not just the family who lost their home. They predict foreclosures will affect 91.5 million homes over the next four years and are expected to cost neighboring homeowners $502 billion in 2009 alone.[15]

B. Exponentially Growing Debt in America

Overwhelming debt problems did not entirely originate with the current recession. Moreover, consumer debt is not isolated to the unemployed and underemployed. All Americans continue to be responsible for mortgages and rent, in addition to other necessary expenses such as groceries, child care and medical expenses. Many have been forced to rely on credit cards for basic necessities.[16] Debt has been an exponentially growing problem for thousands of Americans.

Here are just some of the key findings from a 2007 Demos report:[17]

- American's **credit card debt grew by 315%** from $211 billion to $876 billion between 1989 and 2006
- Homeowners **cashed out $1.2 trillion in home equity** from 2001 to 2006, often to battle credit card debt and cover basic living expenses
- **Credit card debt for seniors increased 194%**, more than any other age group, from 1989 to in 2004
- The percentage of cardholders incurring **late fees** for payments 60 days or more past due increased from 4.8% to 8.0% from 1989 to 2004
- **Credit card debt among very low-income families (earning under $9,999 per year) quadrupled** from 1989 to 2004.
- In 2004, 46% of very low-income credit card-indebted families spent more than **40% of their incoming to pay their debt**

Another major debt study found that living with increased debt had become "an accepted and normal state of affairs" and was considered "inevitable and likely permanent." [18] This shifting attitude toward debt as an accepted and inevitable state of life created an illusion of security that continues to leave many Americans incredibly vulnerable. These statistics reflect the economic environment (and the direction it was heading) prior to the current recession and the wave of joblessness that has accompanied it.

C. Medical Emergencies

"Most medical debtors were well educated, owned homes, and had middle-class occupations. Three quarters had health insurance."

- Medical Bankruptcy in the US, 2007: Results of a National Study[19]

Unemployment and underemployment as a result of the current economic crisis is not the only major cause of overwhelming debt. Medical expenses, which can often come as a surprise, are also a major contributor to consumers' debt problems – specifically for the middle class. Expenses resulting from medical emergencies are to blame for the sharpest deterioration in middle-class financial security, according to the Center for American Progress. Less than 34% of families could afford to cover a medical emergency in 2007, down from 43.7% in 2000.[20] These results echo the rising consumer credit card debt during the same time period. Many consumers were struggling to cover basic expenses, let alone medical expenses, even before the current economic crisis hit.

Moreover, the "first-ever national random sample survey of bankruptcy filers" found that a medical problem was to blame for more than 62% of bankruptcies filed in 2007.[21] The vast majority of those bankruptcies (92%) involved medical debts over $5,000. It was not the financially irresponsible or even the poorest families who fell into debt upon undergoing a medical hardship: "Most medical debtors were well-educated, owned homes, and had middle-class occupations. Three quarters had health insurance," according to the report, "Medical Bankruptcy in the United States, 2007: Results of a National Study."

Medical debts coupled with unemployment and an over-reliance on credit cards has left thousands – if not millions – of American consumers unable to repay their creditors.

D. Rising Charge-Offs

"The blip down in credit card loss rates at some banks in July now looks like a fluke."
- Tom Petruno, Markets Columnist, LATimes.com[22]

Consumers are not the only ones who are suffering. Our nation's rising charge-off rates demonstrate how credit card companies are feeling the pinch as well. Write-offs for uncollectible debt by banks (also known as charge-offs) increased by 81 basis points to 10.62% in August.[23] The low numbers released in September damage hopes that positive trends the month prior would gain momentum.[24] Bank of America's CEO claims that "banks always experience their worst losses long after an economic recovery is under way,"[25] confirming other claims that continued bank losses are expected.

At the same time, bad debt is selling for much less than before. After steadily declining in late 2007 and early 2008, credit card charge-off portfolios are selling for 4 to 7 cents on the dollar.[26] "With unemployment and defaults on the rise, large public buyers…are among those holding out to see if they can snag portfolios at deeper discounts later this year or in the first quarter," according to Collections & Credit Risk.[27]

E. Debt Collector Complaints

As creditors struggle to collect from indebted consumers, debt collectors have been caught using illegal collection tactics aimed at scaring consumers into somehow finding the money to repay their debts. Nearly 300 debt collection companies were sued in the first half of August for allegedly violating the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA).[28] The FTC receives more complaints about debt collectors than any other industry. It reported more than 78,000 complaints about third-party debt collectors in 2008, up from 70,951 in 2007 and 69,249 in 2006. The National Association of Attorneys General also found debt collectors topped the list for most consumer complaints in 2008.[29]

If the current rise in unemployment is indeed about to peak, even the most optimistic admit the recovery will be slow and largely invisible to the people most affected by the economic crisis.

Even if the most optimist predictions come true and our country is headed out of the recession, thousands of Americans will continue to struggle. They need a solid and legitimate way out of debt in order to get back on their feet. Many will not find the help they need with credit counseling or bankruptcy. Whether home-owning, middle-class consumers simply become too overextended, or if they are hit with an unexpected medical expense, they need serious help resolving their unsecured debts. These are precisely the people who typically qualify for debt settlement programs.

II. Debt Resolution Options

In an economic climate where millions are unemployed, and many of the rest struggle to keep their jobs, let alone their homes, any hardship can push them over the edge. Many Americans do not have the savings to support themselves when tragedies strike. A medical emergency, loss of a loved one, reduced income or unemployment can and has sent vulnerable Americans down a path of spiraling debt, and many cannot recover without outside help. When other options cannot offer enough help to people with overwhelming debt problems, debt settlement offers an effective alternative to bankruptcy.

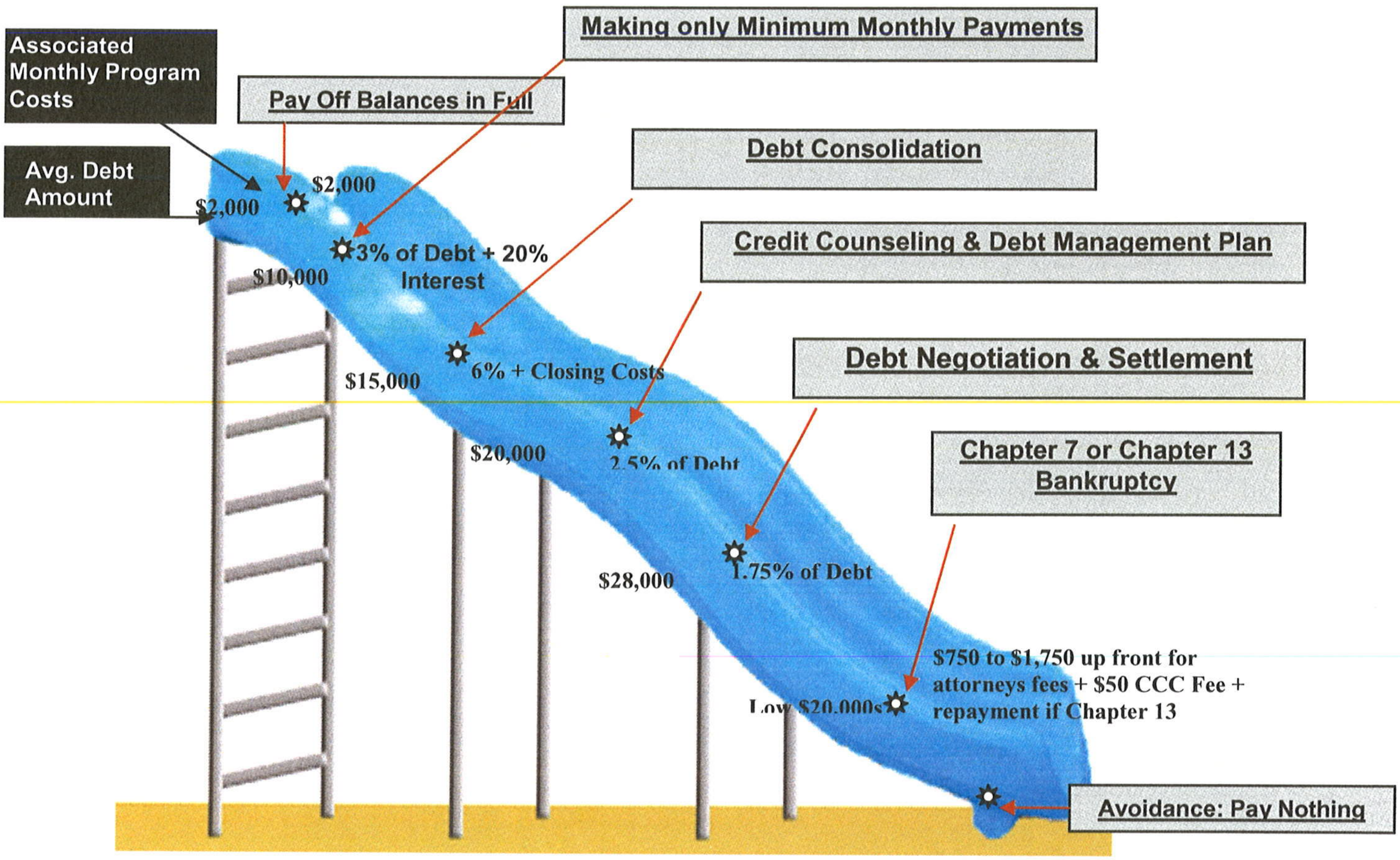
A. Niche Solutions

There are multiple ways to approach debt relief and depending on a person's specific circumstances, some are more appropriate than others. The wrong way out of debt can cost thousands of dollars and create years of unnecessary stress. There are many factors that determine the best way out of debt for a consumer. Not only is the amount of debt an important factor, but so is the kind of debt. Thousands of dollars in credit card debt can (and should) be handled differently than smaller amounts of debt, which, in turn should be handled differently than secured debt or guaranteed debt, such as a mortgage, automobile, student loans or tax debt. Another major factor is a person's ability to repay all or a portion of their debt. For example, someone with a steady income or who owns a home is going to have different options available to them than someone who does not own a home, earns irregular income, or has no income at all.

There is no one-size-fits-all, cookie-cutter approach for effective debt relief. There is a substantial need for the availability of a variety of debt relief options, which consumers can pursue based upon their particular situation. Consumers need access to debt consolidation, bankruptcy as well as consumer credit counseling and debt management. However, for millions of indebted Americans, many debt relief options either are not available (e.g., lack of equity in a home precludes debt consolidation as an option) or are unaffordable (e.g., repaying 100% of the debt plus interest through creditor sponsored consumer credit counseling programs). It's for precisely those consumers that debt settlement may be the best option to resolve their unsecured debt burden.

B. Debt Relief Options: An Illustration

The following illustration is intended to provide a pictorial depiction of the varying debt relief options based on the "severity" of the option. The respective option's severity level is dictated by the consumer's ability to service the debt on a monthly basis. As their ability to pay (i.e., ability to service the debt on a monthly basis) decreases, the severity of the appropriate debt relief measure increases correspondingly. "Severity" is used loosely in this sense to describe the consumer's level of need, the aggressiveness of the debt relief option and the potential attendant negative consequences of a particular debt relief option.



C. Making Only Minimum Monthly Payments

For some consumers, paying only the minimum monthly payments is their only affordable option to service their debt without engaging the services of a debt relief company. Unfortunately, consumers who are relegated to paying only the minimum monthly payments all too often find themselves in debt over their head and in need of additional assistance. To service their debts in this fashion, consumers will exhaust their savings, stop contributing towards retirement plans and allow insurance policies to lapse. Such consumers are right on the edge of catastrophe, whether they are cognizant of it or not.

One seemingly minor financial hardship can be devastating to such consumers. Once they begin missing payments, their credit deteriorates, introductory interest rates are converted into very high interest rates (often in the 20-30% range), late fees, penalties and other charges begin accruing and other creditors, by way of universal default clauses, begin ratcheting up the rates on the consumer's other accounts, even if payments on other accounts remain current.

In addition, it can take years – even decades – to pay off a credit card debt by paying only the minimum monthly payments. It can also cost more than twice the starting balance to accomplish. For example, if a consumer has a $10,000 credit card balance at an 18% interest rate and chooses to make only minimum monthly payments of the interest plus 1% of the principal owed each month, it would take that consumer almost **29 years at a cost of almost $25,000 to pay off the original $10,000 balance!**[30]

It should be evident that paying *only* the minimum monthly payments for any prolonged period of time should be an option of last resort. However, if a consumer is able to remain current on all minimum monthly payments, and assuming the absence of future financial hardships, then enlisting the services of a debt relief company is generally not necessary.

D. Home Equity to Pay off Debts: Debt Consolidation, Refinancing & HELOCs

Moving down the slide of debt relief option severity we come to debt consolidation. Debt consolidation involves repaying multiple debts with one large loan, typically at a reduced interest rate. This form of debt assistance helps consumers organize their finances and concentrate on one debt instead of many. However, many people who need serious help may not qualify for a debt consolidation loan because of their already damaged credit.

Moreover, in this economic climate, home values are lower, which mean families have less home equity if any at all.[31] Currently, millions of Americans are facing the unprecedented prospect of actually owing more on their home than it is worth. As a result, using home equity to obtain a debt consolidation loan is more difficult now than ever before. For those consumers who can actually obtain a home equity loan, doing so converts their unsecured debts into debts secured by their home. The same rings true for other, similar ways to free up home equity, such as refinancing or home equity lines of credit ("HELOC"). Consumers who default on such loans could risk losing their homes.

Like most debt relief options, there are certain consumers who benefit from using their home equity to pay off other debts. Unfortunately, in the current economy with tight credit markets, negative home equity and falling home prices, many consumers with overwhelming debt are either unable to obtain a home equity loan or realize it may not be their most appropriate debt relief option. In fact, they may be worse off: "Pressured by the burden of credit card debt and aggressive marketing tactics, many families don't realize how much equity they will lose, the total costs of that loss, or that they are putting their home in jeopardy in order to temporarily repay unsecured credit card debt."[32]

E. Consumer Credit Counseling & Debt Management Plans

For some people, credit counseling is a useful and appropriate debt relief option. Consumers who enroll in credit counseling services receive financial education and are set up with a debt management plan where they send in a single monthly payment, which is distributed to their various creditors.

Consumer credit counseling is a viable option for people who have some debt, earn a steady income, need help organizing their finances, and would benefit from a reduced interest rate. But credit counseling simply cannot offer the level of help some high-debt consumers need. **The National Foundation for Credit Counseling acknowledges they could not help nearly one million consumers in 2008 alone.**[33] That's about a third of the people who seek their services.[34] Because even the reduced interest payments are determined by creditors, some people are either ineligible from the start or are later forced to drop out of the plans. **One report shows that only about 25% of consumers complete debt management plans.**[35]

While many consumer credit counseling companies are non-profit, they receive the bulk of their funding from creditors. In essence, through a payment arrangement known as "fair share", consumer credit counseling agencies are paid by the creditors based on the amount of money they collect from consumers enrolled in their program. In addition, they receive funding directly from consumers by way of "voluntary" contributions. As such, the credit counseling agencies are funded primarily by their client's creditors, which many argue is no different than a softer approach to debt collection and not necessarily in the consumer's best interests due to the inherent conflicts of interest. Moreover, "[o]nce 'fair share' payments are taken into account, [consumer credit counseling company] fees and payments for a consumer account can exceed 29% of the consumer debt."[36] As such, the fees and other costs associated with consumer credit counseling debt management programs are simply unaffordable for many consumers.

i.) Abuse in the Credit Counseling Industry[37]

It is also worth noting that consumer credit counseling companies and their trade associations have spent thousands, if not millions, of dollars on efforts aimed at discrediting the effectiveness of debt settlement as a debt relief option.[38] The majority of the allegations they are peddling are based on the actions of a handful of debt settlement companies. It is surprising that credit counseling companies would be so quick to stereotype all debt settlement companies as ineffective or "bad" given that their very industry is still licking the wounds suffered due to the actions of companies such as AmeriDebt[39] in addition to the Internal Revenue Service (IRS) reviewing and revoking the non-profit status of many consumer credit counseling agencies.[40]

According to the IRS, "[i]n recent years, **the IRS has seen an increase in abuses in the credit counseling industry**. Many organizations have moved away from their approved tax-exempt purpose of offering counseling and education to help individuals understand and address their financial problems. Instead, their focus is debt management services including promises to restore favorable credit ratings or to provide commercial debt consolidation services."[41]

F. <u>Bankruptcy</u>

"Today's bankruptcy filing number reflects the sustained and growing financial stress on U.S. households."

- ABI Executive Director Samuel J. Gerdano[42]

Bankruptcy is an effective debt relief option for many over-burdened consumers. In fact, for severely distressed consumers, bankruptcy can be a saving grace. However, bankruptcy, like all debt relief options has downsides. Bankruptcy can be difficult, complicated and expensive, not to mention many believe it carries an unfortunate stigma.

Bankruptcy is also noted on credit reports for up to 10 years. Because many employers request access to job-seekers' credit reports, this mark can be concerning to bankruptcy filers who are searching for a job especially for job-seekers in certain industries such as the insurance, finance, government and industries requiring high levels of security clearance. Filers may also be forced to turn over and liquidate their non-exempt assets to a bankruptcy trustee. While bankruptcy is an established and viable safety-net for truly insolvent consumers, many consumers desperately seek bankruptcy alternatives.

A steady rise in bankruptcy filings indicates continued financial stress for many Americans. Bankruptcy filings dropped immediately after the effective date of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BACPA"), which imposes stricter qualifications for Chapter 7 liquidation and was intended to weed out "deadbeats" who actually could afford to repay their debts. However, most bankruptcy filers were not actually deadbeats. The National Association of Consumer Bankruptcy Attorneys found that changes to the law resulted in "new costs and paperwork burdens on tens of thousands of already distressed Americans, the vast majority of whom are being forced into bankruptcy due to financial circumstances beyond their control."[43] Their analysis found that almost none (3.3%) of the people seeking bankruptcy protection were able to repay their debts under consumer credit counseling debt management plan and that the vast majority (79%) were victims of unfortunate circumstances, not "imprudent spenders."[44]

As a result, bankruptcy rates have been steadily rising during the current economic recession. In July, consumer bankruptcy filings hit 126,434— the highest monthly total since the BACPA amendments were implemented.[45] The American Bankruptcy Institute's ("ABI") executive director predicts high pre-existing debt combined with unemployment will mean even higher bankruptcy rates going forward.[46] Filings could top 1.4 million this year, which is just shy of the pre BACPA figure of 1.56 million filings in 2004.[47] [48] In addition, one study showed that only around 33% of those that enter into a Chapter 13 bankruptcy complete the repayment plan.[49]

This trend could continue to hurt our already damaged economy. According to ABI, "A high level of indebtedness among households could lead to increased household delinquencies and bankruptcies, which could threaten the health of lenders if loan losses are greater than anticipated."[50]

However, one of several recent economic studies found that **debt settlement "can help correct some of the nation's financial imbalances, improve access to credit, and thereby contribute to the process of economic recovery."**[51] Not only is debt settlement an option that can benefit millions of people who would have no other alternative but to file for bankruptcy, debt settlement could actually help improve the economy by getting people out of debt faster and repaying creditors as much as consumers can afford rather than the creditors receiving nothing at all, such as in the case of a Chapter 7 liquidation. Further, In addition, debt settlement is a debt relief option for those struggling with unmanageable unsecured debt that either do not qualify for bankruptcy or are seeking an alternative to bankruptcy.

III. Debt Settlement

Debt settlement is a debt relief option that falls between consumer credit counseling and bankruptcy. Debt settlement occupies an important niche because many people cannot afford the monthly payments of a consumer credit counseling debt management plan and, at the same time, many either cannot qualify for bankruptcy or are seeking an alternative to filing for bankruptcy protection.

Debt settlement is a more aggressive debt relief option typically best suited for high-debt consumers who cannot afford the minimum monthly payments owed to all creditors. It isn't for everyone, but for some consumers it is the best viable option. Debt settlement helps people who need more than just a reduction in interest rates and organizing payments. These consumers may have considered bankruptcy, but are seeking debt settlement services as an alternative to bankruptcy.

A. Debt Settlement Offers the Greatest Benefit to a Particular Niche of Consumers

In contrast to consumer credit counseling, debt settlement clients cannot afford to repay 100% of their debt obligations and need more concessions by way of principal reductions from creditors than consumer credit counseling is capable of providing. For consumers experiencing legitimate financial hardships that either do not qualify for bankruptcy or are looking for an alternative to bankruptcy, debt settlement is often their best debt relief option.

Underscoring this point, a new report published by Dr. Richard Briesch of the Southern Methodist University (the "Briesch Study") finds that **when compared to credit counseling, debt settlement programs "create the greatest consumer welfare of any approach."**[52] The report found that debt settlement "has an increasingly higher value to consumers with higher account balances and higher total debt."[53] This study is just the latest evidence demonstrating our society's need for debt settlement in addition to credit counseling, especially when more and more people are struggling through these economically troubling times.

Most debt settlement companies only accept clients with *at least* $10,000 in unsecured debts who are *unable* to repay their debts. Debt settlement clients are in need of serious help due to a personal, financial or medical hardship. Debt settlement companies negotiate with their clients' creditors in light of these hardships to settle the outstanding balances for less than the full amount. Consumers without hardships (i.e., those who *can* afford to repay their debts) are simply not eligible for debt settlement.

In addition, consumers with only a small amount of debt are probably better suited for other debt relief options. This is because debt settlement companies are for-profit entities that charge consumers a fee for their services. While fee models vary, typical debt settlement company fees are a flat rate based on the total enrolled debt amount (e.g., 15%) that is collected over no less than half the projected program length or a hybrid fee structure that decreases as each debt is settled and no longer included on the program.

Legitimate debt settlement companies only enroll consumers who are already delinquent on their payments or are imminently about to fall behind on their payments. These are not consumers trying to get out of their debt obligations; instead they are trying to pay their creditors as a much as they can afford instead of resorting to filing for bankruptcy.

Again, debt settlement is a more aggressive debt relief option that is suitable for a specific niche of consumers. As the Commission points out, failure of consumers to remit monthly payments to their creditors when due will negatively impact their credit rating. In addition, creditors may continue to call consumers enrolled on a debt settlement program and in some, less common instances, may pursue litigation against consumers for the underlying debt amount despite their enrollment with a debt settlement company. Debt Shield agrees with the suggestion in the Briesch Study that instead of eliminating debt settlement as a debt relief option, regulations should be aimed at preventing creditors and collectors from initiating action against consumers enrolled and in good standing with a debt settlement company; similar to what is done in the context of enrollment with a consumer credit counseling agency.[54]

B. Debt Settlement Offers the Greatest Benefit to Creditors

Mutually agreeable settlements help consumers and creditors at a time pervaded by soaring unemployment, rising charge-off rates, escalating bankruptcy filings and prevalent bank losses. As consumers struggle to repay their debts and as banks struggle with mounting losses, debt settlement offers a solution that is not all that different from the time immemorial solution of debt collection. Specifically, debt settlement companies work with both consumers and creditors to arrange for the repayment of unsecured debts for less than the full amount owed but for all the consumer can afford to pay. Settlement amounts typically range from 30-50% of the outstanding balance owed at the time of settlement. In contrast, creditors typically receive between 0-35% through Chapter 7 or Chapter 13 bankruptcy.[55]

It's because of this that several debt purchasers are approaching both debt settlement companies and their trade associations on a regular basis after seeing how beneficial debt settlement is for their bottom line. Of course creditors would prefer to collect the full amount of the debt owed. But when that is not possible, consumers can look to either debt settlement or bankruptcy. Debt settlement provides the most cost effective return to creditors.

As evidence of the benefit debt settlement companies provide to creditors and debt purchasers in addition to consumers, in 2008 alone, the debt settlement industry returned $2.2 billion in consumer debt to creditors.[56] Plus, research indicates that $500 million in settlement funds saved by consumers were available to creditors as of September 2009.[57]

IV. Objections to the Commission's Unfairness Analysis Supporting the Advance Fee Ban

While Debt Shield joins most of the concerns raised by USOBA and TASC in their respective comments regarding the Proposed Amendments, Debt Shield has chosen to address the following particular objections specifically.

A. The Proposed Ban on Advance Fees Does Not Satisfy the Unfairness Analysis

In the NPRM, the Commission recognizes that since it is considering a proposed amendment to §310.4 of the TSR not relating to consumers' privacy rights, the Commission must therefore determine whether the alleged underlying conduct of debt relief service providers meets the criteria for "unfairness", which is codified in 15 USC 45(n).[58]

To make such a showing, "the Commission must demonstrate that: 1) the conduct at issue causes substantial injury to consumers; 2) the harm resulting from the conduct is not outweighed by any countervailing benefits; and 3) the harm is not reasonably avoidable."[59] The Commission is specifically focused on the unfairness analysis to support its proposed ban on what the Commission calls "advance fees."

"Advance fees", according to the Commission, are "fees for any debt relief service before the seller has provided the customer with documentation that the promised services have been rendered."[60] However, such a definition is ambiguous on its face without knowing what, exactly, are the promised services. In the case of debt settlement companies, the Commission has taken the liberty to define what services such entities provide to consumers: "[...] this would require delivery of proof to the customer that the accounts subject to debt settlement have, indeed, been successfully settled."[61]

For the reasons including those discussed in more detail below, Debt Shield vehemently opposes the ban on "advance fees" contained in the Proposed Amendment to §310.4 of the TSR.

i) Advance Fees Do Not Cause Substantial Injury to Consumers

The Commission concludes that a ban on advance fees satisfies the first prong of the unfairness test because, according to the Commission: 1) debt settlement programs have a low likelihood of success; and 2) collecting advance fees places a significant burden on consumers.[62] **However, the Commission's analysis lacks an objective, factual basis from which to support its conclusion that the ban on advance fees satisfies the requirements of the first prong of the unfairness analysis**. In fact, the Briesch Study concluded that "[e]ven without adjusting the cancellation rate [for several factors including the debt settlement provider obtaining settlement offers that consumers fail to accept], the [cancellation] rate [for a debt settlement program] is comparable or lower than other subscription based businesses [...]"[63]

The Commission bases its conclusion that debt settlement programs have a low likelihood of success on what it admits to be an incomplete record and understanding of the true success rates of the industry.[64] To be clear, the Commission's argument in this regard is founded upon statistics derived by the Commission's few enforcement actions against debt settlement companies and mere allegations contained in complaints filed by the New York Attorney General's office against two debt settlement companies.[65]

However, **stereotyping an entire industry consisting of thousands of companies, which employ thousands of Americans and service hundreds of thousands of consumers, simply based on the alleged or actual actions or inactions of a mere handful of companies against whom enforcement action has been taken is illogical**. Proposing regulations that would severely and irreparably eliminate the vast majority of companies in an industry and basing the justification of the regulation on an unfounded stereotype due to the limited actions of alleged "bad apples" is no different than, for example, the Commission or another governmental agency proposing regulations that would put the majority of the wealth management industry out of business merely due to the actions of Bernard Madoff and Richard Piccoli.

The Commission also concludes that advance fees place a significant burden on consumers, and, therefore, result in substantial harm to consumers.[66] The Commission bases its conclusion, in large part, on its assertion that the practice of charging advance fees is "inherently inconsistent with the purported goal of the [debt settlement] services" because, according to the Commission, the debt settlement company's service is only rendered when the consumer's debts are settled.[67]

While the use of the word "advance" implies no work has been done prior to payment, debt settlement companies provide many services for their clients from the onset. Securing a settlement can take several months, however, it is important to note that the purpose of a debt settlement program is also to educate the consumer, help them stick to a budget aimed at resolving their unsecured debts and coaching them through the debt settlement process; along with obtaining settlements on their behalf. A debt settlement company begins incurring immense fixed and variable costs the minute it opens its doors to the public. Not only does the debt settlement company incur costs associated with marketing, payroll, insurance, rent, overhead, etc., there are many costs incurred beginning as soon as a client is accepted onto a debt settlement program.

For instance, before a client can even enroll onto Debt Shield's debt settlement program, they must:

- Go through an extensive consultation;
- Execute a service agreement;
- Enter into an agreement with a third-party payment processor [1] ;and
- Submit their budgetary, creditor and other information to the equivalent of an underwriting department for review and approval.

From there, an informational DVD is sent to the clients and a welcome call performed. Debt Shield then, by way of example and not by limitation:

- Begins notifying the client's creditors of the client's enrollment in the Debt Shield program;
- Enrolls (at Debt Shield's expense) the client with an organization that assists clients with creditor harassment;
- Aggregating the client's account statements and manually entering additional information into Debt Shield's computer system and records on an ongoing basis; and
- Maintains a staff to client ratio of 1:33, which underscores the level of interaction and support needed to assist its clients during some of the most stressful times of their lives.

From that point forward, Debt Shield is in regular communication with clients and provides them with constant coaching. Coaching can be focused on anything from budgetary assistance, emotional support, aggressive collection assistance, program updates, etc..

Debt Shield's negotiations team also spends exorbitant amounts of time building a rapport with various creditors and collectors and negotiating on each of the client's accounts (average client enrolls around 5 accounts). Negotiations are dynamic and a single account negotiation can take several hours over the course of many weeks to complete. From there, Debt Shield must work towards arranging and finalizing the settlement and additional coaching of the client. This is in addition to all the other services that Debt Shield provides clients, such as 24/7 web-based account access and ongoing creditor and collector statement/correspondence processing.

Debt settlement companies are for-profit entities and, rightfully, receive fees for the services they provide. Contrary to the Commission's position, the provided "services" are not simply the settlement of an enrolled account. Debt settlement companies, as demonstrated briefly above, perform a myriad of other services to their clients and incur significant expenses doing so. As concluded by the Briesch Study:

> **[C]harging consumers reasonable 'up-front fees,' before settlement, is consistent with practices in other industries, e.g. legal industry, and can be justified based on value provided to consumers as well as expense incurred generating this value. Any attempt to ban these fees would have a chilling effect on the industry and is inappropriate for this industry.**[68] (emphasis added).

In addition, regardless of the timing of the payment, whether pursuant to the Commission's proposed fee model or under the prevailing current fee models, the overall fees charged to consumers would be the same (or more using the Commission's model). As such, asking a consumer, who is suffering from financial hardship and who may not have the best track record for saving funds, to accrue or otherwise save up for debt settlement company fees to be paid solely after a settlement is reached with one of the

[1] Debt Shield, like many debt settlement companies, does not collect monthly payments from clients. Clients contribute monthly deposits into a set-aside account administered by a third-party. The clients maintain complete control of this account and may withdraw the funds at any time.

consumer's creditors is not only impracticable but unrealistic. Moreover, debt settlement companies would inevitably be placed in the untenable position by being converted into a creditor of their client should such client fail to remit payment to the debt settlement company after a settlement is executed. Such a situation poses a significant conflict of interest and goes against the very grain of the debt settlement company's goal of assisting their clients to resolve their enrolled debt; not take on additional debt.

The fact that loans, financing and lay-away plans are even an option for consumers is because it is far less burdensome for consumers to remit payments over a period of time rather than remitting one large payment all at once. This is analogous to telling a prospective automobile purchaser that a payment plan was no longer an option and instead they have to pay in full for the automobile upon delivery. To be clear, **requiring consumers to save funds for the purpose of making large fee payments to debt settlement service providers at some later date is far more burdensome than allowing consumers to pay for the services they are receiving in small portions over an extended period of time.**

As such, **Debt Shield contends that the Commission has not satisfied the first prong of the unfairness analysis as its conclusions were not based on objective facts and proscribing advance fees would be significantly burdensome to consumers.** Debt Shield respectfully requests that the Commission first continue to work with the debt settlement industry, which by in large supports reasonable regulation, to obtain and review the underlying data regarding such things as success rates prior to further pursuing amendments to the TSR based on incomplete, non-objective, non-representative data.

ii.) Potential Countervailing Benefits Outweigh the Potential Harm

The second prong of the unfairness test requires an analysis of the harm resulting from the underlying conduct and whether such harm is outweighed by countervailing benefits. **Debt Shield disagrees with the Commission's conclusion that the potential harm is not outweighed by the prospective benefit to consumers.**

As the industry data indicates, thousands upon thousands of consumers have received exceptional debt relief from debt settlement companies. Consumers benefit from not resorting to filing bankruptcy, receiving education on debt settlement, budgeting and planning and from resolving their debts. Even if a consumer takes what they learn from a debt settlement company and decides to settle their debt on their own, there is still an obvious and substantial benefit to that consumer.

If the Proposed Amendments, namely the proscription on advance fees, are adopted, the vast, overwhelming majority of debt settlement companies will be forced out of business. Quite simply, it costs too much to enroll and service clients prior to even reaching a settlement with the client's enrolled creditors for all but perhaps 2 or 3 debt settlement companies out of 2,000 to continue to remain in business. The only reason a few debt settlement companies would be able to operate using a model banning advance fees is if they are highly overcapitalized currently due to the fees they have generated using other fee models to date.

While the Commission seems to indicate somewhat of an understanding that such a restriction will be catastrophic to the sustainability of debt settlement companies in general, the Commission indicates that: 1) the companies could simply borrow money to sustain their operations while awaiting remuneration for their previously performed services; and 2) the increased costs would be outweighed by the benefit to consumers.

Again, the "increased costs" will, in fact, cause most if not all debt settlement companies to go out of business. **The result would be the unavailability of a much needed debt resolution option for a particular niche of consumers during the greatest recession America has seen since the Great Depression.** In addition, existing debt settlement clients would be materially negatively impacted as well. Specifically, the advance fee ban contained in the Proposed Amendments would cause the vast majority of existing debt settlement companies to close their doors, thus preventing thousands of existing debt settlement clients from continuing to receive the debt relief service they so desperately need. Such an outcome can hardly be considered a benefit to consumers.

Although the Commission suggests that debt settlement companies will simply be able to borrow money to sustain their operations, such an assertion is illusory at best. It is common knowledge in the business world today that credit markets are extremely tight and almost non-existent. Again, in the current economy, lenders simply are not lending money to businesses. Unfortunately, debt settlement companies are not capable of seeking an economic bailout from the federal government. Moreover, it seems to be common practice in the banking industry for most large lending institutions to have internal policies against lending to companies in the debt relief industry. As such, the suggestion that debt settlement companies could simply borrow money to sustain their operations after imposition of an advance fee ban is extremely unrealistic.

To be clear, the Commission has not established that a ban on advance fees meets the second prong of the unfairness analysis.

iii.) The Purported Harm is Reasonably Avoidable

"The third and final prong of the unfairness analysis precludes a finding of unfairness in cases where the injury is one that consumers can reasonably avoid."[69] The Commission bases its conclusion that consumers seeking debt relief services are unable to reasonably avoid the purported injury caused by advance fees on the proposition that the very business practices of debt settlement companies do not allow for consumers to make informed decisions. **Debt Shield disagrees with the Commission's conclusion that the ban on advance fees satisfies the third prong of the unfairness analysis.**

Even assuming *arguendo* that the Commission's above assertion with regard to the business practices of debt settlement service providers is accurate; the Commission's rationale contradicts and negates the purpose behind the Commission's own proposed mandatory disclosure requirements. An outright ban on advance fees is wholly unnecessary and does not provide consumers with any additional, tangible benefit they would not receive simply from mandatory disclosures.

Further, Debt Shield, like the vast majority of debt settlement companies, only enrolls a consumer after providing them with a thorough consultation as well as entering into a written agreement with the consumer. In addition, as a member of both TASC and USOBA, Debt Shield is required to provide mandatory disclosures to consumers as well as adhere to the bylaws of such organizations. As a result, consumers are provided with numerous disclosures and written documentation fully informing them of the pros and cons of a debt settlement program *prior to* enrolling them.

As such, again, Debt Shield disagrees with the Commission's conclusion that the ban on advance fees satisfies the third prong of the unfairness analysis and opposes the Commission's Proposed Amendments to §310.4 of the TSR.

However, Debt Shield may be willing to support the Commission's alternative advance fee ban proposed on page 85 of the NPRM. Specifically, in the NPRM, the Commission solicited input:

> [R]egarding an advance fee ban for the debt relief industry that parallels the *advance fee loan ban*. Under that alternative formulation, sellers or telemarketers of debt relief services would be prohibited from requesting or receiving payment of any fee or consideration for debt relief services *only when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging the promised debt relief for a person.* In Section VIII, the Commission seeks comments on the relative merits of the two versions of the advance fee ban, other possible alternatives, and the impact on industry of this proposed amendment.[70] (emphasis added)

While Debt Shield may be willing to support this alternative advance fee ban, the precise language of a Proposed Amendment regarding such would first need to be published so that Debt Shield and other interested parties could review the definition of what constitutes "has guaranteed or represented a high likelihood of success in obtaining or arranging the promised debt relief". **Debt Shield welcomes and encourages further explanation of the specific alternative to the advance fee ban from the Commission.**

B. The Commission Lacks Authority to Promulgate the Proposed Amendment to Ban Advance Fees

Pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCPA"), 15 USC 6101-6108, Congress directed the Commission to issue rules aimed at curbing "abusive telemarketing acts or practices".[71] Pursuant to such authority, the Commission promulgated the TSR. Again, Congress's intent when conferring such authority pursuant to the TCPA was largely focused on telemarketing (i.e. the making of unsolicited calls to consumers to sell products or services).

However, by way of several of the Proposed Amendments, including but not limited to the Proposed Amendments to §§ 310.4 and 310.6, the Commission is attempting to drastically and impermissibly expand the scope of the applicability of the TSR beyond that which Congress intended when it enacted the TCPA. While Congress intended for the TCPA to confer authority upon the Commission to issue rules aimed at curbing abusive telemarketing, the Commission's Proposed Amendments go well beyond telemarketing practices and clearly go towards impermissibly regulating all aspects of an industry beyond telemarketing practices, which Congress never intended be regulated to such extent by way of the TCPA and TSR.

For example, the Proposed Amendment to §310.6 would "also bring inbound debt relief calls within the ambit of the Rule."[72] By doing so, the Commission is impermissibly altering the definition of telemarketing to include inbound calls to debt relief servicers, which application to inbound calls is unquestionably something other than what Congress clearly and expressly intended. In essence, **the Commission is simply ignoring their Congressional mandate, removing the issue from consideration by the legislative branch and, in doing so, violating the separations of powers delineated in Article I, Section I of the United States Constitution**.

Previously, the Commission successfully amended the TSR to cover many of the services provided by credit repair organizations. Such amendments included an intended ban on advance fees. However, the Commission was authorized to tailor the TSR to address issues identified in the credit repair industry by way of Congress's passage of the Credit Repair Organizations Act[73] ("CROA") in 1996. Congress, by way of CROA, specifically authorized the Commission to issue rules consistent with CROA. **However, the Commission's attempt to issue the same types of rules with regard to debt relief service providers is impermissible without an analogous Congressional mandate.**

In fact, Congress is currently considering a resolution aimed at providing Commission with certain authority with regard to the issuance of rules concerning debt relief service providers. That resolution, known as the "Consumer Credit and Debt Protection Act," or H.R. 2309 (2009), contains the following provision:

> (a) RULEMAKING.— Section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) is amended by adding at the end the following new subsection: ''(k) Notwithstanding any other procedures set forth in this section or section 22, for any rulemaking relating to consumer credit or debt, the Commission shall conduct such rulemaking in accordance with section 553 of title 5, United States Code, and the provisions for judicial review of rules promulgated in accordance with such section shall apply to any rule promulgated in such a rulemaking.[74]

By way of the very inclusion of the above quoted section at the very beginning of H.R. 2309, it is clearly evident that without such conferment of authority, the Commission would be unable to otherwise issue rules in this regard. **As such, it seems clear that the Commission lacks the authority to issue such broad, overreaching Proposed Amendments to the TSR when the intent behind and the outcome of such rulemaking is outside the scope of the Commission's power and in violation of applicable constitutional mandates regarding the separation of powers.**

Again, the TSR's purpose is not to regulate a specific industry but rather to regulate the prevalent telemarketing techniques of many different industries. **"The purpose of the Act was to curb telemarketing deception and abuse and provide key anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services."**[75] In effect, the Commission's Proposed Amendments target the debt settlement industry specifically in an attempt to regulate all aspects of this industry beyond regulating common telemarketing techniques applicable to this industry and in the absence of a Congressional mandate for the same. Such an attempt is overreaching and is clearly not in line with the explicit Congressional intent behind the TCPA.

Debt Shield respectfully requests that the Commission either tailor the Proposed Amendments to strictly comport with clear Congressional intent (i.e., rules applicable only to outbound phone calls and conduct in specific relation thereto) or abandon any attempt to modify the TSR until such time as Congress confers the authority to do such upon the Commission by way of H.R. 2309 or otherwise.

C. <u>The Proposed Amendments Are Unnecessary in Light of Applicable State Laws and Conflict with State Laws</u>

Many states have already passed legislation or are considering legislation aimed at regulating debt settlement service providers. As such, barring an entirely new federal statute, the mere amendment of the TSR to include piecemeal regulations of debt settlement service providers by the Commission is both *unnecessary* and *unreasonable*. **Instead, Debt Shield would support Congressional action aimed at adopting a federal statute similar in many respects to several existing state laws and pending state bills.**

In fact, in 2005, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Debt Management Services Act ("UDMSA"), which provides states with "comprehensive rules for the regulation of the consumer debt counseling industry."[76] NCCUSL consists of lawyer-legislators, attorneys in private practice, state and federal judges, law professors, and legislative staff attorneys, who have been appointed by state governments to research, draft and promote enactment of uniform state laws in areas where uniformity is desirable and practical.[77] The UDMSA was a result of a intensive multi-year highly scrutinized study of the debt settlement industry. As this study progressed, NCCUSL recognized not only the benefit of the debt settlement industry but also the intense amount of work and service required of debt settlement companies in administration of debt settlement programs. In fact, by the end of this multi year study, the resulting UDMSA specifically set aside for a materially greater fee for debt settlement services and allowed for both an enrollment fee and a monthly fee to be charged prior to the settlement fee. The UDMSA "represents the first national effort at providing some uniform rules to govern both consumer credit counseling and debt settlement services"[78] and has been adopted by 6 states and introduced in 8 states thus far in 2009.[79]

In addition, approximately 20 other states currently regulate debt settlement and at least 3 additional states have introduced legislation in 2009. **Thus, more than half of the states currently regulate the industry and approximately 11 additional states are in the midst of passing legislation to regulate the industry.** As such, again, Debt Shield firmly believes that **barring Congressional action, the Commission's Proposed Amendments are unnecessary, with several such amendments being patently unreasonable.**

While the UDMSA is not perfect, Debt Shield would support efforts aimed at modeling federal legislation after many portions of the UDMSA to fairly regulate debt settlement. The UDMSA represents a comprehensive and solid foundation, with a few necessary alterations, for regulating debt settlement equitably. Moreover, other existing state laws are similar to the UDMSA, requiring similar disclosures and prohibitions on misrepresentations. As demonstrated by the UDMSA and existing state laws, the debt settlement industry clearly recognizes the importance of providing material disclosures and prohibiting misrepresentations to consumers.

i.) Debt Shield Supports the Spirit of the Proposed Amendments to §310.3(a)(1)(viii) of the TSR

Section 310.3(a)(1)(viii) of the Proposed Amendments, would require debt relief service provides to make certain disclosures to consumers in a conspicuous manner prior to the consumer remitting payment for the service or the services being rendered. **As indicated previously, Debt Shield fully supports *reasonable* regulation aimed at clearly providing consumers with all material information concerning a debt settlement program.**

In fact, since its inception, one of Debt Shield's overarching mottos has been F.I.R.E. – Fully Informed with Reasonable Expectations. Debt Shield's employees are trained and consistently reminded that Debt Shield's goal is to fully inform its clients and potential clients thereby setting reasonable expectations for our debt settlement program. By reinforcing the F.I.R.E. acronym throughout its policies and procedures, Debt Shield clients are educated on the pros and cons of their debt settlement program and the expectations related to the performance of debt settlement services. A key factor of our motto is to ensure the disclosure of material information to our clients and potential clients so they are better equipped to make informed decisions. Further, Debt Shield strives to stay abreast of current events, laws and legislation and adjusts its policies and procedures as necessary to stay ahead of the industry. Debt Shield also has an internal check and balance system in place in attempt to further ensure clients and potential clients receive material information necessary to make an informed decision about our debt settlement services.

Therefore, Debt Shield supports the *spirit* of Proposed Amendments to §310.3(a)(1)(viii) of the TSR However, as discussed in more detail below, **Debt Shield is adamantly opposed to the precise requirements of Proposed Amendment §310.3(a)(1)(viii)(A) and §310.3(a)(1)(viii)(B) due to the patent unreasonableness of the same.**

ii.) Debt Shield Opposes Certain Unfair and Unreasonable Aspects of Proposed Amendments to§§310.3(a)(1)(viii)(A) and 310.3(a)(1)(viii)(B) of the TSR

Unlike consumer credit counseling debt management programs where consumers enroll in a program wherein the consumer credit counseling agencies receive their compensation from creditors and have precise agreements in place with creditors governing the terms of the debt management plan, debt settlement programs are not rigid and each situation cannot be procedurally identical. Debt settlement, by its very nature (i.e., that of negotiating), is a dynamic process for which the provision or unwavering guarantee of *specific*, *precise*, *unchanging* time or cost parameters is not possible. The *exact* amount a given creditor will settle a debt account for and the *precise* time the same will be accomplished varies from client to client, from account to account and can be largely based on the algorithms, whims, actions or inactions of creditors, creditor representatives engaged in the negotiations, collections or debt purchaser representatives, along with a myriad of other factors.

This is analogous to, by way of example, legal representation wherein the attorney may be able to provide their client with an approximate cost of the legal representation to be provided but such can only be a projection based on prior experience. This is also analogous to a cost estimate provided by a general contractor to a prospective homeowner. In both of these dynamic situations, as with debt settlement, uncertainties and outside forces exist.

Again negotiation by its very nature is a dynamic process. While Debt Shield generally supports requirements that debt settlement companies be required to disclose certain, reasonable program terms, including *projected* settlement amounts and *projected* program lengths, mandating that precise, exact, unwavering settlement amounts and timeframes be provided to a consumer prior to enrollment in a debt settlement program is patently unreasonable as applied to debt settlement companies in particular.

The Proposed Amendments to the TSR also include additional disclosures not currently required by and in conflict with the UDMSA and other existing state laws.[80] These additional disclosures are more restrictive than current state laws creating a potential conflict. Typically, federal regulation provides broad strokes to form a stable foundation and guidelines leaving states to enact more restrictive laws. Here, the proposed amendments to the TSR propose the converse – creation of a new federal law much more stringent than existing state laws.

Requiring a debt settlement provider to specify the exact amount of time negotiations will take and the exact amount for which the creditor will agree to settle an account will, by necessity, cause all debt settlement companies to choose between not enrolling any more consumers or knowingly violating the Proposed Amendments. Obviously, neither outcome is beneficial to debt settlement companies, the Commission and, most importantly, to the consumers who so desperately require the assistance from debt settlement companies. As such, again, **Debt Shield opposes Proposed Amendments §310.3(a)(1)(viii)(A) and §310.3(a)(1)(viii)(B) as written.**

Instead, Debt Shield would support a requirement, similar to requirements of numerous states that have enacted legislation governing debt settlement companies, that debt settlement service providers be required to disclose the *projected* amount of time necessary to achieve the represented results and the *projected* amount of money or percentage of each outstanding debt that the customer must accumulate before a settlement offer is made to one of the customer's creditors.

iii). The Proposed Amendments Conflict with State Laws and Have Federalism Implications

The Commission is proposing changes to existing law that will have substantial direct effect on the States. While the Proposed Amendments indicate there is no express preemption of state law, the Proposed Amendments fail to address potential implied preemption and federalism implications.[81] As discussed above, many states have existing laws or are in the process of passing laws to regulate debt settlement.

Under the Federal Trade Commission Act ("FTC Act") and the Commerce Clause, the federal government has the authority to regulate unfair or deceptive acts or practices among the several states.[82] The federal government currently regulates debt settlement vis-à-vis Section 5 of the FTC Act, which states that the Commission:

> [...]is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a (f)(3) of this title, Federal credit unions described in section 57a (f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227 (b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.[83]

However, the federal government does not exercise full control over the regulation of debt settlement companies; such power is reserved to the states. The Tenth Amendment of the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The states are actively engaged in the regulation of debt settlement companies. The federal government becoming involved this late in the game will lead to potential conflicts and obstacles for debt settlement companies attempting to comply with both state and federal law. The inevitable result is possible extinction of the industry and harm to consumers by eliminating debt settlement as a viable debt relief option.

In addition, pursuant to the Supremacy Clause of the U.S. Constitution, from which arose the doctrines of preemption and federalism, federal law preempts any state law that conflicts with federal law.[84] Conflict arises when it is impossible to comply with both the state and federal regulations. Here, the Proposed Amendments, especially as they relate to prohibiting advance fees otherwise explicitly allowed by state laws and mandating disclosures that conflict with applicable state laws, if implemented, would by necessity, conflict with state law thus, resulting in preemption. **The Proposed**

Amendments to the TSR are inconsistent with existing state law and compliance with both will be financially prohibitive and impractical for existing debt settlement companies.

In a Memorandum for the Heads of Executive Departments and Agencies dated May 20, 2009, President Obama stated:

> [t]he Federal Government's role in promoting the general welfare and guarding individual liberties is critical, but State law and national law often operate concurrently to provide independent safeguards for the public. Throughout our history, State and local governments have frequently protected health, safety and the environment more aggressively than has the national Government. An understanding of the important role of State government in our Federal system is reflected in longstanding practices by executive departments and agencies, which have shown respect for traditional prerogatives of the States [...] The purpose of this memorandum is to state **the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption** [...]Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. (emphasis added)

The President's memorandum clearly reinforces former President Clinton's Executive Order 13132 of August 4, 1999, which too outlined federalism and preemption principles and indicated:

> Policies that have federalism implications refer to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, on the distribution of power and responsibilities among the various levels of government.

Executive Order 13132 lays out the fundamental principles of federalism as a guide for Federal agencies to adhere to when formulating and implementing policies. Most notably:

> The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.
>
> ***
>
> The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States **according to their own conditions, needs, and desires**.
>
> ***
>
> **The national government should be deferential to the States when taking action that affects the policymaking discretion of the States** [...] (emphasis added).[85]

Moreover, Executive Order 13132 established certain criteria for policies that have federalism implications:

> **Agencies shall closely examine the constitutional and statutory authority for the action and the national activity appropriate in light of the presence of a problem of**

national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, **agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.** [...]

***

When undertaking to formulate and implement policies that have federalism implications, agencies shall: [...] **Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States; [...] Where possible, defer to the States to establish standards;** [...] In determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and **any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority**; and [...] Where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards.

***

Agencies shall not submit to Congress legislation that would directly regulate the States in ways that would either interfere with functions essential to States' separate and independent existence or be inconsistent with the fundamental federalism principles in section 2 [...] Preempt state law, unless preemption is consistent with the fundamental federalism principals set forth in section 2, and **unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.** [86] (emphasis added).

The Commission makes no indication as to whether their objectives surrounding the Proposed Amendments can be attained by other means. To the contrary, the existence of the UDMSA, state laws and legislation in numerous states and actions by state attorney generals are evidence of other means by which any purported federal objectives can be and have been attained. The Proposed Amendments hinder rather than encourage the states' abilities to develop their own policies by forcing limitations, which are in several cases conflicting, on existing state laws. **Thus, the Proposed Amendments run afoul of the federalism principles enumerated by former President Clinton and President Obama.**

Furthermore, the Proposed Amendments affect the policymaking discretion of the states by seeking to ban advance fees, which fees are expressly permitted by many states, and proposing other requirements, such as specific disclosures, that are more restrictive than state laws. The Proposed Amendments are not deferential in any way to the laws of the respective states and were not drafted with the appropriate caution in this regard. Despite the Commission's claim that the Proposed Amendments would not preempt state laws as, according to the Commission, existing state laws *permit but do not require* advance fees to be charged, **the material, obvious effect on the states' discretion nevertheless exists. Those state laws that permit advance fees will be preempted by the adoption of the Proposed Amendments** and future state laws will be prevented from including an allowance of advance fees and less restrictive disclosures regardless of whether public policy of the states permit it. In fact, the overwhelming majority of states that have enacted laws aimed at regulating the debt settlement industry have not adopted the sort of advance fee ban proposed by the Commission.

To be clear, by way of the Proposed Amendments, the Commission is taking the stance that it's position, which is not shared by the majority of the states, is correct and the belief and findings of the learned and respected state legislators, along with their countless numbers of staff and public policy analysts, feedback from constituents and countless hours of debate simply got

things all wrong when they made the explicit decision to permit collection of reasonable advance fees as being in the best interest of the citizens of their respective states. Debt Shield adamantly disagrees with the Commission's conclusion in this regard.

There is little disputing that fair and equitable regulation is needed for the debt settlement industry. Since state regulation has been and is currently underway, the need for federal regulation may not be necessary or should be limited to providing minimum regulations to establish parameters for states to adopt or modify as necessary to represent the needs of their consumers. Providing minimum federal regulation would also offer protection for those consumers in states that have yet to pass their own laws regulating debt settlement. Federal regulation should not impede the policymaking discretion of the states by interfering with ability to adopt laws as strict or lenient as their consumers demand.

VI. Conclusion

Again, Debt Shield appreciates the opportunity afforded by the Commission to comment on the Proposed Amendments and the NPRM. While Debt Shield supports fair, reasonable regulation, the Proposed Amendments simply go too far and are harmful to consumers. Hopefully, the Commission will work with the industry in promoting self regulation and consumer protection and allow either states or the U.S. Congress to draft, consider and pass appropriate legislation concerning the debt settlement industry.

Respectfully submitted,

Brian Tawney
General Counsel

Heather Thomas
Assistant General Counsel

---

[1] 74 FR 41988 (August 19, 2009)
[2] Speech given at the Brookings Institute on 9-15-09:
http://www.federalreserve.gov/newsevents/speech/bernanke20090821a.htm. Retrieved 9-21-09.
[3] Id.
[4] "US Housing Start Hit 9-Month High," 9-17-09. NY Times:
http://www.nytimes.com/2009/09/18/business/economy/18econ.html?_r=3&ref=business. Retrieved 9-21-09.
[5] "Jobless Rate Down for First Time in a Year," 8-7-09. CNNMoney.com:
http://money.cnn.com/2009/08/07/news/economy/jobs_july/index.htm. Retrieved 9-21-09.
[6] "Economic News Release: Table A-9. Unemployed persons by duration of unemployment," 10-2-09. Bureau of Labor Statistics, US Department of Labor: http://www.bls.gov/news.release/empsit.t09.htm. Retrieved 10-20-09.
[7] "Commissioner's Statement on the Employment Situation News Release," 10-2-09. Bureau of Labor Statistics, US Department of Labor: http://www.bls.gov/news.release/jec.htm. Retrieved 10-20-09.
[8] "Job Losses Ebb, But Unemployment Up," 9-4-09. CNNMoney.com:
http://money.cnn.com/2009/09/04/news/economy/jobs_august/index.htm. Retrieved 9-21-09.
[9] Speech given at the Brookings Institute on 9-15-09:
http://www.federalreserve.gov/newsevents/speech/bernanke20090821a.htm. Retrieved 9-21-09.

[10] "For Many, Economic Recovery Still Feels Far Off," 9-14-09. MSNBC.com: http://www.msnbc.msn.com/id/32661591/ns/business-economy_in_turmoil//. Retrieved 9-21-09.
[11] "Regional and State Employment and Unemployment Summary," 9-18-09. Bureau of Labor Statistics, US Department of Labor: http://www.bls.gov/news.release/laus.nr0.htm. Retrieved 10-20-09.
[12] "Employment Situation Summary," 10-2-09. Bureau of Labor Statistics, US Department of Labor: http://www.bls.gov/news.release/empsit.nr0.htm. Retrieved 10-20-09.
[13] Id.
[14] "Delinquencies Continue to Climb, Foreclosures Flat in Latest MBA National Delinquency Survey," Mortgage Bankers Association, 8-20-09: http://www.mbaa.org/NewsandMedia/PressCenter/70050.htm. Retrieved 9-22-09.
[15] "Soaring Spillover," Center for Responsible Lending, May 2009: http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-accelerating-foreclosures-to-cost-neighbors-436-billion-in-2009-alone-73-4-million-homes-lose-5-900-on-average.html#. Retrieved 9-22-09.
[16] García, José. "Borrowing to Make Ends Meet, The Rapid Growth of Credit Card Debt in America," Demos: http://demos.org/publication_list.cfm?mediatype=093801F1%2D3FF4%2D6C82%2D59E2BFE85C22C326. Retrieved 9-21-09.
[17] Id.
[18] Manning, Robert D. "Living with Debt: A Life Stage Analysis of Changing Attitudes and Behaviors," LendingTree.com, 2005: http://www.lendingtree.com/livingwithdebt/. Retrieved 9-22-09.
[19] "Medical Bankruptcy in the United States, 2007: Results of a National Study," The American Journal of Medicine. 6 June 2009.
http://www.washingtonpost.com/wp-srv/politics/documents/american_journal_of_medicine_09.pdf. Retrieved 9-21-09.
[20] "America's Middle Class Still Losing Ground" Center for American Progress. 7-30-08: http://www.americanprogress.org/issues/2008/07/middle_class_squeeze.html. Retrieved 9-17-2009.
[21] "Medical Bankruptcy in the United States, 2007: Results of a National Study," The American Journal of Medicine. 6-06-09:
http://www.washingtonpost.com/wp-srv/politics/documents/american_journal_of_medicine_09.pdf. Retrieved 9-21-09.
[22] "Credit Card Charge-offs Rise as Banks Lose Hope of Collecting," LATimes.com, 9-15-09: http://latimesblogs.latimes.com/money_co/2009/09/credit-card-default-delinquency-rates.html. Retrieved 9-22-09.
[23] "Credit Card Losses Climb With Jobless Rate in August," Reuters via NYTimes.com, 9-16-09: http://www.nytimes.com/reuters/2009/09/16/business/business-us-creditcards-abs-losses.html?_r=1&scp=6&sq=charge%20offs&st=cse. Retrieved 9-22-09.
[24] Saha-Bubna, Aparajita. "Credit Card Losses Ease But Not Much," Online.WSJ.com, 9-16-09: http://online.wsj.com/article/SB125302997590612423.html. Retrieved 9-22-09.
[25] "Credit Card Charge-offs Rise as Banks Lose Hope of Collecting," LATimes.com, 9-15-09: http://latimesblogs.latimes.com/money_co/2009/09/credit-card-default-delinquency-rates.html. Retrieved 9-22-09.
[26] "Bad-debt Prices Down More Than Half," Collections & Credit Risk, 9-21-09: http://www.paymentssource.com/asset/article/2700231/bad-debt-prices-down-more-than-half.html?pg=.
[27] Id.
[28] "Nearly 300 Collection Firms Sued in Early August," Collections & Credit Risk, 8-21-09: http://www.paymentssource.com/asset/article/2696161/nearly-300-collection-firms-sued-early.html?pg=. Retrieved 9-22-09.
[29] "Top 10 List of Consumer Complaints for 2008," National Association of Attorneys General, 8-31-09: http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php. Retrieved 9-22-09.
[30] Bankrate.com "Credit Card Calculator: The True Cost of Paying the Minimum": http://www.bankrate.com/calculators/managing-debt/minimum-payment-calculator.aspx .(10/20/09)
[31] "Soaring Spillover," Center for Responsible Lending, May 2009: http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-accelerating-foreclosures-to-cost-neighbors-436-billion-in-2009-alone-73-4-million-homes-lose-5-900-on-average.html#. Retrieved 9-22-09.
[32] "Risking Home to Pay Off Credit Cards," Center for Responsible Lending, Nov. 05: http://www.responsiblelending.org/credit-cards/research-analysis/ip012-Risking_Homes_Credit_Cards-1105.pdf. Retrieved 9-23-09.
[33] Susan Keating, President of the National Foundation for Credit Counseling, "Group Seeks Affordable Debt Plans." NewsAdvance.com. 01-19-2009.
http://www2.newsadvance.com/lna/business/local/article/group_seeks_affordable_debt_plans/12543/ Retrieved 09-17-2009
[34] Susan Keating, president of the National Foundation for Credit Counseling, "Group seeks affordable debt plans." NewsAdvance.com. 01-19-2009.

http://www2.newsadvance.com/lna/business/local/article/group_seeks_affordable_debt_plans/12543/ Retrieved 09-17-2009

[35] "Credit Counseling in Crisis," Consumer Federation of America & NCLC, Apr. 2003: http://www.consumerfed.org/pdfs/credit_counseling_report.pdf. Retrieved 9-24-09.

[36] "Economic Factors and the Debt Management Industry." Richard A. Briesch, PhD, Associate Professor, Cox School of Business, Southern Methodist University. (pg 3). August 6, 2009. http://www.consumercreditchoice.org/

[37] *See for e.g.* "Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling", Report prepared by the Majority & Minority Staffs of the Permanent Subcommittee on Investigations, United States Senate (March 24, 2004).

[38] *See, for e.g.,* "NFCC Initiates Debt Settlement Awareness Campaign", *Notables* (Spring/Summer 2009, Volume 17, Number 1) page 6, http://www.nfcc.org/Newsroom/Notables/Notables_052009_LOW_FNL.pdf

[39] *See for e.g.* "Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling", Report prepared by the Majority & Minority Staffs of the Permanent Subcommittee on Investigations, United States Senate (March 24, 2004).

[40] "The IRS has revoked, terminated or proposed revocation of more than half of the organizations examined, representing 41% of revenue in the industry, based on latest available IRS filing data. By rigorously reviewing new applications, we were able to prevent abusive organizations from receiving tax exemption. Out of 110 recently reviewed applications, only three met the requirements for tax-exempt status; 95 were not approved and the remaining 12 are pending." Credit Counseling Compliance Project Frequently Asked Questions (September 30, 2006) http://www.irs.gov/pub/irs-tege/cc_initiative_faqs.pdf

[41] Id.

[42] "Consumer Bankruptcy Filings Reach Highest Monthly Total Since 2005 Bankruptcy Law Overhaul," American Bankruptcy Institute, 8-4-09: http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=58351&TEMPLATE=/CM/ContentDisplay.cfm. Retrieved 9-23-09.

[43] "Bankruptcy Reform's Impact: Where Are All the "Deadbeats'?" National Association of Consumer Bankruptcy Attorneys, 2-22-06: http://www.nacba.com/files/main_page/022206NACBAbankruptcyreformstudy.pdf. Retrieved 9-24-09

[44] Id.

[45] Id.

[46] Id.

[47] American Bankruptcy Institute http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=57826

[48] American Bankruptcy Institute http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=58571

[49] "Debtor Discharge and Creditor Repayment in Chapter 13," Scott F. Norberg, , pg.1, (2006).

[50] American Bankruptcy Institute *http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyStatistics/Bankruptcy_Filings_1.htm*

[51] "Debt Settlement: Fulfilling the Need for an Economic Middle Ground" Dr. Bernard Weinstein and Dr. Terry Clower. Sept 09.

[52] "Economic Factors and the Debt Management Industry." Richard A. Briesch, PhD, Associate Professor, Cox School of Business, Southern Methodist University. August 6, 2009. http://www.consumercreditchoice.org/

[53] Id.

[54] Id.

[55] *See for e.g.,* Hunt, Robert M. (2005), "Whither Consumer Credit Counseling?" Business Review, Q4, 9-20.

[56] "Debt Settlement Industry Prove Value to Creditors," The Association of Settlement Companies, 9-3-09: http://www.tascsite.org/article.php?id=52. Retrieved 9-23-09.

[57] Id.

[58] NPRM at pg. 70

[59] Id.

[60] Id.

[61] Id. at pg. 84

[62] Id. at pgs. 72-77

[63] "Economic Factors and the Debt Management Industry." Richard A. Briesch, PhD, Associate Professor, Cox School of Business, Southern Methodist University. (pg 23). August 6, 2009. http://www.consumercreditchoice.org/

[64] NPRM at pg. 73

[65] Id. at pgs. 73-74

[66] Id. at pgs. 74-77
[67] Id. at pg. 75
[68] "Economic Factors and the Debt Management Industry." Richard A. Briesch, PhD, Associate Professor, Cox School of Business, Southern Methodist University. (pg 24). August 6, 2009. http://www.consumercreditchoice.org/
[69] NPRM at pg. 81
[70] Id. at pg. 85
[71] Id. at pg. 6
[72] Id at pg. 46
[73] 15 USCA 1679 (2009)
[74] H.R. 2309 (2009)
[75] NPRM at pg. 6 & 15 U.S.C. 6102(A)(3)
[76] The National Conference of Commissioners on Uniform State Laws: http://www.nccusl.org/Update/
[77] Id.
[78] Uniform Debt Management Services Act: http://www.udmsa.org/
[79] The National Conference of Commissioners on Uniform State Laws: http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-udmsa.asp
[80] The NPRM includes disclosures and prohibits misrepresentations regarding the amount time necessary to achieve the represented results, the specific time by which a settlement offer will be made, and the amount of money or percentage of each debt that must accumulate before a settlement offer will be made. NPRM at pgs. 124-128.
[81] NPRM at pg. 77, citing 16 C.F.R. 310.7(b).
[82] 15 U.S.C. 6105(b) & Article 1, Section 8, Clause 3 of the U.S. Constitution.
[83] 15 U.S.C. 45(a)(2)
[84] Article VI, Clause 2 of the U.S. Constitution.
[85] 64 FR 43255 (August 10, 1999)
[86] 64 FR 43255 (August 10, 1999)