April 28, 2010

David C. Vladeck
Director - Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Via Hand Delivery and Electronic Mail

Re: Telemarketing Sales Rule – Debt Relief Amendments, R411001
Supplement to Previously Filed Comments

Dear Director. Vladeck:

Thank you very much for the opportunity to meet with you and other members of the staff on April 21, 2010. Our meeting was the outgrowth of previous meetings held with the staff on March 4, 2010 and March 18, 2010, the focus of which was to discuss the industry's "safe harbor" proposals, a set of operating principles that would enable subscribing companies to continue to offer consumers the option of obtaining debt settlement services under the industry-standard "fixed-fee" model. We believe that an appropriately crafted safe harbor will benefit consumers while, at the same time, address the Commission's concern, as set forth in the Notice of Proposed Rulemaking ("NPR"), that any compensation methodology that allows fees to be collected in advance of the actual settlement of debt is *per se* an abusive practice.

When discussing compensation methodology in the debt settlement services industry a distinction must be drawn between the term "advance fee model," which the Commission has used in the NPR to refer to any debt settlement plan where fees are collected in advance of the settlement of debt, and the term "fixed-fee model," which the industry uses to describe the standard practice in which fees are collected ratably over a period of time, generally not less than the estimated half-life of the program[1]. The fixed-fee model is similar to the compensation model applicable to other professional services, such as legal or medical services, where periodic payments are made as work is performed, often regardless of outcome. The industry believes that the fixed-fee model strikes an appropriate balance between the interests of the consumer and those of the debt settlement services provider, a balancing that has been recognized as appropriate by those states that have adopted the

[1] Under the"fixed-fee" model fees for a debt settlement services contract are calculated as a percentage of the debt at program inception. These fees, commonly between 15% and 18% of enrolled debt, depending on the state and the provider, are charged ratably over not less than half of the estimated program life. Thus, in a 36-month program with $20,000 of original debt and a 15% program fee the consumer would pay a total of $3,000 in 18 monthly installments of $167 each (assuming level billing).

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Uniform Debt Management Services Act ("UDMSA"), a model act promulgated by the Uniform Law Commission after more than seven years of study and debate. TASC is an enthusiastic supporter of the UDMSA and our opposition to the "advance fee" ban is not an endorsement of any alteration or reduction of the current standard of not less than the half-life of the program as a period during which fees may be collected.

We are concerned that, notwithstanding the industry's constructive engagement with the staff and our having brought forward substantive proposals that would change, fundamentally, the way the industry operates, the staff appears to be ready to recommend that the Commission move forward with the "advance fee" ban, as proposed in the NPR, which would result in a ban of the fixed-fee model. Although members of the staff have acknowledged in our meetings that legitimate debt settlement service providers deliver substantial results and measurable benefits to consumers, there appears to be a willingness to "throw the baby out with the bathwater," so to speak, by undermining the viability of the legitimate debt settlement services providers. We are further concerned that the staff's recommendations – which, if implemented by the Commission, will affect the entire debt settlement industry – are predicated upon the experience, as described in the NPR, of a very few "bad actors" and a disproportionately small number of injured consumers. While the industry has never disputed that "bad actors" exist, the evidence is insufficient to conclude that the industry's standard post-sale customer billing practice constitutes an "abusive telemarketing act or practice." Instead, the evidence points overwhelmingly to an industry that treats its clients respectfully and responsibly while producing significant benefits for consumers that far outweigh the cost of realizing those benefits[2]. Finally, as discussed in Part III below, we believe that the advance fee ban will have a significant negative impact on consumers as a result of increased creditor leverage in the settlement negotiation process.

We remain hopeful that we can continue to engage with the staff on what we believe are very substantive proposals to enhance consumer protections for those seeking the benefits of debt settlement programs while, at the same time, preserving the viability of the overwhelming number of honest debt settlement service providers as the only truly independent voices available to consumers forced to deal with the credit card banks. We believe that our submissions to the Commission of performance and outcome statistics have demonstrated that debt settlement can and does benefit a substantial constituency of financially distressed consumers, and that we have advanced appropriate frameworks for safe harbor discussions; in that spirit we are pleased to offer a written recap of the proposals we have been discussing with the staff.

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[2] We respectfully submit that if, as has been suggested, "late night television advertising" is the primary basis for the staff's concern, then the agency already has both the authority and the responsibility to go after those whom the staff believes are engaging in false and deceptive advertising. We further respectfully submit that if "late night television advertising" is truly a focus of the staff's concern then price and business model regulation are inappropriate tools to address this problem, as compared with the ample and effective enforcement mechanisms already available to the staff.

I: Background for Our "Safe Harbor" Proposals.

We, as an industry, were caught by surprise by the focus in the NPR on the proposal to regulate the business model under which virtually all debt settlement service providers operate, the more so given consumer acceptance for what we believe is a fair, transparent and consumer-focused compensation system for services rendered. We will not revisit here the statistics set forth in the comment letters filed with the agency in response to the NPR[3], but it is worth repeating that, in 2009 alone, TASC members settled more than $1.1 billion of debt for about 40 cents on the dollar. This means that TASC members delivered about $640 million of debt reduction benefit to our nation's most vulnerable consumers[4]. Equally important, our statistics demonstrate tangible, measurable and very substantial benefits delivered not only to those who are able to complete a debt settlement program but also for a substantial subset of those who, for whatever reason, are unable to do so[5].

While we remain secure in the knowledge that our fees are earned and deserved because we deliver outstanding results for our clients, we have come to a greater appreciation of the staff's perspective on the structure and timing of those fees, especially when viewed in the context of a consumer who is unable, for whatever reason, to complete his or her debt settlement program or, equally important, when a renegade service provider collects fees but does not deliver the agreed upon service. Historically, the industry has addressed the first issue by offering refunds (often in the full amount of fees paid) on an *ad hoc* basis; however, we believe that consumers would be better served by the more systematized approach to refunds we have previously proposed to the Commission, and as more fully discussed below. With respect to the second concern, notwithstanding that TASC is a purely voluntary trade association, we investigate every consumer complaint made against a member, as well as undertake significant "secret shopping" activities on our own, and respond to behavior by members that is found not to meet our association standards by directing the member to cure the defects and, where the member does not do so, expelling the member. We have taken this extreme step on numerous occasions[6], and would be pleased to share with the staff our examination and remediation processes.

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3 Comment Letter from TASC, dated October 26, 2009 (hereinafter the "TASC Comment Letter"). See also Comment Letter from Freedom Debt Relief, LLC, dated October 26, 2009, and Supplemental Response to Follow-Up Meeting of December 3, 2009.

4 It is also worth noting that the benefits realized by consumers relative to the cost of continuing to make minimum monthly payments on an ever-growing mountain of debt (assuming that our clients could do that) far exceeds the number given here.

5 As we have discussed with the staff, characterizing the group of consumers who are unable to complete their debt settlement programs as "drop outs" or "terminations" is inaccurate. The vast majority of people who are unable to complete a debt settlement program are forced out either because they face a cascade of creditor lawsuits or suffer a job loss, serious illness or other major life event, leaving bankruptcy as the only alternative.

6 TASC has expelled seven members for a variety of what were deemed to be very important non-compliance issues. In addition, TASC has required a much greater number of members to change certain of their operating procedures to address less serious compliance concerns.

We have approached the issues raised by the Commission in the NPR as an historic opportunity to embrace several sweeping changes in the manner in which debt settlement companies interact with consumers and, in the process, empower consumers in a substantively enhanced way. At the same time, we believe that this objective can be achieved without threatening the existence of legitimate debt settlement services providers to continue to serve as independent voices for our nation's most financially challenged constituency.

II: Articulating a "Safe Harbor" in the Context of Industry Best Practices.

We believe that there is a better way to more closely tie the payment of fees to the delivery of value than to prohibit the fixed-fee model, which prohibition would occur if the overbroad "advance fee" prohibition is promulgated. A "safe harbor" is in the interests of consumers, the industry and the public: it will provide guidance where none now exists, provide consumers with clear and understandable disclosures while protecting them from the risk of non-performance, preserve, rather than restrict, consumer choice and insulate the industry from unwarranted criticism. Moreover, to the extent that the "safe harbor" provisions are satisfied, the perceived risk of injury to consumers discussed in the NPR would be addressed in a manner that provides the same or greater consumer protections without the harm to consumers and competition that would inevitably result from the adoption of the "advance fee" ban.

The following proposals are not meant to replace the existing industry "best practices" nor are they advanced as a unitary whole. Rather these proposals are meant to provide alternative regulatory approaches that will enhance the already-substantial consumer protections currently deployed by the industry, ensure that "bad actors" will no longer be able to do business in an unfettered manner and improve consumer protection throughout the customer relationship lifecycle[7]. Alternatively, if the Commission decides to proceed with a general prohibition of any "advance fee," we believe that, to ensure the continued viability of the great many legitimate providers that operate under the fixed-fee model, the Commission should adopt a "safe harbor" from that prohibition for companies that meet one or more of the following conditions or standards.

1. Systematized Suitability Testing. No consumer should be enrolled in a debt settlement program unless that particular program is suitable for that particular consumer. While many in the industry currently perform suitability analyses, TASC has proposed to formalize suitability testing by requiring, as a condition to association membership, that the debt settlement provider prepare a *pro forma* financial statement and proposed budget, both of which would be given to and acknowledged by the consumer. The financial statement and

[7] While we respectfully submit that the Commission has no jurisdiction to regulate the industry's billing practices as an "abusive telemarketing act or practice" under the Telemarketing Fraud and Consumer Protection Act, as more fully discussed in the TASC Comment Letter, we offer these concepts in the belief that appropriate safe harbor provisions serve the public interest by ensuring a heightened level of consumer protection in a manner that would cause far less harm to competition, generally, and the legitimate members of the debt settlement services industry, specifically, than the harm that would be caused by a sweeping and indiscriminate "advance fee" ban.

budget must demonstrate that, based on current income and assets, the consumer has a substantial likelihood of being able to complete the program.

While there is certainly a role that industry associations can and should play in the context of helping promulgate appropriate suitability guidelines[8], our belief is that a systematized suitability test should be applicable to all debt relief service providers, not just those that belong to one of the two industry trade associations. TASC proposes that the FTC require that a debt settlement company would have to perform this financial analysis prior to any consumer enrollment and that this analysis demonstrate, graphically and objectively, the consumer's ability to meet the financial demands of a debt settlement program, including the monthly deposit amount and the periodic payment of fees. This financial analysis would be presented to the consumer along with the contract documents and, once separately acknowledged by the consumer, would become part of the contract, a representation that the consumer's financial condition is as represented and that the consumer understands the financial responsibilities necessary for program success and would be available in any subsequent analysis or testing of the debt settlement service provider's enrollment decisions. This suitability standard is, we believe, an important component of the consumer due diligence that should be performed by each debt settlement services provider prior to program commencement.

It is important to remember that suitability analyses can only speak as of the date they are performed. As we have noted to the Commission, there are events that occur subsequent to enrollment, including a consumer's inability to stick with the requirements of whatever budget is agreed upon, that can, and will, result in program failures[9]. Simply put, not everyone will succeed in a debt settlement program no matter how appropriate the program may be at the time of inception. The purpose of a suitability analysis is to provide both parties with a reasonable basis for believing that the consumer can succeed in his or her debt settlement program, not to guarantee success, as much as we all may wish that to happen.

We have attached, as Exhibit A to this letter, the more extensive discussion of suitability filed by TASC with the Commission on April 21, 2010. In the interests of brevity we will not recap the points made in that letter, however it is worth repeating that an appropriate suitability screening process

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[8] Commissioner Thomas Rosch, on page 15 of his April 9, 2009 remarks to the Credit & Collections News Conference, endorsed the self-regulatory efforts of TASC and USOBA and urged upon us an expanded role in helping define the parameters of consumer protection in this area. Commissioner Rosch stated, "Self-regulation can provide a critical complement to the FTC's law enforcement actions....Moreover, the judgment and experience of an industry in crafting rules themselves can also be of great benefit, especially where the business practices are complex and industry members have inside knowledge and experience to craft "best practices."

[9] As we have mentioned to the staff in several of our meetings, one of the most critical factors in keeping consumers in debt settlement programs is the willingness of the consumer's creditors to forebear from pursuing collections efforts through lawsuits. While we appreciate that the Commission does not have jurisdiction over the activities of banks, we strongly encourage the Commission to consider a public recommendation (and to recommend to the appropriate banking regulators) that creditors grant a moratorium on collections efforts for consumers who enroll and remain in debt settlement programs that comply with the Commission's regulations (similar to the forbearance that creditors currently extend to clients of consumer credit counseling organizations).

(which, we believe, should be similar to the screening process used by credit card issuers when determining whether or not to issue credit[10]) not only protects consumers in a way that no other requirement could but also works to separate the ethical industry participants from those who, in pursuit of fees, simply accept anyone into their programs without regard for likelihood of success.

2. Enhanced Refund Policy. To date, the industry has addressed refunds of fees paid in an *ad hoc* manner. TASC proposes a simple, straightforward and more systematized refund mechanism:

- Absolute 30-day right of rescission, with refund of 100% of any fees paid to the debt settlement services provider.
- Thereafter and up until the first settlement, the consumer will have the right to terminate his or her contract and receive a refund of all fees paid LESS a per-month account maintenance fee that would be no greater than the monthly account fee allowed to consumer credit counselors under the law of the state of the consumer's residence.

Once a settlement has been accepted by the consumer this right of refund would lapse; this does not mean, however, that the consumer loses a critical protection. In fact, the first settlement often results in a consumer benefit (measured by the difference between the amount owed at the time of settlement and the amount paid to settle the debt) that exceeds the amount of program fees paid up to that point. Accordingly, this refund policy not only goes a long way towards ensuring that every consumer entering a debt settlement program will receive the benefit of the bargain, so to speak, but protects the consumer up to the point that the benefits of the program are likely to outweigh the cost. Moreover, it accomplishes the staff's objective of removing the "bad actors" from the landscape by encouraging debt settlement services providers to make the kinds of infrastructure investments necessary to ensure consumer satisfaction. This is protection that is not only unprecedented in its scope but far exceeds what any other debt relief option (or, for that matter, any other consumer financial service) promises or delivers.

In conversations with the staff regarding our proposal for an enhanced and formalized refund policy concern was expressed that it would leave consumers at the mercy of "fly by night" operators who would not honor a refund obligation or vanish with the consumer's funds. This is a concern that has already been addressed in the UDMSA with a mandate requiring that the debt settlement services provider have in place a surety bond for the protection of consumers as a condition to state licensing. Surety bonds are already a component of virtually all state laws that regulate debt settlement and are a time-tested and commercially available mechanism for protecting the interests of consumers. Moreover, because they are only issued to the financially secure, surety bonds provide an additional mechanism for weeding out the "bad actors." Indeed, the bonding companies do a far more effective job of

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[10] The Federal Reserve Board has mandated that lending institutions utilize reasonable procedures to verify that the consumer to whom credit is proposed to be extended has a reasonable likelihood of being able to repay the loan. Attached hereto as Exhibit B are the guidelines, published at 12 C.F.R. 226.51(a)(1).

screening out inappropriate service providers than could any regulator, primarily because they have a direct financial stake in the behavior of the bonded company.

In structuring this concept we paid particular attention to the staff's desire to properly incentivize debt settlement services providers to actually perform those services the consumer reasonably expects will be provided. While no debt settlement services provider can – or should be required to – guarantee a specific outcome, we are confident that this refund mechanism achieves a more precise alignment of interests by speaking directly to the consumer's reasonable expectations that the consumer's debts will be settled through the program.

While each of these proposals, taken individually, would go a long way toward answering the Commission staff's concerns, we note that *combining* suitability screening with a robust refund policy provides an exceptionally powerful consumer-centric safe harbor by (a) ensuring that a consumer has a reasonable chance of success before he or she is enrolled into a debt settlement program, (b) providing a consumer with an essentially cost-free way out, if he or she decides that the program isn't working and (c) disabling the "bad actors" from offering debt settlement services under the fixed-fee model.

3. Measurement of Consumer Outcomes: (Debt Reduction/Benefit Compared With Fees Collected). We have, in our discussions, drawn a distinction between the legitimate industry participants and those who may be less committed to consumer protection and performance than are the members of TASC. We believe that compensation prohibitions are not appropriate for legitimate debt settlement service providers, those that achieve measurable and significant outcomes for their clients. Legitimate debt settlement service providers should not be subject to Commission-mandated price and method regulation because the stated purpose of such a ban is to regulate "bad actors," companies that do not provide measurable and adequate levels of service. One possibility might be that, if the Commission adopts an advance fee ban in its final regulations, to provide safe-harbor protection to companies that can demonstrate that they provide more in consumer benefit than they collect in fees. Another possibility might be to define an acceptable level of consumer savings, independent of fees. In both cases, it would make sense to apply these standards only on a portfolio-wide basis, taking into account all of the variables that affect outcomes and looking at appropriate vintages, rather than attempt to quantify savings or performance at the individual level (which sounds more like an inappropriate specific outcome guarantee).

4. Side-by-Side Offerings. Notwithstanding our opposition to the contingency-fee model as an exclusive compensation solution, TASC has always supported the consumer's right to choose the debt settlement program that best suits his or her particular circumstances. We support, and will continue to support, the solution found in the adopted version of the UDMSA, which enables companies to offer both models (we have attached as Exhibit C to this letter a draft of the fee alternatives worked out between ourselves and the Uniform Law Commission).

If, however, the staff believes that the offering of a contingency fee model is necessary for the protection of consumers, we suggest consideration be given to allowing debt settlement service providers to offer to consumers both models – the contingency-fee model and the fixed-fee model – on a side by side basis. Assuming full and fair disclosure that does not favor one model over the other, consumers would then be able to choose the payment structure that is best for them. Offering both models, in a value-neutral, comparative way, would enhance consumer choice while addressing the concerns raised by the Commission in the NPR. It is also the only way to neutralize the power shift described below, as it is the only way to deny creditors the information that would enable them to manipulate the timing and amount of a debt settlement service provider's revenue event[11].

5. Timing of Receipt of Fees. In our meeting we spoke of a balancing of risk between the consumer and the debt settlement services provider. At one end of the spectrum would be a fee mechanism where all fees are collected prior to the provision of any services – what would appropriately be called "an up-front fee model." In this case, all of the monetary risk is borne by the consumer. At the other end of the spectrum lies the contingency fee model (what some term the "success fee" model), where no fee is collected prior to the actual settlement of the underlying debt; in this case, all of the monetary risk is borne by the debt settlement service provider.

As was pointed out at our meeting, almost all of the states that have enacted the UDMSA-based regulatory framework for the debt settlement industry have chosen a middle ground, one where the monetary risk is a shared one. This shared-risk system requires that fees be collected on a periodic basis, in no case less than the estimated half-life of the debt settlement program. While we feel the fixed-fee model appropriately allocates monetary risk, we understand the staff's desire to advance a model that moves the risk further away from the consumer. In this formulation, the debt settlement services provider would collect either no fee at all or only a modest monthly service charge until such time as the first debt was settled, at which time the fee structure would revert to the fixed-fee model. Minnesota has enacted a compensation methodology very similar to this one and, while we believe there are ways in which the Minnesota model could be streamlined and improved, we believe this is a concept worthy of consideration.

III: Additional Issues

In addition to the proposals presented above, there are several additional issues that we have been discussing and that we believe must be addressed in any final rulemaking that would, if sustained, prohibit a well-understood and accepted pricing model in favor of a brand new and wholly untested pricing model.

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[11] We were disappointed that, in our discussions, the staff appeared to have little enthusiasm for our side-by-side proposal. While such comparisons may be very information-rich we believe it is a proposal worthy of testing. If the Commission is serious about gathering consumer acceptance data about the "success fee" model – data that, today, simply does not exist – there is literally no other way to obtain such data.

The "Power Shift." We believe that mandating the contingency fee model as the exclusive compensation mechanism available to debt settlement service providers (which would be the result of any prohibition of the fixed-fee model), will seriously endanger the interests of consumers by effecting a dramatic power shift in favor of the credit card banks. When the creditor knows that the debt settlement company will not receive any compensation unless and until the debt is settled, the cost of the settlement to the consumer will rise, a bad outcome for the consumer. Quite simply, prohibiting debt settlement companies from receiving any compensation until the creditor agrees to settle the debt is sharply anti-consumer and dramatically pro-creditor, a policy that will benefit only the credit card banks.

Contingency-Fee Pricing. Although we are willing to explore the possibility of our memberships offering both models on a comparative basis, we would be remiss if we did not sound a cautionary note with respect to the pricing that would likely be required to make the back-end contingency-fee model work. As we have noted to you, several recent legislative initiatives by ACCORD (a very small industry association representing a single debt settlement services provider that currently supports the contingency-fee model) have priced the contingency fee at 50% of savings[12]. While we take no position on whether this is an appropriate amount to charge consumers, we do believe that market pricing of the contingency-fee model will inevitably result in materially higher fees being paid by consumers than they now pay under the fixed-fee model[13]. This is because the contingency-fee model must take into account such factors as settlement risk, capital risk and the time value of money. There is absolutely no question that, when the receipt of revenue is delayed, these and other factors will play a role in the pricing of the contingency percentage.

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12 AB 1188, as introduced in California, and SB 706, as introduced in Florida.

13 Assuming (1) a $20,000 debt at time of enrollment, (2) average account accretion between enrollment and settlement of 20% and (3) a 40% settlement of the balance owed at time of settlement, the following table shows what the consumer would pay under (a) the industry-standard 15% fixed-fee model, (b) the 30% contingency-fee model supported by the UDMSA and (c) the 50% ACCORD-sponsored contingency-fee model:

	(a)	(b)	(c)
Original Debt	$20,000	$20,000	$20,000
Debt at Settlement	$24,000	$24,000	$24,000
40% Settlement	$9,600	$9,600	$9,600
Savings before fees	$14,400	$14,400	$14,400
Fees	$3,000	$4,320	$7,200
Total Cost to Consumer	$12,600	$13,920	$16,800
Net Consumer Savings	$11,400	$10,080	$7,200

These models assume a 40% settlement in all cases, which is approximately the settlement percentage on debt owed at time of settlement that TASC members are currently experiencing. However if the contingency-fee model becomes exclusive we believe this assumption will not hold, and that the power shift will result in a significant increase in the amount a consumer will be forced to pay to settle a debt. This could result in no net savings at all to the consumer and a significant reduction in the amount realized by the debt settlement services provider. Indeed, the strangulation of a debt settlement services provider's revenue stream imposed by the contingency-fee model threatens the ability of many debt settlement services providers to survive if forced to service accounts under this model.

Finally, we note that there is simply no data to support the propositions that (a) a contingency-fee model would result in any consumer benefit or (b) that consumers even want the contingency-fee model. To require an industry to abandon a fair and widely used compensation model in favor of one that is untested and unproven, as well as probably unworkable for many companies and carrying the likelihood of materially higher consumer cost, is rash, at best, and fails to satisfy Administrative Procedures Act standards.

Response to the Staff's "Escrow" Proposal. At our meeting on March 18, 2010 the staff requested input on whether the use of an escrow account would address the industry's objections to the proposed ban of the "advance fee" model. The concept offered was that the "advance fee" model would be permitted only where all fees were placed by the consumer into an escrow account, rather than paid to the debt settlement services provider as services were rendered, and released ratably as debts were settled. As we pointed out to the staff at our meeting, this proposal would have substantial negative consequences for consumers for a number of reasons, including (but not limited to) the fact that an escrow account does nothing to address the power shift risk and will have the dramatically negative effect of incentivizing faster, not better, settlements. Today the industry considers a broad range of factors, including (but not limited to) size of debt, rate of accretion and time to charge-off, when determining which debts to settle. An escrow of fees against a settlement of debts – which is really nothing more than a permutation of the contingency-fee model with the additional negative feature of subjecting escrowed funds to the risk that the consumer will be forced into bankruptcy or suffer a judgment lien on those funds – would incent exactly the opposite behavior that the staff is attempting to encourage. In short, we do not believe that holding the revenue stream of a debt settlement services provider hostage to the settlement decisions of creditors in any way aligns incentives with the interests of consumers.

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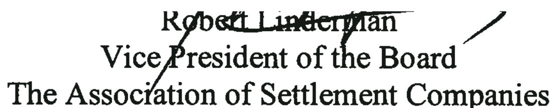
Without a vibrant debt settlement industry, consumers will lack an independent voice speaking on their behalf, and lose a counterweight to the oppressive power of credit card companies and other creditors, whose practices have bound consumers to an ever-growing net of interest, fees, threats of lawsuits and forced bankruptcies. We hope you will agree that the best interests of consumers – a prime mission for both the FTC and the debt settlement services industry – will be served by a regulatory approach that addresses consumer abuses while preserving the viability of legitimate companies to provide substantial benefits to consumers.

We welcome the staff's participation in the search for creative and consumer-centric initiatives, and thank you for your time and attention.

Very truly yours,



Robert Linderman
Vice President of the Board
The Association of Settlement Companies

EXHIBIT A

TASC Letter re Suitability
April 21, 2010

April 21, 2010

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
ATTN: Evan Zullow, Esq.

Re: Telemarketing Sales Rule – Debt Relief Amendments
Suitability Analysis/Safe Harbor Component

Dear Mr. Zullow:

This letter is being submitted as a follow-up to the meeting between the staff and representatives of both The Association of Settlement Companies ("TASC") and the United States Organization for Bankruptcy Alternatives ("USOBA"), on March 18, 2010 (which was, itself, a follow-up to an earlier meeting held with the staff on March 4, 2010). At those meetings, you requested additional input on how the industry addresses the suitability of a debt settlement program for a particular consumer, with an eye towards identifying factors that might contribute to program success or could be used to assist in the construction of an appropriate debt settlement program. In addition to responding to the staff's request for greater clarity with respect to the way in which the industry approaches suitability, we also wish to expand upon the concepts the industry and the staff have been discussing regarding the application of suitability standards in the context of articulating a "safe harbor" for debt settlement providers utilizing the fixed-fee model. We submit that debt settlement services providers that adhere to a set of agreed upon best practices should not be subject to the Commission's proposal to restrict the charging and collecting of a fixed fee for services, a fee that is not necessarily linked to a settlement of the underlying debt.

Suitability is an important and vitally consumer-protective component of any safe harbor precisely because it responds directly to the concern articulated by the Commission in its July 30, 2009 Notice of Proposed Rulemaking that certain debt settlement providers enroll consumers and collect fees without regard for whether the particular consumer has any reasonable likelihood of program success and/or without any intention of providing the advertised services. It is clear from the volume of evidence submitted by the industry that debt settlement programs, when administered properly in the service of an appropriate client, deliver tremendous value; the key is to make sure the individual is properly matched with the program. A determination of suitability has the effect, on the one hand, of providing a level of assurance for both parties that the consumer has a reasonable chance of completing the program while, on the other hand, screening out those with little likelihood of program success. A suitability component of a safe harbor has the additional benefit of preventing the

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bad players, those who enroll consumers with no intention of providing debt settlement services, from accepting fees from consumers in advance of actual settlement activity. Thus, suitability screening achieves a better result than the Commission's proposed "advance fee" ban without the industry disruption and consumer disadvantage that would result from the imposition of such a ban. It is quite simply a less impactful way of approaching the issue.

At the outset, two crucial points must be made. First, there are a very limited number of debt relief alternatives available to consumers overwhelmed by debt, with the availability of any particular alternative being driven by the consumer's personal financial situation. For example, mortgage refinance is available only to homeowners and then only to those with sufficient equity to enable a refinance. Similarly, consumers with sufficient income should be encouraged to pay their debts according to the terms of their agreements with their creditors; those with income just short of enabling them to pay in full and on time should consider more traditional consumer credit counseling, just as those without sufficient income or assets should consider bankruptcy[1].

Second, it is vitally important to respect the right of a consumer to choose the program that is most likely to help the consumer achieve his or her objectives. The collective experience of the debt settlement industry is that those electing debt settlement view it as their last alternative to bankruptcy, one that enables them to pay off an affordable portion of their debts rather than avoiding the debts entirely. We have found our clients to be both embarrassed by their inability to pay in full what they owe and more than willing to make the sacrifices the financial demands of a debt settlement program require. The consumer testimonials submitted to the Commission echo these propositions and overwhelmingly support the industry's position that consumers should have more, rather than fewer, choices when considering their debt resolution alternatives. While these testimonials are anecdotal, they more than offset the very sparse (and similarly anecdotal) evidence produced in support of the proposed rulemaking and merit careful consideration by the Commission, particularly where the amendments will have such a dramatic impact on the lives and choices of consumers.

Taken together, these points underscore the proposition that the essence of suitability is understanding that every consumer situation is different and that a consumer should only be placed in a program that is appropriate for his or her individual circumstances.

Importance of Adequate Disclosure. Crucial to any discussion of suitability in the context of any debt relief program is ensuring that the consumer receives full and complete disclosure – prior to enrollment – of all of the risks, benefits, costs and methodology of whatever debt relief option the consumer chooses. Getting the right client into the right program is dependent not only upon an appropriate financial analysis but also upon making sure that the consumer understands what the provider can and will do. Each debt relief alternative has

[1] TASC members routinely refer consumers to other debt relief service providers when suitability screens indicate. Unfortunately, the reciprocal is not so often the case, contributing to the relatively lower completion rates of both consumer credit counseling and Chapter 13 bankruptcy, when compared with debt settlement programs.

different costs and benefits and a properly informed consumer plays a vital "self-selection" role, in effect performing a self-screen to determine what type of debt relief program may be most appropriate under the circumstances. This self-selection is only possible when the consumer is adequately informed and, when combined with appropriate suitability screening by the debt settlement services provider, helps ensure that the right consumer gets into the right program. While debt settlement is the most direct approach to debt reduction outside of a bankruptcy, it is certainly strong medicine for the financially ill. It carries serious implications for a consumer's credit rating and cannot stop ongoing collection activity, which may include creditor calls and in some relatively small percentage of cases legal action. Similarly, although debt settlement companies deliver, on a portfolio basis, excellent results (often settling debts for 50 cents on the dollar or less), individual results simply cannot be predicted with any degree of accuracy due to the uncertain outcome of any given negotiation and the multiplicity of factors involved. All relevant considerations must be fully and clearly disclosed to all potential enrollees.

Factors Contributing to Program Success. As a general proposition, while program success is influenced by a relatively small set of factors the most significant one is the consumer's ability to meet the financial demands of the program.[2] A detailed budget analysis prior to enrollment, including, on a *pro forma* basis, the monthly program deposit requirement, is the surest way of understanding, and helping the consumer to understand, whether a particular program is suitable for that particular consumer.

We have proposed to the staff that suitability screens be designed along the same lines prescribed for credit card offerings in response to the CARD Act requirements. Generally speaking, the Federal Reserve Board has mandated that lending institutions utilize reasonable procedures to verify that the consumer to whom credit is proposed to be extended has a reasonable likelihood of being able to repay the loan. From a practical point of view, lenders can only make such a suitability determination at the time of underwriting, although in the context of revolving credit, such as a credit card account, periodic underwriting is a prudent expectation. An "underwriting" decision at the outset of any debt settlement program is both a prudent and a necessary exercise if a determination is to be made about the suitability of the match between the consumer and the particular debt resolution program.

While the ability to meet the monthly financial obligations is the most important predictor of program success, that factor is closely correlated with stability both of employment and of family situation. Unfortunately, it not possible to predict whether any particular individual will suffer a job loss, serious illness or the like; indeed, prior to the economic downturn an automotive line worker was an ideal candidate for a debt settlement program, whereas today that is clearly not the case. However, based on the industry's experience with hundreds of thousands of consumers over the past ten years, there are certain characteristics that make it more likely that a consumer will be able to achieve the benefits offered by a debt settlement program. These elements, described below, are used to help determine maximum allowable program length and recommended monthly savings deposit amounts, and are particularly helpful when estimating settlement percentages of enrolled debt.

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[2] It is worth noting that the ability to meet the monthly program obligations is the same suitability screen that should be, but is not always, applied by all debt relief providers, including credit counseling and Chapter 13 bankruptcy.

Volatility of Income Stream. The likelihood of program success is greatly improved where volatility of income stream is reduced. While people on fixed incomes tend to have lower incomes if they can afford the financial demands of a debt settlement program they will demonstrate a higher probability of completing a debt settlement program because that income isn't necessarily at risk.

Number of Creditors & Average Balance. The number of creditors and the average balance of a consumer's accounts play a role in a successful outcome. Overall, results – expressed in terms of program completion statistics and overall settlement rates – are likely not to be as positive for a consumer with one or two large creditors when compared with a consumer with several smaller creditors.

Status of Debt in the Delinquency Cycle. Under most bank accounting rules, banks stop accruing interest on loans held on their books that are more than 90 days' delinquent; an account more than 9180-days delinquent – which, depending upon the write-off policy of the creditor bank, equates to between 210-270 calendar days from statement due date – must be written off. As an account approaches write-off, creditors generally become more motivated to negotiate an appropriate settlement; accordingly, the length of time that an account has been delinquent – or the likelihood that an account is about to go delinquent – will play a significant role in program outcomes.

Identity of Creditors. The identity of each creditor in a given program is useful when estimating program length and deposit requirements. Some creditors, historically, are more difficult to work with than others. It is important to note, however, that a creditor's settlement policies can change abruptly. Some creditors who may have been unwilling to offer reasonable settlements will shift, suddenly and without explanation, to a much more cooperative mode, a variability likely correlated with a particular creditor's internal accounting and periodic liquidity considerations.

Suitability Screening. As stated above, the essence of suitability screening is placing a consumer into the debt relief option that is right for him or her, under the consumer's particular circumstances at the time of enrollment. Most debt settlement services providers have proprietary screening criteria and methodology; however, as described above, common factors can be coupled with common processes and it is here that we believe consumers would benefit from greater specificity and analytics.

Step One: Budget Analysis. A suitability analysis must begin with the preparation by a debt settlement services provider of a *pro forma* budget based on the financial information provided to the debt settlement services provider by the consumer. The budget must reflect all sources of income and all actual and projected liabilities, including (for analysis purposes) the projected monthly deposit required by the proposed debt settlement program.

The *pro forma* budget serves three important purposes: first, it enables the debt settlement company to verify that the consumer's current financial situation affords the consumer a realistic likelihood of program success; second, it enables the consumer to see, graphically,

what his or her monthly cash flow picture looks like, both with and without the program; and third, it enables the debt settlement services provider to determine whether the consumer has the ability to pay off his or her debts in another, less impactful manner (i.e., seeking a mortgage refinance, continuing to make minimum monthly payments, etc.). It is at this point in the consumer enrollment cycle that the debt settlement services provider should refer those not suitable for a debt settlement program to a consumer credit counselor or, where the consumer's financial condition is simply too dire, to a bankruptcy attorney. Of course, the reciprocal also is true: responsible consumer credit counselors and bankruptcy attorneys similarly should refer to debt settlement providers those consumers whose economic circumstances are too difficult to have a reasonable chance of success through a consumer credit counseling program or where the consumer is determined to avoid bankruptcy, if at all possible.

Step Two: Situational Analysis. After the *pro forma* budget has been prepared and reviewed, it is important to look closely at the reasons for the consumer's financial hardship. There are many reasons for financial hardship, including a significant reduction of income, job loss, divorce, medical issues, disability or a death in the family. Reviewing the consumer's hardship status helps to screen out possibly fraudulent activity, which could be indicated where a consumer does not have any identifiable hardship but his or her credit report or card history shows substantial or increased activity, including recent balance transfers, cash advances or luxury purchases. These accounts, if accepted, are invariably much more difficult to negotiate, result in a higher probability of legal action and carry a much lower probability of a successful outcome.

Step Three: Creditor Analysis. An important component of the matching exercise between the consumer and a debt settlement services provider is a creditor analysis, which involves a review of both the mix of creditors and where the consumer stands within the delinquency/write-off cycle. This is a data-intensive analysis that is driven by the particular debt settlement services provider's experience with each of the consumer's creditors; when done properly, a creditor analysis will take into account such factors as (i) historic settlement rates (matched against the point in the delinquency cycle of each account), (ii) average accretion rates (increase in balance from additional interest and fees) from time-of-enrollment to time-of-settlement, (iii) current settlement trends, both on a creditor-specific and industry-wide basis and (iv) that likelihood that, for any given account, the creditors will pursue recovery through litigation rather than negotiation. Creditor-specific information is vital to calculating a consumer-specific program cost (the required monthly savings obligation is driven at time of enrollment by the debt settlement services provider's estimate of what settlement rates are applicable to each of the consumer's debts).

As mentioned above, there are instances where, even though the analysis indicates a fairly low likelihood of program success, a consumer, after being informed of that fact, nonetheless wants to try for program success as a last-ditch attempt to avoid bankruptcy. Some debt settlement services providers believe that these consumers should be given the chance to succeed, even where the odds of success appear low. We take no position on whether the Commission should conclude that these consumers should or should not be allowed to enroll in a debt settlement program, noting only that a debt settlement services provider wishing to

avail itself of the safe harbor protection we have proposed would be requiredto take the suitability of a particular consumer into account when accepting that consumer. A debt settlement services provider would not be entitled to rely on the safe harbor for its fixed-fee model if the consumer in question was, in fact, not suitable for the program into which that consumer was accepted.

We hope that this brief synopsis of the elements of what we believe to be an adequate suitability analysis is helpful, and welcome the opportunity to discuss further with you the role that suitability screening can and should play in providing a safe-harbor option for debt settlement service providers utilizing the fixed-fee model.

Thank you, and please feel free to contact the undersigned should you have any additional questions or wish any additional information.

Very truly yours,

Andrew D. Housser
Member of the Executive Board
The Association of Settlement Companies

EXHIBIT B

CARD Act Suitability Guidelines

12 C.F.R. 226.51(a)(1):

a) *General rule.* (1)

(i) *Consideration of ability to pay.* A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and current obligations.

(ii) *Reasonable policies and procedures.* Card issuers must establish and maintain reasonable written policies and procedures to consider a consumer's income or assets and current obligations. Reasonable policies and procedures to consider a consumer's ability to make the required payments include a consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. It would be unreasonable for a card issuer to not review any information about a consumer's income, assets, or current obligations, or to issue a credit card to a consumer who does not have any income or assets.

EXHIBIT C

UDMSA Fee Language

Enacted as
Tennessee Code Annotated, Title 47, Chapter 18,
Subchapter 47-18-5423(f)

(f) Except as otherwise provided in subsections (c) and (d), if an agreement contemplates that creditors will settle an individual's debts for less than the principal amount of the debt, compensation for services in connection with settling a debt may not exceed the applicable settlement fee limits in subdivisions (1) and (2) the terms of which shall be clearly disclosed in the agreement.

(1) With respect to an agreement that provides for a flat settlement fee based on the overall amount of included debt, the total aggregate amount of fees charged to any individual under this chapter, including fees charged under subdivisions (d)(2)(A) and (B), may not exceed seventeen percent (17%) of the principal amount of debt included in the agreement at the inception of the agreement. The flat settlement fee authorized under this subdivision (1) shall be assessed in equal monthly payments over at least half the length of the plan, as estimated at the plan's inception, unless the payment of fees is voluntarily accelerated by the individual in a separate record and at least half of the overall amount of outstanding debt covered by the agreement has been settled.

(2) With respect to agreements in which fees are calculated as a percentage of the amount saved by an individual, a settlement fee may not exceed thirty percent (30%) of the excess of the outstanding amount of each debt over the amount actually paid to the creditor, as calculated at the time of settlement. Settlement fees authorized under this subdivision (2) shall become billable only as debts are settled, and the total aggregate amount of fees charged to any individual under this part, including fees charged under subdivisions (d)(2)(A) and (B), may not exceed twenty percent (20%) of the principal amount of debt included in the agreement at the agreement's inception.

(3) A provider may not impose or receive fees under both subdivisions (1) and (2).