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