Federal Register

Wednesday,
August 19, 2009

Part II

Federal Trade Commission

16 CFR Part 310
Telemarketing Sales Rule; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Notice of Proposed Rulemaking; Announcement of Public Forum.

SUMMARY: In this document, the FTC issues a Notice of Proposed Rulemaking (''NPRM'' or ''Notice'') to amend the FTC's Telemarketing Sales Rule (''TSR'' or ''Rule'') to address the sale of debt relief services. The Commission seeks public comment on the proposed amendments, which would: define the term ''debt relief service''; ensure that, regardless of the medium through which such services are initially advertised, telemarketing transactions involving debt relief services would be subject to the TSR; mandate certain disclosures and prohibit misrepresentations in the telemarketing of debt relief services; and prohibit any entity from requesting or receiving payment for debt relief services until such services have been fully performed and documented to the consumer.

This NPRM invites written comments on all issues raised by the proposed amendments and seeks answers to the specific questions set forth in Section VIII of this Notice. This document also contains an invitation to participate in a public forum, to be held following the close of the comment period, which will afford Commission staff and interested parties an opportunity to discuss the proposed amendments as well as any issues raised in comments in response thereto.

DATES: Written comments must be received by October 9, 2009. For information on the public forum, please see the **SUPPLEMENTARY INFORMATION** section below.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. For important information concerning the comments you file, please review the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be filed at the following electronic address: (*https://secure.commentworks.com/ftc-TSRDebtRelief*) (following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex T), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Evan Zullow, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION: The public forum will be held at the Federal Trade Commission. The Commission will post the date, time, and location of the public forum on its website no later than 30 days after the publication of this NPRM. The Commission will publish an agenda for the public forum on its website prior to the forum. Requests to participate as a panelist at the public forum must comply with all applicable requirements set forth in this document and must be received by October 9, 2009. To be considered as a panelist at the public forum, interested parties must submit both a request to participate and a comment in response to this NPRM. Further details regarding the public forum are included in Section IV of this Notice.

Requests to participate in the public forum, which must be filed separately from a party's public comment, may be filed in paper form or sent via e-mail to: (*tsrdebtrelief@ftc.gov*) and should refer to ''Telemarketing Sales Rule - Debt Relief Rulemaking Forum – Request to Participate, R411001'' to facilitate organization of such requests.[1] Requests must comply with all other applicable requirements set forth in this section and elsewhere in this document. A request to participate filed in paper form should include this reference, both in the text and on the envelope, and should be mailed or delivered to: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex T), 600 Pennsylvania Avenue, NW, Washington, DC 20580. Because paper mail in the Washington area, and specifically to the FTC, is subject to delay due to heightened security screening, please consider submitting your request to participate via e-mail to: (*tsrdebtrelief@ftc.gov*.)

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Telemarketing Sales Rule - Debt Relief Amendments, R411001'' to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC Website at (*www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as any individual's: Social Security Number; date of birth; driver's license number, other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged orconfidential,'' as provided in Section 6(f) of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[2]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://*

[1] Please note that your request constitutes a public filing before the Commission and will be placed on the public record of the proceeding, including on the publicly accessible FTC website, at (*www.ftc.gov/os/publiccomments.shtm*). Therefore, your request should not include any sensitive or confidential information. In particular, it should not include any sensitive personal information – such as any individual's Social Security Number; date of birth; driver's license number, other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2).

The Federal Trade Commission Act and other laws the Commission administers permit the collection of requests to participate in the above forum to consider and use in this proceeding as appropriate. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals before placing requests to participate on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*www.ftc.gov/ftc/privacy.shtm*).

[2] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

secure.commentworks.com/ftc-TSRDebtRelief) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-TSRDebtRelief*). If this Notice appears at (*www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Website at (*www.ftc.gov*) to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Telemarketing Sales Rule - Debt Relief Amendments - R411001'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex T), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC requests that any comment filed in paper form be sent by courier or overnight service, if possible, to avoid security related delays.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget (''OMB''), Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-5167 because U.S. postal mail at the OMB is subject to delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*www.ftc.gov/ftc/privacy.shtm*).

I. Background

A. Telemarketing and Consumer Fraud and Abuse Prevention Act

On August 16, 1994, the Telemarketing and Consumer Fraud and Abuse Prevention Act (''Telemarketing Act'' or ''Act'') was signed into law.[3] 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. The Telemarketing Act directed the Commission to issue a rule defining and prohibiting deceptive and abusive telemarketing acts or practices, and specified that the FTC's rule must address certain acts or practices. The Act directed the Commission to include provisions relating to three specific ''abusive telemarketing acts or practices'': (1) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of his or her right to privacy; (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all sales calls to consumers ''that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.''[4] The Act also directed the Commission to consider including recordkeeping requirements in the Rule.[5] Finally, the Act authorized state Attorneys General, other appropriate state officials, and private persons to bring civil actions in federal district court to enforce compliance with the FTC's Rule.[6]

B. Telemarketing Sales Rule

Pursuant to its authority under the Telemarketing Act, the FTC promulgated the TSR on August 16, 1995.[7] The Rule was subsequently amended on two occasions, first in 2003[8] and again in 2008.[9] As to the Rule's scope, the TSR applies to virtually all ''telemarketing'' – defined to mean ''a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call . . . .''[10] However, the Telemarketing Act makes clear that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the FTC Act.[11] As a result, some entities and products fall outside the jurisdiction of the TSR.[12] Further, the Rule wholly or partially exempts from its coverage several types of calls.[13]

The TSR sets forth rules governing communications between telemarketers and consumers, requiring certain disclosures[14] and prohibiting certain material misrepresentations.[15] Further, the TSR requires telemarketers to obtain consumers' ''express informed consent'' to be charged on a particular account

[3] 15 U.S.C. 6101-6108.

[4] 15 U.S.C. 6102(a)(3).

[5] 15 U.S.C. 6102(a).

[6] 15 U.S.C. 6103, 6104.

[7] The effective date of the original Rule was December 31, 1995.

[8] *See TSR; Final Amended Rule,* 68 FR 4580 (Jan. 29, 2003).

[9] *See TSR; Final Rule Amendments,* 73 FR 51164 (Aug. 29, 2008).

[10] 16 CFR 310.2(cc) (using the same definition as the Telemarketing Act, 15 U.S.C. 6106).

[11] 15 U.S.C. 6105(b).

[12] 15 U.S.C. 45(a)(2) (setting forth certain limitations to the Commission's jurisdiction with regard to its authority to prohibit unfair or deceptive acts or practices). These entities include banks, savings and loan institutions, and certain federal credit unions. It should be noted, however, that although the Commission's jurisdiction is limited with respect to the entities exempted by the FTC Act, the Commission has made clear that the Rule does apply to any third-party telemarketers those entities might use to conduct telemarketing activities on their behalf. *See TSR; Proposed Rule*, 67 FR 4492, 4497 (Jan. 30, 2002) (*citing TSR; Statement of Basis and Purpose and Final Rule*, 60 FR, 43842, 43843 (Aug. 23, 1995)) (''As the Commission stated when it promulgated the Rule, '[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.' '')

[13] For example, Section 310.6(a) exempts telemarketing calls to induce charitable contributions from the Do Not Call Registry provisions of the Rule, but not from the Rule's other requirements. In addition, there are exceptions to some exemptions that limit their reach. *See, e.g.,* 16 CFR 310.6(b)(5)-(6).

[14] The TSR requires that telemarketers soliciting sales of goods or services promptly disclose several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win. 16 CFR 310.4(d). Telemarketers must also, in any telephone sales call, disclose cost and certain other material information before consumers pay. 16 CFR 310.3(a)(1). In telemarketing calls soliciting charitable contributions, the Rule requires prompt disclosure of the identity of the charitable organization on behalf of which the request is being made and that the purpose of the call is to solicit a charitable contribution. 16 CFR 310.4(e).

[15] The TSR prohibits misrepresentations about, among other things, the cost and quantity of the offered goods or services. 16 CFR 310.3(a)(2). It also prohibits making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution. 16 CFR 310.3(a)(4).

before billing or collecting payment[16] and, through a specified process, to obtain consumers' ''express verifiable authorization'' to be billed through any payment system other than a credit or debit card.[17] In addition, the Rule prohibits requesting or receiving payment of any fee or consideration in advance of obtaining any of three purported services that the Commission determined to be ''fundamentally bogus''[18]: credit repair services,[19] recovery services,[20] and offers of a loan or other extension of credit, the granting of which is represented as ''guaranteed'' or having a high likelihood of success.[21] The Rule also prohibits credit card laundering[22] and other forms of assisting and facilitating fraudulent telemarketers.[23]

The Rule restricts telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located),[24] and from calling consumers whose numbers are on the National Do Not Call Registry (except when the seller has an established business relationship with the person called or has obtained the person's express agreement, in writing, to receive telemarketing calls).[25] It also prohibits calling consumers who have specifically requested not to receive calls from a particular entity.[26] The TSR also requires that telemarketers transmit accurate Caller ID information[27] and places restrictions on calls made by predictive dialers[28] and calls delivering pre-recorded messages.[29]

II. Overview of Debt Relief Services

Debt relief services – including credit counseling, debt management plans, debt settlement, and debt negotiation – are offered by a range of nonprofit and for-profit entities, often through telemarketing. As consumer debt has grown in recent years, so have the number and type of entities that provide, or purport to provide, services to consumers struggling with debt. Over the past several years, consumer protection concerns have arisen regarding the sale of debt relief services. The Commission has addressed these concerns in a variety of ways, including through law enforcement actions, consumer education, and outreach to industry. In September 2008, the Commission held a public workshop entitled ''Consumer Protection and the Debt Settlement Industry'' (''Workshop''),[30] which brought together stakeholders to discuss the current state of debt settlement services, one facet of the debt relief services industry. Based upon information provided in conjunction with the Workshop, as well as through its independent research and law enforcement efforts, the Commission provides the following description of the evolution and marketing practices of the debt relief services industry, with a particular focus on two primary types of service providers: credit counseling agencies and for-profit debt settlement service providers.

A. Credit Counseling Agencies

1) Background

For decades, debt relief services were almost exclusively the province of nonprofit credit counseling agencies (''CCAs'').[31] Beginning in the mid-1960s, creditor banks initiated this model, providing funding for CCAs with the intent of reducing personal bankruptcy filings.[32] CCA credit counselors work as a liaison between consumers and creditors to negotiate a ''debt management plan'' (''DMP'') – usually for the repayment of credit card and other unsecured debt. Typically, credit counselors also have provided educational counseling on financial literacy to assist consumers in developing a manageable budget and avoiding debt problems in the future.[33]

The hallmark of a traditional DMP is that it enables a consumer to repay the full amount owed to creditors, albeit under renegotiated terms that make repayment less onerous.[34] Thus, DMPs can be beneficial both to consumers, who receive more manageable terms, and to creditors, who are paid the outstanding balance. A credit counselor makes an initial determination about whether a DMP is a viable option for a consumer after obtaining the consumer's full financial profile. Traditionally, to be eligible for a DMP, a consumer must have sufficient income to repay the full amount of his or her debts, provided that the terms are adjusted to make such repayment possible.[35]

Crafting a DMP begins when a credit counselor contacts each of a consumer's unsecured creditors. Each creditor determines what, if any, repayment options to offer the consumer based on the consumer's income and total debt load. Repayment options, known as ''concessions,'' include reduced interest rates, elimination of late or over limit fees, and extensions of the term for repayment. After negotiations with all of a consumer's creditors are complete, the credit counselor finalizes the DMP and calculates the new repayment schedule. The traditional DMP typically calls for a consumer to repay the full balance of

[16] 16 CFR 310.4(a)(6).

[17] 16 CFR 310.3(a)(3).

[18] *See TSR; Final Amended Rule,* 68 FR at 4614.

[19] 16 CFR 310.4(a)(2).

[20] 16 CFR 310.4(a)(3). As the Commission has previously explained, in ''recovery room scams . . . a deceptive telemarketer calls a consumer who has lost money, or who has failed to win a promised prize, in a previous scam. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again.'' *TSR; Statement of Basis and Purpose and Final Rule*, 60 FR 43842, 43854 (Aug. 23, 1995).

[21] 16 CFR 310.4(a)(4).

[22] 16 CFR 310.3(c).

[23] 16 CFR 310.3(b).

[24] 16 CFR 310.4(c).

[25] 16 CFR 310.4(b)(1)(iii)(B) (a safe harbor regarding Do Not Call violations can be found at 16 CFR 310.4(b)(3)).

[26] 16 CFR 310.4(b)(1)(iii)(A) (a safe harbor regarding Do Not Call violations can be found at 16 CFR 310.4(b)(3)).

[27] 16 CFR 310.4(a)(7).

[28] 16 CFR 310.4(b)(1)(iv) (a call abandonment safe harbor is found at 16 CFR 310.4(b)(4)).

[29] 16 CFR 310.4(b)(1)(v).

[30] Materials from the Workshop, including an agenda and transcript, and link to public comments, are available at (*www.ftc.gov/bcp/workshops/debtsettlement/index.shtm*). Public comments associated with the Workshop are available at (*www.ftc.gov/os/comments/debtsettlementworkshop/index.shtm*). Attachment A to this Notice contains a list of commenters who submitted comments for the Workshop, together with the abbreviations used to identify each commenter referenced in this NPRM. Where a commenter has submitted multiple comments, the abbreviation used indicates – by reference to either its date or subject matter – which specific comment is being referenced in this NPRM. Attachment B to this Notice contains a list of Workshop participants, together with the abbreviations used to identify each participant referenced in this NPRM.

[31] *But see* Credit Advisors at 1 (stating that the credit counseling industry ''was founded as a for-profit industry, and was much more consumer oriented than under the subsequent nonprofit model'').

[32] *See* National Consumer Law Center, Inc. (''NCLC'') and Consumer Federation of America (''CFA''), *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, April 2003, at 6.

[33] *See* IRS (Grodnitzky) Tr. at 19 (noting that the IRS ''issued two rulings, one in 1965 and one in 1969, and really kind of set up a framework for what a compliant credit counseling organization needs to look like. I think the overarching theme of these rulings were the organization, at least with respect to 501(c)(3), needs to educate, educate consumers, educate the public.'').

[34] *See Credit Counseling in Crisis* at 6. The study goes on to note that ''a DMP is very similar to a chapter 13 bankruptcy 'reorganization,' through which a consumer submits a plan to repay creditors over time. The critical difference is that Chapter 13 plans allow consumers with sufficient income to pay back secured as well as unsecured creditors. For consumers trying to hold onto their homes or cars, this is a critical distinction.'' *Id.* at 25-26.

[35] *See* Press Release, National Foundation for Credit Counseling, *Top Credit Card Issuers Support the NFCC's ''Call to Action'' For Consumer Repayment Relief,* (Apr. 15, 2009) (also noting that ''in these tough economic times, fewer consumers have sufficient income to be eligible for, or the ability to maintain, a traditional DMP, often leaving bankruptcy as the only option''), *available at* (*www.nfcc.org/NewsRoom/newsreleases/files09/NFCC_Call_Action.pdf*); CCFS (Manning) Tr. at 6.

unsecured debt to creditors by making reduced, consolidated monthly payments over a period of three to five years. The CCA receives these monthly payments over the term of the DMP and distributes the appropriate share to each of the consumer's creditors.

In response to the recent economic downturn and increase in consumer debt, the National Foundation for Credit Counseling (''NFCC'') – the umbrella organization for more than one hundred nonprofit credit counseling organizations – announced on April 15, 2009, that the top ten credit card issuers in the U.S. had agreed to provide additional concessions to ensure that even consumers in significant financial straits may be able to use a DMP as a means to extricate themselves from indebtedness.[36] According to the NFCC, this initiative came in response to its October 2008 ''Call to Action,'' which urged creditors to ''make DMPs more affordable for people in troubled financial circumstances.''[37]

For their efforts, CCAs, which operate as nonprofit entities, receive funding from two sources.[38] First, consumers now typically pay for services,[39] although this was not always the case.[40] According to the NFCC, as of 2001, consumers paid on average about $20 to enroll in a DMP, and then paid a monthly service fee of about $12.[41] These fees have increased over the last decade, and now average approximately $25 to enroll, plus $25 per month.[42] The second source of funding is creditors themselves. Traditionally, after a consumer enrolls in a DMP, the consumer's creditors pay the CCA a percentage of the monthly payments the CCA receives.[43] This funding mechanism, known as a ''fair share'' contribution, historically has provided the bulk of a CCA's operating revenue.[44] For many years, creditors' fair share payments ranged from 12 to 15% of the amount received as a result of the DMP, but that amount has decreased over time to between 0% and 10%.[45]

2) Abuse and Crackdown in the Credit Counseling Industry

Responding to the rise in consumer debt and the concomitant increase in defaults, many new entities entered the credit counseling field during the last decade.[46] The advent of these new credit counseling entities – many of which, unlike traditional CCAs, operated on a for-profit basis – appeared to increase the options for indebted consumers.[47] At the same time consumer protection concerns emerged with regard to these new credit counselors. Research by consumer advocates and congressional scrutiny highlighted troubling trends in the credit counseling industry, including: deceptive and unfair practices; excessive fees; and the abuse of nonprofit status.[48] These abuses prompted an array of responses over the past decade, including law enforcement, regulatory, legislative, educational,[49] and self-regulatory[50] actions.

The FTC and state Attorneys General have targeted unscrupulous practices by some CCAs in a number of law enforcement actions.[51] Since 2003, the

[36] *Id.* The participating creditors include: American Express, Bank of America, Capital One, Chase Card Services, Citi, Discover Financial Services, GE Money, HSBC Card Services, U.S. Bank, and Wells Fargo Card Services.

[37] *Id.* These credit card issuers endorsed two new plans: a ''more affordable 'Standard' DMP'' and a '''Hardship' DMP,'' specifically designed to enable consumers who have lost their jobs or experienced other serious financial problems to qualify. Like traditional DMPs, these so-called ''Call to Action DMPs'' provide for a five-year repayment term, but they allow a consumer to make more affordable, fixed monthly payments and establish an emergency savings fund rather than using all disposable income to repay existing debt. *Id.*

[38] *See Consumer Protection Issues in the Credit Counseling Industry: Hearing Before the Permanent Subcommittee on Investigations Senate Committee on Governmental Affairs*, 108 th Cong. 2d Sess. (2004) (Testimony of the FTC), *available at* (*www.ftc.gov/os/2004/03/040324testimony.shtm*). Binzell Tr. at 37 (''If we had to do it all over again, we could go back 50 years, that fair share would have never existed. We think it's important. We think creditors have a very important role and should be responsible for helping to fund credit counseling and financial literacy. I mean, they have a vested interest and they should be supporting it. The fact that it's tied to DMPs, again, it started long before I got involved and it probably ought to be something different.'').

[39] These fees are often limited by state law. *See, e.g.*, Me. Rev. Stat. Ann. Tit. 17 § 701, *et seq.*, tit. 32 § 6171, *et seq.* (limiting fees to $75 for set-up, $40 monthly charge, and 15% of reduction for any settlement of debt); Md. Code Ann. § 12-901 *et seq.* (limiting to $50 consultation fee and the lesser of $40 per month or $8 per creditor per month); Ill. Com. Stat. Ann., § 205 ILCS 665/1 *et seq.* (capping initial and monthly credit counseling fees).

[40] *See Credit Counseling in Crisis* at 13-14 (''charging consumers was virtually unheard of even a decade ago'' but, in 2001, ''about 88% of [NFCC] agencies were charging monthly fees, a little more than half charged enrollment fees, and almost 25% were charging for counseling.'').

[41] *See id.*

[42] *See* Cards & Payments, Vol. 22, Issue 2, *Credit Concessions: Assistance for Borrowers on the Brink* (Feb. 1, 2009) (noting that ''nonprofit agencies' counseling fees average about $25 per month''); Miami Herald, *Credit Counselors See Foreclosures on the Rise* (July 13, 2008) (noting that CCAs charge an initial fee of $25, and a $25 monthly fee).

[43] *See* Letter from NFCC to Lucy Morris, Attorney, Federal Trade Commission (Feb. 27, 1997) (proposing CCA disclosure that creditor contributions are usually calculated as a percentage of ''each payment received''), *available at* (*www.ftc.gov/os/1997/03/nfcc2.pdf*).

[44] *See* NFCC, *FAQs* (''The majority of agency funding comes from voluntary contributions from creditors who participate in Debt Management Plans.''), *available at* (*www.nfcc.org/aboutus/aboutus_04.html#7*); NFCC (Binzel) Tr. at 37. Some have since questioned the appropriateness of the ''fair share'' model. *See, e.g.,* NFCC (Binzel) Tr. at 37 (''If we had to do it all over again . . . fair share would have never existed . . . . We think creditors have a very important role and should be responsible for helping to fund credit counseling and financial literacy. I mean, they have a vested interest and they should be supporting it. The fact that it's tied to DMPs, again, it started long before I got involved and it probably ought to be something different.'').

[45] *See Credit Counseling in Crisis* at 10-12.

[46] *See* IRS (Grodnitzky) Tr. at 19-21 (noting that in the past 10 years, the IRS observed that new entities, which looked more like commercial entities than nonprofits, entered the CCA marketplace); AADMO (Guimond) Tr. at 40 (''Everybody saw the AmeriDebt nightmare, all the horror stories that were on the news.''); *see also Credit Counseling in Crisis* at 7 (''Ten years ago, there were about 200 credit counseling organizations in the country, with 90% affiliated with NFCC. By 2002, there were more than 1,000 credit and debt management organizations in the country.'').

[47] *See Credit Counseling in Crisis* at 8 (''These [new] agencies have pioneered more business-like methods of making debt management plans convenient for consumers, including flexible hours, phone and Internet counseling, and electronic payments. These improvements, in turn, have forced the 'old guard' to be more responsive to their clients. Some of these newer agencies are responsible, effective and sensitive to their client's needs. However, as the newer agencies have gained market share, a number of serious problems have surfaced as well.'').

[48] *See generally id*; *see also* IRS (Grodnitzky) Tr. at 20; NFCC (Binzel) Tr. at 28-29 (noting that ''when profit motive is injected into a non-profit industry, it should come as no surprise that harm to consumers will follow.''). In March of 2004, the Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs conducted an investigation and held hearings on the industry. The Subcommittee's report, issued in April 2005, concluded that ''[c]learly, something is wrong with the credit counseling industry.'' S. Rep. No. 109-55, at 1 (2005).

[49] The FTC and IRS, as well as other entities, have created and disseminated education materials to help consumers understand the fundamentals of credit counseling and learn how to select a reputable CCA. *See, e.g.,* FTC, *Fiscal Fitness: Choosing a Credit Counselor, available at* (*www.ftc.gov/bcp/edu/pubs/consumer/credit/cre26.shtm*); FTC, *Knee Deep in Debt*, *available at* (*www.ftc.gov/bcp/edu/pubs/consumer/credit/cre19.shtm*); IRS, *Credit Counseling Organizations - Questions and Answers about New Requirements*, *available at* (*www.irs.gov/charities/article/0,,id=163180,00.html*).

[50] Some industry associations have created or enhanced self-regulatory codes. *See, e.g.,* NFCC, Member Application (Attachments A-C), *available at* (*www.nfcc.org/NFCC_MemberApplicationFINAL_REV071006.pdf*); AICCA Certification of Compliance, *available at* (*www.aiccca.org/images/CertificateofCompliance.pdf*); AADMO (Guimond) Tr. at 43 (AADMO ''created the first nationwide accreditation program for for-profit credit counselors'').

[51] State enforcers have sued CCAs for violations of state consumer protection laws. *See, e.g.,* Colorado Office of the Attorney General Press Release, *Eleven Companies Settle With The State Under New Debt-Management And Credit Counseling Regulations* (Mar. 12, 2009), *available at* (*www.ago.state.co.us/press_detail.cfmpressID=957.html*); Press Release of

Continued

Commission has brought six cases against credit counseling entities for deceptive and abusive practices, including a seminal action against AmeriDebt, Inc., which was, at the time, one of the largest CCAs.[52] The defendants in these cases allegedly engaged in several common patterns of deceptive conduct in violation of Section 5 of the FTC Act.[53] First, most made deceptive statements regarding their nonprofit status.[54] Second, they allegedly frequently misrepresented the scope, benefits, and likelihood of success consumers could expect from their services. Misrepresentations included false promises to provide counseling and education services[55] and overstatements of the amount or percentage of interest charges a consumer might save using the services.[56] Third, these entities allegedly commonly misrepresented material information regarding their fees, including making false claims that they did not charge up-front fees[57] or that fees were tax deductible.[58] In addition to allegedly violating the FTC Act, some of these entities also allegedly engaged in violations of the TSR, particularly the Rule's disclosure and misrepresentation provisions and the abusive practices section, including the National Do Not Call Registry provision.[59]

The IRS has played a key role in regulating CCAs based on its authority to regulate nonprofit entities under Section 501(c)(3) of the Internal Revenue Code (''IRC''). In 2003, in response to the abuses arising from for-profit entities masquerading as nonprofits, the IRS announced its intention to re-examine CCAs with 501(c)(3) status to determine whether they were complying with the laws and regulations governing tax-exempt status.[60] Ultimately, this initiative expanded into a full-scale program to examine all tax-exempt CCAs, resulting in ''widespread revocation, proposed revocation or other termination of tax-exempt status,'' of many organizations,[61] as well as increased scrutiny of new applications for tax-exempt status by credit counseling agencies.[62]

To enhance the IRS's ability to oversee CCAs, in 2006 Congress amended the IRC, adding Section 501(q) to provide specific eligibility criteria for CCAs seeking tax-exempt status as well as criteria for retaining that status.[63] Among other things, Section 501(q) of the IRC prohibits tax-exempt CCAs from: making or negotiating loans to or on behalf of a client; engaging in credit repair activities, if those activities are not incidental to the provision of credit counseling, or charging a separate fee for credit repair activities; or refusing to provide credit counseling services due to a consumer's inability to pay or a consumer's ineligibility or unwillingness to agree to enroll in a DMP.[64] In addition, Section 501(q) provides that tax-exempt credit counselors may only charge reasonable fees for services; must allow fee waivers if a consumer is unable to pay; and may not, unless allowed by state law, base fees on a percentage of a client's debt, DMP payments, or savings from enrolling in a DMP.[65] Section 501(q) also limits the aggregate revenues that a tax-exempt CCA may receive from creditors for DMPs.[66] Under Section 501(q), tax-exempt CCAs also are prohibited from making or receiving referral fees and from soliciting voluntary contributions from a client.[67]

In addition to receiving regulatory scrutiny from the IRS, as a result of changes in the federal bankruptcy code, certain nonprofit CCAs have been subjected to rigorous screening by the Department of Justice's Executive Office of the U.S. Trustee (''EOUST''). Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, consumers must obtain credit counseling before filing for bankruptcy and must take a financial literacy class before obtaining a

the N.J. Department of Public Affairs, *State Files Suit Against United Credit Adjusters and Related Companies* (Oct. 15, 2008), *available at* (*www.nj.gov/lps/ca/press/creditadjusters.htm*); North Carolina Office of Attorney General Press Release, *AG Cooper Seeks to Stop Sham Credit Counselor* (Oct. 10, 2006), *available at* (*www.ncdoj.gov/DocumentStreamerClient?directory=PressReleases/&file=Commercial Credit Counseling final.pdf*); *State Accuses Columbus Man of Credit-Counseling Scam,* Columbus Dispatch (July 12, 2006), *available at* (*www.columbusdispatch.com/live/contentbe/dispatch/2006/07/12/20060712-D1-01.html*); New York Office the Attorney General, *State Wins Order to Shut Down Bogus Debt Counseling Agencies in Queens* (Oct. 17, 2000), *available at* (*www.oag.state.ny.us/media_center/2000/oct/oct17a_00.html*).

[52] *See FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006); *United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Ca. 2004); *FTC v. Debt Mgmt. Found. Svcs.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004); *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. 2003). AmeriDebt was also the subject of law enforcement actions by several states. *See, e.g.*, *State of Missouri ex rel. Nixon v. AmeriDebt, Inc.*, No. 03-402378 (St. Louis City Circuit Court, Sept. 11, 2003); *State of Texas v. AmeriDebt, Inc.*, No. GV-304638 (Dist. Ct. Travis County, Texas, Nov. 19, 2003); *State of Minnesota v. AmeriDebt, Inc.*, Case No. MC 03-018388 (Hennepin County Dist. Ct., Nov. 19, 2003).

[53] *See, e.g., FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006); *United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004).

[54] *See FTC v. Integrated Credit Solutions, Inc.,* No. 06-806-SCB-TGW (M.D. Fla. 2006); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006); *FTC v. Debt Mgmt. Found. Svcs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004); *FTC v. AmeriDebt, Inc.,* No. PJM 03-3317 (D. Md. 2003). Other defendants allegedly claimed to have ''special relationships'' with the consumers' creditors. *See FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006).

[55] *See, e.g., FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006); *United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004).

[56] *See United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); *FTC v. Integrated Credit Solutions, Inc.,* No. 06-806-SCB-TGW (M.D. Fla. 2006); *FTC v. Debt Mgmt. Found. Svcs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004).

[57] *See FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006); *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. 2003).

[58] *See FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006); *United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006).

[59] *See FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006); *United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006).

[60] *See* IRS (Grodnitzky) Tr. at 19-23; *see also* IRS, Press Release, *IRS Takes Steps to Ensure Credit Counseling Organizations Comply with Requirements for Tax-Exempt Status* (Oct. 17, 2003), *available at* (*www.irs.gov/newsroom/article/0,,id=114575,00.html*).

[61] A list of entities whose tax exempt status has been revoked can be found at (*www.irs.gov/charities/charitable/article/0,,id=164392,00.html*).*See also* IRS (Grodnitzky) Tr. at 20-23 (noting that of the initial 63 CCAs reviewed, the vast majority of them had their 501(c)(3) status revoked, or were issued notices of revocation).

[62] IRS, Press Release, *IRS Takes New Steps on Credit Counseling Groups Following Widespread Abuse* (May 15, 2006), *available at* (*www.irs.ustreas.gov/newsroom/article/0,,id=156996,00.html*).

[63] Pension Protection Act of 2006, P.L. 109-280, Section 1220 (Aug. 2006), *codified as* 26 U.S.C. 501(q).

[64] *See* 26 U.S.C. 501(q).

[65] *See id.*

[66] 26 U.S.C. 501(q)(2) (requiring that ''[t]he aggregate revenues of the organization which are from payments of creditors of consumers of the organization and which are attributable to debt management plan services do not exceed the applicable percentage [that is being phased in and that will go down to 50%] of the total revenues of the organization.'').

[67] *See* 26 U.S.C. 501(q)(1)(C). In addition to government efforts to regulate CCAs, some industry trade associations have imposed registration and/or certification requirements on their members requiring, among other things, that members maintain nonprofit status, provide counseling and education services, and provide counseling services to consumers regardless of ability to pay. *See* NFCC Member Application (Attachments A-C), *available at* (*www.nfcc.org/NFCC_MemberApplicationFINAL_REV071006.pdf*); AICCA Certification of Compliance, *available at* (*www.aiccca.org/images/CertificateofCompliance.pdf.*)

discharge from bankruptcy.[68] Under the established processes, CCAs seeking certification as approved providers of the required credit counseling must submit to an in-depth initial examination and to subsequent re-examination by the EOUST.[69]

B. For-profit Debt Settlement Services

1) Background

As detailed above, the last decade has seen tremendous change in the debt relief industry. Historic levels of consumer debt[70] have dramatically increased the demand for debt relief services, but traditional DMPs have become less available to consumers who increasingly have insufficient income to repay their debts under such plans.[71] At the same time, CCAs have been under significant pressure due to decreases in fair share funding and new regulatory constraints.[72] These developments have created an opportunity for a new debt relief business model offered by for-profit debt settlement companies.[73] These companies commonly use radio, television, and Internet advertising to entice consumers with the prospect of lump sum settlements for less than the full outstanding balance of their unsecured debts.[74] In many cases, they purport to offer consumers a way to pay off their unsecured debt obligations for pennies on the dollar. Unlike a DMP, the goal of a debt settlement plan is for the consumer to repay only a portion of the total owed. Thus, debt settlement may appeal to a wide range of indebted consumers, including: those who are ineligible for a DMP because their income is insufficient to enable them to repay their total debt in three to five years; those who would be able to repay their debts in full, but are unaware of the existence of or uninterested in the DMP option; and even those who might be better off declaring bankruptcy due to the extent of their indebtedness or other specifics of their particular situation.[75]

Many consumers seeking information about debt settlement are already behind on their debt payments and subject to the attendant stresses of their financial situations, including fielding multiple debt collection calls, struggling to make even minimum payments on their credit cards, and, in many instances, struggling to pay their mortgages. Thus, the prospect of alleviating these stresses has undeniable appeal. Advertisements for debt settlement services typically direct consumers to call for more information, and the resulting telemarketing transactions often occur when consumers are extremely vulnerable.[76]

The debt settlement business model appears to depend on the ability of the debt settlement provider to time a consumer's delinquency and rate of savings to coincide with a creditor's or debt collector's incentive to settle.[77] According to debt settlement industry representatives, settling a debt for less than the full principal value becomes more attractive to creditors as their internal charge-off deadlines approach.[78] The delinquency, charge-off, and collection process varies from creditor to creditor, but some commonalities exist. Generally, after a credit card account is delinquent for some period of time (most often between six months and a year) the issuer will ''charge off the account.''[79] Once the creditor charges off the account, it is no longer listed as an account receivable, and its value is charged against the creditor's reserves for losses.[80] At the time of charge-off, the issuer may assign or sell the debt to a debt collector – whether a contingency collection agency, collection law firm, or debt buyer –who will then attempt to collect the debt directly from the consumer.[81] Debt settlement companies often negotiate with debt collectors regarding accounts that are, due to their delinquency status, no longer in the creditor's portfolio.[82]

Debt settlement industry representatives assert that they assess the information about a particular consumer's financial condition and, based on that individualized assessment, calculate a monthly payment.[83] Depending on the debt

[68] *See* Pub L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. 101 et seq.).

[69] *See Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies by United States Trustees*; *Notice of Proposed Rulemaking*, 73 FR 6062 (Feb. 1, 2008) (seeking comment on proposed rule setting forth additional procedures and criteria for approval of entities seeking to become, or to remain, approved nonprofit budget and credit counseling agencies). The proposed rule and public comments are available at (*www.regulations.gov*). A list of EOUST-approved credit counselors is available to consumers at (*www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm*).

[70] *See* CCFS (Manning) Tr. at 54-57 (noting ''unprecedented levels of debt'' and explaining that at least $350 billion in credit card debt was refinanced into home equity loans and mortgages between 2001 and 2007).

[71] *See* CCFS (Manning) Tr. at 65; FTC (Parnes) Tr. at 6-7; Care One at 2, 5 (estimating that six million consumers a year are unable to qualify for a traditional DMP because ''[t]he traditional [DMP] supported by creditors is not sufficient to help consumers impacted by the downturn in the economy and the increased availability and use of unsecured debt.''); *see also supra* notes 35-38 and accompanying text.

[72] This pressure may be responsible for a reduction in entities seeking to engage in credit counseling on a nonprofit basis. *See, e.g.,* IRS (Grodnitzky) Tr. at 25 (noting that ''since 2006, [the IRS has] received very few new applications from organizations wishing to engage in credit counseling'').

[73] *See* NFCC (Binzel) Tr. at 29 (''what we've seen as a result of companies being pushed out of 501(c), many have reemerged or are morphing into for profit entities and, in some cases, debt settlement companies.''); IRS (Grodnitzky) Tr. at 66; EFA Data Processing (Ansbach) Tr. at 81 (''There are more and more debt settlement companies that join us every day. Some are certainly well organized. Others are not. Some certainly join us with a tremendous amount of expertise. Others do not.''); Debt Settlement USA (Craven) Tr. at 88 (''In the past year alone, we have experienced a more than 50% increase in the number of consumers who have turned to us and turned to debt settlement as an alternative to bankruptcy.'').

[74] *See* NFCC (Binzel) Tr. at 31.

[75] *See* CCFS (Manning) Tr. at 61-62 (''If people are in financial distress, we should be able to essentially underwrite them through a means test provision and say which program they should go into, and most importantly, what the debt concessions should look like. . . . We need to have a means test that says people are going to pay what they can afford to pay.'').

[76] *See* CFA (Plunkett) Tr. at 103; EFA Data Processing (Ansbach) Tr. at 83 (''These are consumers that are distraught, these are consumers that are crying, and I am sad to report to you that more often than not my representatives shared with me that these are people that are actually suicidal.'').

[77] *See* USOBA at 7; *see also generally* US Debt Resolve (Johnson) Tr. at 71-75 (discussing the debt settlement business model).

[78] *See* USOBA at 7 (asserting that debt settlement offers are more likely to be accepted on accounts that are at least 120 days delinquent).

[79] *See* FTC, *Collecting Consumer Debts, The Challenges of Change: A Workshop Report* (Feb. 2009), at 2-3; Kaulkin Ginsberg, *The Kaulkin Report: The Future of Receivables Management* 37 (7th ed. 2007).

[80] *See* NCLC, *Fair Debt Collection* 14-15 (6th ed. 2008).

[81] *See id.* Of course, many creditors use contingency collection agencies to collect debts that are delinquent but not charged-off. Once the debt is charged-off, ''[c]ollection efforts continue on many charged-off debts for a substantial period of time . . . . Any payment on the charged-off debt is then treated as income – a recovery on a bad debt – on the debt collector's books.'' *Id.* (citing Uniform Retail Credit Classification and Account Management Policy, 65 FR 36,903 (June 12, 2000)). The use of the term ''debt collector'' to include contingency collection agencies, collection law firms, and debt buyers is consistent with the Commission's interpretations of the Fair Debt Collection Practices Act (''FDCPA''). *See* FTC, *Collecting Consumer Debts, The Challenges of Change: A Workshop Report* (Feb. 2009), at 2-3.

[82] *See* ACA (Feb. 20, 2009) at 2 (reporting the results of a survey ACA conducted to determine its members' experiences with debt settlement companies).

[83] *See, e.g.,* USOBA at 7 (''Once a consumer has preliminarily qualified for and decided upon a debt settlement company, the consumer receives an agreement for services, a creditor information form, a budget form, limited power of attorney, a permission to communicate form, and instructions on how to complete the package. Once the consumer has completed the package . . . [the company] is responsible for reviewing the package to ensure that the consumer meets the criteria to qualify for the program. The qualification process is a timely process, which includes a complete review of the client's monthly budget form, the list of creditors on the creditor worksheet, the client's

Continued

settlement company, the consumer may make the payment to the debt settlement company or to a third-party escrow company.[84] Consumers are typically told that the monthly payments – often in the range of hundreds of dollars – will accumulate until there are sufficient funds to make the creditor or debt collector an offer equivalent to an appreciable percentage of the amount originally owed to the creditor. During this time, the debt settlement provider often instructs the consumer not to talk to his or her creditors or debt collectors.[85] To effectuate what appears to be a ''communication blackout,'' debt settlement companies often instruct consumers to assign them power of attorney[86] and to send creditors (directly or through the debt settlement provider) a cease communication notice.[87] In some cases, the debt settlement provider may even execute a change of address form substituting its address for the consumer's, redirecting billing statements and collections notices so that the consumer does not receive them.[88] A company may assure the consumer that it is in contact with the creditors or debt collectors directly and represent that collection calls and lawsuits will cease upon enrollment in the debt settlement program.

The Workshop record indicates that there are three common fee models in the debt settlement industry. The first is the ''front-end fee model.'' Although this model has some variations, debt settlement companies that charge front-end fees generally require consumers to pay as much as 40% or more of the fee within the first three or four months of enrollment, and collect the remaining fee over an ensuing period of 12 months or less,[89] whether or not any settlements have been attempted or achieved.[90] This model is apparently becoming the most prevalent.[91] Additionally, depending on the debt settlement company, consumers may be required to pay a substantial percentage or even the full fee before any portion of their funds are paid to creditors – and perhaps before the debt settlement company makes any contact with creditors.[92] As a result, consumers may pay hundreds of dollars in up-front fees before any of their funds are escrowed for the settlement fund.

The second common fee structure is the ''flat fee model,'' in which the entire fee is collected over approximately the first half of the total enrollment period.[93] Finally, the ''back-end model'' contemplates the consumer paying a small monthly fee for the duration of the plan, and then, upon program completion, paying a fee equal to a percentage of total savings.[94]

Debt settlement broadcast advertising typically omits any representation

history with those creditors (current, delinquent, how long the account has been open, cash advances, balance transfers), and the client's ability to make the recommended monthly payment.'').

[84] In many instances, consumers are requested or required to send funds to the debt settlement company to be escrowed. One debt settlement provider at the Workshop noted, however, that no ''legitimate debt settlement company [should] pay creditors on behalf of the consumer.'' Debt Settlement USA (Craven) Tr. at 91. The Commission's law enforcement shows the dangers of the escrow model. *See, e.g., FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. 2002) (alleging that defendants regularly withdrew money from consumers' trust accounts to pay their operating expenses); *FTC v. Edge Solutions*, No. CV-07-4087 (E.D.N.Y.), First Interim Report of Temporary Receiver (Oct. 23, 2007), at 3 (noting that ''customer funds in the amount of $601,520 were missing from the receivership defendants' accounts and unaccounted for by the receivership defendants'').

[85] *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC(RNBx) (C.D. Cal. 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC(Ex) (C.D. Cal. 2002).

[86] *See* ACA (Dec. 1, 2008) at 5 (''ACA members routinely receive letters from debt settlement companies or law firms claiming to represent consumers. Commonly the letters include [power of attorney documents] that purport to be signed by the consumer authorizing the attorney to act on behalf of the consumer. The attorney then directs the credit-grantor or collection agency to work with a debt settlement company to resolve the debt.''); *see also, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007)(alleging defendants send power of attorney documents to consumers); *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326(WG4) (D. Mass. 2004) (alleging that consumers were instructed to sign power of attorney forms); *FTC v. National Credit Council*, Case. No. SACV04-0474 CJC(JWJx) (C.D. Cal. 2004) (alleging that defendants used power of attorney documents).

In a comment submitted to the Commission in connection with the Workshop, ACA International (a trade organization representing third-party debt collectors) claimed that the power of attorney documents prepared by debt settlement companies are frequently legally deficient under state law. *See* ACA (Dec. 1, 2008) at 5-8. Moreover, unless presented by an attorney, a power of attorney may permit, but does not require, a creditor to contact the debt settlement company. Accordingly, it appears that this strategy often does not stop contacts between creditors and consumers, collection calls, or lawsuits/garnishment proceedings, but instead has the propensity to escalate the collection process.

[87] *See* ACA (Dec. 1, 2008) at 7 (''The increase in for-profit debt settlement companies has resulted in more of these companies seeking to interpose themselves between consumers and credit-grantors or collectors.''). Workshop comments from the Community Bankers Association (CBA), the American Financial Services Association (AFSA) and ACA International, as well as statements by banking representatives at the workshop, indicate debt settlement companies often use power of attorney and cease and desist letters to stop contacts between creditor and consumer. *See* ACA (Dec. 1, 2008) at 4-7; CBA at 2-3; AFSA at 3. Creditors express displeasure, however, that once debt settlement companies intercede on behalf of consumers, the debt settlement companies are non-responsive to creditor contacts. *See, e.g.,* AFSA at 3. One workshop panelist representing the American Bankers Association (''ABA'') noted that, even when successful, attempts to inhibit direct communication with consumers prevent creditors from informing consumers about available options for dealing with the debt and the ramifications of failure to make payments. *See* ABA (O'Neill) Tr. at 96.

[88] *See, e.g., FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal 2002) (alleging defendants instructed consumers, among other things, to submit change of address information to creditors so that mail would go directly to defendants); *FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM, Exs. Supp. Mot. T.R.O., at Ex. 7 (D. Colo. 2007) (same).

[89] *See* US Debt Resolve (Johnson) Tr. at 72-74 (''It is my opinion that a front end-loaded model looks at that [sic] 40 percent or more of the service fee is collected within the first three or four months and, then typically, the remainder of the service fee paid by the consumer to the company is paid over a 12-month period of time, sometimes even less.''); TASC, *General Response* (Dec. 1, 2008), at 2 (''The settlement savings fee model bases the majority of the fee on a percentage of the savings realized by the consumer. In most instances the fees for this model equate to around 20%. Companies using the settlement savings model generally charge an initial fee collected over the first one to three months followed by a lower monthly fee over the life of the program.''); USOBA at 12 (''Some business models call for the fee to be paid up front in its entirety, over the first several months of the program prior to any negotiating with creditors takes [sic] place. Other business models include this percentage fee into a consumer's monthly payment, deducting a portion of the monthly payment and applying that portion towards the overall fee amount.''); *see also, e.g., FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006) (alleging that defendants required consumers to make a ''down payment'' of 30% to 40% of total fee in first two or three months with the remainder paid over the following 6 to 12 months).

[90] *See* US Debt Resolve (Johnson) Tr. at 73 (noting that the cost of a program may be tied to a percentage of the debt owed when the consumer enrolls in the program or based on an estimate of the amount of money the consumer may save); *see also* CFA (Plunkett) Tr. at 103, 110 (''Fifteen to 20 percent of the total debt enrolled in the program is collected in the first year of the program. So, if you have $50,000 in debt, we're talking about $7,500 or more in the first year . . . [T]hat makes it very difficult for most people to afford a program for which they have received nothing at that point.'').

[91] *See* CFA (Plunkett) Tr. at 103.

[92] *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007)(alleging defendant required full payment of fee – 8% of consumer's total unsecured debt – before contacting any creditors); *FTC v. Innovative Sys. Tech., Inc.,* No. CV04-0728 GAF JTLx (C.D. Cal. 2004) (alleging defendants required payment of ''all or some of the fee'' before they would perform services); US Debt Resolve (Johnson) Tr. at 108 (''I think there is concern on protection for the consumer because at different points in time[] the settlement firm will collect 65% of the fees in six months and the client won't have any results at that point in time.''); *id.* Tr. at 74 (''Typically on a front-end loaded program – I'm not saying that it's incorrect – but the opportunity for the average consumer will not have the ability to settle.''); *see also* USOBA Comment at 12 (''Some business models call for the fee to be paid up front in its entirety, over the first several months of the program prior to any negotiating with creditors takes place.''); *FTC v. National Credit Council,* Case. No. SACV04-0474 CJC (JWJx) (C.D. Cal. 2004) (alleging ''[o]nly after these [up-front] fees are paid in full do defendants begin to apply a consumer's monthly payments to his NCC-administered trust account for use in settling his debts'').

[93] *See* US Debt Resolve (Johnson) Tr. at 73.

[94] *See id.* at 73-74.

regarding fees or charges for the service, other than statements such as ‘‘free online evaluation’’ or ‘‘free consultation.’’[95] The issue of fees or charges is not broached until contact is made through a telemarketing sales call or even later – in the written contract the consumer receives after the telemarketing call.[96]

2) Consumer Protection Abuses in the Debt Settlement Industry

Debt settlement plans, as they are commonly marketed and implemented, raise several consumer protection concerns. These concerns begin with the marketing and advertising of the services,[97] but also extend to whether such plans are fundamentally sound for consumers.

The initial contact between a debt settlement company and a prospective customer is typically through Internet, television, or radio advertising.[98] The ads commonly urge consumers to call a toll-free number for more information.[99] Common claims in the ads and ensuing telemarketing pitches include representations that debt settlement companies will obtain for consumers who enroll in a debt settlement plan any of the following results: a reduction of their debts by 50%; elimination of debt in 12 to 36 months; cessation of harassing calls from debt collectors and collection lawsuits; and expert assistance from debt settlement providers who have special relationships with creditors and knowledge about available techniques to induce settlement.[100] Debt settlement companies also frequently represent that there is a high likelihood (sometimes even a ‘‘guarantee’’) of success.[101] Law enforcement actions, consumer complaints, and the Workshop record, however, cast serious doubt on the validity of such claims.[102] Indeed, even the industry’s own figures, to the limited extent it has provided them,[103] indicate that a large proportion of consumers who enter a debt settlement plan do not attain the commonly touted results.[104]

In some instances debt settlement companies omit material information about the debt settlement process from their marketing presentations to consumers. Specifically, they often counsel consumers to stop paying their creditors[105] without informing them that failing to make payments to creditors may actually increase the amount they owe because of penalties and interest and likely will adversely affect their credit score. Consumers often are misled that their initial payments are taken by the debt settlement company as fees and not saved for settlement of their debt.[106] Further, debt settlement companies, in many instances, misrepresent to consumers how long it will take them to

[95] *See, e.g,. FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007)(alleging defendants’ website represented ‘‘It’s Free’’ and ‘‘No Fee Application’’); *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006) (alleging defendants offered consumers free analysis of their financial situation); *FTC v. Nat’l Credit Council,* Case. No. SACV04-0474 CJC (JWJx) (C.D. Cal. 2004) (alleging defendant purported to offer ‘‘free counseling and assistance in debt management’’); TASC (Young) Tr. at 138-139.

[96] *See, e.g.,* CFA (Plunkett) Tr. at 110 (‘‘[Y]ou go on almost any website for a settlement firm and you can’t find a simple explanation of what will be charged in general based on whatever, say a fee schedule.’’); TASC (Young) Tr. at 155-56.

[97] *See* AADMO (Guimond) Tr. at 45-46 (‘‘What are the real problems with debt settlement? I would mirror the earlier comments. I believe it’s the advertising practices. It’s an enticing offer to eliminate 75% of your debt in 12 months, but if that’s not what’s occurring it’s an absolutely worthless claim.’’).

[98] *See* USOBA at 7 (‘‘Most consumers normally begin the debt settlement process by searching online through various search engines, such as, Yahoo, Google, MSN, ASK, etc. Consumers will type in a keyword or key phrase, such as ‘debt help’ or ‘debt assistance’ and the search engine will provide both natural and advertised results. . . . Other means of advertising include national radio, television, newspapers, and magazines. Most advertisements specifically target consumers who are in financial trouble.’’).

[99] *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007); *FTC v. Edge Solutions, Inc.,* No. CV-07-4087 (E.D.N.Y. 2007); *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal 2002).

[100] *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007); *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326 (WG4) (D. Mass. 2004); *California v. Am. Debt Arb.,* No. 06CS01309 (Sup Ct. Sacramento Cty. 2006); *Florida v. Emergency Debt Relief*, AG Case No. L05-3-1033 (2006); *Florida v. Boyd,* 2008 CA 002909 (4 th Jud. Cir., Duval Cty Mar 2008); *see also* NFCC (Binzel) Tr. at 30.

[101] *See, e.g., FTC v. Innovative Sys. Tech., Inc.,* No. CV04-0728 GAF JTLx (C.D. Cal. 2004) (alleging that defendant represented that service was ‘‘no risk’’ because it guaranteed that its services would produce the advertised result).

[102] *See, e.g., FTC v. Nat’l Consumer Council, Inc.*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004) (showing that only 1.4% of the consumers that entered defendant’s debt settlement program obtained the promised results); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx), Order Denying Def’s Mot. Summ. J. (Dec. 20, 2006), at 18 (finding that only 12% to 14% of defendant’s consumers had debts settled with the represented reduction in overall debt); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR, App. for T.R.O. (W.D. Wash. Mar. 6, 2006) at 15 (alleging that Defendants failed to achieve promised interest rate reductions for 99.5% of sample of accounts and failed to achieve any interest rate reductions in 80.4 percent of the accounts); New York Attorney General, Press Release, *Attorney General Cuomo Sues Debt Settlement Companies for Deceiving and Harming Consumers* (May 20, 2009) (alleging that two debt settlement companies only provided the promised results to 1% and 1/3% of their consumers, respectively), *available at* (*www.oag.state.ny.us/media_center/2009/may/may19b_09.html*).

[103] Generally, when asked for data to support its pervasive performance claims, the industry has not provided reliable statistical or empirical data. The lack of industry-wide statistics is not a new phenomenon. In its 2005 report on the debt settlement industry, the NCLC described its difficulty getting debt settlement companies or a trade association to provide data to support the advertising claims of debt settlement entities. *See* NCLC, *An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers* (2005), at 1 (‘‘[M]any debt settlement companies we called would not share information about their business.’’); *id.* at 9 (‘‘It is possible that the fee arrangements described above would be justifiable if the companies actually earned those fees. Unfortunately, it is not easy to determine what the companies actually do to earn these fees. As noted above, the debt settlement trade association (USOBA) and companies we called have either refused to speak with us or provided vague responses.’’). Then, and now, the industry has not provided sufficient performance data to demonstrate that the typical consumer who enrolls in their debt relief services obtains the represented relief. For example, at the Workshop, USOBA’s representative stated that it has undertaken a new study, but could not state whether the study would be made public. *See* USOBA (Keehnen) Tr. at 260-61; *see also* CFA (Plunkett) Tr. at 105 (‘‘This is a very murky industry. It’s not just consumers who have a hard time getting real information on what’s really occurring. We need empirical information that’s independently verified. Based on what we have seen in the industry, it has to be independently verified.’’).

[104] TASC, a debt settlement industry trade association, submitted a study to the FTC purporting to show ‘‘completion rates’’ for consumers in debt settlement programs offered by TASC members. The study, which was voluntary for industry members, reported that ‘‘completion rates’’ ranged from 35% to 60%. *See* TASC *, Study on the Debt Settlement Industry*, at 1 (2007). However, this study’s probative value is limited substantially by, among other things, the fact that it does not provide any information on the TASC members who participated in the survey – *i.e.*, how many TASC members participated, how long those who did participate had been in business, and how many consumers those members serviced. Additionally, the measurement of ‘‘completion rates’’ –a term undefined and subject to various interpretations – is not the correct means of judging success rates for the debt relief industry. For example, industry members may define ‘‘completion’’ to mean that consumers obtained even a single settlement, regardless of how many accounts a consumer may have outstanding. *See id.* at 1 (in explaining its methodology, TASC notes that some of those surveyed ‘‘defined a completion as having all debts settled, [but that] there were two that considered a client completed if they had settled at least 80% of the debt and one if they had settled at least 50% of the debt’’). Similarly, a settlement may be counted as ‘‘completed’’ regardless of whether it was obtained on the terms represented to the consumer, or on less favorable terms. Industry members might even include consumers who ceased paying for services prior to receiving the represented results in the count of ‘‘completed’’ accounts. The Commission believes, instead, that success rates should reflect the number or percentage of consumers who pay for the offered goods or services that then fully achieve the represented results.

[105] *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. 2002).

[106] *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007).

save sufficient funds in order to offer settlements to each creditor.[107]

Consumers often suffer irreparable injury as a result of paying a fee in advance of receiving services offered by a debt settlement company. These consumers, relying on the representations of results, pay fees to debt settlement companies believing that most or all of the payments are being saved for the promised debt settlement.[108] Telemarketers' practice of taking fees before a settlement is obtained results in a number of adverse consequences: late fees or other penalty charges, interest charges, delinquencies reported to credit bureaus that decrease the consumer's credit score, and sometimes legal action to collect the debt.[109] Given what appear to be the relatively low success rates for debt settlement plans, consumers who pay substantial fees up-front are likely to be harmed.

3) Law Enforcement Actions and Other Responses

The Commission and state enforcers have brought law enforcement actions and launched consumer education efforts to combat deceptive and unfair practices in the debt settlement industry. Since 2001, the Commission has brought seven actions against debt settlement entities for a variety of the abuses detailed above.[110] As in the FTC's actions against deceptive credit counselors, these suits commonly allege the misrepresentation of fees, or the failure to fully disclose them – including the significant up-front fees that are often charged.[111] Additionally, the Commission alleged that these defendants falsely promised high success rates,[112] promisedunattained results (*e.g.*, settlements for a certain percentage of the total original debt),[113] and misrepresented their refund policies.[114] Further, the Commission complaints charged that the defendants in these matters failed to warn consumers of the negative consequences of debt settlement, including the accumulation of late fees and other charges,[115] the effect on consumers' credit ratings,[116] and the fact that debt collectors would continue to contact consumers.[117]

To complement its law enforcement efforts, the Commission has worked to advance public awareness of the debt settlement industry through its September 25, 2008 Workshop to discuss the origins and current practices of the debt settlement industry and consumer protection issues, including the possible need for additional regulation by the Commission and the future of the industry. The Workshop record has aided Commission efforts to understand better, and now propose additional restrictions to curb, deceptive and unfair practices involving debt settlement and other forms of debt relief services.[118]

The states have also been active in attempting to regulate abuses in the debt settlement industry.[119] Many states have enacted statutes specifically designed to restrict deceptive practices in this area; in fact, some have banned for-profit debt settlement entirely[120] or the charging of up-front fees.[121] However, most of these statutes allow debt settlement but impose certain requirements, for example that companies be licensed in the state,[122] that they provide consumers with certain key disclosures (*e.g.*, schedule of payments and fees),[123] and/or that they provide consumers with some right to cancel enrollment.[124] Additionally, some states restrict the amount and timing of fees, including up-front fees and subsequent monthly charges.[125] In 2005, the National Conference of Commissioners on Uniform Laws (''NCCUSL'') drafted the Uniform Debt-Management Services Act (''Uniform Act'') in an attempt to provide consistent regulation of both for-profit and nonprofit debt relief services across the United States.[126] Among the key consumer protection provisions in the Uniform Act are: a fee cap[127]; mandatory education requirements[128]; certified counselors[129]; and accreditation requirements for

[107] *See, e.g.,* Debt Settlement USA, *Growth of the Debt Settlement Industry*, at 10 (''Fraudulent firms also regularly fail to provide the services promised to consumers by claiming that they can help them become debt free in an unrealistically short amount of time and/or promise too low of a settlement.'').

[108] *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007); *FTC v. Innovative Sys. Tech., Inc.,* No. CV04-0728 GAF JTLx (C.D. Cal. 2004); *see also* USOBA at 12 (''Some business models call for the fee to be paid up front in its entirety, over the first several months of the program prior to any negotiating with creditors takes place.'').

[109] One of the Commission's enforcement actions, *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006), is particularly illustrative on this harm: In that matter, between 2004 and 2005, 5,679 lawsuits were filed against defendants' estimated 18,116 consumers (the total number of consumers as of October 2005). *See id.,* Trial Exs. 382, 561, 562, 623 & Schumann Test., Day 4, Vol. III, 37:21-40:12; 34:17-37:4; *see also infra* note 221.

[110] *FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. 2007); *FTC v. Edge Solutions*, No. CV-07-4087 (E.D.N.Y. 2007); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. 2004); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. 2004); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX)(C.D. Cal. 2004); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. 2002).

[111] *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. 2007) (alleging that defendants misrepresented that they would not charge consumers any up-front fees before obtaining the promised debt relief, but required a substantial up-front fee).

[112] *See, e.g., id.*

[113] *See, e.g., id.*; *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006).

[114] *See, e.g., FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF (JTLx) (C.D. Cal. 2004) (defendants misrepresented that they would refund consumers' money if unsuccessful).

[115] *See, e.g., id.*

[116] *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006).

[117] *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. 2007).

[118] In addition to the Workshop, the FTC has also published a number of relevant consumer education publications. *See e.g., Knee Deep in Debt, available at* (*www.ftc.gov/bcp/edu/pubs/consumer/credit/cre19.shtm;*) *Fiscal Fitness: Choosing a Credit Counselor, available at* (*www.ftc.gov/bcp/edu/pubs/consumer/credit/cre26.shtm.*)

[119] *See* AADMO (Guimond) Tr. at 44 (''If you also look at some states [which regulate debt settlement] . . . [t]here are no or very few licensed debt settlement companies.'').

[120] *See, e.g.,* Conn. Gen. Stat. § 36A-655, *et seq.*; La. Rev. Stat. § RS 14:331, *et seq.*, 37:2581, *et seq.*; N.D. Gen. Stat. § 13-06-01-03 & 13-07-01-07; Wyo. Stat. Ann. § 33-14-101, *et seq.*

[121] *See, e.g.,* N.C. Gen. Stat § 14-423 *et seq.*

[122] *See, e.g.,* Kan. Stat. Ann. § 50-1116, *et seq.*; Me. Rev. Stat. Ann. Tit. 17 § 701, *et seq.* &tit. 32 § 6171, *et seq.*, 1101-03; N.H. Rev. Stat. Ann. § 339-D:1, *et seq.*; Va. Code Ann. § 6.1-363.2, *et seq.*

[123] *See, e.g,.* Kan. Stat. Ann. § 50-1116, et seq.; N.H. Rev. Stat. Ann. § 339-D:1, et seq; S.C. Code Ann. § 37-7-101, et seq.; Wash. Rev. Code § 18.28.010, *et seq.*

[124] *See, e.g.,* S.C. Code Ann. § 37-7-101, *et seq.*; Va. Code Ann. § 6.1-363.2, *et seq.*; Wash. Rev. Code § 18.28.010, *et seq.*

[125] *See, e.g.,* Fla. Stat. § 817.801, *et seq.* (limiting initial fee to $50 and monthly fee to $35 or 7.5% of total payment); Me. Rev. Stat. Ann. Tit. 17 § 701, *et seq.*, tit. 32 § 6171, *et seq.* (limiting set-up fee to $75, monthly charge to $40, and 15% of reduction for any settlement of debt).

[126] *See* AADMO (Guimond) Tr. at 42.

[127] *Unif. Debt-Mgmt. Servs. Act* § 23(d)(2) (2008) (allowing debt settlement entities to charge ''a fee for consultation, obtaining a credit report, setting up an account, and the like, in an amount not exceeding the lesser of $400 and four percent of the debt in the plan at the inception of the plan; and . . . a monthly service fee, not to exceed $10 times the number of creditors remaining in a plan at the time the fee is assessed, but not more than $50 in any month.''); *id.* § 23(d)(1) (2008) (allowing entities that offer to ''reduce finance charges or fees for late payment, default, or delinquency'' to charge ''a fee not exceeding $50 for consultation, obtaining a credit report, setting up an account, and the like; and . . . a monthly service fee, not to exceed $10 times the number of creditors remaining in a plan at the time the fee is assessed, but not more than $50 in any month.'').

[128] *Unif. Debt-Mgmt. Servs. Act* § 17(b) (requiring that debt management entities provide consumers ''with reasonable education about the management of personal finance'').

[129] *Unif. Debt-Mgmt. Servs. Act* § 2(6) (setting forth requirements for certification); *id.* § 16 (requiring that registered entities ''maintain a toll-free communication system, staffed at a level that reasonably permits an individual to speak to a certified counselor, certified debt specialist, or customer-service representative, as appropriate, during ordinary business hours.'').

sellers of debt management services.[130] At this point, only a handful of states have adopted the Uniform Act, but NCCUSL believes that with recent modifications to the Act in 2008 more states will adopt it in 2009.[131]

Further, state regulators and Attorneys General have filed numerous law enforcement actions against debt settlement companies.[132] Some states have sued these entities for alleged violations of state consumer protection laws banning unfair or deceptive acts and practices. For example, in one recent action, Texas sued a debt settlement entity under state consumer protection law for making deceptive claims that it could eliminate consumers' debts in 36 months or less and reduce their overall amount by as much as 60%.[133] Other states have brought lawsuits against companies for allegedly violating their debt management or settlement statutes.[134] In an illustrative case, Colorado recently settled suits against several debt settlement entities under its debt management statute for, among other things, failing to register with the state, charging illegal fees, and/or failing to allow consumers to cancel contracts.[135]

C. Debt Negotiation

In addition to credit counseling and debt settlement, the Commission has observed a third category of debt relief service which this Notice refers to as ''debt negotiation.'' Debt negotiation companies offer to obtain interest rate reductions or other concessions to lower consumers' monthly payment to creditors.[136] Unlike DMPs or debt settlement, debt negotiation does not purport to obtain full balance payment plans or lump sum settlements of less than the full balance. Rather debt negotiators offer to obtain interest rate reductions or other concessions from creditors to make monthly payments more affordable. However, similarly to debt settlement companies, some debt negotiation entities charge significant up-front fees.[137] Additionally, like some debt settlement companies, debt negotiators may represent or promise specific results, like a particular interest rate reduction or amount saved.[138]

The FTC has brought four actions against defendants for alleged deceptive debt negotiation practices.[139] In each case, defendants relied on telemarketing to deliver alleged deceptive representations to consumers – *i.e.*, that they could reduce consumers' interest payments by specific percentages or minimum amounts, in exchange for a fee of hundreds of dollars. The Commission also alleged that some of these entities falsely purported to be affiliated, or have close relationships, with consumers' creditors.[140] Finally, in each case, the Commission charged defendants with violations of the TSR.

III. Discussion of the Proposed Rule

Based on its enforcement and outreach experience, including information from the Workshop, the Commission tentatively has concluded that additional legal restrictions are needed to address pervasive illegal conduct occurring in the sale of debt relief services.[141] Thus, the Commission

[130] *Unif. Debt-Mgmt. Servs. Act* § 6(8); *see also* AADMO (Guimond) Tr. at 42-43; NCCUSL (Kerr) Tr. at 207.

[131] According to NCCUSL, the recent amendments to the Uniform Act did not impact the consumer protection provisions referenced above, rather the amendments focused on addressing problems identified with the Uniform Act that made it difficult for states to implement. *See* NCCUSL (Kerr) Tr. at 211-12.

[132] *See, e.g., California v. American Debt Arb.*, Case No. 06CS01309 (Sup. Ct. Sacramento Cty. 2006); *Florida v. Emergency Debt Relief*, AG Case No. L05-3-1033 (2006); *Florida v. Boyd*, 2008 CA 002909 (4 th Jud. Cir., Duval Cty Mar. 2008); *see also*, Florida Attorney General, Press Release, *Attorney General Announces Settlement in Debt Relief Scheme that Victimized Thousands* (Nov. 25, 2008), *available at* (*www.myfloridalegal.com/newsrel.nsf/pv/352C2D099A1FA7EE8525750C006DF6B4*); North Carolina Attorney General, Press Release, *Debt relief firms ordered to stop taking money in NC, says AG*, *available at* (*www.ncdoj.gov/DocumentStreamerClient?directory=PressReleases/&file=Consumer%20Law%20Center.pdf*) (Feb. 15, 2008); Maryland Attorney General, Press Release, *Attorney General Settles with Companies Selling Debt Repayment Services*, *available at* (*www.oag.state.md.us/Press/2007/101907.htm*) (Oct. 19, 2007); West Virginia Attorney General, Press Release, *Attorney General McGraw Reaches Settlement with Four Debt Relief Companies for 366 Consumers* (May 16, 2007), *available at* (*www.wvago.gov/press.cfm?ID=343&fx=more*).

[133] *See Texas v. CSA-Credit Solutions of Am.*, Inc., No. 09-000417 (Dist. Travis Cty, filed Mar. 26, 2009), *available at* (*www.oag.state.tx.us/newspubs/releases/2009/032509csa_op.pdf*). In a similar case, Florida challenged the practices of another debt settlement provider. *See Florida v. Boyd*, 2008-CA-002909 (Cir. Ct. 4th Cir. Duval Cty, Mar. 5, 2008) (alleging deceptive and unfair practices for promises to settle debts for ''as little as 25-50%'' of the balance owed in 12 to 36 months), *available at* (*www.myfloridalegal.com/webfiles.nsf/WF/JFAO-7CFMMD/$file/FutureFinancialComplaint.PDF*.)

[134] *See, e.g., New Hampshire Banking Dept. v. Debt Relief USA*, No. 08-361 (Order of License Denial, Jan. 2, 2009) (denying company licencing for failing to abide by state requirements, including fee caps), *available at* (*www.nh.gov/banking/Order08_361DebtReliefUSA_DO.pdf*); *Florida v. Boyd*, 2008-CA-002909 (Cir. Ct. 4 th Cir. Duval Cty, Mar. 5, 2008) (alleging violations of Florida credit counseling statute for, inter alia, charging fees above statutory cap), *available at* (*www.myfloridalegal.com/webfiles.nsf/WF/JFAO-7CFMMD/$file/FutureFinancialComplaint.PDF*). West Virginia Attorney General, Press Release, *Attorney General McGraw Sues Texas Debt Settlement Company* (Apr. 14, 2009) (alleging that defendant charged more the 2% fee cap set by state law), *available at* (*www.wvago.gov/press.cfm?fx=more&ID=472*); Vermont Attorney General, *Debt Adjuster Sanctioned For Violating Licensing And Consumer Laws* (Mar. 9, 2009) (alleging, *inter alia*, that company violated state debt adjustment law by doing business in state without a license), *available at* (*www.atg.state.vt.us/display.php?smod=63&pubsec=4&curdoc=1659*). Maryland Attorney General, *Attorney General Settles with Companies Selling Debt Repayment Services* (Oct. 19, 2007), *available at* (*www.oag.state.md.us/Press/2007/101907.htm*).

[135] *See* Colorado Attorney General Press Release, *Eleven Companies Settle With The State Under New Debt-Management And Credit Counseling Regulations* (Mar. 12, 2009), *available at* (*www.ago.state.co.us/press_detail.cfmpressID=957.html*).

[136] *See e.g., FTC v. MCS Programs, LLC,* No. C09-5380RJB (W.D. Wash. 2009); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint); *FTC v. Select Pers. Mgmt.,* No. 07- 0529 (N.D. Ill. 2007); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006).

[137] *See FTC v. MCS Programs, LLC,* No. C09-5380RJB (W.D. Wash. 2009)(alleging defendants charged an up-front fee of $690 to $899); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint) (alleging defendants charged an up-front fee of $595 to $895); *FTC v. Select Pers. Mgmt.,* No. 07- 0529 (N.D. Ill. 2007) (alleging defendants charged an up-front fee of $695); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006) (alleging that defendants charged an up-front fee of $399 to $629).

[138] *See FTC v. MCS Programs, LLC,* No. C09-5380RJB (W.D. Wash 2009) (alleging defendants represented that their program would save consumers $2,500 or more); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint) (alleging defendants represented they would provide consumers with savings of $1,500 to $20,000 in interest); *FTC v. Select Pers. Mgmt.,* No. 07- 0529 (N.D. Ill. 2007) (alleging defendants represented consumers would save a minimum of $2,500 in interest); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006) (alleging defendants promised to save consumers $2500).

[139] *See FTC v. MCS Programs, LLC,* No. C09-5380RJB (W.D. Wash. 2009); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint); *FTC v. Select Pers. Mgmt.,* No. 07- 0529 (N.D. Ill. 2007); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006).

[140] *See FTC v. MCS Programs, LLC,* No. C09-5380RJB, App. for T.R.O. at 7 (W.D. Wash. 2009) (alleging that defendants ''create the impression of affiliation with consumers' banks or credit card companies''); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint) (alleging defendants claimed to have ''close working relationship with over 50,000'' creditors); *FTC v. Select Pers. Mgmt.,* No. 07- 0529 (N.D. Ill. 2007) (alleging defendants claimed to be affiliated with consumers' credit card companies); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006) (alleging that defendants claimed to have ''special relationships'' with creditors).

[141] Workshop participants expressed support for a federal legislative or regulatory solution to concerns about debt settlement. *See, e.g.,* American Credit Alliance (Franklin) Tr. at 212 (agreeing that federal regulation is necessary); NCCUSL (Kerr) Tr. at 212 (agreeing that federal regulation of debt settlement advertising is needed); USPIRG (Mierzwinski) Tr. at 212-213 (agreeing that federal regulation is necessary, but arguing that it should serve as a floor, not a ceiling, of protection); USOBA (Keehnen) Tr. at 213 (agreeing that federal regulation is necessary, but arguing that it should serve as a floor, not a ceiling, of protection); Gordon Feinblatt (Witzel) Tr. at 213 (agreeing that federal

Continued

is proposing amendments to the TSR specifically to address debt relief services, the sale of which commonly involves telemarketing. The existing provisions of the TSR already apply to outbound calls made to induce the purchase of debt relief services and to any non-exempt inbound calls.[142] The proposed amendments would bring all *inbound* debt relief calls in response to direct mail or general media advertisements under the Rule and would add tailored provisions to address specific concerns about deceptive and abusive practices prevalent in the marketing of such offers.

While the Commission believes that the proposed amendments are an important step in the effort to prevent harm to consumers considering debt relief options, it believes that a comprehensive approach is needed to address the important consumer protection concerns at issue. Therefore, in addition to this rulemaking initiative, the Commission intends to continue law enforcement, as well as its consumer education efforts, to ensure that consumers considering debt relief make informed choices. Further, the Commission believes that creditors and debt collectors can do more to address the concerns at issue in this proceeding, such as developing innovative loss mitigation techniques.[143] Creditors are uniquely positioned to play a role in resolving issues related to debt relief because they have direct relationships with consumers in financial distress. With traditional DMPs out of reach for many consumers and significant concerns about the efficacy of the debt settlement model, at least as it currently exists, the Commission encourages creditors to step up efforts to reach consumers directly and determine what, if any, debt relief options may be available. One positive development in this regard came with the recent announcement that the ten top credit card issuers are amenable to more flexible DMPs.[144]

The Commission invites written comments on the proposed Rule, and, in particular, answers to the specific questions set forth in Section VIII, to assist it in determining whether the proposed Rule provisions strike an appropriate balance between maximizing protections for consumers from deceptive and abusive conduct in the telemarketing of debt relief services, while avoiding the imposition of unnecessary compliance burdens on legitimate industry actors.

A. Section 310.1: Scope

Although no amendment is proposed with regard to the scope of the Rule, it is worth noting, for the benefit of those who may be unfamiliar with the TSR, that the Telemarketing Act dictates that the jurisdictional limits of the FTC Act apply to the TSR. Specifically, the Act states that ''no activity which is outside of the jurisdiction of [the FTC Act] shall be affected by this chapter.''[145] One example of such an activity, which merits mention here, is the exemption of nonprofit entities from the jurisdiction of the FTC Act and, by extension, the TSR. This jurisdictional limitation is rooted in Sections 4 and 5 of the FTC Act which, by their terms, provide the Commission with jurisdiction only over persons, partnerships, or corporations organized to carry on business for their profit or that of their members.[146]

Thus, legitimate nonprofit credit counseling agencies that conduct telemarketing campaigns on their own behalf will not be subject to the amended Rule. As the Commission previously has stated, however, the TSR ''does apply to any third-party telemarketers [that exempt] entities might use to conduct telemarketing activities on their behalf.''[147] Thus, if a for-profit telemarketer is engaged on behalf of a nonprofit entity in a telemarketing campaign to offer a ''debt relief service,'' as defined in proposed Section 310.2(m), that telemarketer would be subject to the Rule.[148] Additionally, the Commission has jurisdiction over sham nonprofits that operate as for-profit entities in practice.[149]

Indeed, the Commission's law enforcement record shows that sham nonprofit CCAs have been a source of significant consumer injury. Although these entities purport to operate as nonprofits, their activities in fact earn profits for affiliated entities or individuals. The Commission has obtained robust injunctive and monetary relief in actions against these bogus nonprofit credit counselors for deceptive practices in violation of the FTC Act.[150]

legislation is necessary); NFCC (Binzel) Tr. at 33 (''[I]f debt settlement companies are going to be allowed to do business, they should be subjected to strong Federal legislation. At a minimum, the legislation should define the scope of the services that may be provided;. . . set caps on the range of fees that may be charged and ensure that the fees are commensurate with the services being provided; prohibit the collection of fees until actual services are provided; require full disclosure to consumers to inform them of the fees that are being charged, the potential consequence of utilizing debt settlement, the potential impact of debt settlement services on their credit history and the tax consequences of debt settlement''); AADMO (Guimond) Tr. at 46 (''AADMO does support federal legislation and state regulation that regulates both credit counseling and debt settlement, just not necessarily together'').

[142] Outbound telemarketing of debt relief services is already subject to the TSR. *See, e.g., FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006) (alleging violation of TSR by defendant offering consumers assistance in obtaining lower credit card interest rates); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. 2006) (alleging violations of the TSR by debt settlement company). Inbound telemarketing of debt relief services in response to general media advertisements currently is exempt from the Rule, 16 CFR 310.6(b)(5), as is inbound calling in response to direct mail advertisements that make the requisite disclosures required in Section 310.3(a)(1) of the Rule. 16 CFR 310.6(b)(6). Inbound calls in response to direct mail advertisements that do not make these disclosures, however, are presently subject to the Rule. 16 CFR 310.6(b)(6).

[143] *See* CFA (Plunkett) Tr. at 101-02 (''It's not like there isn't some responsibility here on the part of the credit card industry for the fact that the debt settlement industry is surfacing and appears to be growing. Creditors do share some responsibility for this growth. As I mentioned, there's demand and CFA has documented over the last decade that credit card issuers have reduced the concessions, the benefits that they offer to consumers in credit counseling. So, therefore, the demand for an alternative has been even stronger. And we'd like to *see* creditors work harder in their work-out programs, their individual one-on-one programs, to meet the needs of the consumers who clearly have a hardship and clearly need some form of a settlement.'').

[144] *See supra* notes 35-38 and accompanying text; *see also* CFA (Plunkett) Tr. at 104 (''One of the market-based solutions that's very promising are the ongoing efforts by creditors and credit counseling agencies to develop what I think is a much more viable and a consumer-friendly alternative to bankruptcy and to, on the other extreme, a traditional debt management plan.'').

[145] 15 U.S.C. 6105(a).

[146] Section 5(a)(2) of the FTC Act states: ''The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce.'' 15 U.S.C. 45(a)(2). Section 4 of the Act defines ''corporation'' to include: ''any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members*. . . .'' 15 U.S.C. 44 (emphasis added).

[147] *See TSR; Proposed Rule*, 67 FR 4492, 4497 (Jan. 30, 2002) (*citing TSR; Statement of Basis and Purpose and Final Rule*, 60 FR, 43842, 43843 (Aug. 23, 1995)) (''As the Commission stated when it promulgated the Rule, '[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.'''); *see also Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 334-35 (4th Cir. 2005).

[148] Pursuant to the USA PATRIOT Act amendments to the TSR in 2001, the Rule now reaches ''not only the sale of goods or services, but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.'' *TSR; Final Amended Rule*, 68 FR 4580, 4585 (Jan. 29, 2003).

[149] *Supra note* 147.

[150] Specifically, in these actions, the Commission has secured injunctive relief and significant monetary judgments. *See, e.g., FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. 2005) (stipulated final judgment for $172 million suspended judgment, and barring defendants from making nonprofit claims, with $12.7 million returned to consumers as a result of the FTC action and $7-million as a result of class action settlements); *see*

B. Section 310.2: Definitions

The only proposed change to the definitions section of the Rule is the addition of newly renumbered Section 310.2(m), which defines the term ''debt relief service'' to mean:

any service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a consumer and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a consumer to an unsecured creditor or debt collector.[151]

The Commission intends that the definition of ''debt relief service'' encompass a broad swath of debt relief activities, including offers of debt settlement or negotiation services and debt management plans.[152] The definition of ''debt relief service'' is, however, limited with regard to the underlying nature of the debt involved and would not reach offers regarding consumers' secured debt, such as mortgage loans. Deceptive foreclosure rescue and mortgage loan modification schemes, which have proliferated as a result of the mortgage crisis, cause significant harm to homeowners already in financial distress.[153] The Commission tentatively has determined not to address these types of transactions under the proposed amendments because it anticipates comprehensively regulating such conduct under its new mortgage loan rulemaking authority pursuant to the Omnibus Appropriations Act.[154] On June 1, 2009, the Commission commenced a rulemaking proceeding to address deceptive or unfair practices in connection with mortgage assistance relief services (including loan modification and foreclosure rescue).[155] That Notice sets forth the law enforcement and education efforts undertaken by the Commission and state enforcers and seeks comment about the appropriate contours of a mortgage relief rule.

C. Section 310.3: Deceptive Telemarketing Acts or Practices

Section 310.3 of the Rule addresses deceptive acts or practices in telemarketing. Specifically, this provision sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization by following specified procedures whenever a payment method other than a credit or debit card is used; prohibits false or misleading statements to induce a person to pay for goods or services or to induce a charitable contribution; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions.[156]

Outbound calls to solicit the purchase of debt relief services are already subject to the TSR, including the provisions of Section 310.3. The proposed amendments to Section 310.6, discussed in detail below, would also bring *inbound* debt relief calls within the ambit of the Rule.[157] As a result, virtually all debt relief telemarketing transactions would be subject to the TSR if the proposed modifications to the Rule are adopted.[158]

As context for examining how the Rule, including the proposed modifications, applies to debt relief marketing practices, it is important to understand the fundamental nature of debt relief services and the ways in which they are commonly marketed. As discussed above in Section II, various types of debt relief services have different goals, and each employs different means of reaching those goals. A debt management plan, for example, is intended to enable a consumer to repay his or her full debt by making regular payments over a period of 3 to 5 years. Debt settlement, on the other hand, envisions a consumer repaying only a fraction of each debt owed by making one lump sum payment to each creditor. Distinct from DMPs or debt settlement services, debt negotiators offer to obtain interest rate reductions or other concessions to lower consumers' monthly payment to creditors. Nevertheless, there are some common techniques used to market these debt relief services. The following section explains how the existing provisions of the TSR and proposed amendments set forth in this NPRM would apply to debt relief services.

also, e.g., FTC v. Express Consolidation, No. 06-cv-61851-WJZ (S.D. Fla. 2008) (stipulated final judgment for over $40 million); *United States v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006) (stipulated final judgment of $926,754 in consumer redress and civil penalties, a $102,540 suspended judgment, and injunctive relief); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006) (stipulated final judgment of $2,371,380 in consumer redress and ordering defendants to set aside $415,000 to refund enrollment fees); *FTC v. Debt Mgmt. Found. Svcs.*, No. 04-1674-T-17-MSS (M.D. Fla. 2005)(stipulated suspended judgment for over $11 million and injunctive relief); *FTC v. Nat'l Consumer Council*, No. SACV04-0474CJC(JWJX) (C.D. Cal. 2005) (stipulated suspended judgment of $84.3 million and injunctive relief).

[151] Former Section 310.2(m) (definition of ''donor'') and all subsequent definitions have been renumbered accordingly in the proposed amended Rule.

[152] The definition is focused on the provision of debt relief services, but Section VIII of this Notice includes questions to aid the Commission in determining whether this definition, and by extension, the coverage of the proposed amendments, should include ''debt relief products'' as well.

[153] The Commission has brought actions against entities and individuals alleging mortgage-related debt relief fraud using its authority under Section 5 of the FTC Act. These cases allege false guarantees of success; false representations about refund policies; undisclosed up-front fees; misrepresentations regarding affiliations with nonprofit or government entities; and failure to deliver the promised services. *See FTC v. Dinamica Financiera LLC,* No. 09-CV-03554 CAS PJWx (C.D. Cal., filed May 19, 2009); *FTC v. Cantkier*, No. 1:09-cv-00894 (D.D.C. filed May 14, 2009); *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *FTC v. (http://bailout.hud-gov.us) and Ryan*, Civil No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC v. Home Assure, LLC,* Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009); *FTC v. New Hope Property LLC*, Case No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. Hope Now Modifications, LLC*, Case No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. National Foreclosure Relief, Inc.*, Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009); *FTC v. United Home Savers, LLP*, Case No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008); *FTC v. Foreclosure Solutions*, LLC, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008); *FTC v. Mortgage Foreclosure Solutions, Inc.*, Case No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008); *FTC v. Nat'l Hometeam Solutions, Inc.*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008); *see also* FTC Press Release, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at* (*www.ftc.gov/opa/2009/04/hud.shtm*).

[154] *See* Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009) (2009 Omnibus Appropriations Act). Further, to the extent that outbound telemarketing is used to further mortgage-related debt relief schemes, the Commission may use the existing provisions of the TSR, in addition to Section 5, to challenge the conduct if appropriate.

[155] *See Advance Notice of Proposed Rulemaking: Mortgage Assistance Relief Services,* 74 FR 26130 (June 1, 2009).

[156] *See generally* 16 CFR 310.3.

[157] Most inbound calls placed by consumers in response to direct mail or general media advertising are exempt from the Rule. *See* 16 CFR 310.6(b)(5) & (6). Certain exceptions to the exemption have been created to require TSR compliance for the sale of products or services that have been the subject of significant fraudulent or deceptive telemarketing activity. The proposed amendments would create an exception to the direct mail and general media exemptions for the sale of debt relief services, requiring sellers and telemarketers of these services to comply with the Rule in both inbound and outbound calls.

[158] Another exemption provides that ''[t]elephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer'' are exempt. 16 CFR 310.6(a)(4). Thus, if a customer were to call a seller or telemarketer regarding debt relief services independent of any solicitation, such a call would not be subject to the proposed revised TSR.

1) Application of Section 310.3(a)(1) to Debt Relief Services: Disclosure Obligations

The existing requirements of Section 310.3(a)(1)(i)-(vii), while not subject to amendment in this proceeding, provide the framework for understanding the general disclosure obligations of sellers and telemarketers of debt relief services who are now (in the case of outbound telemarketing) or may be as a result of this rulemaking (in the case of most inbound telemarketing) subject to the TSR. The subparts that are most likely applicable to debt relief services – Sections 310.3(a)(1)(i), (ii), and (iii) – relate to disclosure of the total costs of services; all material restrictions, limitations or conditions to purchase, receive, or use the services; and the seller's refund policy.[159] Accordingly, it is important to examine how these provisions establish the general obligations of debt relief providers.

Section 310.3(a)(1)(i) of the TSR prohibits a telemarketer from failing to disclose truthfully, in a clear and conspicuous manner, certain material information including ''the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer'' before a customer pays for goods or services offered. Debt relief companies and industry association representatives contend that industry members disclose costs to consumers during telemarketing sales calls or after the call, in written disclosures.[160] Yet, law enforcement actions allege, and consumers consistently complain, that the debt relief telemarketers say little, if anything, about fees or misrepresent the amount and timing of fee payments.[161] As a result of these practices, consumers who enter into debt relief agreements often do so unaware of the total costs they will incur, which commonly amount to thousands of dollars.

The Commission believes that disclosure of total costs is particularly crucial in the sale of debt relief services.[162] This is especially true for debt settlement plans, for which the costs are often significant. According to TASC, the median fee under the predominant debt settlement model calls for a consumer to pay the equivalent of 14% to 18% of the debt enrolled in the program.[163] Using this formula, a consumer with $20,000 in debt would pay between $2,800 and $3,600 for debt settlement services. Such large amounts of money are especially significant given that the typical consumer seeking debt relief is almost certainly experiencing serious financial distress and thus, is unable to afford existing financial obligations. Similarly, in the sale of debt management plans, disclosure of total costs is crucial to ensure that consumers understand what they will need to pay for the touted services. Indeed, in the cases brought against sham nonprofit credit counselors, consumers allegedly have been misled not only as to the total costs, but also as to the nature of monies paid because they are told that the only fees are ''voluntary contributions'' used to offset the operating expenses of the allegedly nonprofit service provider.[164] Adherence to the requirements of Section 310.3(a)(1)(i) by all sellers and telemarketers of debt relief services will provide consumers with material information necessary to evaluate their offers.[165]

Section 310.3(a)(1)(ii) requires disclosure of ''[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer.'' A seller or telemarketer of debt relief services would be required, pursuant to this provision, to disclose that the debt relief services will only extend to unsecured debt, if that is the case. Similarly, if a debt relief provider places other limits on the services they provide – such as requiring that a consumer have a minimum amount of debt to be eligible or providing that only individual debts of a certain amount will be enrolled – this would need to be disclosed pursuant to Section 310.3(a)(1)(ii). Such information would be material to consumers in determining whether the offered services would provide all, or merely some, of the debt relief they seek.

Section 310.3(a)(1)(iii) of the TSR requires that ''[i]f the seller has a policy of not making refunds, cancellations, exchanges, or repurchases,'' disclosure of this policy must be made to consumers. Further, the provision requires that, ''if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy'' be made. This TSR provision signifies the Commission's view that a seller's unwillingness to provide refunds is a material term that a consumer must know about before

[159] *See* 16 CFR 310.3(a)(1)(i)-(iii). In addition to these provisions, Section 310.3(a)(1) of the TSR also requires disclosures specific to offers involving prize promotions, credit card loss protection plans, and negative option plans. *See* 16 CFR 310.3(a)(1)(iv)-(vii).

[160] *See* Debt Settlement USA (Craven) Tr. at 109 (stating that all fees are disclosed to consumers in the telemarketing call); TASC (Young) Tr. at 155-156 (noting that fees should be disclosed on the phone and again in writing following the call). The Commission's law enforcement experience suggests that in many cases, post hoc written disclosures contradict what telemarketers have told consumers. *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx), Opp. to FTC Mot. Summ. J., at 12 (Aug. 3, 2006) (arguing that subsequent telephone calls would have ''corrected any misconceptions the consumer had about the program based on [previous] correspondence''). However, such contradictory post hoc disclosures do not adequately modify or qualify the claims made in the telemarketing sales pitch. *See, e.g., Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

[161] *See, e.g., FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. 2004) (alleging that defendant obfuscated the total costs for the products and services by separately reeling off various fees, such as retainer fees, monthly fees, and fees correlated to the percentage of money that a customer saves using the services, without ever disclosing the total cost, which sometimes was as high as thousands of dollars); *FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. 2007) (alleging that, in numerous instances, defendants represented that there would be no up-front fees or costs for their debt settlement program, when in fact the defendants required consumers to pay, through monthly payments, an up-front fee of approximately 8% of the consumers' total unsecured debt); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006) (alleging that defendant failed to disclose to consumers that they would have to pay 45% of their total program fees up-front, before any payments would be made to the customers' creditors).

[162] According to one industry participant, ''disclosure is often very inadequate, especially with regards to program fees.'' Debt Settlement USA - Revised White Paper at 10.

[163] TASC, *General Response* (Dec. 1, 2008), at 2 (stating that in the predominant flat fee model, the cost for debt settlement services ''is calculated based on a percentage of debt enrolled into the program. The approximate median flat fee is 14% to 18% of the debt brought into the program depending on the amount of debt enrolled.'').

[164] *See, e.g., FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. 2003) (alleging that, ''[i]n response to the question, 'How much will it cost me to be on the Debt Management Program,' AmeriDebt's website . . . stated, 'Due to the fact that AmeriDebt is a nonprofit organization, we do not charge any advance fees for our service. We do request that clients make a monthly contribution to our organization to cover the costs involved in handling the accounts on a monthly basis.''' In fact, the Commission alleged that defendants retained all of consumers' first monthly payment as a fee without notice to the consumer.).

[165] The Commission previously has explained the compliance obligations when marketing installment contracts, some of which are particularly applicable to debt relief services. Specifically, the Commission noted that ''it is possible to state the cost of an installment contract in such a way that, although literally true, obfuscates the actual amount that the consumer is being asked to pay.'' *TSR; Proposed Rule*, 67 FR 4492, 4502 (Jan. 30, 2002). It goes on to state that ''[t]he Commission believes that the best practice to ensure the clear and conspicuous standard is met is to **do the math for the consumer** wherever possible. For example, where the contract entails 24 monthly installments of $8.99 each, the best practice would be to disclose that the consumer will be paying $215.76. In open-ended installment contracts, it may not be possible to do the math for the consumer. In such a case, particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand.'' *Id.* at n.92. (emphasis supplied, internal quotations omitted).

paying for goods or services. Similarly, if a seller or telemarketer chooses to tout the availability of a refund policy, that entity is affirmatively obliged to disclose the material terms and conditions of the policy. Application of this provision to sellers and telemarketers of debt relief services is particularly important given that data from law enforcement actions and consumer complaints indicate that, commonly, consumers either are not apprised that refunds are unavailable or are misled by material omissions regarding the full terms and conditions of these policies.[166]

2) Proposed Amendments to Section 310.3(a)(1): Disclosure Obligations

In addition to the application of the relevant provisions of the existing Rule, Section 310.3(a)(1) of the proposed Rule contains a new disclosure provision specifically applicable to the sale of debt relief services. Proposed Section 310.3(a)(1)(viii) would prohibit a telemarketer of any debt relief service from failing to disclose, clearly and conspicuously before any services are rendered,[167] six material pieces of information. These proposed disclosures have been tailored to address recurrent concerns that arise in Commission and state enforcement actions, and consumer complaints, regarding the practices of debt relief providers. Each of these proposed amendments is discussed immediately below.

Proposed Section 310.3(a)(1)(viii)(A) would require telemarketers of debt relief services to disclose ''the amount of time necessary to achieve the represented results, and to the extent that the offered service may include the making of a settlement offer to one or more of the customer's creditors or debt collectors, the specific time by which the debt relief service provider will make such a bona fide settlement offer to each of the customer's creditors or debt collectors.'' Proposed Section 310.3(a)(viii)(B) would require covered entities to disclose, ''to the extent that the offered service may include the making of a settlement offer to one or more of the customer's creditors or debt collectors, the amount of money or the percentage of each outstanding debt that the customer must accumulate before a debt relief service provider will make a bona fide settlement offer to each of the customer's creditors or debt collectors.'' These disclosures are intended to ensure that consumers have material information about how debt relief services operate, thereby enabling them to make an informed purchasing decision before paying for the offered services.

The Commission's law enforcement actions and consumer complaints show that consumers often do not understand the mechanics of debt relief. Indeed, some Workshop participants suggested that consumers are often unaware of their ability, independent of a third party, to initiate debt settlement negotiations.[168] In particular, consumers may not understand the amount of time required to achieve the represented results or that there may be prerequisites to attaining debt relief. For example, consumers considering a DMP may not know that these plans often take three to five years to complete. In the case of debt settlement, consumers often fail to understand that certain conditions must be present in order for a debt settlement offer to be accepted. In particular, consumers misunderstand that settlement negotiations rarely, if ever, begin immediately upon enrollment. Indeed, debt settlement negotiations generally do not begin until the consumer has saved a significant portion – often 50%– of the total amount of a single debt enrolled in the program and is significantly delinquent. Only when both these conditions are met is it likely that a creditor or debt collector will find agreeing to settle the account is advantageous.

Given this information deficit, the Commission intends that the disclosures in proposed Section 310.3(a)(1)(viii)(A) and (B) will put consumers on notice about the length of time it will take to achieve the represented results. In particular, the disclosures address the fact that the timing and likelihood of success may be, as is generally the case for debt settlement, entirely contingent on the consumer's ability to accumulate sufficient funds and to become sufficiently delinquent for settlement. In the case of a consumer who has six outstanding accounts to be included in the debt settlement plan, each with balances of between $4,000 and $8,000, for example, a debt settlement provider would be required to explain the anticipated length of the entire program and also the specific time frame under which each debt included in the program is expected to be settled to comply with Section 310.3(a)(1)(viii)(A). In so doing, the debt relief provider must disclose the fact that negotiations will not take place with all creditors simultaneously, but rather seriatim, if such is the case. To comply with Section 310.3(a)(1)(viii)(B), the debt settlement provider or telemarketer would have to disclose the specific amount or percentage of money that must be accumulated before an offer of settlement could be made to the first creditor or debt collector and that additional monies would have to accumulate to make an offer to a second creditor or debt collector, and so on.

These disclosures will help a consumer to understand not only the time commitment required for the plan to achieve its full effect, but also that each debt brought into the program would likely be settled one by one, and not as part of a single negotiation, if that is the case. Further, they will make clear that the debt relief is conditioned upon the consumer saving enough money to make a settlement offer. Awareness of these key facets of the debt relief program, together with the information required to be disclosed by proposed Section 310.3(a)(viii)(E) regarding failure to make timely payments, will provide the consumer with material information about the risks involved in failing to make timely payments to creditors for long periods of time, as settlement negotiations may not begin for months or even years, if ever.

Proposed Section 310.3(a)(1)(viii)(C) would require telemarketers of debt relief services to disclose that ''not all creditors or debt collectors will accept a reduction in the balance, interest rate, or fees a customer owes such creditor or

---

[166] *See, e.g., FTC v. Select Personnel Mgmt., Inc.*, No. 07-0529 (N.D. Ill. 2007); *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. 2004); *FTC v. Debt Mgmt. Found. Svcs.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004). Commission staff has reviewed a sample of debt relief complaints received between April 1, 2008, and March 31, 2009, included in the Commission's Consumer Sentinel database. These complaints routinely allege that debt relief providers fail to give dissatisfied consumers refunds.

[167] Note that proposed Section 310.3(a)(1) provides that all of the disclosures required under that provision be made not only before the consumer pays, but also ''before any services are rendered.'' This change is intended to account for the fact that, under proposed Section 310.4(a)(5), debt relief services would be prohibited from requesting or receiving an advance fee and as a result would be providing services before the consumer has paid for them. Under proposed Section 310.3(a)(1), a debt relief service entity must provide a consumer with all required disclosures before it enrolls that consumer in a debt relief program and begins providing services.

[168] *See* American Express (Flores) Tr. 142-43 (''[American Express'] primary goal as a company is to work directly with our card members in resolving these sorts of issues. We don't feel that there is anything, any service or benefit that a debt settlement company can offer one of our card members that we can't offer ourselves directly.''); ABA (O'Neill) Tr. at 96-97 (opining that debt settlement providers are unnecessary because consumers can obtain same options as the provider and noting that interposition of debt settlement providers hinders a creditor's ability to inform consumers of their options).

debt collector.'' The fact that some creditors and debt collectors will not participate in debt relief programs – whether to offer concessions or accept a lower balance repayment option – is likely unknown to consumers.[169] Similarly, consumers may be unaware that even those creditors and debt collectors that do not have a blanket policy against debt relief will evaluate each consumer's circumstances individually and may be unwilling to grant favorable terms to a consumer based on a variety of factors. Debt relief providers often tout their ability to obtain favorable outcomes for consumers, representing that they have special expertise or relationships with creditors and debt collectors that give them an edge in negotiations.[170] Particularly in light of these claims in advertising and telemarketing pitches, and their significance to consumers, the Commission believes that disclosure of the fact that not all creditors or debt collectors will participate in debt relief plans is material to a consumer's decision whether to pay for debt relief services.

Proposed Section 310.3(a)(1)(viii)(D) would require disclosure ''that pending completion of the represented debt relief services, the customer's creditors or debt collectors may pursue collection efforts, including initiation of lawsuits.'' Thus, to comply with this provision, a telemarketer of debt relief services would have to disclose that enrollment alone will not stop creditors' collection efforts, including lawsuits. Indeed, creditors and debt collectors may continue to call a consumer pending resolution of the debt and even proceed with a lawsuit and later enforcement of any judgment, such as through garnishment.[171] It is vital that telemarketers of debt relief services disclose this information because, in many instances, consumers who seek debt relief services are already behind on payments and are regularly contacted by creditors or collectors. Accordingly, they may be motivated to seek debt relief services, in part, as a means of stopping such contacts. Thus, the fact that debt relief services may fail to achieve this result is material to a consumer's purchase decision.

Proposed Section 310.3(a)(1)(viii)(E) would require disclosure that, ''to the extent that any aspect of the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors, that use of the debt relief service will likely adversely affect the customer's creditworthiness, may result in the customer being sued by one or more creditors or debt collectors, and may increase the amount of money the customer owes to one or more creditors or debt collectors due to the accrual of fees and interest.'' Given the harm that can accrue from missing even a few payments, the Commission believes that it is important to require a debt relief provider to disclose the likely adverse consequences of failing to make timely payments to creditors. This is especially important for consumers who are, in fact, able to make monthly payments, but who stop paying creditors and instead fund a settlement account – either because they are encouraged to do so or because they simply cannot afford to both make monthly payments and pay fees to the debt settlement company.[172]

If consumers stop paying their creditors, their creditworthiness will likely be harmed as a result.[173] This fact is likely material to a consumer's decision about whether to purchase debt settlement services because it imposes a significant cost on proceeding in this manner – the risk that a consumer's ability to obtain credit in the future will be negatively impacted.[174] Another serious and negative consequence that may result from a consumer's decision to engage a debt relief service provider is the accrual of late fees or interest on their accounts. Finally, if payments are missed, the likelihood of being sued by one or more creditors may actually increase.

The Commission recognizes that some consumers considering debt relief are unable to make payments, and may be subject to late fees or other charges in any event. However, the record shows that, in a significant number of instances, particularly in debt settlement programs, consumers are counseled to stop making payments to their creditors in order to facilitate settlement.[175] In other cases, consumers are misled regarding the use to which their monthly payments will be put and erroneously believe that money the debt relief provider is making monthly payments to creditors when this is not the case.[176] Thus, proposed Section 310.3(a)(1)(viii)(E) is designed to ensure that, in cases where the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors, the telemarketer of the debt relief service discloses the likely negative consequences – *i.e.*, harm to creditworthiness, an increase in the amount owed and possible lawsuits.

Finally, proposed Section 310.3(a)(1)(viii)(F) would require that a telemarketer of debt relief services disclose ''that savings a customer realizes from use of a debt relief service may be taxable income.'' Participants at the Workshop noted that many consumers fail to understand that savings realized from a debt relief program may be considered taxable income.[177] If savings realized from debt

[169] *See, e.g.,* CFA (Plunkett) Tr. at 101 (''[T]here is no guarantee . . . or reasonable chance of a guarantee of a reduction in the amount of debt owed by consumers who meet required conditions. In fact, some creditors insist that they won't settle.''); American Express (Flores) Tr. at 164 (''[O]ur policy is not to . . . accept settlements from debt settlement companies.''); *see also, e.g.*, Phil Britt *, Debt Settlement Companies Largely Ignored by Banks,* Inside ARM (Nov. 3, 2008)(noting statement by Discover Financial Services spokesman that ''[w]e choose not to work with debt settlement companies''), *available at* (*www.insidearm.com/go/arm-news/debt-settlement-companies-largely-ignored-by-banks*).

[170] *See e.g.*, *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint) (alleging defendants claimed to have close working relationships with over 50,000 creditors); *FTC v. Select Pers. Mgmt.*, No. 07- 0529 (N.D. Ill. 2007) (alleging defendants claimed to be affiliated with consumers' credit card companies); *see also, e.g., FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. 2006); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4), Mem. Supp. T.R.O. Mot. at 6 (D. Mass. 2004).

[171] The FDCPA governs, among other things, debt collectors' communications with consumers and provides consumers the right to request that a debt collector cease communication. 15 U.S.C. 1692c. Creditors collecting their own debts, however, are not subject to this provision. *See also supra* Section II.B.1, and notes 86-88.

[172] *See supra* note 105 and accompanying text.

[173] *See* CFA (Plunkett) Tr. at 102 (noting that the length of time it takes to achieve settlement, combined with withheld payments, has a negative effect on consumers); *see also* Fair Isaac Corp, *Understanding Your FICO Score*, at 7 (noting that payment history is typically the most important factor used to determine a consumer's FICO score), *available at* (*www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf.*)

[174] As frequently noted by the Commission, a consumer's credit score can impact the availability of a wide variety of opportunities, including the ability to obtain loans, find employment, or even obtain affordable insurance. *See, e.g.*, FTC *, Need Credit or Insurance? Your Credit Score Helps Determine What You'll Pay, available at* (*www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.shtm*).

[175] *See, e.g., FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal 2002).

[176] *See FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM, Mem. Supp. Mot. T.R.O. at 8-9 (D. Colo. Mar. 20, 2007) (''Defendants lead consumers to conclude that, once enrolled, the Defendants in turn will disburse consumers' monthly payments to the appropriate creditors every month.'').

[177] *See* Debt Settlement USA (Craven) Tr. at 91 (''Amounts greater than $600 in savings obtained through a settlement may be reported to the IRS. Again, this has to be disclosed to consumers.''); American Credit Alliance (Franklin), Tr. at 223 (''Unless they get that early disclosure that they may have the tax consequence, they may opt for the

relief programs may be considered taxable income,[178] then the financial benefits of such programs may be significantly limited. As a result, the Commission believes that this fact is material to a consumer's decision about whether to pursue debt relief and should be disclosed to consumers.

3) Application of Section 310.3(a)(2) to Debt Relief Services: Prohibited Misrepresentations

Section 310.3(a)(2) prohibits a seller or telemarketer from making certain prohibited misrepresentations of material information. As with the analysis above relating to Section 310.3(a)(1), the existing provisions of Section 310.3(a)(2) establish the general obligations of sellers and telemarketers of debt relief services who are now, or may be as a result of this rulemaking, subject to the TSR. The subparts of Section 310.3(a)(2) that are most likely applicable to debt relief services prohibit misrepresentations regarding the total costs of services; any material restriction to purchase, receive, or use the services; any limitation about any material aspect of the performance, efficacy, nature, or central characteristics of the services; the seller's refund policy; and a seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.[179]

Specifically, Section 310.3(a)(2)(i) of the TSR prohibits misrepresentations regarding the ''total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer.'' As with the parallel required disclosure of total costs contained in Section 310.3(a)(1)(i), and discussed above, the Commission believes the prohibition of misrepresentations regarding the cost of debt relief services is critical to ensure that consumers receive complete and truthful information regarding the monetary cost of the services offered. While in many cases telemarketers of debt relief services fail to disclose any information about the total costs involved, in other instances telemarketers misrepresent the costs.[180] Deception involving the true costs of the services, which often are significant, is particularly harmful to consumers whose financial situation already is tenuous. Adherence to this requirement by all sellers and telemarketers of debt relief services is important to ensure that consumers have truthful and accurate information on which to base their decisions about whether to use such services.

Section 310.3(a)(2)(ii) of the TSR prohibits misrepresentations regarding ''any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer.'' This provision, too, has a parallel required disclosure, found at Section 310.3(a)(1)(ii). Taken together with Section 310.3(a)(2)(iii), which prohibits misrepresentations regarding ''any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer,'' these provisions would ensure that the important aspects or features of offered debt relief services are not misrepresented to consumers in the course of a telemarketing transaction.

Section 310.3(a)(2)(iv) of the TSR prohibits misrepresentations regarding ''any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies.'' For the reasons enunciated above, in the section discussing the parallel disclosure of debt relief services sellers' refund policies, this prohibited misrepresentation protects consumers by ensuring that they are not deceived regarding the existence or terms of a seller's refund policies. Given the low success rates for all consumers who pay telemarketers for debt relief plans and the evidence showing consumers' frustration regarding their inability to receive refunds for these plans, this provision provides essential protections in the context of debt relief.

4) Proposed Amendments to Section 310.3(a)(2): Prohibited Misrepresentations

The proposed Rule contains a new misrepresentation prohibition to address specifically the sale of debt relief services. While these specific prohibited misrepresentations regarding debt relief services are arguably covered by the existing provision of Section 310.3(a)(2), as well as the broad prohibition contained in Section 310.3(a)(4) against ''[m]aking a false or misleading statement to induce any person to pay for goods or services,'' the Commission believes that expressly including them in the proposed amended Rule text provides the best opportunity for stakeholders to evaluate and comment on them.[181] Further, the Commission believes that setting forth these requirements with specificity provides greater clarity to debt relief service providers subject to the TSR of their obligations to ensure their claims are truthful and non-deceptive.[182] Accordingly, proposed Section 310.3(a)(2)(x) would prohibit telemarketers of debt relief services from making misrepresentations regarding any material aspect of any debt relief service, including, but not limited to:

- the amount of money or the percentage of the debt amount that a customer may save by using such service;
- the amount of time necessary to achieve the represented results;

– what sounds to be the better of the two, which would be the debt settlement, which might not be the best solution for them. So, there has to be some sort of a disclosure that says look, this is it. If you're going to settle a debt for greater than $600, you're going to have an IRS tax consequence this year.'').

[178] IRS, *Publication 525 - Taxable and Nontaxable Income* (Feb. 19, 2009), at 19-20 (''Generally, if a debt you owe is canceled or forgiven, other than as a gift or bequest, you must include the canceled amount in your income.''), *available at* (*www.irs.gov/pub/irs-pdf/p525.pdf*).

[179] *See* 16 CFR 310.3(a)(2)(i)-(iv), (vii). Section 310.3(a)(2)(vii) of the TSR prohibits misrepresentations of ''seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.''

[180] Debt relief providers also sometimes request consumers' billing information during the telemarketing sales call or pressure them to return payment authorization forms and signed contracts as quickly as possible following the call. *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. 2007) (alleging ''[c]onsumers who agree to enroll . . . are sent an initial set of enrollment documents from Debt Set Colorado. During their telephone pitches, the defendants' telemarkers also exhort consumers to fill out the enrollment documents and return the papers as quickly as possible . . . . Included in these documents are forms for the consumer to authorize direct withdrawals from the consumer's checking account, to identify the amounts owed to various creditors, and a Client Agreement.''). Consequently, unauthorized payments may automatically be taken from consumers' accounts without their consent. The TSR currently prohibits telemarketers from charging consumers' accounts without first obtaining express informed consent in all transactions, and it requires express verifiable authorization in cases where a consumer uses a payment method other than a credit or debit card. *See* 16 CFR 310.3(a)(3); 16 CFR 310.4(a)(6). The proposed amended Rule would apply these existing requirements to inbound debt relief telemarketing calls, as well.

[181] Moreover, this decision is consistent with the inclusion elsewhere in the Rule of specific misrepresentations made in the sale of other goods or services. *See, e.g.,* 16 CFR 310.3(a)(2)(v) (prohibiting certain misrepresentation in connection with prize promotions); 16 CFR 310.3(a)(2)(vi) (prohibiting certain misrepresentations in connection with investment opportunities).

[182] Claims made by debt relief providers must be truthful and non-deceptive. To establish that a claim is deceptive in violation of Section 5 of the FTC Act, the Commission must prove that the representation, omission, or practice is likely to mislead consumers acting reasonably under the circumstances and is material. *See In re Cliffdale Assocs.*, 103 F.T.C. 110 (1984). To be non-deceptive, specific, unqualified performance claims made by marketers of debt relief services must be true for the typical consumer who pays money to enroll in a debt relief service. *See FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528-29 (S.D.N.Y. 2000) (holding that, in the face of express earnings claims for multi-level marketing scheme, it was reasonable for consumers to have assumed the promised rewards were achieved by the typical Five Star participant).

- the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors debt collectors to negotiate, settle, or modify the terms of customer's debt;
- the effect of the service on a customer's creditworthiness;
- the effect of the service on collection efforts of the consumer's creditors or debt collectors;
- the percentage or number of customers who attain the represented results; and
- whether a service is offered or provided by a nonprofit entity.

Proposed Section 310.3(a)(2)(x) contains a prohibition on misrepresentations about ''the amount of money or the percentage of the debt amount that a customer may save by using such service,'' which is intended to ensure that consumers are not misled regarding the potential financial benefits of various debt relief services. The Commission's law enforcement experience and consumer complaints show that a pivotal claim made in most debt relief telemarketing pitches is that the offered plan can save the consumer money, either by lowering monthly payments or by eliminating debt altogether.[183] Thus, this prohibition will help ensure that consumers are not misled regarding this fundamental characteristic of the offered services.

Proposed Section 310.3(a)(2)(x) would also prohibit telemarketers of debt relief services from misrepresenting ''the amount of time necessary to achieve the promised results'' and ''the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors debt collectors to negotiate, settle, or modify the terms of customer's debt.'' As set forth in detail above in the discussion of Proposed Section 310.3(a)(1)(viii)(A) and (B), consumers often have little understanding of the mechanics of the debt collection process and are often deceived about the fact that many sellers collect fees up-front before any funds are saved to be used as payments to creditors. As a result it would take months, or even years, for a final resolution of all of a consumer's debts to be achieved. Often, however, telemarketers of these services tell consumers that results can be achieved more quickly.[184] Consumers seeking debt relief are often in exigent circumstances, having exhausted their financial resources and are eager to end their debt problems. The Commission believes that this prohibition against misrepresenting the time necessary to achieve the promised results will serve two key purposes. First, it will prevent consumer confusion about the time commitment necessary to attain results, and second, it will act as a check on unscrupulous practices by purveyors of debt relief services who might otherwise misrepresent the speed with which results can be achieved in order to induce a consumer to enroll in a debt relief plan.

Another provision of proposed Section 310.3(a)(2)(x) would prohibit misrepresentations regarding ''the effect of the service on a customer's creditworthiness.'' Like the disclosure required by proposed Section 310.3(a)(1)(viii)(E), discussed above, this provision is designed to ensure that consumers are not misled about the negative effects that will likely result if they fail to make timely payments to their creditors.

Proposed Section 310.3(a)(2)(x) would also prohibit a telemarketer from misrepresenting the ''effect of the service on collection efforts of the consumer's creditors or debt collectors.'' This provision, like the disclosure required by proposed Section 310.3(a)(1)(viii)(D), discussed above, would ensure that consumers are not misled regarding the effect that enrollment in a debt relief plan may have on collection efforts.

Another prohibited misrepresentation relates to ''the percentage of customers who attain the represented results.'' As noted above, success rates for debt relief services appear to be low, even according to industry-provided data.[185] Given this fact, the Commission believes that it is imperative that telemarketers of debt relief services not mislead consumers regarding the likelihood of success if they enroll in such services. In particular, this provision would operate to curb misrepresentations that state or imply that more customers have attained the promised results than is truly the case.

Finally, proposed Section 310.3(a)(2)(x) would prohibit telemarketers of debt relief services from misrepresenting ''whether a service is offered or provided by a nonprofit entity.'' This provision is particularly relevant to entities that masquerade as nonprofits, but in fact operate for their own profit, or that of related entities. The Commission has brought law enforcement actions against such entities, each of which represented that it operated as a nonprofit and could provide debt relief services – often involving credit counseling or debt negotiation – to consumers.[186] As the Commission has stated in testimony before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, significant harm to consumers may accrue from misrepresentations regarding an entity's nonprofit status.[187]

5) Application of Section 310.3(a)(4): Prohibited False or Misleading Statements

In addition to the prohibited misrepresentations contained in Section 310.3(a)(2), Section 310.3(a)(4) of the TSR prohibits covered telemarketers

[183] As noted above, the FTC has alleged deceptive debt settlement operations often promise to reduce consumer debt by large amounts. *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. 2007) (promising to reduce amount owed to 50% to 60% of amount at time of enrollment); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006) (promising to reduce overall amount owed by up to 40% to 60%). In other cases, the FTC has alleged that defendants made deceptive promises to lower consumer consumers' monthly payments. *See, e.g., FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006); *United States v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); *FTC v. Debt Mgmt. Found. Svcs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006).

[184] *See, e.g., FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. 2006) (alleging that defendant misrepresented that consumers could pay off debt three to five times faster without increasing monthly payments); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006) (alleging that defendants misrepresented that debt relief would be achieved before consumers' next billing cycle); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. 2004)(alleging defendant told consumers it could shorten period of time to pay off debts).

[185] *See supra* notes 102-104; CFA (Plunkett) Tr. at 102 (''It appears to be a crap shoot. It's not like settlement doesn't occur, but it does appear – there does appear to be significant evidence that these firms are greatly exaggerating the number of settlements that do occur.'').

[186] *See, e.g., FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. 2003); *FTC v. Debt Mgmt. Found. Svcs.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006).

[187] *See Consumer Protection Issues in the Credit Counseling Industry: Hearing Before the Permanent Subcommittee on Investigations Senate Committee on Governmental Affairs*, 108 th Cong. 2d Sess. (2004) (Testimony of the FTC) (''[S]ome CCAs appear to use their 501(c)(3) status to convince consumers to enroll in their DMPs and pay fees or make donations. These CCAs may, for example, claim that consumers' 'donations' will be used simply to defray the CCA's expenses. Instead, the bulk of the money may be passed through to individuals or for-profit entities with which the CCAs are closely affiliated. Tax-exempt status also may tend to give these fraudulent CCAs a veneer of respectability by implying that the CCA is serving a charitable or public purpose. Finally, some consumers may believe that a 'non-profit' CCA will charge lower fees than a similar for-profit.''), *available at* (*www.ftc.gov/os/2004/03/040324testimony.shtm*).

from ''[m]aking a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.''[188] Thus, this provision acts as a catch-all prohibition of misrepresentations and other deceptive statements, some of which are also captured by specific subsections of Section 310.3(a)(2). Accordingly, it prohibits a number of false representations commonly observed in the debt relief services industry, including some specifically set forth in proposed amended Section 310.3(a)(2)(x) above.

By way of illustration, the FTC has brought cases against debt relief service providers alleging violations of this provision for misleading statements made in connection with outbound telemarketing, including statements that the entity:

- will obtain a favorable settlement of the consumer's debt promptly or in a specific period of time;[189]
- will stop or lessen creditors' collection efforts against the consumer;[190]
- will secure concessions, such as interest rates, by specific amounts or percentages;[191]
- that the provider has a close relationship with the creditor;[192]

Under the proposed amended Rule, debt relief service providers would be prohibited from making these sorts of misleading statements, and others prohibited by existing Section 310.3(a)(4), in not only outbound, but also inbound telemarketing transactions.

D. Section 310.4: Abusive Telemarketing Acts or Practices

The Commission proposes to amend Section 310.4 to prohibit a debt relief service provider from requesting or receiving any fee until it has provided the customer with documentation that a particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered. An overview of the requirements of the Section and a discussion of the proposed amendment follow.

1) Background

The Telemarketing Act authorizes the Commission to promulgate rules ''prohibiting deceptive telemarketing acts or practices and *other abusive telemarketing acts or practices.*''[193] Section 310.4 of the TSR sets forth telemarketing acts or practices deemed abusive, together with provisions to curb the deleterious effects these acts or practices may have on consumers. Compliance with the existing provisions of Section 310.4 already is required for outbound telemarketing calls offering debt relief services and would be required for inbound calls as well if the proposed amendments to Section 310.6(a)(5) and (a)(6) are adopted.

The Rule delineates five categories of abusive conduct: (1) abusive conduct generally;[194] (2) conduct related to the pattern of calls, including the Rule's Do Not Call provisions;[195] (3) violations of the Rule's calling time restrictions;[196] (4) failure to make required oral disclosures in the sale of goods or services;[197] and (5) failure to make required oral disclosures in charitable solicitations.[198] The first of these categories is at issue in this proceeding.

As discussed at considerable length in the January 2002 NPRM,[199] issued pursuant to the initial review of the TSR, the Commission has articulated an analytical framework for implementing its authority to proscribe abusive telemarketing acts or practices.[200] The Telemarketing Act directs the Commission to include in the TSR provisions to address three specific practices denominated by Congress as ''abusive.''[201] However, the Act ''does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.''[202]

In determining which conduct should be characterized by the TSR as abusive, the Commission noted that each of the statutorily-denominated abusive practices implicate consumers' privacy.[203] Nevertheless, the plain meaning of the term ''abusive'' suggests that no such inherent limitation in the meaning of the term constrains the Commission in crafting the Rule.[204] Thus, to give full effect to the statutory mandate to protect consumers from harmful telemarketing practices, the Commission has used its authority to prohibit abusive practices related to telemarketing of credit repair services, recovery services, and advance fee loans. Although not rooted in privacy protection, each of these services had been the subject of significant numbers of law enforcement actions and consumer complaints and resulted in demonstrated consumer harm.

As explained in the 2002 NPRM, ''[w]hen the Commission seeks to identify practices as abusive that are less distinctly within [the ambit of privacy], the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis as developed in Commission jurisprudence.''[205] Thus, in considering any amendment to Section 310.4 of the TSR not relating to consumers' privacy rights, the Commission will determine whether the conduct at issue meets the criteria for unfairness. 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.[206]

2) Advance Fees for Debt Relief Services as an Abusive Practice

It appears that requesting or receiving payment of a fee for any debt relief service before the seller has provided

[188] 16 CFR 310.3(a)(4).

[189] *See, e.g., FTC v. Nat'l Consumer Council,* No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004).

[190] *See, e.g., id.*; *FTC v. Group One Networks, Inc.,* Case No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint).

[191] *See, e.g., FTC v. Debt Mgmt. Found. Svcs., Inc.,* No. 04-1674-T-17-MSS (M.D. Fla. 2004).

[192] *See, e.g., FTC v. Group One Networks, Inc.,* Case No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint).

[193] 15 U.S.C. 6102(a)(1) (emphasis added).

[194] 16 CFR 310.4(a) (this category includes the following acts or practices: threats, intimidation, or the use of profane or obscene language; requesting or receiving an advance fee for credit repair or recovery services or the arrangement of a loan or other extension of credit when the telemarketer guarantees or represents a high likelihood of success; disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor; and failure to transmit Caller ID information).

[195] 16 CFR 310.4(b).

[196] 16 CFR 310.4(c).

[197] 16 CFR 310.4(d).

[198] 16 CFR 310.4(e).

[199] *See TSR; Proposed Rule*, 67 FR 4492 (Jan. 30, 2002).

[200] *See id.* at 4510-4511.

[201] 15 U.S.C. 6102(a)(3) (these three delineated practices are for any telemarketer to: (1) ''[u]ndertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumers right to privacy; (2) make unsolicited phone calls to consumers during certain hours of the day or night; and (3) fail to promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.).

[202] *See TSR; Proposed Rule*, 67 FR at 4510.

[203] *See id.*

[204] The ordinary meaning of abusive is (1) wrongly used; perverted; misapplied; catachrestic; (2) given to or tending to abuse, (which is in turn defined as improper treatment or use; application to a wrong or bad purpose). *See* Webster's International Dictionary, Unabridged (1949).

[205] *See TSR; Proposed Rule*, 67 FR at 4511.

[206] 15 U.S.C. 45(n) (codifying the Commission's unfairness analysis); *see also* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1079, 1074 n.3 (1984) (''Unfairness Policy Statement'').

the customer with documentation that the promised services have been rendered meets the criteria for unfairness, as is the case with credit repair services, recovery services, and advance fee loans, each of which is subject to an advance fee ban under the TSR.[207] With respect to these services, the Commission found that telemarketers commonly take consumers' money for services that the seller has no intention of providing and in fact does not provide.[208] Each of these services had been the subject of large numbers of consumer complaints and enforcement actions, and in each case caused substantial injury to consumers.[209] Taking money without providing anything in return caused substantial harm to consumers without any countervailing benefits to consumers or competition.[210] Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offers.[211] Thus, an advance fee ban for such services was found to meet the test for unfairness.

At the Workshop, consumer advocates and others argued that unless and until a debt is settled, the job is incomplete and it is therefore unfair for a provider to request or receive a fee.[212] These participants generally agreed that a ban on the receipt of fees for debt settlement services prior to the performance of those services is essential to effect consumer protection in this area. Pending the receipt of public comment, the Commission agrees with this view, and information currently available to the Commission indicates that other debt relief services, including debt negotiation and for-profit credit counseling, should similarly be subject to such a ban. The analysis supporting the Commission's current view is set forth below.

Substantial Injury to Consumers. As an initial matter, the information available to the Commission from its complaint data, its law enforcement experience, as well as state enforcement efforts, the Workshop record, and additional independent research conducted by Commission staff indicates that collecting up-front fees for debt relief services causes substantial injury to consumers.[213] Consumers suffer monetary harm – often in the hundreds or thousands of dollars – when they pay in advance for services that, in most cases, are never provided. Further, in the case of debt settlement, in order to pay these high fees, consumers typically need to (and are frequently encouraged to) stop paying their creditors and therefore suffer lasting injury to their creditworthiness. These main categories of harm caused are detailed below as follows:

(1) *The low likelihood of success.* At the most fundamental level, it appears that a ban on advance fees may be justified in the telemarketing of debt relief services because the information currently available on the debt relief industry indicates that, in the vast majority of cases, consumers are required to pay in advance for services that, in most cases, are never rendered. The information obtained through FTC law enforcement actions against debt relief providers suggests that most consumers do not receive the promised debt relief services. For example, in one FTC case only 1.4% of consumers enrolled in a debt settlement plan by the defendants obtained the promised results.[214] The New York Attorney General recently filed cases against two debt settlement companies alleging that, respectively, these entities were providing the represented services to only 1% and 1/3% of their consumers.[215] This information is not sufficiently rebutted by industry data to the limited extent it has been provided.[216] Accordingly, based on the current record available, the prevailing debt settlement business model requires consumers to pay in advance for services that, according to available data, in most cases, are never provided to the vast majority of consumers.

Similarly, in other types of debt relief services, including for-profit credit counseling and debt negotiation, it appears that advance fees are taken and the represented services are never provided in the majority of cases. A primary concern regarding for-profit credit counseling is that, after fees are taken, the represented counseling services are often not provided and, instead, consumers are placed in DMPs without regard to whether such plans will be an appropriate means of providing them debt relief.[217] In cases the Commission has brought against providers of debt negotiation services, advance fees are taken, but claims that credit card interest rates can be reduced turn out to be false.[218]

[207] In addition to the ban on advance fees for credit repair in the TSR, the Credit Repair Organizations Act expressly prohibits any credit repair organization from charging or receiving ''any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.'' 15 U.S.C. 1679b(b).

[208] *See TSR; Final Rule*, 68 FR 4580, 4614 (Jan. 29, 2003).

[209] *See id.*

[210] *See id.*

[211] *See id.*

[212] *See* CFA (Plunkett) Tr. at 106 (''[T]here is really no service that's being offered until there is a settlement. And just like credit repair organizations are forbidden under the Credit Repair Organizations Act from charging up-front fees for services, we think there should be a prohibition on up-front fees for services here because the major service that's being promised, the only service consumers really want is a settlement. If you can't get a settlement, you shouldn't have to pay a fee.''); *see also* NFCC (Binzel) Tr. at 33 (arguing that debt settlement companies should be subject to strong federal regulation, including a prohibition on the collection of fees until actual services are provided); NFCC (Binzel) Tr. at 40 (endorsing the idea that the government should intervene to prohibit debt settlement companies from collecting fees until services have been provided); SCDCA (Lybarker) Tr. at 223 (positing that there should not be any sort of payment until activity begins on the account); National Consumer Law Center, Inc., *An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers* (2005), at 9 (''It is possible that the fee arrangements described above would be justifiable if the companies actually earned those fees. Unfortunately, it is not easy to determine what the companies actually do to earn these fees. As noted above, the debt settlement trade association (USOBA) and companies we called have either refused to speak with us or provided vague responses.'').

[213] The injury caused by up-front fees applies particularly to debt settlement. However, it appears that, like debt settlement, other debt relief services, such as for-profit credit counseling services, commonly take consumers' money in advance for services that are almost never provided. For that reason, the proposed Rule's advance fee ban reaches all providers of debt relief services.

[214] *See FTC v. Nat'l Consumer Council, Inc.,* No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004); *see also supra* notes 102-104 (setting forth the low rates of success characteristic of cases brought by the FTC and the states against debt relief providers and explaining that little probative empirical evidence has been offered by industry members to the contrary).

[215] Press Release, *Attorney General Cuomo Sues Debt Settlement Companies for Deceiving and Harming Consumers* (May 20, 2009), *available at* (*www.oag.state.ny.us/media_center/2009/may/may19b_09.html*).

[216] *See supra* notes 103-104.

[217] *See, e.g., FTC v. Integrated Credit Solutions,* No. 06-806-SCB-TGW (M.D. Fla. 2006); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004); *FTC v. AmeriDebt, Inc.,* No. PJM 03-3317 (D. Md. 2003).

[218] *See, e.g., FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR, App. for T.R.O. (W.D. Wash. Mar. 6, 2006) at 15 (''Approximately four months' worth of consumer data obtained from Defendants show that they failed to achieve interest rate reductions [to the promised rate] on 99.5 percent of the accounts reviewed and failed to achieve any interest rate reductions at all in 80.4 percent of the accounts.'');. *see also FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint); *FTC v. Select Pers. Mgmt.,* No. 07- 0529 (N.D. Ill. 2007). The Commission acknowledges that debt negotiation services were not the focus of the FTC's September 2008 Workshop and, therefore, that the current record with regard to this category of service is based largely on the agency's law enforcement actions against debt negotiation entities. Accordingly, the Commission invites comments, including any data, demonstrating the ability (or lack thereof) of debt negotiation entities to secure the results they represent to consumers.

(2) *The significant burden on consumers of front-loaded fees.* As discussed above in Section II, of the three basic fee models in the debt settlement industry, the front-end fee model is the most prevalent. Under this model, as much as 40% or more of the fee is collected within the first three or four months of enrollment, with the remaining fee collected over a twelve-month period.[219] Collecting fees in advance of providing the represented services also appears to be the most common business model in for-profit credit counseling and debt negotiation.[220]

As discussed above, substantial harm accrues when debt relief providers charge fees and then fail to provide the represented services. The practice of charging substantial up-front fees, as is the case with many debt relief services, is inherently inconsistent with the purported goal of the services. Specifically, debt settlement providers represent settlement as a way to pay off unsecured debts with a one-time lump sum payment. However, given that consumers to whom they market are typically already delinquent or in danger of becoming delinquent on their payments to creditors, the practice of taking substantial up-front fees before any monies are saved for the purported settlement forces many consumers – who cannot pay both the debt settlement provider and their creditors – to stop making payments to creditors. Additionally, once consumers realize that the telemarketers have kept their initial payments as a large up-front fee, many then drop out of the program, often with higher balances, among other detrimental results, thereby suffering substantial injury.[221] At the Workshop, even a representative from the industry group, TASC, expressed concern about the front-end fee model.[222]

In this regard, it is telling that nearly all states have now adopted laws that regulate the provision of some or all debt relief services, and some of these directly address the ability of a debt relief service provider to take an up-front fee. Several of these laws ban for-profit debt settlement entirely,[223] while others prohibit the charging of up-front fees.[224] However, at present a larger number of states instead allow debt relief service providers to charge a small up-front or set-up fee (*i.e.*, less than one hundred dollars), and then some combination of the following: (1) subsequent flat monthly fees for service; or (2) a choice between flat monthly fees for service or some set percentage (*i.e.*, a percentage of the total debt enrolled in the program or a percentage of the amount by which the consumer's debt is reduced).[225]

The record indicates that the harm to consumers from advance fees for debt relief services is substantial because they pay in advance for services that it appears are only rarely rendered. Further, the record suggests that substantial fees – such as those commonly charged for debt settlement – are particularly onerous because they may actually impede the ultimate goal of attaining debt relief for the consumer. In addition, the recognition by state legislatures of the need to regulate these fees indicates that federal regulation of fees for debt relief services may be justified.[226]

Potential Countervailing Benefits. The second prong of the unfairness test requires a determination of whether the harm to consumers is outweighed by countervailing benefits to consumers or competition.[227] The inclusion of this criteria signals the recognition that costs and benefits attach to most business practices. As the Commission previously has stated, it will ''not find that a practice unfairly injures consumers unless it is injurious in its net effects.''[228]

Representatives of the debt relief industry have advanced several arguments as to the countervailing benefits of charging advance fees. First, they have stated that cash flow is a benefit of the up-front fee structure prevalent in the industry and that disallowing this fee method would limit new entrants to the industry. Specifically, debt settlement industry representatives argue that allowing only back-end fees would be an unsustainable business model and that no new companies would enter the market, which would reduce competition.[229]

---

[219] *See supra* notes 89-92 and accompanying text.

[220] *See, e.g., FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. 2006) (alleging that consumers paid an advance fee of between $329 and $629 before any debt negotiation was attempted); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. 2006) (alleging that defendants charged between $99 and $499 as an initial fee for credit counseling services that were not, in fact, provided).

[221] *See, e.g., FTC v. Edge Solutions*, No. CV-07-4087 (E.D.N.Y Oct. 1, 2007) (complaint alleging that ''[c]ontrary to Defendants' representations,'' consumers in numerous instances ''have in fact increased the amount of their debt by incurring late fees, finance charges and overdraft charges, causing their financial situation to worsen. In numerous instances, as a result of Defendants' services, consumers' credit reports include significant negative information such as late payments, charge-offs, collections, and garnishments.''); *see also FTC v. Debt-Set, Inc.*, No. 07-558, Mem. Supp. Mot. T.R.O. at 16-19 (D. Colo. Mar. 20, 2007) (alleging that ''[c]onsumers' financial condition deteriorates precipitously with hundreds, if not thousands, of dollars in monthly payments lost to Defendants''); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ, Pls. Mem. Law Supp. T.R.O. at 17 (S.D. Fla. Dec. 11, 2006) (alleging consumers paid up-front fees and that savings claims ''falsely report benefit to the consumer from plans that actually will make the consumer worse off''); *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326 (WG4), Pls. Mem. Law Supp. T.R.O. at 8-9 (D. Mass. 2004) (alleging that ''[t]ypically, consumers leave the program after finding that defendants have never contacted their creditors, nor done anything to stop creditors from making harassing calls to consumers, as promised. When consumers do terminate their contracts, they often find that their overall debt has actually *increased* because they owe interest and late fees due to not paying creditors as required by defendants' program. Many consumers, prior to entering the program, were able to pay their credit accounts on time, but find that enrolling in defendants' debt management scheme caused their financial situation to deteriorate. Some consumers find their financial situation has deteriorated to the point of their being forced to file bankruptcy.'').

[222] TASC (Young) Tr. at 183 (arguing that fees should be ''spread out over no less than half of the length of the program'' so the consumer can save money to pay creditors).

[223] *See, e.g.,* Conn. Gen. Stat. § 36A-655 *et seq.*; La. Rev. Stat. § RS 14:331 *et seq.*, & 37:2581, *et seq.*; N.D. Gen. Stat. § 13-06-01-03 & 13-07-01-07; Wyo. Stat. § 33-14-101 *et seq.*

[224] *See, e.g.,* N.C. Gen. Stat § 14-423 *et seq.*

[225] *See, e.g., supra* note 125. To the extent that state laws permit, rather than mandate, that fees for debt relief services be collected before the promised goods or services are documented as provided, there is no conflict with the proposed Rule, and thus, no preemption. *See* 16 CFR 310.7(b) (''Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.'').

[226] *See supra* notes 121, 125; *see, e.g.,* Illinois Attorney General, Press Release, *Attorney General Madigan Sues Two Debt Settlement Firms* (May 4, 2009) (encouraging ''consumers in financial trouble to consider credit counseling instead of debt settlement services'' and ''to look for credit counseling services that charge modest fees and provide true financial and budget counseling based on a consumer's personal circumstances''), *available at* (*www.illinoisattorneygeneral.gov/pressroom/2009_05/20090504.pdf*).

[227] Unfairness Policy Statement at 1073 (''The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.''); *see also* J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, *available at* (*www.ftc.gov/speeches/beales/unfair0603.shtm*) (noting that ''[g]enerally, it is important to consider both the costs of imposing a remedy (such as the cost of requiring a particular disclosure in advertising) and any benefits that consumers enjoy as a result of the practice, such as the avoided costs of more stringent authorization procedures and the value of consumer convenience.'').

[228] *Id.* at 1075 (''As we have indicated before, the Commission believes that considerable attention should be devoted to the analysis of whether substantial net harm has occurred, not only because that is part of the unfairness test, but also because the focus on injury is the best way to ensure that the Commission acts responsibly and uses its resources wisely.'').

[229] *See, e.g.,* TASC (Young) Tr. at 186-87.

Second, one debt settlement industry association claims that their fees are required to pay for labor or services engaged in before settlement occurs.[230] The debt relief provider must obtain information about the consumer's debts, familiarize themselves with the consumer's finances, and call creditors and/or debt collectors to ascertain whether debt relief is possible for the consumer. According to one participant at the Commission's workshop, such an effort can involve numerous phone calls to the creditor.[231] If the creditor or debt collector agrees to provide some kind of debt relief, the telemarketers must coordinate the execution of the debt relief, which may include, for example, arranging the debt management plan terms, ensuring the savings or transfer of funds for settlement, and receipt of appropriate documentation of completed services. These operating costs must be recovered for the firm to remain solvent, and under the prevailing model whereby these providers operate on a for profit basis, the costs are likely recovered substantially in the form of up-front fees.

Third, industry representatives have expressed concern that if they complete services before receiving payment, they may become one of their clients' creditors.[232] Because their customer base, to a large extent, is comprised of financially distressed consumers with limited ability to pay their current debts, they argue that ensuring that the debt relief firm can obtain payment for services dictates that the fees are collected up-front.

Based on the evidence in the record at this time, it appears that insufficient empirical data have been presented to substantiate that these purported benefits outweigh what appears to be substantial harm to consumers. With regard to the possible curtailment of competition if an advance fee ban is imposed, the Commission acknowledges that, at least conceivably, such a prohibition could increase the costs incurred by any legitimate providers of debt relief services, make it impossible for some firms to continue to exist, and reduce the ability of new firms to enter the market. For example, additional capitalization, in the form of borrowing or investment, may be necessary for firms who would otherwise have relied upon advance fees for cash flow.[233] If existing providers' costs are increased, they could be forced to increase the prices they charge consumers for their services in order to remain solvent. However, the record lacks empirical data on whether debt relief companies actually provide the debt relief as represented to consumers. In fact, the federal and state law enforcement record demonstrates that few, if any consumers who pay upfront fees, receive any benefits from the advance fee practice. Thus, any increase in costs resulting from the advance fee ban would be unlikely to outweigh the consumer injury resulting from the current fee practice.

Moreover, while the Commission acknowledges that debt relief services may have labor and operating costs, it notes that the actual benefit of allowing entities to recover these costs largely rests on their ability to deliver represented results – an ability that still remains largely unsupported by the record. In addition, industry has conceded that a large portion of its purported operating costs are actually devoted to marketing, and not provision of services to consumers.[234] Finally, the proposed Rule's allowance for legitimate, third-party escrow services is intended to ensure that debt relief service entities will be able to obtain payment if, and once, they have completed their represented services.

Reasonably Avoidable Harm. 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.[235] The extent to which a consumer may reasonably avoid injury is determined in part by whether the consumer can make an informed choice. In this regard, the Unfairness Policy Statement explains:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice – the ability of individual consumers to make their own private purchasing decisions without regulatory intervention – to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.[236]

Consumers seeking debt relief services are unable reasonably to avoid the injury caused by the payment of up-front fees because business practices prevalent among debt relief service providers make it impossible for consumers to know the offered services are illusory. Relying on the representations made in advertisements and in telemarketing calls, these vulnerable consumers expect to receive the promised services from those who purport to be experts and have no way of knowing that the promised services are almost never provided.[237] Further, deceptive representations and inadequate disclosures about fees and their timing leave consumers unaware that the bulk of fees will be collected as up-front payments.[238] As a result, in many instances, consumers do not even anticipate that they will be paying fees before settlements are achieved.

Thus, the Commission proposes a ban on advance fees for the provision of debt relief services. As described above, the practice appears to meet the statutory test for unfairness because it appears to cause significant harm to consumers that is not outweighed by countervailing benefits to consumers or competition,

[230] *See* TASC, *Study on the Debt Settlement Industry* (2007), at 6 (''Debt settlement companies do not simply negotiate the debts at the beginning of the contract and act as a repayment collection clearinghouse for the creditors, as is the case with credit counseling agencies. Debt settlement companies must negotiate and actively monitor the creditor's activities with respect to their client's accounts throughout the length of the program.'').

[231] *See* Debt Settlement USA (Craven) Tr. at 113.

[232] *See, e.g.,* TASC (Young) Tr. at 185.

[233] Some states already impose licensing and bonding requirements on companies and thus require some capitalization. *See, e.g.,* Kan. Stat. Ann. § 50-1116, *et seq.*; Me. Rev. Stat. Ann. Tit. 17 § 701, *et seq.* & tit. 32 §§ 6171-82, 1101-03; S.C. Code Ann. § 37-7-101, *et seq.*

[234] As TASC has commented: ''One of the primary costs is the client acquisition. . . . Since the concept of debt settlement is not well-known to the public, debt settlement companies must spend more time, effort and money marketing their services. The lead cost for acquiring one debt settlement client ranges from $300 to $400. Once the intake costs associated with contacting the potential clients and the overhead costs are factored into the lead costs, the cost to acquire and set up a single debt settlement client can range from approximately $425 to $1,000. The data reveals that most debt settlement companies report this cost at $700 to $1,000 range. This necessitates debt settlement companies to charge a greater portion of fees during the initial phase of the program.'' TASC, *Study on the Debt Settlement Industry* (2007), at 4.

[235] Unfairness Policy Statement at 1073.

[236] *Id.*

[237] *See* Summary of Prepared Remarks of Commissioner Roscoe B. Starek, III, FTC, *Advertising and Promotion Law 1997* (July 25, 1997) (''In assessing whether injury is reasonably avoidable, the Commission looks at how susceptible the affected audience may be to the act or practice in question.'').

[238] *See supra* note 161.

and the harm is not reasonably avoidable.

Accordingly, proposed amended Rule Section 310.4(a)(5) would prohibit:

> Requesting or receiving payment of any fee or consideration from a person for any debt relief service until the seller has provided the customer with documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.[239]

The focus of the provision is to prevent a seller or telemarketer from charging a fee in advance of completion of represented services.

The Commission intends for this proposed amendment to apply to all of the debt relief services described in this Notice and encompassed by proposed amended provision 310.2(m). With regard to debt settlement, proposed amended Section 310.4(a)(5) is intended to prohibit up-front fees, and require debt settlement entities to provide the represented services – that is, to settle a consumer's debt – before collecting any fee in connection with that debt.[240] The Commission does not intend that the advance fee ban be interpreted to prohibit a consumer from using legitimate escrow services – services where funds are controlled by the consumer – to save money in anticipation of settlement, including money that may eventually be used to pay a debt relief service provider. Such monies held in escrow are the consumer's property, held by a fiduciary. However, the proposed advance fee ban would prohibit any debt relief provider from taking any fee or consideration from funds held in escrow until such time as the represented services are delivered. At such time, a fee proportional to the work completed may be requested by the debt settlement provider. In the context of for-profit credit counseling, the proposed amended Rule would require that the provider successfully provide the consumer with the represented services, such as counseling and enrollment in a DMP – with the consent of both the consumer and his or her creditors – before charging any fees.[241] In the context of debt negotiation, the proposed amended Rule would require that the debt negotiation provider successfully negotiate an agreement between the consumer and his or her creditor(s) to provide the concession or result represented by the debt negotiation entity (*e.g.*, a lower interest rate, lower monthly payments, etc.).[242]

Moreover, in light of the abuses observed in the debt relief services industry, the proposed rule would require providers to give consumers proof that they have received the debt relief services as contracted for or promised. In the case of debt settlement, this would require delivery of proof to the customer that the accounts subject to debt settlement have, indeed, been successfully settled.[243] The Commission has learned that, presently, many creditors prepare a written instrument referred to as a ''settlement in full'' to memorialize the settlement of a debt in connection with a debt settlement service provider. The Commission intends for proposed amended Rule Section 310.4(a)(5) to encompass not only the ''settlement in full'' document, but also such other legally-binding documents as may be presently used by other debt relief services or adapted in the future. For, example, in the case of for-profit credit counseling, an executed DMP, accepted by each of the consumers creditors as well as the consumer, would evidence that the proffered services had been successfully completed. With regard to debt negotiation, documentation that, for example, a creditor has agreed to lower the interest rate for a particular credit card would suffice. These documents would serve as objective proof to the consumer that the promises or contracted services have, indeed, been provided.

Section VIII of this Notice solicits comments regarding this provision. Specifically, as set forth in the questions in Section VIII, the Commission seeks input regarding an advance fee ban for the debt relief industry that parallels the advance fee loan ban.[244] 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.

E. Section 310.5: Recordkeeping

Section 310.5 of the Rule describes the types of records sellers or telemarketers must keep, and the time period for retention. Specifically, this provision requires that telemarketers must keep for a period of 24 months: all substantially different advertising, brochures, scripts, and promotional materials; information about prize recipients; information about customers, including what they purchased, when they made their purchase and how much they paid for the goods or services they purchased; information about employees; and all verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.[245]

Although the provisions of this section remain unchanged in the proposed Rule, the operation of the other proposed amendments may result in some providers of debt relief services being subject to this provision of the TSR for the first time. As a result, the Commission believes it prudent to direct the attention of interested parties to the recordkeeping provision of the Rule, 16 CFR 310.5. Further, the Commission solicits comments with regard to the impact of this provision on the business operations of providers of debt relief services and responses to the specific questions regarding this provision in Section VIII of this Notice.

[239] The provisions currently contained in 310.4(a)(5) - 310.4(a)(7) will be renumbered to accommodate the new section 310.4(a)(5) and will shift to 310.4(a)(6) - 310.4(a)(8), respectively.

[240] Accordingly, if a consumer has more than one debt enrolled in a debt settlement program, amended Section 310.4(a)(5) would allow the debt settlement entity to collect the fee associated with each individual debt once it has settled that debt.

[241] As noted in Section II, CCAs commonly charge consumers not only an initial setup fee, but also periodic – usually monthly – fees throughout the consumer's enrollment in the DMP after the consumer is enrolled. Proposed amended Rule Section 310.4(a)(5) would prohibit CCAs from charging periodic fees before the consumer has enrolled in a DMP, but would not prevent subsequent periodic fees taken for servicing the account.

[242] Although proposed amended Rule Section 310.4(a)(5) would prohibit a debt negotiator from charging any fee until it has achieved the represented results, if multiple accounts are to be negotiated a proportional fee may be charged as work on each account is completed.

[243] *See, e.g.,* USOBA at 8 (''After the final payment is processed by the creditor or collection agency, a request for a confirmation letter is made showing the settlement agreement amount has been paid, along with the settlement agreement and copies of payments to the creditor or collection agency which serve as a record that the account has been satisfied and no outstanding balance is owed.'').

[244] *See* 16 CFR 310.4(a)(4).

[245] 16 CFR 310.5.

F. Section 310.6: Proposed Modification to General Media and Direct Mail Exemptions for Debt Relief Services

Section 310.6 sets forth the Rule's exemptions, which are designed to ensure that legitimate businesses are not unduly burdened by the Rule. Each is justified by one of four factors: (1) whether Congress intended a particular activity to be exempt from the Rule; (2) whether the conduct or business in question is already the subject of extensive federal or state regulation;[246] (3) whether the conduct at issue lends itself easily to the forms of abuse or deception the Telemarketing Act was intended to address; and (4) whether the risk that fraudulent sellers or telemarketers would avail themselves of the exemption outweighs the burden to legitimate industry of compliance with the Rule.

Based on its law enforcement experience and the information gleaned from the Workshop, the Commission proposes to modify the general media exemption and the direct mail exemption (Sections 310.6(b)(5) and 310.6(b)(6)) to make them unavailable to telemarketers of debt relief services.[247] This treatment would parallel the existing exceptions for investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule,[248] credit card loss protection plans, credit repair services, recovery services, and advance fee loans.[249] Like debt relief services, each of those services has been the subject of significant numbers of deceptive telemarketing campaigns that capitalize on mass media or general advertising to entice their victims to place an inbound telemarketing call.

The Commission, using its authority under Section 5 of the FTC Act, has devoted significant law enforcement resources to combating deceptive and unfair practices by debt relief services providers over the last several years.[250] All indications are that the industry is growing. Industry statistics suggest that the number of firms offering debt settlement services has increased in recent years from 300 to over 1,000.[251] It is reasonable to assume that this trend will continue, given that increasing numbers of consumers are in financial distress and thus ripe for solicitation by debt relief providers. The growth in the industry has been accompanied by a rise in the volume of complaints about deceptive, unfair, and abusive practices involving debt settlement. Recognizing that telemarketing fraud perpetrated by debt relief services providers is a prevalent and growing phenomenon, the Commission proposes to make the general media advertising exemption and the direct mail exemption unavailable to sellers and telemarketers of debt relief services. Otherwise, the Commission believes that the proposed amended Rule's focus on debt relief services may create some incentive for unscrupulous sellers to market these programs via general media advertising or direct mail specifically to ensure that their efforts are exempt from the Rule's coverage. The proposed modification to the exemptions will ensure that sellers and telemarketers who market these goods and services would be required to abide by the Rule regardless of the medium used to advertise their services.

The Commission solicits comments with regard to the impact of these proposed amendments to Section 310.6 and responses to the specific questions regarding this provision in Section VIII of this Notice.

IV. Public Forum

FTC staff will conduct a public forum to discuss the issues raised in this NPRM and the written comments received in response to this Notice. The Commission will post the date, time, and location of the public forum on its website no later than 30 days after the publication of this NPRM. The purpose of the forum is to afford Commission staff and interested parties an opportunity to discuss issues raised by the proposal and in the comments and, in particular, to examine publicly any areas of significant controversy or divergent opinion that are raised in the written comments. The forum is not intended to achieve a consensus among participants or between participants and Commission staff with respect to any issue raised in the comments. Commission staff will consider the views and suggestions made during the forum, in conjunction with the written comments, in formulating its final recommendation to the Commission regarding amendment of the TSR.

The forum will be open to the public, and there is no fee for attendance. For admittance to the building, all attendees will be required to show a valid photo identification, such as a driver's license. Pre-registration is not required for attendees. Members of the public and the press who cannot attend in person may view a live webcast of the forum on the FTC's website. The proceedings will

---

[246] One such exemption involves the sale of franchises and business opportunities. *See* 16 C.F.R. 310.6(b)(2). When originally promulgated in 1995, the TSR included an exemption for the sale of franchises and business opportunities subject to the Commission's Rule entitled ''Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures,'' 16 C.F.R. Part 436. *See* TSR; Statement of Basis and Purpose and Final Rule, 60 FR 43842, 43859 (Aug. 23, 1995). However, in 2007, the Commission took the final step to separate the rule requirements applicable to franchises from those applicable to business opportunity ventures. Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities; Final Rule, 72 FR 15444 Mar. 30, 2007. Part 436 now covers only franchises, while a newly-numbered Part 437 preserves the text of the original rule in so far as it covers business opportunity ventures. The bifurcation of the original Franchise Rule necessitates a non-substantive modification to the language of TSR Section 310.6(b)(2) to clarify that sales of franchises subject to the Franchise Rule, 16 C.F.R. Part 436, and business opportunities subject to the Business Opportunities Rule, 16 C.F.R. Part 437, are exempt from the TSR. Any business venture not covered either by Part 436 or Part 437 remains outside the scope of the exemption set forth at TSR § 310.6(b)(2).

In addition, the Commission is conducting a separate proceeding to consider amendments to what is now designated Part 437, the Business Opportunity Rule. *See* Business Opportunity Rule; Proposed Rule, 73 FR 16110 (Mar. 26, 2008). The proposed amendments would embody a more streamlined regulatory approach and require far fewer disclosures, while broadening the coverage of the Business Opportunity rule to reach ventures previously regulated by neither the Franchise Rule nor the Business Opportunity Rule. If rules along these lines are adopted, the Commission would need to evaluate whether the final Business Opportunity Rule would obviate the need for the protections of the TSR.

[247] Section 310.6(b)(3) would continue to exempt telemarketing of debt relief services where the sale of services is not completed, and payment or authorization of payment is not required until after a face-to-face sales presentation by the seller from compliance with most provisions of the Rule.

[248] The bifurcation of the Franchise Rule, *see supra* note 246, necessitates a non-substantive modification to the language of Sections 310.6(b)(5) and (6). Specifically, the general media and direct mail exemptions to the Rule (Sections 310.6(b)(5) and (6), respectively) are amended to make clear that those exemptions do not apply to calls initiated by a customer or donor in response to an advertisement relating to business opportunities other than business arrangements covered by the Franchise Rule or the Business Opportunity Rule.

[249] Each of these categories is excepted from the exemptions for both general media and direct mail advertising. In addition, prize promotions are excepted from the direct mail exemption.

[250] *See, e.g., FTC v. MCS Programs, LLC,* No. C09-5380RJB (W.D. Wash 2009); *FTC v. Group One Networks, Inc.,* Case No. 8:09-cv-352-T-26-MAP (M.D. Fla. 2009) (amended complaint); *FTC v. Edge Solutions, Inc.,* No. CV-07-4087 (E.D.N.Y. 2007); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. 2006); *FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. 2007); *FTC v. Select Personnel Mgmt., Inc.*, No. 07-0529 (N.D. Ill. 2007); *FTC v. Integrated Credit Solutions, Inc.,* No. 06-806-SCB-TGW (M.D. Fla. 2006); *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); *United States v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. 2006); *FTC v. Debt Mgmt. Found. Svcs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. 2004); *FTC v. Nat'l Consumer Council,* No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004); *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326 (WG4) (D. Mass. 2004); *FTC v. Innovative Sys. Tech., Inc.,* No. CV04-0728 GAF JTLx (C.D. Cal. 2004); *FTC v. AmeriDebt, Inc.,* No. PJM 03-3317 (D. Md. 2003); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal 2002).

[251] *See* Birnbaum, Jane, *Debt Relief Can Cause Headaches of Its Own*, N.Y. Times, Feb. 9, 2008.

be transcribed, and the transcript will be placed on the public record.

The forum venue will be accessible to persons with disabilities. If you need an accommodation related to a disability, call Carrie McGlothin at (202) 326-3388. Such requests should include a detailed description of the accommodations needed and a way to contact you if we need more information. Please provide advance notice of any needs for such accommodations.

Commission staff will select a limited number of parties from among those who submit requests to participate to represent the significant interests affected by the issues raised in the Notice. These parties will participate in an open discussion of the issues, including asking and answering questions based on their respective comments. In addition, the forum will be open to the general public.

To the extent possible, Commission staff will select parties to represent the following interests: providers of debt relief services; telemarketers, lead generators, and aggregators; consumer advocacy groups; federal and state law enforcement and regulatory authorities; and any other interests that Commission staff may identify and deem appropriate for representation. FTC staff will select panelists based on the following criteria: 1) the party has expertise in or knowledge of the issues that are the focus of the workshop; 2) the party's participation would promote a balance of interests represented at the workshop; and 3) the party has been designated by one or more interested parties (who timely file requests to participate) as a party who shares the interests of the designator(s). Members of the general public who attend the workshop may have an opportunity to make brief oral statements presenting their views on issues raised in the NPRM. Oral statements by members of the general public will be limited on the basis of the time available and the number of persons who wish to make statements.

Parties interested in participating as panelists must submit written comments addressing the issues raised in the NPRM, in addition to a formal written request to participate in the form and manner described above. Parties must include in their request a brief statement setting forth their expertise or knowledge of the issues on which the workshop will focus, as well as their contact information, including, if available: a telephone number, facsimile number, and e-mail address to enable the FTC to notify requesters whether they have been selected to participate.

V. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record.[252]

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA'')[253] requires a description and analysis of proposed and final rules that will have a significant economic impact on a substantial number of small entities.[254] The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'')[255] with the proposed Rule and a Final Regulatory Flexibility Analysis (''FRFA'')[256] with the final rule, if any. The Commission is not required to make such analyses if a rule would not have such an economic effect.[257]

The Commission does not have sufficient empirical data at this time regarding the debt relief industry to determine whether the proposed amendments to the Rule may impact a substantial number of small entities as defined in the RFA.[258] It is also unclear whether the proposed amended Rule would have a significant economic impact on small entities. Thus, to obtain more information about the impact of the proposed rule on small entities, the Commission has decided to publish the following IRFA pursuant to the RFA and to request public comment on the impact on small businesses of its proposed amended Rule.

A. Description of the Reasons Why Action by the Agency is Being Considered

As described in Section III, above, the proposed amendments are intended to address consumer protection concerns regarding telemarketing of debt relief services and are based on evidence in the record to date suggesting that deceptive and abusive acts are pervasive in telemarketing of debt relief services to consumers.

B. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Amended Rule

The objective of the proposed amended Rule is to curb deceptive and abusive practices occurring in the telemarketing of debt relief services. The legal basis for the proposed amendments is the Telemarketing Act.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Amended Rule Will Apply

The proposed amendments to the Rule will affect sellers and telemarketers of debt relief services engaged in ''telemarketing,'' as defined by the Rule to mean ''a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.''[259] Staff estimates that the proposed amended Rule will apply to approximately 2000 entities. Determining a precise estimate of how many of these are small entities, or describing those entities further, is not readily feasible because the staff is unaware of published data that reports annual revenue figures for debt relief service providers.[260] Further, the Commission's requests for information about the number and size of debt settlement companies yielded virtually no information.[261] The Commission invites comment and information on this issue.

[252] *See* 16 CFR 1.26(b)(5).

[253] 5 U.S.C. 601-612.

[254] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small-business concern'' as a business that is ''independently owned and operated and which is not dominant in its field of operation.'' 15 U.S.C. 632(a)(1).

[255] 5 U.S.C. 603.

[256] 5 U.S.C. 604.

[257] 5 U.S.C. 605.

[258] In response to a request for comments issued in conjunction with the Workshop, the Commission received no empirical data regarding the revenues of debt relief companies generally, or debt settlement companies specifically. One Workshop commenter opined, without attribution, that the vast majority of debt settlement companies have fewer than 100 employees. *See* Able Debt Settlement at 6 (''[o]f the thousand plus or minus companies whose business activities are related to debt settlement, the estimates for the numbers of companies and the numbers of individuals either working for or affiliated with them are as follows: Two percent consist of more than 100 individuals; Eight percent consist of 25 to 100 individuals; and the remaining Ninety percent consist of less than 25 individuals.'').

[259] 16 CFR 310.2(cc) (in the proposed amended Rule, this definition is renumbered as Section 310.2(dd)).

[260] Directly covered entities under the proposed amended Rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System (''NAICS'') as follows: All Other Professional, Scientific and Technical Services (NAICS code 541990) with no more than $7.0 million dollars in average annual receipts (no employee size limit is listed). *See* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System codes (Aug. 22, 2008), *available at* (*www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*)

[261] *See* Able Debt Settlement at 6.

D. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed rule, Including an Estimate of the Classes of Small Entities which will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed amended Rule would impose disclosure and recordkeeping burden within the meaning of the PRA, as set forth in Section VII of this NPRM. The Commission is seeking clearance from the OMB for these requirements, and the Commission's Supporting Statement submitted as part of that process is being made available on the public record of this rulemaking. Specifically, the proposed amended Rule would require specific disclosures in telemarketing of debt relief services,[262] and it would subject inbound debt relief service telemarketing to the Rule's requirements, including the existing disclosure and recordkeeping provisions. In addition, the proposed amended Rule would prohibit a seller or telemarketer of debt relief services from requesting or receiving a fee in advance of providing the offered services.

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance. As noted in the PRA analysis below, the total estimated cost burden for all entities subject to the proposed rule will be approximately $967,436. The Commission seeks further comment on the costs and burdens of small entities in complying with the requirements of the proposed amended Rule.

E. Identification, to the Extent Practicable, of all Relevant Federal Rules which may Duplicate, Overlap or Conflict with the Proposed Amended Rule

The FTC has not identified any other federal statutes, rules, or policies currently in effect which may duplicate, overlap or conflict with the proposed rule. However, several state laws do regulate debt relief services.[263] The Commission invites comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies.

[262] *See* Proposed Rule Section 310.3(a)(1)(viii).

[263] *See supra* notes 120-125.

F. Description of any Significant Alternatives to the Proposed Rule

In drafting the proposed amended rule, the Commission has made every effort to avoid unduly burdensome requirements for entities. The Commission believes that the proposed amendments that are specific to the debt relief services industry – including the newly proposed disclosures, prohibited misrepresentations, and the advance fee ban – are necessary in order to protect consumers considering the purchase of debt relief services. Similarly, at this time the Commission is proposing to extend the coverage of the existing provisions of the Rule to inbound telemarketing of debt relief services. This amendment is designed to ensure that in all telemarketing transactions to sell debt relief services, consumers receive the benefit of the Rule's protections. For each of these proposed amendments, the Commission has attempted to tailor the provision to the concerns evidenced by the record to date. On balance, the Commission believes that the benefits to consumers of each outweighs the costs to industry of implementation.

The Commission considered, but decided against, providing an exemption for small entities in the proposed amended Rule. The protections afforded to consumers from the proposed amendments are equally important regardless of the size of the debt relief service provider with whom they transact. Indeed, small debt relief service providers possess no intrinsic characteristics that would warrant exempting them from provisions, such as the proposed debt relief disclosures. The information provided in the disclosures is material to the consumer regardless of the size of the entity offering the services. Similarly, the protections afforded to consumers by the advance fee ban are equally necessary regardless of the size of the entity providing the services. Thus, the Commission believes that creating an exemption for small businesses from compliance with the proposed amendments would be contrary to the goals of the amendments because it would arbitrarily limit their reach to the detriment of consumers.

Nonetheless, the Commission has taken care in developing the proposed amendments to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept.

The Commission seeks comments on the ways in which the rule could be modified to reduce any costs or burdens for small entities.

VII. Paperwork Reduction Act

The Commission is submitting this proposed amended Rule and a Supporting Statement to OMB for review under the Paperwork Reduction Act (''PRA'').[264] The recordkeeping and disclosure requirements under the proposed amendments to the TSR discussed above constitute ''collections of information'' for purposes of the PRA.[265] Accordingly, the Commission is providing PRA burden estimates for those requirements, which are set forth below.

The proposed amendments would require specific new disclosures in the sale of a ''debt relief service,'' as that term is defined in proposed Section 310.2(m), which would result in PRA burden for all entities – both new and existing respondents[266] – that engage in telemarketing of these services. In addition, if the proposed amendments are adopted, new respondents would be subject to the existing provisions of the TSR, including its general sales disclosures and recordkeeping provisions.[267] Specifically, as a result of the proposed exceptions to the general media and direct mail exemptions, entities that currently engage exclusively in inbound telemarketing of debt relief services, and thus are likely exempt under the current Rule, would be covered by the amended Rule. The PRA burden of these requirements will depend on various factors, including the number of covered firms and the percentage of such firms that conduct inbound or outbound telemarketing.

The definition of ''debt relief service'' in the proposed Rule would include debt settlement companies, for-profit credit counselors, and debt negotiation companies. Commission staff estimates that approximately 2,000 entities sell debt relief services and thus would be covered by the Commission's proposed Rule.[268] This includes existing entities already subject to the TSR for which there would be new recordkeeping or disclosure requirements (''existing

[264] 44 U.S.C. 3501-3521.

[265] *See* 5 CFR 1320.3(c).

[266] ''Respondents'' denote already existing entities that have or will have, as a result of this proceeding, recordkeeping and/or disclosure obligations under the TSR.

[267] *See* 16 CFR 310.3(a)(1); 16 CFR 310.5.

[268] To err in favor of being over inclusive, staff assumes that every entity that sells debt relief services does so using telemarketing.

respondents''),[269] as well as existing entities that newly will be subject to the TSR (''new respondents'').[270] Staff has arrived at this estimate by using available figures obtained through research and from industry sources of the number of debt settlement companies[271] and the number of for-profit credit counselors.[272] Although these inputs suggest that an estimate of 2,000 entities might be overstated, staff has used it in its burden calculations in an effort to account for all entities that would be subject to the proposed amendments, including debt negotiation companies, for which no reliable external estimates are available.

Burden Statement:

Estimated Additional Annual Hours Burden: 42,580 hours

As explained below, the estimated annual burden for recordkeeping attributable to the proposed Rule amendments, averaged over a prospective 3-year PRA clearance, is 29,886 hours for all industry members affected by the Rule. Although the first year of compliance will entail setting up compliant recordkeeping systems, burden will decline in succeeding years as they will then have such systems in place. The estimated burden for the disclosures that the Rule requires, including the newly proposed disclosures relating to debt relief services, is 12,694 hours for all affected industry members. Thus, the total PRA burden is 42,580 hours.

A. Number of Respondents

Based on its estimate that 2,000 entities sell debt relief services, and that each of these entities engages in telemarketing as defined by the TSR, staff estimates that 879 new respondents will be subject to the Rule as a result of the proposed amendments. The latter figure is derived by a series of calculations, beginning with an estimate of the number of these entities that conduct inbound versus outbound telemarketing of debt relief services. This added estimate is needed to determine how many debt relief service providers are existing respondents and how many are new respondents, the distinction being relevant because their respective PRA burdens will differ.

Staff is unaware of any source that directly states the number of outbound or inbound debt relief telemarketers; instead, estimates of these numbers are extrapolated from external data. According to the DMA, 21% of all direct marketing in 2007 was by inbound telemarketing and 20% was by outbound telemarketing.[273] Using this relative weighting, staff estimates that the number of inbound debt relief telemarketers is 1,024 (2,000 x 21 ÷ (20 + 21)) and the number of outbound telemarketers is 976 (2,000 x 20 ÷ (20 + 21).

Of the estimated 1,024 entities engaged in inbound telemarketing of debt relief services, an estimated 217 entities conduct inbound debt relief telemarketing through direct mail; the remaining 807 entities do so through general media advertising and would thus far largely be exempt from the Rule's current requirements.[274] Of the 217 entities using direct mail, staff estimates that 72, approximately one-third, make the disclosures necessary to exempt them from the Rule's existing requirements.[275] Thus, an estimated 879 entities (807 + 72) are new respondents that will be newly subject to the TSR and its PRA burden, including burden derived from the new debt relief disclosures.

The remaining 145 entities (217 - 72) conducting inbound telemarketing for debt relief through direct mail would be existing respondents because they receive inbound telemarketing calls in response to direct mail advertisements that do not make the requisite disclosures to qualify for the direct mail exemption.[276] The estimated 976 entities conducting outbound telemarketing of debt relief services are already subject to the TSR and thus, too, would be existing respondents. Accordingly, an estimated 1,121 telemarketers selling debt relief services would be subject only to the additional PRA burden imposed by the newly proposed debt relief disclosures in proposed amended Rule Section 310.3(a)(1)(viii).

B. Recordkeeping Hours

Staff estimates that in the first year following promulgation of the proposed amended Rule, it will take 100 hours for each of the 879 new respondents identified above to set up compliant recordkeeping systems. This estimate is consistent with the amount of time allocated in other PRA analyses that have addressed new entrants, *i.e.*, newly formed entities subject to the TSR.[277] The recordkeeping burden for these entities in the first year following the proposed amended Rule's adoption is 87,900 hours (879 new respondents x 100 hours each). In subsequent years, when TSR-compliant recordkeeping systems will, presumably, have already been established, the burden for these entities should parallel the one hour of ongoing recordkeeping burden staff has previously estimated for existing respondents under the Rule.[278] Thus, annualized over a prospective three-year PRA clearance period, cumulative annual recordkeeping burden for the 879 new respondents would be 29,886 hours (87,900 hours in Year 1: 879 hours for each of Years 2 and 3). Burden

[269] Outbound telemarketing and non-exempt inbound telemarketing of debt relief services are currently subject to the TSR. Non-exempt inbound telemarketing would include calls to debt relief service providers by consumers in response to direct mail advertising that does not contain disclosures required by Section 310.3(a)(1) of the Rule. *See* 16 CFR 310.6(b)(6) (providing an exemption for ''[t]elephone calls initiation by a customer . . . in response to a direct mail solicitation . . . that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule . . . .'').

[270] Inbound telemarketing calls in response to advertisements in any medium other than direct mail solicitation are generally exempt from the Rule's coverage under the ''general media exemption.'' 16 CFR 310.6(b)(5). Inbound telemarketing calls in response to direct mail advertisements are also exempt to the extent that the direct mail pieces ''clearly, conspicuously, and truthfully disclose[] all material information listed in § 310.3(a)(1) of this Rule.'' 16 CFR 310.6(b)(6).

[271] *See* Streitfeld, David, *Debt Settlers Offer Promises But Little Help*, N.Y. Times, Apr. 19, 2009 (stating, without attribution, that ''[a]s many as 2,000 settlement companies operate in the United States, triple the number of a few years ago''); Birnbaum, Jane, *Debt Relief Can Cause Headaches of Its Own*, N.Y. Times, Feb. 9, 2008 (noting that ''[a] thousand such [debt settlement] companies exist nationwide, up from about 300 a couple of years ago, estimated David Leuthold, vice president of the Association of Settlement Companies, which has 70 members and is based in Madison, Wis.''); Able Debt Settlement at 5 (''At the time of this FTC Workshop there are nearly a thousand debt settlement companies within the US and a few companies servicing US consumers from outside the US with operations in Canada, Mexico, Argentina, India and Malaysia.''); *see also* SIC Code 72991001 (''Debt Counseling or Adjustment Service, Individuals''): 1,598 entities.

[272] According to industry sources consulted by Commission staff, there are believed to be fewer than 100 for-profit credit counseling firms operating in the United States.

[273] *See* Direct Marketing Association *Statistical Fact Book* 17 (30 th ed. 2008).

[274] According to the DMA, 21.2% of annual U.S. advertising expenditures for direct marketing is through direct mail; the remaining 78.8% is through all other forms of general media (*e.g.*, newspapers, television, Internet, Yellow Pages). *See Id.* at 11. Thus, applying these percentages to the above estimate of 1,024 inbound telemarketers, 217 entities (21.2%) advertise by direct mail and 807 (78.8%) use general media.

[275] The apportionment of one-third is a longstanding assumption stated in past FTC analyses of PRA burden for the TSR. *See, e.g., Agency Information Collection Activities*, 74 FR 25540, 25543 (May 28, 2009); *Agency Information Collection Activities*, 71 FR 28698, 28700 (May 17, 2006). No comments have been received to date with an alternative apportionment or reasons to modify it.

[276] 16 CFR 310.6(b)(6).

[277] *See, e.g., Agency Information Collection Activities*, 74 FR at 25542; *Agency Information Collection Activities*, 71 FR at 28699.

[278] *Id.*

accruing to new entrants, 100 hours apiece to set up new recordkeeping systems compliant with the Rule, has already been factored into the FTC's existing clearance from OMB for an estimated 75 entrants per year, and is also incorporated within the FTC's latest pursuit of renewed clearance for the TSR under OMB Control No. 3084-0097.[279]

Staff believes that the 1,121 existing respondents identified above will not have recordkeeping burden associated with setting up compliant recordkeeping systems. These entities are already required to comply with the Rule, and thus should already have recordkeeping systems in place. As noted above, these existing respondents will each require approximately one hour per year to file and store records required by the TSR. Here, too, however, this recordkeeping task is already accounted for in the FTC's existing PRA clearance totals and included within the latest request for renewed OMB clearance for the TSR.[280]

C. Disclosure Hours

As has been stated in prior FTC analyses for the TSR under the PRA, staff believes that in the ordinary course of business a substantial majority of sellers and telemarketers make the disclosures the Rule requires because doing so constitutes good business practice.[281] To the extent this is so, the time and financial resources needed to comply with disclosure requirements do not constitute ''burden.''[282] Moreover, some state laws require the same or similar disclosures as the Rule mandates. Thus, the disclosure hours burden attributable to the Rule is far less than the total number of hours associated with the disclosures overall. Staff continues to assume that most of the disclosures the Rule requires would be made in at least 75 percent of telemarketing calls even absent the Rule.[283]

To determine the number of outbound and inbound calls regarding debt relief services, staff has combined external data with internal assumptions. Staff assumes that outbound calls to sell and inbound calls to buy debt relief services are made only to and by consumers who are delinquent on one or more credit cards.[284] For simplicity, and lacking specific information to the contrary, staff further assumes that each such consumer or household will receive one outbound call and place one inbound call for these services.

According to recently published figures, 78% of U.S. households, or 91.1 million households, had one or more credit cards at the end of 2008.[285] The Federal Reserve Board reported in May 2009 that the delinquency rate for credit cards had risen to 6.5%.[286] Applying this rate to the stated number of households, 91.1 million, yields 5,921,500 consumers who will receive and place a call for debt relief services in a given year.

Because outbound calls are already subject to the existing provisions of the TSR, each such call will entail only the incremental PRA burden resulting from the new debt relief disclosures. For inbound calls, however, there will be new respondents in addition to existing ones, and associated underlying distinctions between current exemptions applicable to direct marketing via direct mail and those for general media (discussed further below). Accordingly, separate estimates are necessary for inbound debt relief calls attributable to each.

To determine the number of inbound debt relief calls attributable to general media advertising versus direct mail advertising, staff relied upon the DMA estimate that 21.2% of direct marketing is done by direct mail[287] and 78.8% of direct marketing is done by general media methods.[288] Applying these percentages to the above-noted estimate of 5,921,500 inbound debt relief calls translates to 4,666,142 calls resulting from general media advertising and 1,255,358 calls arising from direct mail. Staff then estimated that 1/3 of inbound direct mail debt relief calls, or 418,453 such calls, are currently exempt from the TSR because they are in response to direct mail advertising that makes the requisite Section 310.3(a)(1) disclosures. The remaining 2/3, or 836,905 inbound direct mail calls, are non-exempt.

1) Existing respondents' disclosure burden

As discussed above in this NPRM, the proposed amended Rule includes a new provision, Section 310.3(a)(1)(viii), which includes six disclosures specific to providers of debt relief services. Staff estimates that reciting these disclosures in each sales call pertaining to debt relief services will take 12 seconds.

For outbound calls, the disclosure burden for existing entities from the new debt relief disclosures is 4,935 hours [5,921,500 outbound calls involving debt relief x 12 seconds each (for new debt relief disclosures) x 25% TSR burden].

Similarly, currently non-exempt inbound calls – inbound calls placed as a result of direct mail solicitations that do not include the Section 310.3(a)(1) disclosures – will only entail the incremental PRA burden resulting from the new debt relief disclosures. As noted above, this totals 836,905 such calls each year. The associated disclosure burden for these calls would be 697 hours (836,905 non-exempt direct mail inbound calls x 12 seconds for debt relief disclosures x 25% burden from TSR).

Thus, the total disclosure burden under the proposed amended Rule for all existing respondents is 5,632 hours (4,935 hours for entities conducting outbound calls + 697 hours for entities conducting inbound, non-exempt telemarketing).

2) New respondents' disclosure burden

New respondents – those currently exempt from the Rule's coverage as a result of the direct mail or general media exemptions for inbound calls – will incur disclosure burden not only for the debt relief disclosures in proposed Section 310.3(a)(1)(viii), but also for the existing general disclosures for which such entities will newly be responsible.[289]

As noted above, inbound calls responding to debt relief services advertised in general media are

[279] *Agency Information Collection Activities*, 74 FR at 25542 (''The Commission staff also estimates that 75 new entrants per year would need to spend 100 hours each developing a recordkeeping system that complies with the TSR for an annual total of 7,500 burden hours.''). The term ''new entrant'' denotes an entity that has not yet, but may in the future come into being.

[280] *Id.*

[281] *See, e.g., id.* (''Staff believes that in the ordinary course of business a substantial majority of sellers and telemarketers make the disclosures the Rule requires because to do so constitutes good business practice.'').

[282] 16 CFR 1320.3(b)(2).

[283] *See, e.g., Agency Information Collection Activities*, 74 FR at 25543; *Agency Information Collection Activities*, 71 FR at 28699. Accordingly, staff has continued to estimate that the hours burden for most of the Rule's disclosure requirements is 25 percent of the total hours associated with disclosures of the type the TSR requires.

[284] By extension upsells on these initial calls would not be applicable. Moreover, staff believes that few, if any, upsells on initial outbound and inbound calls would be for debt relief.

[285] *See* Woolsey, Ben and Schulz, Matt, *Credit Card Statistics, industry facts, debt statistics, available at* (*www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php*).

[286] FRB, *Federal Reserve Statistical Release: Charge Offs and Delinquency Rates on Loans and Leases at Commercial Banks, available at* (*www.federalreserve.gov/releases/chargeoff/delallsa.htm*) (reporting a 6.5% delinquency rate for credit cards for the first quarter of 2009).

[287] *Supra* note 274.

[288] *Id.*

[289] *See Agency Information Collection Activities*, 74 FR at 25542.

currently exempt from the Rule.[290] The disclosure burden for these calls would be 20 seconds each [8 seconds for existing Section 310.3(a)(1) disclosures + 12 seconds for debt relief disclosures]. Applying this unit measure to the estimated 4,666,142 inbound debt relief calls arising from general media advertising, the cumulative disclosure burden is 6,481 hours per year (4,666,142 inbound debt relief calls in response to general media advertising x 20 seconds x 25% burden from TSR).

Applying the previously stated estimates and assumptions, the disclosure burden for new respondents attributable to currently exempt inbound calls tied to direct mail (*i.e.*, currently exempt when the requisite Section 310.3(a)(1) disclosures are made), is 581 hours per year (418,453 exempt inbound direct mail calls x 20 seconds x 25% burden from TSR).

Thus, the total disclosure burden attributable to the revised proposed Rule is 12,694 hours (4,935 + 697 + 6,481 + 581).

Estimated Annual Labor Cost: $905,726

Estimated Annual Non-Labor Cost: $61,716

D. Recordkeeping Labor and Non-Labor Costs

1) Labor Costs

Assuming a cumulative burden of 87,900 hours in Year 1 (of a prospective 3-year PRA clearance for the TSR) to set up compliant recordkeeping systems for existing debt relief service providers newly subject to the Rule (879 new respondents x 100 hours each in Year 1 only), and applying to that a skilled labor rate of $25/hour,[291] labor costs would approximate $2,197,500 in the first year of compliance for new respondents.[292] As discussed above, however, in succeeding years, recordkeeping associated with the Rule will only require 879 hours, cumulatively, per year. Applied to a clerical wage rate of $14/hour, this would amount to $12,306 in each of those years. Thus, the estimated annual labor costs for recordkeeping associated with the revised proposed Rule, averaged over a prospective 3-year clearance period, is $740,704.

2) Non-Labor Costs

Staff believes that the capital and start-up costs associated with the TSR's information collection requirements are *de minimis*. The Rule's recordkeeping requirements mandate that companies maintain records, but not in any particular form. While those requirements necessitate that affected entities have a means of storage, industry members should have that already regardless of the Rule. Even if an entity finds it necessary to purchase a storage device, the cost is likely to be minimal, especially when annualized over the item's useful life.

Affected entities need some storage media such as file folders, electronic storage media or paper in order to comply with the Rule's recordkeeping requirements. Although staff believes that most affected entities would maintain the required records in the ordinary course of business, staff estimates that the previously determined 879 new respondents newly subject to the revised proposed Rule will spend an annual amount of $50 each on office supplies as a result of the Rule's recordkeeping requirements, for a total recordkeeping cost burden of $43,950.

E. Disclosure Labor & Non-Labor Costs

1) Labor Costs

The estimated annual labor cost for disclosures for under the revised proposed Rule is $165,022. This total is the product of applying an assumed hourly wage rate of $13[293] to the earlier stated estimate of 12,694 hours pertaining to general and specific disclosures in initial outbound and inbound calls.

2) Non-Labor Costs

Estimated outbound disclosure hours (4,935) per above multiplied by an estimated commercial calling rate of 6 cents per minute ($3.60 per hour) equals $17,766 in phone-related costs.[294]

The Commission invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility; (2) the accuracy of the FTC's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information on those who respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

VIII. Questions for Comment

The Commission seeks comment on various aspects of the proposed Rule. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

A. General Questions for Comment

Please provide comment on each aspect of the proposed Rule, including answers to the following questions.

(1) How would the proposed Rule impact different entities or the provision of different types of debt relief services? Please provide as much detail as possible. Useful information would include information about the services provided by particular entities or types of entities, and how different entities perform their services.

a. In particular, do entities differ in how they currently collect their fees, *e.g.*, what payments are required before the services are begun, what payments are required while services are being provided, and what payments are not collected until after the work is completed? Which providers of debt relief services currently require consumers to make some payment before services are completely provided? Which entities do and do not require such payments? How much of the total fee do the various providers charge prior to completion of the services being offered?

b. How do the various types of entities measure their success in providing the represented services and what level of success are they able to achieve? (Please

[290] This is so because, at present, no limitation or exemption would limit use of the general media exemption by those selling debt relief services via inbound telemarketing. *See* 16 CFR 310.6(b)(5) (the general media exemption, unlike the direct mail exemption, is not conditional and does not presently except from its coverage debt relief services).

[291] This rounded figure is derived from the mean hourly earnings shown for computer support specialists found in the National Compensation Survey: Occupational Earnings in the United States 2007, U.S. Department of Labor released August 2008, Bulletin 2704, Table 3 (''Full-time civilian workers,'' mean and median hourly wages). *See* (*www.bls.gov/ncs/ncswage2007.htm*).

[292] As discussed above, existing respondents should already have compliant recordkeeping systems and thus are not included in this calculation.

[293] This rounded figure is derived from the mean hourly earnings shown for telemarketers found in the National Compensation Survey: Occupational Earnings in the United States 2007, U.S. Department of Labor released August 2008, Bulletin 2704, Table 3 (''Full-time civilian workers,'' mean and median hourly wages). *See* (*www.bls.gov/ncs/ncswage2007.htm*).

[294] Staff believes that remaining non-labor costs would largely be incurred by affected entities, regardless, in the ordinary course of business and/or marginally be above such costs.

provide data to support these representations.)

(2) What would be the effect of the proposed Rule changes (including any benefits and costs), if any, on consumers? Would the benefits to consumers differ depending on the service offered or the type of provider offering it, and if so, how? What evidence is there that consumers are or are not misled in the promotion and sale of different types of goods or services or by different providers? Please provide as much detail as possible.

(3) What would be the impact of the proposed Rule changes (including any benefits and costs), if any, on industry?

(4) What changes, if any, should be made to the proposed Rule to increase benefits to consumers and competition?

(5) What changes, if any, should be made to the proposed Rule to decrease any unnecessary cost to industry or consumers?

(6) How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

B. Questions on Proposed Specific Provisions

Section 310.2 – Definitions

(1) Does the definition of ''debt relief service'' in proposed Section 310.2(m) adequately describe the scope of the proposed Rule's coverage? If not, how should it be modified? Is the proposed definition accurate? Are there alternative definitions that the Commission should consider? Should additional terms be defined, and, if so, how? What would be the costs and benefits of each suggested definition?

(2) Are there reasons to broaden the definition of ''debt relief service'' to include the word ''product''? Would the addition of ''products'' allow the Rule to reach additional deceptive and abusive practices engaged in by sellers and telemarketers of debt relief products and services? Are there reasons to include ''products'' to ensure that the scope of the definition is appropriately broad to anticipate likely changes in the marketplace? Why or why not?

(3) The definition of ''debt relief service'' in proposed Section 310.2(m) would apply to ''any service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a consumer and one or more *unsecured* creditors or debt collectors.'' (emphasis added). The Commission has so limited the provision in anticipation of covering mortgage loan modification and foreclosure rescue services under its new rulemaking authority with respect to mortgage loans. As a result of this determination, with a few exceptions, only outbound telemarketing calls to sell mortgage loan modification or foreclosure rescue debt relief services would be covered by the TSR. Is this determination appropriate? Why or why not?

(4) Should any entities encompassed by the definition in proposed Section 310.2(m) be excluded or exempted from this definition? If so, which entities? Why or why not?

Section 310.3 –Deceptive telemarketing acts or practices

(1) The proposed amended Rule contemplates extending coverage of the existing TSR disclosure and misrepresentation provisions contained in Section 310.3(a) to inbound debt relief sales calls (as defined in the proposal). Would this adequately address the harms to consumers that occur in the sale of debt relief services? Why or why not?

(2) Proposed Section 310.3(a)(1)(viii) has six required disclosures. For each disclosure, please provide comment on the following questions:

a. Is this disclosure appropriate to address harms to consumers that occur in the sale of debt relief services? If not, why or why not? How could the proposed amended Rule be modified to better address such harms?

b. Should this provision be applicable to all providers of debt relief services, or should this provision be tailored to apply only to certain debt relief providers? Why or why not? If so, which entities should be covered?

c. What would be the benefits to consumers of this proposed requirement?

d. What burdens would be imposed on providers of debt relief services if this requirement were adopted?

e. As a practical matter, how would providers comply with the requirement? Would it be necessary to provide disclosures that were specific to the situation of an individual consumer or could the requirement be satisfied with a generic disclosure that would be given to all of the provider's potential customers? What would such a disclosure look like?

f. Are there changes that could be made to lessen the burdens without reducing the benefits to consumers?

(3) Are there other disclosures that should be included in the Rule to address harmful practices in the sale of debt relief services? If so, provide the suggested disclosure and discuss the relative costs and benefits to industry and consumers of such a requirement.

(4) Proposed Section 310.3(a)(2)(x) prohibits misrepresentations of any material aspect of a debt relief services, and provides specific examples of such prohibited misrepresentations. Is each specified misrepresentation sufficiently widespread to justify inclusion in the Rule?

(5) Are there other prohibited misrepresentations that should be specified in the Rule to address harmful practices in the sale of debt relief services? If so, why?

(6) Does the proposed Rule need to be modified in any way to better address any misrepresentations or omissions, and if so, what should those modifications be?

Section 310.4 – Abusive telemarketing acts or practices

(1) What has been the experience in states that have regulated the fees that debt relief providers can charge – for example, allowing a limited initial or set-up fee, and then limiting the fees that can be charged while the services are being provided? Have providers of debt relief services been able to comply with these restrictions and still operate successfully in those states? What kinds of providers have been able to do so? Would it be appropriate for the Commission to consider such an approach? Why or why not? If providers were permitted to collect such limited fees, what fees should be permitted and what limits should be established on them?

(2) To what extent does proposed Section 310.4(a)(5) prevent harm to consumers that would not be eliminated by the disclosure requirements in proposed Section 310.3(a)(1) and misrepresentation prohibitions in proposed Section 310.3(a)(2)? Alternatively, if you believe that proposed Section 310.4(a)(5) would not prevent any additional harms, please explain why.

(3) Proposed Section 310.4(a)(5) provides that payment may not be requested or received until a seller provides a customer with ''documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.'' Is it appropriate to require provision of these documents before a covered entity can request or receive payment of any fee or consideration? In addition to those listed in the proposed amended Rule or described this Notice, are there other documents that typically evidence the completion of a debt relief service? Do such documents adequately

demonstrate that a consumer's debt has been successfully renegotiated, settled, reduced, or otherwise altered? Is one type of document preferable to another?

(4) Should any type or portion of fees charged by entities offering debt relief services be exempted from Section 310.4(a)(5)? If so, which fees – either by type of entity providing the service or by type of fee – should be exempted, and why? Will entities that offer a measurably beneficial service to consumers be adversely affected by this proposed Section? Why or why not? Will covered providers find it is no longer possible to provide particular types of services if this requirement is imposed? Which services will it no longer be economic to provide and why will it no longer be economic to provide them?

(5) Would an alternative formulation of an advance fee ban, such as the one in Section 310.4(a)(4) of the existing Rule (prohibiting requesting or receiving a fee in advance only when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging the promised services), be more appropriate than a ban conditioned on the provision of the promised goods or services? Why or why not?

(6) Are there alternatives to an advance fee ban exist that would sufficiently address the problem of low success rates in the debt settlement industry? If so, please explain.

(7) As noted, the Commission does not intend that the advance fee ban be interpreted to prohibit a consumer from using legitimate escrow services – services controlled by the consumer – to save money in anticipation of settlement. Is it appropriate to allow the use of such escrow services? Why or why not?

Section 310.5 – Recordkeeping requirements

(1) No changes to Section 310.5 are included in the proposed Rule, but the application of the Rule to inbound debt relief calls would require some sellers and telemarketers to comply with these requirements for the first time. What would be the costs and benefits to industry and consumers of this result?

Section 310.6 – Exemptions

(1) Proposed Sections 310.6(b)(5) and 310.6(b)(6) modify the general media and direct mail inbound call exemptions to make them unavailable to telemarketers of debt relief services. Is there a sufficient basis for this modification? Why or why not?

Regulatory Flexibility Act

(1) As noted in this NPRM, it is not readily feasible to determine a precise estimate of how many small entities will be subject to the proposed Rule. Please provide any information which would assist in making this determination.

(2) Identify any statutes or rules that may conflict with the proposed Rule requirements, as well as any other state, local, or industry rules or policies that require covered entities to implement practices that comport with the requirements of the proposed Rule.

(3) Do the prohibited practices in the proposed Rule impose a significant impact upon a substantial number of small entities? If so, what modifications to the proposed Rule should the Commission consider to minimize the burden on small entities?

IX. Proposed Rule

List of Subjects in 16 CFR Part 310

Telemarketing, Trade Practices

■ Therefore, as stated in the preamble, the Federal Trade Commission proposes to revise part 310 of title 16, Code of Federal Regulations, to read as follows:

PART 310—TELEMARKETING SALES RULE

Section Contents

§ 310.1 Scope of regulations of this part.
§ 310.2 Definitions.
§ 310.3 Deceptive telemarketing acts or practices.
§ 310.4 Abusive telemarketing acts or practices.
§ 310.5 Recordkeeping requirements.
§ 310.6 Exemptions.
§ 310.7 Actions by states and private persons.
§ 310.8 Fee for access to the National Do Not Call Registry.
§ 310.9 Severability.

Authority: 15 U.S.C. 6101-6108.

§ 310.1 Scope of regulations of this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Debt relief service* means any service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a consumer and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a consumer to an unsecured creditor or debt collector.

(n) *Donor* means any person solicited to make a charitable contribution.

(o) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or

service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(p) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(q) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(r) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(s) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(u) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(v) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(w) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(x) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(y) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(z) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(aa) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(bb) *State* means any state of the United States, the District of Columbia, Puerto Rico, the

Northern Mariana Islands, and any territory or possession of the United States.

(cc) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(dd) *Telemarketing* means a plan, program, or campaign which is conducted to induce thepurchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(ee) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays [295] for goods or services offered, and before any services are rendered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[296]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, orrepurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

[295] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

[296] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643;

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); and

(viii) In the sale of any debt relief service,

(A) the amount of time necessary to achieve the represented results, and to the extent that the offered service may include the making of a settlement offer to one or more of the customer's creditors or debt collectors, the specific time by which the debt relief service provider will make such a bona fide settlement offer to each of the customer's creditors or debt collectors;

(B) to the extent that the offered service may include the making of a settlement offer to one or more of the customer's creditors or debt collectors, the amount of money or the percentage of each outstanding debt that the customer must accumulate before a debt relief service provider will make a bona fide settlement offer to each of the customer's creditors or debt collectors;

(C) that not all creditors or debt collectors will accept a reduction in the balance, interest rate, or fees a customer owes such creditor or debt collector;

(D) that pending completion of the represented debt relief services, the customer's creditors or debt collectors may pursue collection efforts, including initiation of lawsuits;

(E) to the extent that any aspect of the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors, that use of the debt relief service will likely adversely affect the customer's creditworthiness, may result in the customer being sued by one or more creditors or debt collectors, and may increase the amount of money the customer owes to one or more creditors or debt collectors due to the accrual of fees and interest; and

(F) that savings a customer realizes from use of a debt relief service may be taxable income.

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643;

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); or

(x) Any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors debt collectors to negotiate, settle, or modify the terms of customer's debt; the effect of the service on a customer's creditworthiness; the effect of the service on collection efforts of the consumer's creditors or debt collectors; the percentage or number of customers who attain the represented results; and whether a debt relief service is offered or provided by a non-profit entity.

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[297] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[298] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[299]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in

[297] Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

[298] Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[299] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

§§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating*. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering*. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions*. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally*. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Requesting or receiving payment of any fee or consideration from a person for any debt relief service until the seller has provided the customer with documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.

(6) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(7) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(8) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the ''do-not-call'' registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[300] of that person; or

(ii) as an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is''abandoned'' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii), unless:

(A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) Includes such person's telephone number and signature;[301] and

(B) In any such call to induce the purchase of any good or service, or to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) Allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) Within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by § 310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

(A) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at any time during the message. The mechanism must:

(1) Automatically add the number called to the seller's entity-specific Do Not Call list;

(2) Once invoked, immediately disconnect the call; and

(3) Be available for use at any time during the message; and

(B) In the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

(1) Automatically adds the number called to the seller's entity-specific Do Not Call list;

(2) Immediately thereafter disconnects the call; and

(3) Is accessible at any time throughout the duration of the telemarketing campaign; and

(iii) Complies with all other requirements of this part and other applicable federal and state laws.

(C) Any call that complies with all applicable requirements of this paragraph (v) shall not be deemed to violate § 310.4(b)(1)(iv) of this part.

(D) This paragraph (v) shall not apply to any outbound telephone call that delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

[300] For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

[301] For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the ''do-not-call'' registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(iv) if:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

(ii) The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) Whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[302]; and

(iv) The seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[303]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

[302] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

[303] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(1) The sale of pay-per-call services subject to the Commission's Rule entitled ''Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992,'' 16 CFR Part 308, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled ''Disclosure Requirements and Prohibitions Concerning Franchising,'' (''Franchise Rule'') 16 CFR Part 436, and the sale of business opportunities subject to the Commission's Rule entitled ''Disclosure Requirements and Prohibitions Concerning Business Opportunities,'' (''Business Opportunities Rule'') 16 CFR Part 437, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided,* however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided,* however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or the Business Opportunity Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided,* however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or the Business Opportunity Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided,* however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $54 for each area code of data accessed, up to a maximum of $14,850; provided, however, that there shall be no charge to any person for accessing the first five area codes of data, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing area codes of data in the National Do Not Call Registry if the person is permitted to access, but is not required to access, the National Do Not Call Registry under this Rule, 47 CFR 64.1200, or any other Federal regulation or law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) Each person who pays, either directly or through another person, the annual fee set forth in § 310.8(c), each person excepted under § 310.8(c) from paying the annual fee, and each person excepted from paying an annual fee under § 310.4(b)(1)(iii)(B), will be provided a unique account number that will allow that person to access the registry data for the selected area codes at any time for the twelve month period beginning on the first day of the month in which the person paid the fee (''the annual period''). To obtain access to additional area codes of data during the first six months of the annual period, each person required to pay the fee under § 310.8(c) must first pay $54 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, each person required to pay the fee under § 310.8(c) must first pay $27 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,

Secretary

Federal Register

Attachment A

Consumer Protection and the Debt Settlement Industry Workshop Commenters

Able Debt Settlement, Inc. (''Able Debt Settlement'')
ACA International (''ACA'')
American Association of Debt Management Organizations (''AADMO'')
American Financial Services Association (''AFSA'')
CareOne Credit Counseling Services (''CareOne'')
Carlson, N. (''Carlson'')
Consumer Bankers Association (''CBA'')
Consumer Recovery Network (''CRN'')
Credit Advisors, Inc. (''Credit Advisors'')
Debt Settlement USA (''Debt Settlement USA'')
First Stone Credit Counseling (''First Stone'')
Gilpin, William (''Gilpin'')
Manning, Robert (''Manning'')
McClendon (''McClendon'')
Merry, Jack (''Merry'')
Morgan Drexen Integrated Legal Systems (''Morgan Drexen'')
Rhode, Steve (''Rhode'')
The Association of Settlement Companies (''TASC'')
United States Organizations for Bankruptcy Alternatives (''USOBA'')
US Debt Resolve (''US Debt Resolve'')

Federal Register

Attachment B

Consumer Protection and the Debt Settlement Industry Workshop Participants

American Association of Debt Management Organizations (''AADMO''): Mark Guimond
American Bankers Association, Center for Regulatory Compliance (''ABA''): Virginia O'Neill
American Credit Alliance, Inc. (American Credit Alliance''): Alan Franklin
American Express, Consumer Affairs Division (''American Express''): Anna Flores
Center for Consumer Financial Services, Rochester Institute of Technology (''CCFS''): Robert Manning
Consumer Federation of America (''CFA''): Travis Plunkett
Debt Settlement USA (''Debt Settlement USA''): Jack Craven
EFA Data Processing, L.P (''EFA'').: John Ansbach
Federal Trade Commission (''FTC''): Lydia Parnes
Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC (''Gordon Feinblatt''): Carla Stone Witzel
Internal Revenue Service (''IRS''), EO Technical Group, Ruling and Agreements: Steve Grodnitzky
Loeb & Loeb, LLP (''Loeb''): Michael Mallow
Maryland Consumer Rights Coalition (''MCRC''): Stephen Hannan
National Conference of Commissioners on Uniform State Laws (''NCCUSL''): Michael Kerr
National Foundation for Credit Counseling (''NFCC''): William Binzel
South Carolina Department of Consumer Affairs (''SCDCA''): Carolyn Lybarker
The Association of Settlement Companies (''TASC''): Wesley Young
US Debt Resolve (''US Debt Resolve''): Scott Johnson
United States Organizations for Bankruptcy Alternatives, Inc.(''USOBA''): Jenna Keehnen
U. S. Public Interest Research Group (''USPIRG''): Ed Mierzwinski

[FR Doc. E9–19749 Filed 8–18–09: 8:45 am]

BILLING CODE: 6750–01–S