American Financial Services Association

October 9, 2009

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

Re: Telemarketing Sales Rule – Debt Relief Amendments – R411001

Ladies and Gentlemen:

The American Financial Services Association ("AFSA") applauds the Federal Trade Commission's ("FTC") effort to adopt additional legal restrictions to address pervasive abusive and often illegal conduct occurring in the sale of debt relief services. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks, and industry suppliers. AFSA's mission is to promote responsible, ethical lending to responsible, informed consumers and to improve and protect consumers' access to credit.

Abuses in the Debt Settlement Industry

It has been the experience of AFSA's members that many for-profit debt settlement service providers harm both consumers and creditors by engaging in questionable practices, abusing the Fair Credit Reporting Act ("FCRA"), abusing the power given to them by consumers, perpetrating fraud, delaying remitting payment, engaging in deceitful actions, and facilitating false complaints.

AFSA members have seen a rapid and substantial increase in frivolous or invalid disputes since the emergence of for-profit debt relief service providers. Rather than engaging in bona fide attempts to reach a settlement with creditors regarding the consumer's obligation, for-profit debt settlement service providers often submit communications for the apparent purpose of abusing the protections that consumers are given under Regulation Z/FCRA. The routine submission of full balance disputes, debt verification and credit bureau disputes may be abuses of the consumer protections created under the Fair Credit Billing Act ("FCBA"), the Fair Debt Collection Practices Act ("FDCPA") and the FCRA. For example, some creditors get blanketed with letters from for-profit debt relief service providers that blatantly dispute the debt and request all supporting documentation, but provide *no* basis as to why the debt is disputed. AFSA members work hard to keep their reporting accurate and respond to consumers' disputes and it takes AFSA member companies time to answer each of these dispute letters. With regard to the credit reporting disputes, when negative reporting is erroneously removed from a credit report, it undermines the validity of our national credit reporting system.

Another common practice used by for-profit debt settlement service providers, which is not in the consumers' best interest, is blocking or discouraging consumer communication with creditors. Many for-profit debt settlement service providers do this by using Power of Attorney ("POA") and Limited Power of Attorney ("LPOA") forms, many of which are unsigned by the consumer. It is extremely difficult for creditors to communicate with consumers when nearly all letters come with these POAs or LPOAs. Moreover, for-profit debt relief service providers frequently do not adhere to state laws that govern the creation and use of POA. For-profit debt settlement service providers often give consumers the impression that the consumer is now represented by an attorney when the entity is either not a law firm or not a law firm licensed and authorized to practice law in the consumer's state. When creditors receive cease and desist requests and a change of correspondence and billing addresses, they cannot educate, help, or otherwise communicate with the consumers.

In many cases, the creditor is unable to contact the for-profit debt settlement service provider and no further communication is received by the creditor from them. Thus, the creditors are left without a means to resolve the outstanding debt and cannot even offer the debt relief programs it has available. Once the debt has been charged off, then a settlement offer may be received for a relatively small percentage of the debt. By the time this settlement offer is received, the consumer's credit rating has been substantially impaired due to late marks and the charge-off and the amount of the obligation has needlessly grown due to the continued accumulation of interest and fees. Because creditors understand that this is the pattern, customers who have retained a for-profit debt relief service provider will be evaluated earlier to determine whether they are a good candidate for a lawsuit to collect the debt than a consumer who is continuing to work with the creditor directly.

It is important to note that any settlement agreed to by the creditor and arranged with a for-profit debt settlement service provider, would be agreed to if arranged directly with the consumer (saving the consumer a large fee). Indeed, consumers can often obtain at no cost, low cost, or nominal flat fees the same reduced payment plans directly from creditors or other non-profit entities that some debt relief organizations charge a percentage fee of total amount of debt and/or a percentage of the amount of debt reduced.

Additionally, creditors, unlike for-profit debt settlement service providers, are required to post or return payment remittance in a timely fashion in order to minimize the resulting assessment of fees, interest, etc. Creditors also manage escrow accounts in accord with strict regulations – regulations that for-profit debt relief service provides do not have to follow. In fact, for-profit debt settlement service providers frequently do not forward consumer funds to creditors in a timely manner. Oftentimes, they will hold the funds while submitting bogus disputes. This often results in unnecessary accrual and assessment of fees and interest to a consumer's account. Also, it is AFSA's belief that for-profit debt settlement service providers do not return fees and/or proceeds to a consumer if or when they fail to negotiate terms with a creditor. For-profit debt settlement service providers do not make accommodations with respect to the date that funds are received, nor do they adhere to industry standard regulations governing the management of escrow accounts. Some for-profit debt settlement service providers fail to make known funds

they possess on behalf of consumers during judicial proceedings, including bankruptcy and probate hearings.

Instead of contacting a for-profit debt settlement service provider, AFSA has always recommended that when consumers have trouble meeting credit obligations, they seek help by contacting their creditors or locating a reputable credit counseling agency by contacting The National Foundation for Credit Counseling ("NFCC").

General Comments on the Notice of Proposed Rulemaking ("NPRM")

AFSA commends the FTC for the NPRM to amend the FTC's Telemarketing Sales Rule ("Rule"), which is an important step in the effort to prevent harm to consumers considering debt relief options. The Rule will help level the playing field for financially distressed consumers so that they receive accurate information and effective services. The FTC has done an excellent job in its law enforcement and consumer education efforts. This Rule will provide much needed regulation and will benefit consumers immensely.

AFSA hopes that the proposed disclosures lead to better-informed consumers who fully realize what the for-profit debt relief service provider can accomplish on their behalf and for what fee. We believe that the prohibition on requesting or receiving any fee until the consumer has documentation that a particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered, will be very effective.

One of the problems with the current for-profit debt relief model that the Rule may not resolve is the abuse perpetrated by many companies to invalidate a debt. As discussed above, rather than trying to reach a settlement, for-profit debt settlement service providers often exploit the protections consumers are given under Regulation Z or FCRA to try to have a debt invalidated. This clogs up the courts and takes time away from creditors who are trying to respond to legitimate complaints. There are very few debt repair ploys that cannot be countered with legal process, but there are even fewer cases where the benefits justify the cost. Because of this, many debt repair scams accomplish the consumer's goal of having the debt invalidated, even if the collateral result is a blemish on the consumer's credit record.

Because of this nefarious but very real success rate, enhanced disclosures are an excellent start, but are not enough to keep consumers from engaging the services of illegitimate, but sometimes-successful, debt repair scams.

One possible approach, which would have to be taken by the states, is to define debt settlement services as the practice of law. Since negotiating contracts and preparing deeds constitutes the practice of law, representing consumers in negotiations to alter or amend existing contracts is also the practice of law. That definition would require that debt repair services only be performed by an attorney at law who is licensed by a state which would limit such services to debtors who reside in that state or states. Having the practice of law include debt repair services will also reduce the need for additional rules because attorneys are required to maintain rigorously controlled trust accounts, and their conduct is regulated by each state's highest court or licensing

authority. AFSA believes that attorneys at law who commit the conduct described in the Rule would be exposed to disciplinary action by most state attorney licensing authorities.

In the Rule, the FTC notes that, "creditors and debt collectors can do more to address the concerns at issue in this proceeding, such as developing innovative loss mitigation techniques."[1] The FTC goes on to state that it "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 [Debt Management Plans]." AFSA members have substantially increased their efforts to reach consumers once they become delinquent, but before they default. For example, one AFSA member will temporarily reduce the interest on a credit card to 0% for twelve months. Another member allows consumers to reduce their interest rate to 0% or 1% APR while the consumer repays existing balances on a fixed term repayment schedule over a period of 60 months. AFSA members may also offer a settlement plan that forgives a portion of a consumer's credit card balance. Additionally, AFSA members have extended installment loans for up to three months or given temporary rate reductions for up to six months. AFSA members work with agencies accredited by the NFCC to put a plan in place.

QUESTIONS FOR COMMENT

Not all of the questions posed in section VIII, Questions for Comment, apply to AFSA members, so we will answer the questions relevant to our industry.

A. General Questions for Comment

> *(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 good or services or by different providers? Please provide as much detail as possible.*

AFSA believes that the proposed Rule changes would benefit consumers. For-profit debt settlement service providers use false advertising by offering hollow promises such as, "Eliminate unsecured debt for only pennies on the dollar!" These advertisements do not adequately disclose the possible risks to the consumer, which include credit damage, additional fees, adverse action, and legal action. For example, debt settlement service providers often damage a consumer's credit by withholding payment while submitting bogus disputes to the creditor – with no up front disclosure to the consumer. Debt settlement is complicated and highly customized to each unique consumer situation. Blanket promises create false hope and are misleading. The proposed Rule would limit these false claims and hopefully allow consumers to make educated decisions.

Additionally, AFSA agrees with the FTC that it is often the case that consumers pay in advance for debt relief services that are never rendered. It is shocking that some debt settlement service

[1] *See* FTC, 16 CFR Part 310 Telemarketing Sales Rule; Notice of Proposed Rulemaking and Request for Comment, 74 Fed. Reg. 41998 (August 19, 2009).

providers actually provide the represented services to only 1% or fewer of their consumers. AFSA believes that this Rule will help to prevent such serious harm to consumers.

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

Increased regulation of debt relief service providers could help creditors' loss mitigation efforts. AFSA members have seen examples of debt settlement companies facilitating frivolous complaints using the machinery of federal and state regulation in a fashion that calls into question the consumer's knowledge and involvement.

It is the experience of AFSA's members that frequently, instead of trying to reach a settlement with the creditor for the consumer, for-profit debt settlement service providers try to trap the creditor by exploiting federal regulations such as the FCRA. Creditors have found that for-profit debt settlement service providers falsely claim that a consumer's account has been previously disputed by the consumer, although no record of a prior dispute exists. For-profit debt settlement service providers also claim that a consumer is currently disputing a debt, when in fact, the consumer does not disagree with the history of charges. Furthermore, for-profit debt settlement service providers often make frivolous or unreasonable claims of jurisdiction, challenge the creditor's right to collect the debt, and allege violations of the USA Patriot Act by the creditor. For-profit debt settlement service providers frequently request information, such as debt validation, from the creditor for the sole purpose of following those requests with claims that the information the for-profit debt settlement service provider received is incomplete. A significant amount of time is wasted by creditors replying to these frivolous complaints. During this time, the consumer is not paying, which results in adverse credit reporting since the "dispute" is usually not bona fide or has been tendered in an incorrect way, such as "there may be problems with your credit reporting" or "it appears you may be reporting improperly" without any accompanying details as required by law and regulation. This time could be better spent in serious loss mitigation efforts that have a much better chance of actually helping the consumer.

Additionally, increased regulation of for-profit debt settlement service providers could help prevent the use of unsigned Power of Attorney and Limited Power of Attorney forms. Debt settlement providers frequently use such means to block communication between the creditor and the consumer. This prevents the creditor from being able to put together a workout plan that would be free for the consumer.

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

In addition to the changes advocated in the General Comments section of this letter, it would be very beneficial for consumers if the FTC mandated that for-profit debt relief service providers speak, in person or over the telephone, to creditors' representatives within three business days of receipt of a response from a creditor. AFSA members frequently write to for-profit debt relief service providers, but almost never hear back from them. In the meantime, the consumer gets further in debt because they were told by the for-profit debt relief service provider not to make payments. In this situation, creditors must submit negative information to the credit reporting

agencies. Sometimes creditors also must sue the consumer because neither the consumer nor the for-profit debt relief service provider will respond to the creditor. Some creditors are considering filing suit or taking other collection efforts when they get such "inquiries" from for-profit debt relief service providers, even though the creditor would rather work out a payment arrangement with the consumer.

It would also be beneficial to consumers if the FTC were to require that for-profit debt relief service providers inform consumers of any material developments with respect to accounts being handled for the consumer, including any communications made by the creditor to the for-profit debt relief provider regarding the status of the account or any offers to assist in resolving the obligation. AFSA members frequently receive "cease and desist" requests or POA's, asking that further communications be made only with the for-profit debt relief provider. Typically, consumers are then cut off from further understanding of what is occurring with their account. This type of requirement would help to keep consumer apprised of interest and fees that continue to accrue to the account, as well as any debt relief options the creditor may be able to offer.

Finally, additional protection to consumers could be achieved by requiring that for-profit debt relief service providers include the disclosures required under Section 310.3(a)(1) in a written contract required to be signed by the consumer. This would be similar to the contract requirement set forth at 15 U.S.C.A. § 1679d with respect to credit repair organization contracts. This requirement would aid in ensuring the disclosures are given in a clear and conspicuous manner and not hidden on a website a consumer may not access.

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

As mentioned above, the Rule needs to force for-profit debt relief service providers to respond promptly to the creditors. If creditors cannot get in touch with a for-profit debt relief service provider, they need to be able to contact the consumer directly. The for-profit debt relief service providers' motives are impure and they are causing serious and irreversible harm to consumers.

Also, AFSA strongly supports the strict regulations on advance fees that the FTC has proposed. Advance fees should be prohibited.

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?*

The definition of "debt relief service"[2] in proposed section 310.2(m) does not adequately describe the scope of the proposed Rule's coverage. The definition is broad enough to potentially include an affiliate entity servicing an unsecured loan or credit card account on behalf of a creditor, even though AFSA believes that the FTC did not intend to include creditors and their affiliates in this Rule. Instead, the definition should include an exemption for entities affiliated with the creditor. If the definition does not include this exception, the rule would limit creditors' loss mitigation efforts.

> *(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?*

The definition of debt relief services should not be limited to the debt between a consumer and an unsecured creditor. If the FTC intends to exempt real estate secured credit, the definition needs to be more specific. As written, the definition excludes for-profit debt settlement service providers that assist the consumer with relationships with most installment lenders, all payday and title lenders, all auto finance lenders and some card issuers as well as all residential mortgage lenders. There does not appear to be a reason in the Rule for limiting debt repair services to relationships only with unsecured creditors.

> *(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?*

As mentioned above, the FTC should clearly exempt creditors, their affiliates, and counsel employed by the creditors and their affiliates from this rule. This rule is clearly intended to cover for-profit debt settlement service providers rather than creditors, and that distinction should be made clear.

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] Section 310.2 defines "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.

AFSA believes that this would adequately address the harms to consumers that occur in the sale of debt relief services because it would make virtually all debt relief telemarketing transactions subject to the TSR. It would be beneficial to address communications over the Internet as well in order to avoid creating a loophole in which for-profit debt settlement service providers could skirt the regulations by marketing their products exclusively online.

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

AFSA believes that all six disclosures appropriately address harms to consumers, should be applicable to all for-profit debt settlement service providers, and would benefit consumers.

Specifically, AFSA believes that Proposed Section 310.3(a)(1)(viii)(D), which 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."[3] AFSA member companies have received complaints from consumers who were unaware of this provision and were surprised when a lawsuit was initiated.

AFSA also believes that Proposed Section 310.3(a)(1)(viii)(E), which 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."[4] AFSA has long been concerned that lack of this information has been detrimental to consumers. We are grateful to the FTC for including this disclosure in the proposed Rule.

> *(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.*

One other disclosure might be helpful to consumers. The FTC noted that "some Workshop participants suggested that consumers are often unaware of their ability, independent of a third party, to initiate debt settlement negotiations."[5] AFSA and its members work hard to tell consumers that if they think they may be delinquent or may default on a loan, the best thing for them to do is to contact their creditor. AFSA realizes that many people do not know that this is an option. The FTC should include in a disclosure the information that consumers may be able to put together a workout plan with their creditor.

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[3] *See* FTC, 16 CFR Part 310 Telemarketing Sales Rule; Notice of Proposed Rulemaking and Request for Comment, 74 Fed. Reg. 42002 (August 19, 2009).
[4] *See* FTC, 16 CFR Part 310 Telemarketing Sales Rule; Notice of Proposed Rulemaking and Request for Comment, 74 Fed. Reg. 42002 (August 19, 2009).
[5] *See* FTC, 16 CFR Part 310 Telemarketing Sales Rule; Notice of Proposed Rulemaking and Request for Comment, 74 Fed. Reg. 42001 (August 19, 2009).

Although disclosures are useful, it would be best to regulate the conduct of for-profit debt relief service providers directly. Possibly, for-profit debt relief service providers should be required to report on a weekly basis to the consumer on their activities so the consumer can determine if the for-profit debt relief serve provider is really doing anything for them.

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

Each specified misrepresentation is sufficiently widespread to justify inclusion in the Rule. Specifically, AFSA is grateful that Proposed Section 310.3(a)(2)(x) would "prohibit a telemarketer from misrepresenting the 'effect of the service on collection efforts of the consumer's creditors or debt collectors.'"[6] AFSA members may continue to collect on a debt even when a consumer has engaged a for-profit debt settlement service provider. It is crucial that consumers recognize that.

Section 310.4 – Abusive telemarketing acts or practices

> *(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.*

Proposed section 310.4(a)(5) prevents harm to consumers that would not be eliminated by the disclosure requirements. AFSA agrees with the FTC that "requesting or receiving payment of a fee for any debt relief service before the seller has provided the customer with documentation that the promised services have been rendered meets the criteria for unfairness."[7] For-profit debt relief service providers should not receive a fee until they have actually done something for the consumer. It is an abusive practice for telemarketers to take consumers' money for services that they cannot or will not provide. AFSA members often get one or two letters from a for-profit debt settlement service provider, but nothing else. For-profit debt settlement service providers frequently do not pursue a solution beyond those one or two letters and do not respond to requests from creditors. This does not provide any value to the consumer. Instead, the consumer gets further in debt, and the creditor may end up suing to collect.

> *(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*

[6] *See* FTC, 16 CFR Part 310 Telemarketing Sales Rule; Notice of Proposed Rulemaking and Request for Comment, 74 Fed. Reg. 42004 (August 19, 2009).
[7] *See* FTC, 16 CFR Part 310 Telemarketing Sales Rule; Notice of Proposed Rulemaking and Request for Comment, 74 Fed. Reg. 42005 (August 19, 2009).

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?

Yes, it is appropriate to require provision of documents proving that a debt has, in fact, been renegotiated, settled, reduced or otherwise altered. Without that proof, there is no way for the consumer to be sure that she is getting something for her money.

Conclusion

AFSA thanks the FTC for the opportunity to comment on the proposed Rule and commends the agency for its work in protecting consumers from the unscrupulous practices of some for-profit debt settlement service providers. AFSA members do generally provide written documentation when a debt is settled. Please feel free to contact me with any questions at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,

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