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DEBT RELIEF

Division of Freedom Financial Network, LLC

Federal Trade Commission
Office of the Secretary
Room H-135 [Annex T]
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Telemarketing Sales Rule – Debt Relief Amendments, R411001

Ladies and Gentlemen:

Freedom Debt Relief, LLC ("FDR") is pleased to submit the following comments in response to the Notice of Proposed Rulemaking ("NPR") published by the Federal Trade Commission ("Agency") on July 30, 2009. While we support many of the regulatory initiatives put forth in the NPR, we believe substantive business-method regulation is best undertaken by the states or through a comprehensive federal rule that applies evenhandedly to all debt relief service providers. The rulemaking attempted by the NPR under the Telemarketing Sales Rule ("TSR"), limited as it must be by the statutory constraints on the Agency's authority set forth in the Telemarketing Sales Act ("TSA"), cannot reach many segments of the debt relief industry; we believe that imposing regulation on only one segment is both detrimental to the interests of consumers and severely anti-competitive. In particular, we are strongly opposed to the proposed "advance fee" prohibition, both because our clients undeniably receive debt settlement services (contrary to the Agency's core thesis) and because any such prohibition will cause both substantial harm to consumer interests by limiting or making wholly unavailable a proven method of resolving excessive debts and substantial harm to competition in the debt relief services industry by favoring credit counselors that may be aligned with creditor interests.

Before addressing ourselves to the substance of the NPR, we are compelled to state our belief that there are substantial substantive and procedural problems with the Agency's regulatory authority underlying the attempted rulemaking set forth in the NPR. First, the proposed "advance fee" prohibition does not constitute regulation of telemarketing and, as such, exceeds the Agency's authority under the TSA, especially in light of FDR's highly successful experience in settling consumer debts. Moreover, the proposed regulation under the TSA does not extend to non-profit companies or providers that offer services in person, over the Internet or by means other than the telephone, and thus will cause substantial injury to competition in the industry by imposing very significant limitations only upon certain segments of the industry (primarily for profit debt settlement companies) to the direct competitive advantage of others (primarily credit counselors, but especially non-profit credit counselors whose interests are frequently aligned with the credit card issuers). Finally, the Agency's use of the TSR to avoid the procedural protections of the Magnuson Moss Act applicable to a rulemaking with respect to deceptive practices under Section 5 of the Federal Trade Commission Act, which has been the basis of all

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of the Agency's enforcement actions with respect to debt relief service providers, is especially concerning here because the Agency's purported reason for imposing the "advance fee" limit is predicated on a factual determination on the performance (as measured by settlement success) of the industry, a determination on which the Agency, by its own admission, has scant data that is wholly at odds with the data presented by FDR in this letter.

SUMMARY

Overall, we commend the Agency for kick starting the debate about the nature and scope of appropriate regulation for the debt relief services industry. We share the Agency's goal of advancing consumer protection but believe that substantive regulation of the industry is best undertaken at the state level. That said, we believe the Agency has a significant role to play in prescribing uniform disclosure regulations, provided those regulations can be applied to <u>all</u> debt relief service providers, rather than just to one segment of the industry.

Many of the disclosure requirements proposed by the Agency are consistent with those pioneered by FDR in the service of enhanced consumer protection. FDR has long been a vocal advocate of extensive consumer disclosure and has worked closely with different stakeholders[1] to secure state-by-state passage of the Uniform Debt Management Services Act ("UDMSA"), the model statute regulating the debt settlement industry that embodies more than seven years of research and drafting by the Uniform Law Commission ("ULC"). FDR believes that the most recent iteration of the UDMSA[2] codifies "best practices" in the registration and regulation of all segments of the debt settlement industry and offers the kind of robust state-based enforcement mechanisms that are crucial to the protection of consumers. It is worth noting that the UDMSA was drafted with significant input from all stakeholders, including participants from the industry, consumer groups and the enforcement and legislative communities.

However, with respect to its proposal to ban the receipt of fees in advance of completion of services, particularly when the prevailing industry model is one of incremental fee collection over no less than the half life of a debt settlement program[3], the Agency is not only attempting sweeping business-model reform, but has also failed to carry its burden of proof with respect to all three prongs of the Agency's own test for determining what constitutes an "abusive business practice" under the TSR[4]. Indeed, the core thesis on which the Agency has based that

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1 Executives from FDR work closely with The Association of Settlement Companies ("TASC"), the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), now known as the Uniform Law Commission ("ULC"), and a wide range of state legislators and regulators.

2 The most recent iteration of the UDMSA is the version passed recently in Tennessee, which version sanctions both a fixed-fee model with a cap of 17% of enrolled debt, as well as a contingency fee model with a cap of 30% of savings.

3 By way of example, under a typical "fixed-fee" 36-month debt settlement program fees are calculated at the time the program is established and are collected ratably over the first 18 months.

4 In setting forth an analytical framework for identifying an "abusive practice" subject to TSR regulation, the Agency stated, "To make such a showing the Commission must demonstrate that: 1) the conduct at issue causes

determination – that it is abusive to allow consumers to pay for services because it is highly unlikely that they will ever receive them – is patently incorrect, at the very least insofar as FDR's data demonstrates:

- From inception through September 30, 2009, FDR has settled more than 100,000 accounts for our customers.
- From inception through September 30, 2009, FDR has settled more than $467 million of consumer debt, based on the amount owed at the time of settlement.
- From inception through September 30, 2009, FDR has settled debt for an average debt reduction of about 55.3% of the amount owed at the time of settlement (meaning an average settlement rate of 44.7% of the amount owed). These settlements have resulted in total debt reduction for FDR consumers of more than $259 million of the balances owed.

If the test were, as the Agency appears to suggest, simply whether FDR actually delivered to consumers the services it had offered to provide, then we pass the test: FDR has, in fact, settled more than $467 million of consumer debt, which is exactly the service we offered to provide. Furthermore, the settlement of that amount of debt has resulted in tremendous savings to consumers (i.e., the difference between the amounts owed by the consumer at the time of settlement minus the amount actually paid to creditors). These are real numbers and provide hard evidence that not only does FDR deliver to consumers the services we represent will be provided, but also that the services provided result in a tangible and substantial consumer benefit.

As discussed in more detail below, the data demonstrates that consumers derive significant benefits that significantly exceed the amounts paid for the services. Furthermore, the data shows that the benefits are not derived only at program completion but rather are delivered to the consumer throughout the program lifetime. Finally, the data shows that these benefits are not reserved only for those who are able to complete the program but are realized as well by those who, for whatever reason, do not complete the program.

Accordingly, based on data available from FDR, we do not believe that the Agency can show that the conduct at issue (specifically, the charging of fees incrementally as services are performed) causes substantial injury to consumers, or that any harm resulting from the conduct (and we do not concede that any harm does, in fact, flow from the charging of fees incrementally as services are performed) is not outweighed by the benefits received. The fact is that FDR has a clearly demonstrable record of providing valuable settlement services that consumers want and, thus, it is untenable for the Agency to assert that an "advance fee" prohibition (with its substantial anti-consumer consequences and disruption to industry competition) is necessary to

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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." NPR at 70.

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ensure that consumers receive such services. Moreover, even putting aside the sharply anti-competitive aspects of the proposed prohibition, it is not in the interests of consumers for the Agency to impose a ruinous "advance fee" prohibition on FDR and other debt settlement companies that provide valuable services to many, many consumers when the Agency can address perceived abuses much more directly (and without substantial adverse impact) through more traditional regulation of marketing practices (such as prohibiting unsubstantiated claims of success or misrepresentations regarding services).

In contrast to the Agency's proposal, the UDMSA's approach is to empower enacting states to regulate fee limits and practices in the context of what those states believe to be in the best interests of their citizens. The version of the UDMSA that is currently being offered to the states for consideration contains amendments agreed to by the ULC with input from the industry. These amendments, adopted in virtually every state that has considered the UDMSA, allow the consumer to choose between companies offering a contingency fee model and those offering a fixed-fee structure, thereby empowering the consumer to elect a compensation structure with which the consumer feels most comfortable. The UDMSA-sanctioned fixed-fee model balances the consumer's need for reasonable fees and transparency in disclosure with the debt settlement services provider's need to support its ongoing client counseling, customer service, technology and support functions essential to a successful debt settlement program.

For the reasons described more fully below, we believe the Agency's proposed prohibition on the fixed-fee model is ill-considered and anti-competitive, and will, among other effects:

- Severely limit consumer choice and, in the process, severely impact the ability of consumers to receive debt settlement services;

- Reduce the success rate of consumers who stick to their savings plans and achieve settlements because they would be almost certainly pay the higher fees that would be required to subsidize those who do not stick to their plans or who demand unreasonable or unattainable concessions from creditors.

- Result in the collapse of many legitimate debt settlement services providers with significant track records of providing great value to consumers, with the direct effect of eliminating hundreds, if not thousands, of jobs[5];

[5] As noted in greater detail below, FDR employs approximately 500 people in California and Arizona. Should the fixed-fee model be prohibited, FDR may be forced to lay off a significant percentage of its workforce, with a corresponding deterioration in the quality and quantity of customer service, technology support and other customer-facing functions. We also believe that substantial job losses among other industry participants will be an inevitable consequence of this prohibition.

- Discriminate against for-profit service providers and in favor of non-profit companies that are more closely aligned with the credit card companies' interests;

- Discriminate against debt settlement firms that do not adopt the cloak of a law firm affiliation to avoid licensure and regulation, including avoiding the reach of the TSR, without a rational basis for such discrimination;

- Undermine the rights of the states to regulate those doing business within their borders in a way best suited to the needs of their citizens[6]; and

- Sharply tilt the playing field <u>away</u> from consumers at the time of their greatest need and, by lessening available options, significantly favoring credit card companies.

FREEDOM DEBT RELIEF

Freedom Debt Relief was founded in 2003 with a simple and straightforward mission: to provide an alternative to bankruptcy that would allow financially distressed consumers to resolve severe levels of unsecured debt in the most efficient and effective way possible. The resonance of our mission, and our success in carrying it out, is demonstrated by our results:

- FDR has assisted more than 72,000 consumers and has settled more than $467 million of unsecured debt;

- Debt reduction savings have averaged approximately 55.3% of debt owed at the time of settlement (meaning an average settlement rate of 44.7% of the debt owed);

- Currently, FDR manages more than $1.3 billion of unsecured debt[7] owed by more than 39,000 consumers; and

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[6] Twelve states have enacted legislation regulating debt settlement, with an additional 15 or more states expected to consider the UDMSA or similar legislation in the coming 18 months. The states have an important role in the regulation of businesses within their own boarders and, as the Obama Administration has recently stated in its May 20, 2009 Memo to the Heads of Executive Departments and Agencies re Preemption, should be entitled to deference in determining what regulatory framework best serves the interests of their citizenry. Montana, for example, permits a fixed-fee model of up to 20% of enrolled debt, whereas Minnesota has adopted a model that limits fixed fees to 15% of enrolled debt. In both cases, and in each state enacting legislation regulating debt settlement service providers, enactment was preceded by considerable public testimony, consideration of evidence of impact on that state's citizens and evaluation of the costs and benefits of debt settlement services, and a rejection of the contingency fee model as the exclusive compensation system for debt relief service providers. We respectfully submit that the state legislatures, not the Agency, are best positioned to make a determination about how to regulate those transacting business within their borders.

[7] FDR estimates that it manages between 6-8% of all debt currently enrolled in debt settlement programs.

- Currently, FDR settles approximately $27 million of unsecured debt every month, with settlements over the past three months providing average debt reduction savings to consumers of about 58.8% of the debt owed at the time of settlement (meaning an average settlement rate of 41.2%).

FDR is one of the largest debt settlement services providers in the country. FDR employs approximately 500 people, including over 150 in customer service, over 130 in creditor negotiation, 27 in underwriting and more than 50 in technology and other operational support functions.

THE FREEDOM DEBT RELIEF DEBT SETTLEMENT PROGRAM

For many consumers with unmanageable levels of high-interest credit card debt or large amounts of medical debt, the monthly burden of making even their minimum monthly payments may force them to choose between paying their creditors or providing food, shelter and other essentials of life to their families. For these consumers, debt settlement may be the only alternative to bankruptcy, a solution that is in some cases (due to the higher financial and procedural hurdles imposed by the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act) out of reach for some consumers.

FDR is committed to finding the right debt resolution solution for every consumer who contacts us. We manage our client evaluation process according to the principle that debt settlement is the right solution for some severely indebted consumers, but not for all[8]. Consumers responding to FDR's advertising will contact us and request further information, including a contact by an FDR debt counselor. Quite often the consumer contact cycle will result in a number of in-depth discussions over a period of several weeks, during which time the consumer will discuss his or her debt situation with a debt counselor and be educated about available options, including alternatives to a debt settlement program. Only about one in 22 of these consumer-generated contacts will result in an enrollment into FDR's debt settlement program, with the majority of those seeking assistance being referred to a more appropriate alternative (including credit counseling and bankruptcy). We take great pride in the fact that we try to provide substantial and valuable services to all who contact us, regardless of whether or not they qualify for our program.

At several stages in FDR's consumer education and client evaluation process, we perform a financial analysis in order to screen out consumers with an unreasonably low likelihood of program success, consumers who do not demonstrate significant financial hardship and consumers who may show evidence of having acting fraudulently (for example, by taking a cash advance shortly before going delinquent on an account)[9]. Generally, only those applicants who

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8 An integral part of the client enrollment process is educating the potential client about alternatives.

9 Approximately 75% of consumers are, at the time they contact FDR, either already delinquent, or are about to go delinquent, on at least one, and most often all, of their credit card accounts. Consumers are generally eligible

have sufficient income to fund their settlement account with modest monthly deposits but who lack the ability to meet their mounting financial obligations are considered to be good candidates for FDR's debt settlement program.

Once accepted into the FDR program, a client is asked to establish a separate savings account with a bank of their choice or one recommended by FDR. Regardless of where the money is saved, this special purpose bank account ("SPA") is always owned by the consumer[10]; at no point in time does FDR have any control over, or possess any ability to convert, the funds in the SPA. Following program establishment, the client is expected to deposit into the SPA a fixed sum on a monthly basis; although the client at all times controls the set aside funds, the mutual expectation is that these funds are to be used only to fund debt settlements negotiated by FDR, as well as for payment of program fees.

FDR's clients have 24x7 online access to their settlement program information and receive frequent status updates. Furthermore, six days a week, our clients have access to our team of live customer service representatives, who provide some of the best call response times available anywhere[11]. We believe that, with the stress and emotional toll that financial pressures can exert on our clients, it is imperative that we provide service levels that meet or exceed our client's expectations.

Substantive negotiation between FDR and one or more of a client's creditors usually begins within two to three months of program commencement. Depending on the size and distribution of the accounts and the identities of the creditors; the negotiation cycle can be lengthy: FDR usually experiences a substantial and widely variable number of creditor communications over a settlement cycle by FDR's negotiation staff, but at least six to seven creditor contacts may be expected before a debt is settled. The median FDR client sees their first settlement sometime between month six and month seven of their program.

FDR's Client Base. Debt settlement clients come from all economic strata, however all clients share two common characteristics: they suffer under unmanageable levels of consumer debt, primarily credit card debt; and have few, if any, debt resolution alternatives available to them. Unlike consumers with stable financial foundations, the typical FDR home-owner client cannot refinance his or her home (even assuming any equity remains), due to a high debt-to-income ratio and a severely damaged credit score.

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for FDR's debt settlement program only if they are already delinquent or show imminent financial hardship, such that, absent assistance, have no ability to continue making their minimum monthly payments.

10 Ownership and control over client funds is a crucial difference between debt settlement service providers and credit counselors, who hold and control client funds, a state of affairs that has lead to abusive practices in the credit counseling industry. See "FTC's AmeriDebt Lawsuit Resolved: Almost $13 Million Returned to 287,000 Consumers Harmed by Debt Management Scam," September 10, 2008.

11 FDR prides itself on the fact that more than 95% of all inbound customer service calls are answered within the first 30 seconds, a standard virtually unmatched by any financial services provider of any sort.

The average FDR client is employed and enters the program with approximately $30,000 of credit card debt spread over an average of about seven different unsecured accounts (this ranges broadly depending on the individual consumer situation). Approximately 75% of clients are delinquent or about to become delinquent at the point of initial consultation; the remaining 25% are able to make monthly payments only by juggling debts, transferring balances or stopping payment on secured loans such as mortgages and car loans. For this most distressed consumer constituency, making their minimum monthly payments, which typically range as high as 4% of the principal, including fees and high amounts of interest, or paying their bills through a credit counseling service, which requires 2-3% of principal per month, is out of reach. This has historically left bankruptcy as the only alternative available; FDR's client is the consumer who is attempting to avoid bankruptcy but cannot afford to continue to pay their ever-increasing monthly payment requirements.

FDR'S PERFORMANCE STATISTICS

The Agency has acknowledged in the NPR that it lacks empirical data with respect to the efficacy of debt settlement programs. In the Proposal, the Agency drew from a small sample of high-profile and abusive practitioners and, using what we believe to be an unreliable data set, has concluded that the industry does not delivery any tangible benefits to consumers. The truth, as evidenced by our clients' results, is plainly other: from inception, FDR has settled more than $467 million of outstanding debt while providing an average savings on these settlements of about 55.3% of the amount owed (equivalent to an average settlement rate of 44.3% of the amount owed). In very simple terms, this means that FDR's debt settlement program has saved consumers more than $259 million. This is a very real, tangible and undeniably very significant consumer benefit.

Measuring Success. In the NPR, the Agency paints the debt settlement industry as a failure because not every consumer who enrolls in a debt settlement program achieves resolution of all of his or her debts. We respectfully submit that adopting this metric is a fundamentally flawed measure of value delivered to the consumer. From the consumer's perspective, the settlement of even one debt is, by itself, a successful result, since the consumer is no longer burdened by the debt. Further, from the service provider's perspective, outcomes are almost entirely dependent upon the ability and willingness of the consumer to save sufficient funds for settlement. In fact, for some consumers, particularly those who are already in precarious financial circumstances, a life event unrelated to the provision of services by the debt settlement services provider, such as an illness or a job loss, can cause the consumer to withdraw from the program, notwithstanding that, as described in more detail, below, the consumer is very likely to have already received substantial benefits from the program, and therefore experienced program success. Moreover, imposing a "100%" standard on the debt settlement industry constitutes the imposition of a guarantee, rather than a measurement of program efficacy[12].

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12 In response to one of the questions on which the Agency has sought input, we agree with the proposition that, if a guarantee of outcome is made by a debt settlement services provider, the contingency fee model is an

A much more rational and legitimate measure of success is whether the consumer has received a benefit from his or her participation in the program. Since the delivery of a benefit, in the form of a negotiated resolution of a debt for substantially less than is owed by the consumer at the time of settlement, is unquestionably a successful outcome we believe that delivery of a benefit must be recognized in measuring program success, even if the benefit is delivered incrementally throughout the life of the program. Furthermore, to the extent that the benefit delivered exceeds the cost of obtaining that benefit (in other words, to the extent that the debt settled and the debt reduction exceed the fees paid,) the program itself must be judged valuable to consumers.

Finally, it is important to remember the context in which the Agency, in the NPR, is assessing the debt settlement industry. The NPR advances a finding that debt settlement companies are so extraordinarily unlikely to provide the services that they market and sell over the telephone that it amounts to telemarketing fraud or abuse to allow consumers to pay for services before consummation of a settlement. This amounts to a indictment of the industry that is inconsistent with the successful track record established by FDR and many other debt settlement companies.

FDR's Debt Settlement Program Delivers Tangible and Significant Consumer Benefits[13]. In response to our realization that the Agency had based its conclusions on insufficient data and interpreted the data it did have in a way we believe to be inappropriate, FDR undertook an examination of its historic client base. We looked at every single consumer that enrolled in our debt settlement program from inception (September 2003) through August 31, 2006. Our choice of August 31, 2006 as a cutoff date was deliberate: a typical program length for consumers enrolled in a debt settlement program is approximately three-year programs, thus data associated with enrollees after August 31, 2006 would not have had sufficient time in the program to provide full-length program results[14].

The data indicates some very interesting trends and very positive outcomes. Specifically, we segmented the population into three groups: Active, Completed and Terminated, and reviewed for each population the total debt settled, total debt reduction savings and total fees paid by each group. The results show a compelling story that the consumers in each of these segments are

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appropriate compensation model. However, imposition of a contingency fee model is wholly inappropriate where outcomes are subject to a range of factors.

13 While the presentation of program savings to a consumer is offered in absolute dollar terms, we firmly believe that significantly understates the total benefit realized by the consumer. The total program savings are considerably more significant when compared to comparable cost of other alternatives such as struggling to make minimum payments on credit cards or making payments into a Debt Management Plan, even assuming such alternatives are within the consumer's financial reach. For example, we estimate that a consumer owing $30,000 of credit card debt at 25.5% interest and making only the minimum payments could pay a more than $100,000 over more than 20 years. Similarly, in a typical credit counseling program, where interest rates are reduced to 12.5% in a five-year plan, the cost to the consumer would be in excess of $42,000.

14 By analogy, if one were to calculate the graduation rate of a four-year college it would be meaningless and quite misleading to include in the data set those who had enrolled in college less than 4 years ago. In other words, including in the data set those who have not been part of the pool for a time sufficient to have received the expected benefits will produce flawed results.

receiving substantial benefits in terms of debt settled and debt reduction savings, especially when compared to the total fees paid by these groups:

- Active Clients[15] (804 consumers):
  - Total Fees Paid: $3.3 million
  - Total Debt Settled: $19.5 million
  - Total Debt Reduction: $10.0 million

- Completed Clients[16] (2,503 consumers):
  - Total Fees Paid: $8.8 million
  - Total Debt Settled: $74.1 million
  - Total Debt Reduction: $38.5 million

- Terminated Clients[17] (4,496 consumers):
  - Total Fees Paid: $8.7 million
  - Total Debt Settled: $24.7 million
  - Total Debt Reduction: $13.5 million

- Total Enrollees (Active + Completed + Terminated): 7,803 consumers
  - Total Fees Paid: $20.8 million
  - Total Debt Settled: $118.4 million
  - Total Debt Reduction: $62 million

There are several conclusions that can be drawn from this data. First and foremost, we are settling a substantial amount of debt for our consumers. Across all categories of consumers (Active, Completed and Terminated), we settled $118.4 million in debt and in the process reduced those balances by about $62 million. These same consumers paid FDR a total of $20.8 million in fees. The average client across this pool of 7,803 consumers had over $15,000 in debt settled, and received over $7,900 in debt reduction, while paying approximately $2,660 in fees. Thus, even factoring in the consumers who leave the program early, the average consumer receives significantly more in debt reduction (by a factor of approximately three times) than they pay to FDR in fees. Even more interesting is that looking at **only** those consumers who terminated the program early, the average consumer in this group received significantly more in debt settled and debt reduction ($3,000) than they paid to FDR in fees ($1,900).

As powerful as these results are, they are even more impressive when expressed as a percentage of program participants who derived a net benefit from their participation. A staggering 99.5%

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15 A client currently in the FDR debt settlement program.

16 A client who has had 75% or more of his or her debts settled, and is not still an Active client.

17 A client who did not complete the FDR debt settlement program.

of all "active clients" – those who have not yet received the full benefit of FDR's services but remain enrolled and are expected to realize additional settlements – have already received significantly more benefit, in terms of savings on their settled debt, than the total of all fees paid to FDR. For those who have completed the program, the percentage of those who have derived a net benefit is equally impressive: 98.6% (the statistically insignificant erosion is due, we believe, to the steadily improving settlement percentages that FDR has been able to obtain over the past two years). But perhaps the most interesting statistic of all is with respect to the terminated clients, those who withdrew from our program after at least one month of participation. In this group more than half – almost 52% - derived a benefit in excess of the fees paid to FDR (in fact, the average terminated client had debts reduced by an amount equal to almost 1.6 times what they paid in fees to FDR).

Finally, it should be noted that fully 42.4% of the FDR consumers in this pool either have completed the program, or are still active in the program. Of those that are still active, the average consumer has just over one credit card account left in the program to settle out from the six to seven accounts originally enrolled, and thus is extremely likely to complete the program.

As stated above, the data tells a compelling story, one in direct contrast to the Agency's contention that debt settlement delivers little or no value to consumers. In FDR's case, the data clearly demonstrates that consumers not only derive significant benefits even if they are unable to complete the program, but that the benefits that are received are well in excess of the cost of receiving those benefits. Furthermore, the data shows that the benefits are not derived only at program completion but rather are delivered throughout the program lifetime. Finally, these benefits are not reserved to those who are able to complete the program but are realized by those who, for whatever reason, do not complete the program.

Current experience shows that the trends revealed by an examination of our historic data are not only consistent but improving. For the nine months ended on September 30, 2009, FDR settled more than 39,700 accounts, settling more than $206 million of outstanding debt for an average savings to the consumer of 58.4% of the amount owed at the time of settlement (meaning and average settlement rate of about 41.6% of the amount owed), thereby saving its clients more than $120 million.

It is also important to keep in mind that these results were obtained for the most vulnerable segment of American consumers: those for whom bankruptcy may have been the only other option. Rather than force these consumers into bankruptcy with all of the attendant consequences, FDR has enabled these people to remain productive and contributing members of their communities, without the possibly forced sale of their homes and assets, as might well occur in a bankruptcy setting, and helped settle their debts in an efficient and dignified manner.

FDR's economic contributions go well beyond the benefits realized by our clients: over the past nine months we have returned more than $86 million to creditors, funds that, had the consumer gone into bankruptcy, would have been substantially reduced and paid many months, if not years, later. Although many creditors, particularly credit card companies, publicly deny that they work with debt settlement service providers, the facts are clearly otherwise: of the almost 40,000 accounts settled by FDR over the past nine months, approximately 95% were credit card accounts.

The fact is that debt settlement programs, when properly managed, are of tremendous benefit to the creditor community. Delinquent credit card debt and rising default rates are serious problems affecting the financial health of many financial institutions. Updated guidance issued by the Office of the Comptroller of the Currency recommends that credit card debt held by a Federally insured bank that is more than 90 days delinquent be declared in default and, after 180 days, be charged off. With an ever-increasing number of consumers no longer able to meet their minimum monthly payments and the costs of debt collection rising, many banks and credit card companies have concluded that a reasonable negotiated settlement of existing consumer debt can be a far better outcome than retaining the charged off debt, pursuing expensive and possibly fruitless collection efforts or selling the charge-offs in bulk for pennies on the dollar. That creditors have come to realize that responsible debt settlement companies like FDR offer a source of liquidity for delinquent debt at a fair and reasonable cost is evidenced by the recent uptick in settlement volume.

Even the most cursory look at FDR's performance statistics disprove the Agency's proposed finding that allowing debt settlement companies to charge on a fixed-fee basis amounts to fraudulent or abusive telemarketing because consumers do not receive valuable settlement services. The facts quite simply prove otherwise. Accordingly, for the reasons set forth above, we respectfully submit that the basis on which the Agency proposes to adopt an "advance fee" prohibition does not exist, and strongly urge the Agency to avoid the significant adverse consequences that would follow from adopting such a prohibition on the debt settlement industry, as discussed further below.

PROGRAM FEES:
WHY THE FIXED-FEE MODEL IS BOTH APPROPRIATE AND CONSUMER-PROTECTIVE

FDR, like most debt settlement service providers, has adopted a "fixed fee" model in which fees are calculated at the time of program inception as a percentage of the debt enrolled and then, rather than being paid in an up-front lump sum, are spread out in a series of payments over a fixed period of time, typically not less than half of the estimated program life. The FDR program sets total fees at 15% of debt at the time of enrollment. There is never a program application fee or any other form of up-front charge. Depending on the state in which the consumer resides, payments may be somewhat uneven (for example, in some states clients pay 5% of debt over the first three to four months), but in almost all cases the total program fees are paid out over no less than half of the estimated program life[18]. By way of example, on a program with $20,000 of enrolled debt with a 15% fixed fee structure (with 5% paid over the first four months) and an estimated 36-month program life, the client would pay total program fees of $250 per month for the first four months, then about $143 per month for the next 14 months of the program. Clients pay no other program charges to FDR, nor is there ever any finance charge associated with the extended fee payment schedule, thereby providing clients with absolute transparency regarding the fees they will be paying.

Consumers Have Embraced the Fixed-Fee Model because of its Predictability and Transparency. Unlike the contingency fee model proposed in the NPR, wherein providers are only compensated by charging a percentage of the amount saved, the fixed-fee model enables a consumer to know, with certainty at the time of program commencement, what his or her fees will be for the entire program, while enabling the debt settlement services provider to cover its substantial infrastructure costs without any negative incentive to provide sub-standard customer service or to secure quick settlements that may be more costly to the consumer than could otherwise be obtained. We respectfully submit that, where consumers have accepted the fixed-fee model for its obvious benefits, and where the states, which have shown both the ability and willingness to regulate the manner in which fees are charged to their citizens, have in almost every single case permitted the fixed-fee model, the Agency should not substitute its judgment for that of the marketplace with respect to what is or isn't an appropriate fee structure.

The Fixed-Fee Model Enables Robust Customer Service. The most common misperception stated as a justification for prohibiting the fixed-fee model is that debt settlement companies provide no or minimal services prior to the time a debt is settled. This assertion is absolutely wrong, both factually and conceptually.

Before a consumer enrolls in an FDR debt settlement program FDR's debt counseling staff will typically have spent one to two weeks working with the consumer, reviewing not only his or her options but also discussing a broad and comprehensive range of disclosures associated with a debt settlement program. The objective of this pre-enrollment education cycle is to be as certain as possible that, for this particular consumer, debt settlement is not only the most appropriate option, but also that the consumer will have the greatest likelihood of success in the program. Following the initial consultation, we provide a thorough review of the potential enrollee's financial situation, with particular emphasis on the level and distribution of all unsecured debt. The goal of this process is to determine program applicability, screen out consumers who may not be suitable for a debt settlement program and provide a more accurate estimate of program cost and length based on the individual consumer's creditors.

Immediately following an enrollment, a member of our Customer Service team initiates a welcome call, the primary purpose of which is to review with the new client the program

[18] This is a requirement under the UDMSA, as adopted in Colorado, Iowa, Nevada, Tennessee and Utah; similar requirements may be found in Idaho, Minnesota and Montana.

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disclosures and to ensure that the new client understand all aspects of his or her debt settlement program.

For the first 180 days following enrollment each client receives a sizeable number of outreach contacts from FDR's customer service staff to ensure that the program is meeting the client's reasonable expectations and to answer any questions she may have. Likewise, given that our client base comes to us in a fragile and emotional state, it is not uncommon for there to be a very large volume of in-bound customer contact, particularly in the early stages of the program. Additionally, we provide each of our clients with budgeting, education and consumer finance information throughout the life of their program, beginning in month one. Finally, sometimes immediately and sometimes not, depending on the creditor, FDR will initiate creditor contact to inform the creditors that we are now representing the consumer, request that future communications be directed to us, set expectations with regard to the timing of settlement negotiations and assess, as quickly as possible, what range of settlement might be appropriate for a particular creditor.

FDR has committed significant resources and capital to hiring, training and maintaining an exceptional customer service staff that is dedicated to assisting our clients from enrollment and at all stages of the settlement process. We recognize that dealing with unmanageable levels of consumer debt is a serious and emotional issue and we understand that, without ongoing client support, our clients are less likely to succeed. We also understand that this work requires educated, experienced employees that must be supported by a significant investment in technology and systems.

In short, well before settlements are consummated, FDR has already provided a large volume of customer education, assistance and support[19].

<u>FDR's Fees Have Been Designed to Promote Program Success</u>. Spreading out the payment of a fixed fee over a period of time that is never less than half of a client's estimated program life enables the consumer to manage the cost of the services provided. With an incremental payment plan the consumer is able to start saving funds immediately and has immediate access to the wide range of FDR support services that might otherwise be unavailable, including assistance with creditor contacts and access to FDR response teams that are able to assist our clients with a wide variety of consumer and creditor-facing service requests. The fixed-fee model allows FDR to offset the very high cost of establishing and maintaining functions crucial to a successful client experience, including hiring, training and certifying[20] experienced debt counselors,

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[19] This is another statement of over-inclusion: that all debt settlement companies, not just the unethical players, have an incentive to take fees without performing services. In fact, the majority of the investment in infrastructure, as well as the performance of many services, is done long before a client is enrolled, because without the essential infrastructure investment a debt settlement company could not possibly provide the advertised services.

[20] Each of FDR's debt counselors has been independently certified by the Independent Association of Professional Debt Arbitrators, a third-party certification body accepted for licensure purposes by each state requiring certification programs for debt counselors.

creating and maintaining a superior technology infrastructure, providing ongoing customer service and maintaining constant contact with the creditor community. Due to the complex nature of a debt settlement program, the quantity and quality of employees servicing our clients plays a significant role in helping our clients achieve favorable results. Debt settlement services must be provided by employees with strong educational or financial work experience, and FDR's significant investment in both employees and technology infrastructure confer a significant consumer benefit.

Prohibiting the Fixed-Fee Model Will Lead to Decreased Consumer Choice, Decreased Customer Service and Higher Costs for Consumers. FDR believes that, if only the contingent fee model is permitted, the increased risk and instability will force major changes in its operations. One clear area of vulnerability is customer service. FDR currently employs more than 150 people in customer service and another 130 in negotiations; without the predictability of cash flow necessary to support a staff of that size, serious consideration would have to be given to severe staff reductions – and it would be those that need the service most that would suffer. Another clear area of vulnerability is program cost. Under FDR's fixed-fee model, the consumer pays only 15% of enrolled debt, no more, no less. Under a contingent fee model the consumer would have to pay far more in order to make the additional risk a worthwhile undertaking. Note as well that the disciplined consumers, those who are the most likely to succeed in a debt settlement program, are quite likely to see their chances of success substantially reduced. This is because the contingent fees associated with their settlements will have to subsidize the work that the debt settlement company is doing on behalf of those consumers who are not able to stick to their plans. This is, we submit, a tremendous negative consequence.

Furthermore, it is entirely reasonable to assume that creditors, knowing that the debt settlement services provider gets no cash flow until the debt settles, are likely to hold out much longer, or demand much more punitive terms, than our historic experience suggest; any uptick in settlement cost will have the twin effect of costing consumers untold amounts of money while, at the same time, reducing the ability of a debt settlement services provider to deliver ongoing customer service, let alone the levels of customer service consumers currently enjoy. This highlights a hidden, but very serious, extra cost associated with the contingent fee model: the almost certain reduction of customer service levels. Whenever revenues are placed at risk, as is the case with the uncertainty associated with the contingent fee model, costs are the first place businesses look to assure their survival. Customer service is one of the largest ongoing expense for the debt settlement business and the most obvious place to cut; it is inevitable that many debt settlement service providers will cut customer service deeply and dramatically, impacting most seriously those who need their attention. In short, consumers will suffer both economically and emotionally under the NPR's mandate.

Settlement Based Fees Create Misaligned Incentives. Where fees are based exclusively on settlement activity or on the timing of achieving settlements, the debt settlement services provider has an incentive to complete settlements with the creditor and on the account that

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creates the most revenue. The typical FDR client enters the program with about seven different credit card or other accounts, and each creditor normally has different settlement parameters and different recovery strategies. FDR is creditor-neutral with respect to payment priority; rather, FDR takes an objective "portfolio approach" when creating an optimal settlement strategy for each client. Under FDR's portfolio approach, accounts are prioritized for settlement by such variable factors as accretion rate (i.e., the rate at which the amount owed may grow due to the imposition by the creditor of fees, charges and penalty interest), probability of litigation or other collection activity and whether an account could be settled through a bulk settlement opportunity. Our experience has shown this to be the most efficient and effective way to address all of a consumer's debt. If, however, the revenue opportunity for the debt settlement provider is tied only to settlement activity, it could create a misaligned incentive relative to the incentive to maximize client benefit through a portfolio approach to settlement activity.

Finally, it is entirely likely that the prohibition of the fixed-fee model will result in a dramatic increase in revenue risk such that many debt settlement service providers will simply withdraw from the marketplace, thereby sharply reducing available options. Taking all of this into consideration, it is hard to see how the prohibition of the fixed-fee model will do other than empower and enrich the creditor community at the expense of the most vulnerable segment of our society.

CONCLUSION

While we recognize the Agency's legitimate role in regulating false and misleading advertising and marketing, and while we support generally the Agency's rulemaking initiatives concerning the method and content of consumer disclosures in the context of a debt settlement program, we do not and cannot support the Agency's overreaching proposal to prohibit the fixed-fee model, which will have severely anti-competitive and severely anti-consumer consequences. Furthermore, the Agency's proposed business-model regulation flies in the face of the rights of the states to make their own determinations about how to regulate those that choose to transact business within their borders and frustrates the ongoing legislative initiatives undertaken at the state level to license and regulate the debt settlement industry in a comprehensive and consumer-centric manner.

As demonstrated by FDR's actual performance data, it cannot be denied that the FDR debt settlement program not only provides the services we represent will be provided to the consumer, but that the provision of these services results in a tangible and significant benefit to the consumer. On that basis alone, the Agency cannot demonstrate that its burden of satisfying each of the analytical prongs of the TSR's "abusive practices" test can be satisfied.

Moreover, the Agency has failed to consider the dramatic anti-competitive effects of applying the prohibitions and restrictions to only one segment of the debt settlement industry. We believe that such selective and discriminatory application will have seismic effects on the competitive landscape by essentially forcing one segment of the industry to sharply reduce customer service

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levels and, in some cases, exit the business altogether, thereby leaving consumers with a severely reduced set of alternatives at a time when they most need a choice.

Furthermore, those consumers who decide to remain in a debt settlement plan will see their likelihood of success plummet, as they are forced to subsidize others who either cannot carry their monthly program savings obligations or treat their debt settlement program as a no-risk opportunity to demand unreasonable or illogical terms from their creditors, knowing in advance that they will not have to pay anything if those terms are rejected.

For the reasons set forth above, we believe, while the NPR advances certain appropriate regulatory initiatives in the context of consumer disclosures, imposing a compensation system, for the delivery of debt settlement services will have severe anti-competitive effects and will result in a playing field that sharply tilts away from consumers and in favor of the creditor community, thereby disadvantaging those who most need assistance.

Thank you again for the opportunity to submit comments on the NPR.

Very truly yours,

Robert Linderman
General Counsel