

Wesley Young, Esq.
General Counsel
American Debt Exchange, Inc.
17304 Preston Road, Suite 1400
Dallas, Texas 75252

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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

Dear Secretary Clark,

I am writing this comment as a supplement to my preliminary comment regarding the FTC's Proposed Rules regarding Debt Relief services under the Telemarketing Sales Rule on behalf of my clients American Debt Exchange, Inc. (ADE) and Debt Settlement America, Inc. (DSA).

The Companies support strong regulation of the industry including disclosures and other consumer protections

As members of The Association of Settlement Companies (TASC), American Debt Exchange, Inc. and Debt Settlement America, Inc. (hereinafter referred to as Companies) support strong regulation including mandatory disclosures and other consumer protections. The Companies are licensed or in the process of applying for licensure in states that have strong consumer protection laws based on the Uniform Debt Management Services Act (UDMSA). The UDMSA constitutes 40-60 pages of regulation covering areas including Licensing, Accreditation, Mandatory Disclosures, Requirements for Service Agreements, Fee Restrictions, Prohibitions of certain conduct, and Enforcement.

Some of the requirements for licensure include:

- a. Criminal background checks including FBI fingerprint checks
- b. Financial statements for the last 2 years
- c. Accreditation
- d. Certification for consultants
- e. Description of consumer education program
- f. Sample forms
- g. Schedule of fees
- h. Bond/security

i. Insurance against dishonesty, fraud, theft, and other misconduct

Of particular note, the requirement that the company be accredited is often overlooked as one line in a 40+ page statute, but imposes the requirement that a third party independent company audit the debt settlement provider onsite to ensure that they are following a set of standards approved by the State.

Mandatory disclosures include most if not all of the mandatory disclosures that the FTC proposes in its Notice of Proposed Rules (NPR). The UDMSA further requires a financial analysis by the debt settlement provider to ensure that the consumer is appropriate for the programs.

The UDMSA also mandates certain information be spelled out in service agreements with consumers including the amount of the fee, the payment schedule for how and when the fee will be paid, and how the consumer can obtain reports from the provider.

Further, the UDMSA prohibits certain types of activity including those that the FTC is concerned about: misrepresentations regarding the service to be provided and the cost of the services.

Based on the above extensive consumer protections and the strong enforcement powers granted the State, the UDMSA recognizes that a fair fee may be charged.

However, this is where the FTC's NPR differs in that the FTC concludes that there exist no consumer protections sufficient to guard against abuses, so the only way to protect consumers is by banning any fees until the debt is settled. The Companies support the consumer protections in the UDMSA that are largely consistent with the disclosures and prohibitions that the FTC is seeking. However, the Companies strongly disagree with the FTC's conclusion that despite these other consumer protections, debt settlement companies should be prohibited from collecting any fee until the debt is settled. As such, the remainder of this comment will address the unfairness analysis in the NPR.

Debt Settlement Services are not fundamentally unfair

The FTC wrongly concludes that debt settlement companies are akin to credit repair services, recovery services and advance fee loans which the FTC has found take consumers' money for services that the seller has no intention of providing and in fact does not provide because the services are simply illusory. To the contrary, debt settlement companies expend significant costs to provide real, actual services. For example, the Companies hire more than one employee for every 80 consumer clients it services. The Companies rent out significant space to house such employees and incur significant costs so that those employees can provide services, such as costs of computers, phones, software, furniture and supplies, bonuses for good performance such as getting a good settlement for a consumer, and benefits such as health insurance and

retirement plans. If there were no intention to provide real services, there would be no need to incur all these costs. The services are not illusory and the Companies are providing a good faith service. Our colleagues that operate TASC member companies report similar costs that likewise evidence good faith operation of businesses that provide services¹.

The FTC argues that no service is provided until a debt is settled based on a premise that the only service the consumers want is a settlement. First that is false since consumers would be extremely unhappy if we did not respond to their inquiries, provide advice, keep them accountable, explain the process and their progress on a regular basis, initiate negotiations and work hard to get good offers that they can choose to accept or reject, among many other things. Secondly, many services do not always get what the consumer wants. Payment for these services is made despite the results. For example, doctors are paid even if they cannot cure you. Lawyers are paid even if they don't win a trial. Physical trainers are paid even if you do not lose weight. Tutors are paid even if you don't get an A in a test. Schools are paid even if you do not get a degree. Financial planners are paid even if you do not make money. Each of these involves some circumstances that are outside of the control of the service provider. Likewise, in debt settlement, there are many factors that are outside of the provider's control such as the consumer's discipline in saving, the consumer's work performance and job situation, the creditor's changing policies in making settlement offers, which collection agency the debt is sent to and many other varying factors.

FTC's Analysis of Substantial Injury to Consumers is Defective and Inequitable

The FTC's proposed fee ban will have devastating effects on debt settlement companies and their existing clients according to a survey conducted by TASC and USOBA. The vast majority of companies will not survive the fee restrictions. Despite the severe impact of the fee restrictions on the industry and the consumers that are currently being serviced by debt settlement companies, the FTC, admitting that the "current record" is very limited, relies on information from two isolated sources: one FTC case and two lawsuits in New York based on allegations. Further, while the FTC criticizes the reports of TASC in its methodology for calculating "completion rates" and as such dismisses that data, it seems to lack proper methodology for calculating the completion rate calculated in the one enforcement case it relies on. The first defect in its calculations arises from the fact that the company investigated was very young – approximately 3 years in operation. Because the debt settlement plans typically take 2-4 years to complete, it is unlikely that many consumers had a full opportunity to complete the program. Related to that, the second defect is that the FTC appears to have included all consumers in the denominator for calculating the percentage. Including consumers who just enrolled last week or last month in the calculation is unfair because they again have not had an opportunity to complete the program. Third, assuming the company was growing in size from the date that it started operating, many more consumers would have

¹ As an example, see *Delivering Value to Consumers in a Debt Settlement Program*, Hasnain Walji, Ph.D.

been enrolled in the last year or two than the first year, thus skewing the data in that most consumers were not even in a position to complete the program before the FTC action. The data from such case is not reliable data with which to judge the entire industry.

The Companies have supplied data to TASC who will report the data findings to further refute the FTC's position. The Companies' data and TASC data reveal that debt settlement is as effective, if not more so, as other debt relief options, specifically nonprofit credit counseling and Chapter 13 bankruptcy that have completion rates of 21-26%² and 33%³ respectively. Yet both nonprofit credit counseling and Chapter 13 bankruptcy both take advance fees. Bankruptcy lawyers often receive their entire fee prior to the bankruptcy plan's start. Nonprofit credit counselors receive fair share contributions from creditors as a percentage of monthly payments from the debtor to the creditor as part of Debt Management Plans (DMP). Because of the way debt is amortized, interest is disproportionately front loaded, and the benefit to the consumer of the DMP is disproportionately back loaded resulting in upfront fees to the nonprofit credit counselor. In other words, the consumer's debt is reduced less in the first year than in later years because of the interest charges. A nonprofit credit counselor that receives a fair share percentage of each payment is paid more early in the program for reducing less debt than later in the program. Thus, a consumer who cancels early on in the DMP may receive minimal benefit in terms of debt reduction, especially if the creditor charges back concessions granted, yet the nonprofit credit counselor receives significant fees from the fair share payments.

Debt settlement companies provide significant service

Prior to negotiations with creditors, debt settlement companies must provide significant and costly support services that are integral to making the process work. Services include the following:

1. Education and counseling costs.
2. Client support and communication.
3. Regular review of client progress including money saved, debt balance, creditor status and creditor activity.
4. Coaching of the consumer to save money and stay on budget.
5. Review of correspondence and paperwork received by the consumer from creditors.
6. Regular updating of account information.

Negotiation of debt is also a significant and intensive process. Negotiations involve engaging a creditor, verification of the latest account information, back and forth

² "Bankruptcy by the Numbers: Measuring Performance in Chapter 13" by Gordon Bermant and Ed Flynn, Executive Office for the U.S. Trustees.

³ *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, Consumer Federation of America and National Consumer Law Center, April 2003.

demands and offers, and communicating with the consumer about such negotiations. Settlement negotiations can also fail for a number of reasons such as insufficient concessions, rejection by the consumer or transfer/sale of the account to another collection agency or creditor. Negotiations may be conducted with several agencies or several individuals within an agency.

All of the above services are rendered based on a consumer enrolling in a debt settlement plan. The cost of providing such services is incurred whether or not a settlement is made. Further even after a settlement agreement is made, it could still fall through if the consumer backs out or fails to pay according to the terms negotiated. Debt settlement companies should be compensated for these services.

One recent example of how the FTC's fee ban would be unfair involves a client Jane.⁴ Jane had been a client for three years during which time over 200 calls or emails were made or sent. Many were regarding 27 settlement offers obtained over the three (3) year period for the 7 accounts enrolled in the debt settlement plan almost all of which were between 40-60% of the outstanding balance.

Jane rejected or failed to respond to attempts to contact her regarding such offers despite numerous conversations of the importance to respond and about the reasonableness of such offers. In the end, Jane demanded a full refund and filed a formal complaint this year claiming that since no debts were settled, she was entitled to a refund. Under the FTC's fee ban, Jane would be correct and Jane would pay no fees as the company had "not rendered any service", a grossly unfair result.

Debt settlement companies provide ongoing services. According to data provided by Global Client Solutions, who manages third party bank accounts consumers use to save money for funding settlements, consumers have in FDIC insured accounts \$200 million today as a result of following the plans set up by debt settlement companies. The consumers further paid out 375,000 settlement payments in the amount of \$265 million as of September 2009 for this year. Global Client Solutions projects an aggregate annual amount of settlements to be paid out this year to be approximately \$400 million. At the reported settlement percentage by TASC members, this equates to almost \$1 billion in debt settled in one year as recorded by this company alone. There are other companies that provide similar services as Global Client Solutions as well as many debt settlement companies whose consumer clients use their own savings accounts with their own existing banks to save money for settlements. So the above numbers represent only part of the actual settlement work that is performed by debt settlement companies. The actual numbers, as extrapolated, reach easily into the billions of dollars per year. This is strong evidence that debt settlement companies provide significant and real services to consumers.

⁴ Name changed to protect privacy.

DSA and ADE further have a turn rate of 33 months for 2009 which means that at the current rate at which settlements are made for their clients, all debt currently under management would be settled in 33 months. This again is evidence of real service and real results that are provided to debt settlement clients.

Substantial Injury to consumers can be avoided by other protections

The UDMSA has many consumer protections that seek to avoid injury to consumers. These consumer protections include licensing, accreditation, mandatory disclosures, requirements for service agreements, fee restrictions, prohibitions and mandatory operational requirements, and strong enforcement authority for the State, as discussed in detail above. These significant protections help avoid injury to the consumer and help educate the consumer about the debt settlement process, set proper expectations, and ensure the consumer knows how much the fee is and when fees will be paid. Such existing protections mean that there is no need to achieve consumer protection solely by restricting fees.

The UDMSA as supported by the Companies and TASC mandate a cap on the amount of fees and a restriction on the manner by which they may be collected. One fee option, a flat fee, mandates that the fee must be spread out equally over half the length of the program thus resulting in fees typically spread out over 18-24 months⁵. This fee arrangement allows the consumer to save money for settlements throughout the plan and has been adopted in Tennessee, Colorado, Nevada, Utah, and Delaware. Montana, Iowa and Idaho have adopted comparable fee structures. A number of other states are considering similar laws: California, Michigan, Ohio, Pennsylvania, Florida and many other states are considering similar legislation. Thus, these protections are expected to be in place in many states across the country.

Debt Settlement Provides Significant Benefits

In addition to the many reasons set out in the FTC's analysis of the benefits to the businesses of collecting fees to cover ongoing costs, there are substantial benefits to consumers as well. Based on surveys by TASC and USOBA, the availability of debt settlement services will be reduced by approximately 90% of current operators if the proposed "advance fee" limit is adopted. In other words, the FTC's proposal will virtually eliminate debt settlement as a debt relief option for consumers.

⁵ The reason for collecting fees over half the program is that debt settlement is not a fixed payment plan, but rather a dynamic, changing and adjusting plan that is unique and individual for each consumer. The Companies statistics and others in the industry show that over 50% of consumers that complete the debt settlement program do so in 24 months or less. Even with the flat fee some consumers finish the program prior to paying all of the fee leaving the company in the position of having to try and collect the remainder of the fee from the consumer after they have received all the benefit of the program. This has proven very difficult to do and more often than not results in unpaid fees.

However, debt settlement is a necessary debt relief option for consumers, especially in this economic time when they need more options to deal with debt, not less options. Academics, banks, creditors, lawmakers and even other competing debt relief operators and consumer groups have acknowledged that many consumers cannot afford to repay their debts without some concession in not just the interest rate but in the principal itself. Some of the benefits debt settlement provides to consumers include the following:

1. An affordable debt relief option

The debt settlement industry offers a solution when other debt management methods may not be a viable solution. While there may be some overlap of clients, debt settlement services a large population of debtors who cannot afford more traditional debt management methods and who's only other option otherwise would be bankruptcy. In credit counseling debt management plans the consumer pays back his or her entire debt at rates approximating 16%⁶ interest per annum over a period of approximately 5 years. In order to accelerate the payment into those 5 years, even with the concessions, a debtor must usually make monthly payments equal to or greater than the minimum payments required under the credit card agreements prior to the debt management plan. There are many consumers who, for hardship reasons such as the loss of a job, divorce, medical emergency, or unexpected increases of interest rates and fees, are now behind in their payments and/or are no longer able to afford their payments. As such, these individuals are often unable to afford traditional debt management plans.

2. An effective debt relief option

The national rate of completion for confirmed Chapter 13 bankruptcy plans is 33%.⁷ Credit counseling companies historically have an approximate success rate of 21-26%⁸. Debt settlement completion rates are reported to be higher – approximately 34.5%⁹.

3. A cost effective debt relief option

To put the fees in perspective, credit card companies often charge almost 30% interest per annum. On a balance of \$10,000 of debt, that equates to \$3,000 a year in interest as well as other fees such as late charges, penalties and other costs. Based on a debt settlement program charging a fee of 17% of the enrolled debt, the maximum flat fee permitted by the UDMSA enacted in a number of states, and based on a 36 month program, the fee averages less than 6% per annum or \$600 in the above example. Further, settlements achieved by TASC members approximate less than 50% of the amount owed saving the consumer significant

⁶ Testimony of nonprofit credit counseling agency at a committee hearing in Salem, Oregon, February 9, 2009.

⁷ "Bankruptcy by the Numbers: Measuring Performance in Chapter 13" by Gordon Bermant and Ed Flynn, Executive Office for the U.S. Trustees.

⁸ *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants*, Consumer Federation of America and National Consumer Law Center, April 2003.

⁹ TASC Comment Letter to FTC.

money. In a debt management plan, the creditors' concession interest rate averages 16%¹ per annum and the consumer pays back 100% of what is owed plus interest and fees.

4. A timely debt relief option

Debt settlement plans are typically 36 months in length compared to 60 months for debt management/credit counseling plans. However, more than 50% of consumers who complete the program do so in 24 months or less.

5. Less risk to consumer funds

TASC members do not hold funds saved by the consumer for payment to creditors. Consumers hold their own funds and can withdraw that money or close the bank account at anytime at their discretion. The consumer exercises full control over the funds. Credit counseling DMP's involve paying money for distribution to creditors to the provider – the holding and misappropriation of such funds has been the subject of a number of enforcement actions.

6. Provides assistance with setting up a workable plan

While creditors claim that they can work directly with the consumer, they fail to consider that the typical consumer is dealing with 6 or 7 creditors, each of whom has no interest in a plan that works towards paying the others. Each creditor is concerned only about their own collections. Debt settlement plans are for most or all unsecured debt that the consumer owes.

7. Provides guidance to stay disciplined to stay with the plan

Whether the consumer exercised poor money skills or experienced a hardship, it is difficult to stay disciplined and on track with a long term program. Much like a personal trainer helps a person stay on track with an exercise or diet program, debt settlement companies help keep the client accountable and improve their success in completing the program.

8. Provides an advocate for the consumer

Debt settlement companies do not receive any funding, contributions or fair shares from creditors and act solely in the interest of the consumer without any conflict of interest. Credit counselors and debt management companies typically receive compensation from the creditors.

9. Provides consistent education throughout the plan to improve financial habits

Post program interviews indicate that 75% of consumers do not wish to use credit cards after completing the program. Further, 50% of such interviewees stated they were using the money once being set aside for settlements for sound financial goals such as retirement savings, emergency savings, down payments on a house and other types of investments¹⁰.

¹⁰ *Delivering Value to Consumers in a Debt Settlement Program*, Hasnain Walji, Ph.D.

10. Allows the consumer to pay back debts as can be afforded

Consumers in debt settlement plans are often those who would otherwise be among the millions of Americans dodging collection agencies with no hope of repaying their debts. Debt settlement permits the consumer to pay back what they can afford and allows creditors to receive some return when they otherwise would receive nothing.

The FTC's conclusion that the benefits do not outweigh the risks rest almost entirely on its inadequate finding that debt settlement companies do not provide any real debt relief to consumers. Yet the above benefits culminate in billions of dollars of settled debt per year that represents real relief to consumers.

There exist other protections to reasonably avoid harm to consumers

Consumers can make informed decisions and ought to be given the free choice to elect how to manage their debt. In the Companies' experience, consumers do compare the various debt relief products and are often themselves researching credit counseling DMP's and/or bankruptcy at the time they call to inquire about debt settlement. The Companies further explain and educate the consumer about differences between the various debt relief options and frequently recommend those other options. Further, per TASC member standards and existing state law such as the UDMSA, disclosures regarding challenges to the debt settlement plans are made prior to consumers enrolling in the plans.

Consumer choice is critical as the consumer is in the best position to evaluate his or her needs and what programs are best suited for him or her. Consumers are clearly choosing debt settlement on a frequent basis. But they are also doing so on an informed basis when presented with disclosures about the risks or challenges of the plan and when the fees are clearly explained as TASC members are doing.

The industry has grown over the past few years for a number of reasons -- the economy has increased the need for assistance. Also, the Bankruptcy Reform Act of 2005 took away bankruptcy as an option for many consumers. However, the devastating effects on the debt settlement industry of the FTC's proposed fee ban will take away an important choice that consumers both want and need. While the FTC argues that there is no real choice now because the services are illusory, TASC's statistics show that debt settlement is at least as viable an option as credit counseling or bankruptcy.

The FTC's belief that consumers do not know what the fees are or when or how fees will be collected does not seem consistent with the larger perspective of what we know. First, many companies use mandatory disclosures and clear service agreements that explain the calculation of fees, the amount of the fees, and the schedule of collection as previously described. Second, fees are one of the top priority issues consumers ask about and seek to understand. Consumers have a natural tendency to want to know how their

money is handled and what the payment arrangements are regardless of what product or service they are purchasing, and thus, are usually quite knowledgeable about the fees. The one circumstance where consumers would not have a clear understanding of how much the fees are or when they are due is if they have been deceived.

Existing law provides the FTC with authority necessary for enforcement against companies that engage in bad acts

If consumers are deceived, defrauded or misled about services or fees, the FTC and/or state regulators already have the authority to enforce existing laws that prohibit such bad acts. These laws already address FTC concerns regarding misleading or deceptive practices that harm consumers. The FTC and state regulators also have and are actively using such laws.

However, the current fee ban proposal captures all companies, notably including those who are fair and honest about the debt relief service and disproportionately punishes them. Many of these are small companies. Law abiding companies will struggle or more likely fail in trying to work under the fee ban. On the other hand, those who would deceive or defraud consumers may not be deterred by any change in law. The resulting effect is that there will be less or no competition, thereby allowing companies who do not care about the law to proliferate.

Other general arguments against the FTC's proposed fee ban

Even if a company could survive and work under the fee ban, the likely result is that there would be little or no service provided until the consumer saved sufficient funds for settlement. The lower level of support and less communication would mean greater dropout and less success in the programs. Complaints would likely rise. Fees would increase significantly for settlements. Fewer consumers would be able to benefit from the services. And more consumers would be left without a viable debt relief option.

Debt settlement companies also would become creditors of the consumer, having to pursue the consumer to collect the fee. Alternatively, consumers would approach creditors directly deep into the negotiation process to circumvent the debt settlement company and avoid incurring the fee. Third party accounts do not help as they are accounts held by the consumer, in the consumer's name, and subject to the authority of the consumer who can withdraw money, transfer money, reverse payments or close the account.

Conclusion

In conclusion, the FTC's finding that debt settlement services are fundamentally bogus and constitute outright theft is a completely unjustified conclusion that was based upon anecdotal and insufficient data. The FTC's entire analysis depends upon the statistics from one enforcement case and allegations made in a couple of lawsuits. Even

those statistics are highly questionable in the manner and method they were calculated and vague in how the terms were defined. More reliable data from TASC indicate that debt settlement is as viable as other debt relief methods such as nonprofit credit counseling DMP's and bankruptcy. Debt settlement offers consumers an important choice and is a needed option in helping them deal with their debt. There are many benefits to debt settlement that are not available via the other debt relief options. There are also many alternative ways to protect the consumer that do not have the devastating effects of closing down businesses such as DSA and ADE and that eliminate a consumer choice. These alternatives are real and are being implemented on the state level. As such, the FTC has not satisfied the unfairness analysis needed to justify the proposed fee ban and it must not enact a rule that contains such proposed fee ban.

Respectfully submitted

Wesley K. Young
Counsel to American Debt Exchange, Inc. and Debt
Settlement America, Inc.