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Via E-mail

October 26, 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

Dear Commissioners and Staff:

We have been requested to submit the following comment regarding the proposed changes to the Telemarketing Sales Rule ("TSR") on behalf of a group of clients that engage in full service debt settlement, meaning that their business is not limited to marketing debt settlement products that are then serviced by a separate entity.

As at least Commissioner Rosch has stated, debt settlement can be, and in our clients' view, is a an important tool to for consumers to address debt extremis. Notwithstanding the controversy surrounding the debt settlement industry, the evidence is clear that thousands of Americans have resolve hundreds of millions of dollars in liabilities without the emotional stigma of bankruptcy. For these consumers, the notion of paying what they can to relieve their debts is far superior to declaring that bankruptcy. At a time when consumer credit card debt has approached $1 trillion,[1] the need for programs that assist consumers to resolve their debt effectively is acute.[2]

Benefits Provided By The Debt Settlement Industry

Before specifically addressing our clients' comments to the proposed TSR amendments, we believe it is necessary to address what appears to be a misconception regarding the services provided by reputable debt settlement companies, like our client group. In preparation of this letter, Loeb & Loeb collected settlement statistics from a relatively small number of our clients and other debt settlement companies that were willing to share the settlement results they have obtained on behalf of their clients. These results are impressive and demonstrate that the debt settlement industry provides a valuable service on behalf of consumers.

Using settlement data provided to us by ten companies that have been in operation since as long as 2003 and as recent as September 2009, we have determined that these companies

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[1] Federal Reserve Statistical Release, G.19, Consumer Credit (October 7, 2009).

[2] Briesch, Richard A., PhD, "Economic Factors and the Debt Management Industry" (August 6, 2009), p. 2.

have settled ***23,586 accounts***, eliminating more than ***$350 million*** in debt for almost ***$158 million***. .

While the companies who have agreed to share information are among the industry leaders, extrapolating the data we collected across a larger segment of the industry leads to the inescapable conclusion that literally billions of dollars have been negotiated by debt settlement companies who have saved their clients literally billions of dollars. As a recent study of the debt settlement industry has found, consumers that participated in programs long enough and save sufficient funds to receive an offer or settlement achieved median settlements at or below 50% of the amount of their original debt.[3] More importantly, and contrary to current impressions, the study determined that more than 57% of consumers received offers to settle at least 70% of their debt, and nearly 30% of the consumers received settlement offers for at least 90% of their original debt. The study concluded that "[t]he debt settlement company generates tremendous value to its clients…"[4]

In our experience, most debt settlement companies are legitimate businesses that focus on serving their clients' interests first. We are familiar with companies that have reduced their fees to help consumers reach settlements. Others pay for their clients to have access to attorneys that counsel them regarding Fair Debt Collection practices, and defend them against creditor litigation. Other companies will assist those for whom bankruptcy is the only viable option.

Although our experience has been that debt settlement companies do not typically hold themselves out as providing credit repair assistance to consumers, a November 2007 study by National Economic Research Associates concluded that "[c]redit negotiation[5] may result in improved creditworthiness relative to other alternatives available and may lead to improved credit scores for some individuals after completion of a negotiation program."[6]

The debt settlement industry also provides a real benefit to creditors and the American economy, increasing returns that can be obtained from what are or will be non-performing debts. Many of these debts would be charged off for pennies on the dollar and/or discharged completely through bankruptcy.[7]

Finally, the Briesch study, among others, indicates that for-profit debt settlement may be more cost effective for consumers than credit counseling, which is generally conducted by non-profit institutions that would be expressly exempted from the proposed amendments to the TSR. "Once 'fair share' payments are taken into account, CCCS fees and payments for the consumer

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[3] Briesch, *supra.* at 2-3.

[4] *Id.*

[5] The author used the terms "credit negotiation" and "debt negotiation" interchangeably in the report.

[6] Miller, Ronald, National Economic Research Associates, Inc., "Analysis of the Effects of Credit Negotiation on Credit Worthiness," November 20, 2007.

[7] See, *e.g.*, Briesch, *supra.* at 2.

account can exceed 29% of the consumer debt, levels which Plunkett (2009) calls 'exorbitant.'"[8] Debt settlement companies generally charge consumers fees in the range of 14% to 25%.[9]

While there are issues that must be addressed through the regulatory process, and there are certainly debt settlement companies in operation that do not properly market their services or that fail to deliver on their promises to consumers, the evidence is clear that numerous industry participants are settling debt and consumers are achieving real savings as a result.

The Proposed Amendments Are Based on Some Faulty Assumptions

The services offered by debt settlement companies have proven to be a valuable and successful alternative to bankruptcy for thousands of consumers. But the industry continues to face what is often outdated and unfounded criticism based on misunderstood and misreported historical information. Unfortunately, it appears that the FTC has relied upon some of these misconceptions, rather than on a current and complete review of the industry, in formulating some of the proposed amendments.

An example of the misinformation cited in the Notice of Proposed Rulemaking ("NPRM") as a basis for the proposed amendments is the May 2004 enforcement action brought by the FTC against the National Consumer Council ("NCC").[10] The NPRM states that less than 2% of the consumers that enrolled in an NCC-certified debt settlement program actually completed the program. This statistic, based on the experience of a small number of affiliated debt settlement companies under the most onerous circumstances, is then treated as failure indicative of the entire industry.

But this often cited statistic both is both inaccurate in its implication and ignores additional information that is in the FTC's possession that clearly established that the FTC's enforcement action prematurely curtailed the ability of the NCC-affiliated companies from settling consumer debt. For example, the completion percentage cited by the NPRM ignores that the NCC-certified debt settlement companies structured their settlement program on an anticipated completion period of 36 to 48 months. The reason for the purportedly low completion rate was that the NCC program had only been operating for about 27 months (January 1, 2002 to March 31, 2004) when the FTC obtained a temporary restraining order, appointment of a temporary receiver and an asset freeze that effectively put the NCC and the defendant debt settlement companies out of business and locked up over $27 million of consumer trust funds for over a year. Given the length of time the NCC program was in place, there should have been almost no consumers who completed the program.

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[8] *Id*. at 3 (citing testimony of Travis B. Plunkett, Legislative Director of the Consumer Federation of America, before the Senate Committee on Commerce, Science and Transportation).

[9] *Id*. (citing Plunkett testimony and testimony of Robert D. Manning, PhD, before the Federal Trade Commission in 2004).

[10] As the Commission well knows, Michael Mallow served as counsel of record for the companies and individuals sued by the FTC and has on the ground knowledge of the facts of this enforcement action.

What the NPRM fails to report, and is far more germane to the issue of the benefits provided by debt settlement to consumers, was the Court-appointed Receiver's summary of what the NCC certified debt settlement companies accomplished during the abbreviated period of time they were in business. The Receiver's report shows, among other things, that:

- During the 27-month period the program was in operation, despite the fact that it was designed to be a 36-to-48-month program, 638 consumers successfully completed the program, resolving ***all*** of their enrolled debt.

- During that same period, 40,572 credit card accounts were settled on behalf of 44,844 clients, representing more than $193 million in resolved debts.

- Consumers saved nearly $64 million, or more than one-third of the amount of their total debts at the time of the settlements, **including all of the fees that were paid by consumers** to the company.[11]

Having served as counsel to the NCC and the certified debt settlement companies, including defending those companies in the FTC litigation, we are aware of and have access to far more compelling data that was not included in the Receiver's Report, which clearly shows the extraordinary success of the NCC program and the geometric escalation of consumer settlements that was underway when the NCC program was prematurely terminated by the FTC's litigation.

Despite these facts, the NPRM cites the NCC case as principal evidence supporting the FTC's assumption that low success rates plague the industry.[12] The reason for the discussion of the NCC case is not to re-litigate the case or to resurrect old wounds, but to emphasize that when statistics are used in either a biased manner or without a clear understanding of the information presented, consumers lose. Industry antagonists, protagonists and the FTC must all approach historical data with a critical view toward understanding the story that the data tells, rather than using the data to promote predetermined agendas.

To that point, a recent study determined that "[a]ccurate measures of consumer completion and cancellation cannot be calculated from the data" available.[13] This is because nearly 30% of all cancellations are the result of consumers successfully paying off the debt themselves or being forced into bankruptcy. *Id.* In addition, the cancellation data fails to account for settlement offers received and debt repaid "so it does not accurately reflect value generated by the

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11 "Report of Temporary Receiver's Activities, May 3, 2004 Through May 14, 2004," First Report to the Court, Temporary Receiver of National Consumer Council, Inc., et. al.

12 An example of the FTC's assumption is Question #6 relating to Section 310.4 on page 116 of the NPRM, which states: "Are there alternatives to an advance fee ban exist (sic) that would sufficiently address ***the problem of low success rates in the debt settlement industry***? If so, please explain."

13 Briesch, *supra*. at 3.

company." *Id*. The study concluded that debt settlement cancellation rates are similar to other subscription-based service industries, such as mobile telephones and cable television companies that include Better Business Bureau certified members and are regulated by the existing TSR. *Id*.

Commissioner Rosch best addressed this issue in April 2009 when he told a credit and collection industry conference in Carlsbad, California, that in his view,

> "debt settlement can provide some real benefits for consumers… For example, a debt settlement firm can advocate on the consumer's behalf, especially in cases where consumers are reluctant, embarrassed, or even afraid to contact their creditors directly… A debt settlement firm also may be able to provide individualized attention to consumers, taking a holistic approach to all of the consumer's unsecured debt owed to several creditors, rather than just the amount owed to a particular creditor."

In short, consumers need a well-functioning and properly-regulated debt settlement industry now more than ever. But treating the industry as a pariah based on misinformation, or implementing unnecessary and overlapping regulations, will serve no purpose other than to impede the industry's ability to reach and serve potential clients.

Discussion of the Proposed Amendments

A. Disclosure and Prohibited Conduct Provisions

Our view of the proposed amendments is generally positive. With the exception of minor modifications to certain specific proposed language in order to avoid unintended consequences, we generally agree with the proposed mandatory disclosures and prohibited representations and conduct. Most or all of the proposed disclosures have already been implemented by reputable companies that abide by the codes of conduct that are required for membership in the United States Organizations For Bankruptcy Alternatives (USOBA) and The Association of Settlement Companies (TASC), the leading self-regulatory organizations for the industry.

Similarly, the vast majority of industry members currently abide by the provisions on prohibited representations and conduct. The principles embodied by the FTC's proposals, of fair and honest dealings with consumers, are already adhered to by most debt settlement companies, which are law-abiding and seek to comply with the rules. We are aware of few, if any, industry members that do not support the implementation of these provisions, whether they are implemented through regulations established by the trade organizations, the states, the FTC or Congress.

B. Fee Limitation Provisions

Regarding the FTC's proposal to prohibit debt settlement companies from charging consumers any fees before a settlement is completed; our view is that the FTC needs to obtain additional information and data to determine accurately the effect of any such blanket restrictions. While we support requiring the bulk of fees to be tied to settlements of individual consumer accounts, a blanket prohibition on any fees prior to settlement is inconsistent with research indicating consumers have higher success rates when they pay some fees upfront and have a "stake in the game."[14]

In a 2003 study prepared by the California Department of Corporations ("DOC") on the credit counseling industry, the DOC found that there a number of good reasons reasonable upfront fees are justified for debt settlement plans. Quoting from the comments of a credit counseling agency that had performed debt settlement, the DOC reported:

1. "[T]here is a lot of work involved upfront in negotiating a settlement. In fact, all the hard work is at the beginning – that of contacting the creditor and making a deal."

2. "It's sort of like a catch 22: the creditor tends to be more agreeable to a YES if we can prove the client has the money to settle; we can prove this more easily if the client already has funds on deposit with us – the best indication of good faith on their part."

3. "The agency deserves some sort of set up fee for this initial work as we take on too much risk without knowing how serious the consumer is."

4. "The consumer needs to have some 'skin in the game' so to speak."[15]

Most of the companies with which we are familiar use fee structures that have been approved by states such as Colorado, Delaware, Iowa (effective July 1, 2009), Montana (effective October 1, 2009), Nevada (effective July 1, 2020), Tennessee (effective July 1, 2010) and Utah (effective May 12, 2009) and that are currently under consideration by the legislature in California. These statutory fee structures allow initial enrollment fees ranging from 4% to 5% of the consumer's enrolled debt and overall settlement fees ranging from 15% to 20% of the consumer's enrolled debt, paid over at least half of the contract period.

Some of our clients have analyzed the economic effects of the FTC's proposal to eliminate all revenues until settlements can be reached on behalf of consumers with creditors. Unlike the credit counseling industry, which receives upfront enrollment fees, ongoing monthly fees from consumers and significant "fair share" payments from creditors,[16] the proposed amendments would prohibit debt settlement companies from receiving ***any*** revenues at all until after settlements are achieved on behalf of consumers.

Where for-profit debt settlement companies must compete for clients, requiring them to pay outside marketers or internal marketing staff to obtain clients, and provide customer service, accounting and negotiation staff to service their clients from the time their accounts are first

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14 "Study of the Consumer Credit Counseling Industry in California and Recommendations to the Legislature Regarding the Establishment of Fees for Debt Management Plans and Debt Settlement Plans," California Department of Corporations (April 8, 2003), p.34

15 *Id*. at 29-30.

16 Notice of Proposed Rulemaking, pp. 14-15, fn. 44 ("The majority of [credit counseling] agency funding comes from voluntary contributions from creditors who participate in the Debt Management Plans.")

opened, it is unrealistic to amend the TSR to prohibit the generation of ***any*** revenues until a settlement is completed. Such a regulatory approach will put too great a financial strain on legitimate debt settlement companies, and would have the unintended result of forcing debt settlement companies to limit customer service staff, which would, of course, decrease customer service.

As such, debt settlement companies should be permitted to charge a reasonable enrollment fee of $200 or less with an additional monthly fee up to approximately $50. Any additional fees would be tied in some fashion (whether as a percentage of savings or a pro-rata portion of the debt resolved) to completed settlements of a consumer's specific debts.

The proposed amendments also fail to address compensation of debt settlement companies in instances where the consumer receives the benefits of the debt settlement company's services but elects to withdraw from the program after creditors begin making settlement offers to the debtor. As reported in the Briesch study,[17] there are numerous instances where consumers have sought to cancel their debt settlement agreements after following the advice of their debt settlement company, learning to live without credit cards, cancelling their credit cards, accumulating sufficient funds to receive settlement offers from creditors and then determining that they could resolve the debt without the debt settlement company's assistance. Under these circumstances, where the company has provided the full measure of its services, the proposed amendments should provide for them to be compensated if a successful settlement is completed by the consumer after the debt settlement company's services have been terminated.

D. State Law Issues

The proposed amendments also fail to address the interplay between the amended TSR and existing state laws and regulations that currently govern the industry. Nearly every state in the country has statutes relating to the debt settlement industry, and many have specific laws and regulations that specifically govern debt settlement. Some of these laws directly conflict with provisions contained in the proposed amendments, yet the NPRM provides no guidance regarding the question whether the amended TSR would preempt such laws. Without clear guidance on this issue, the existing patchwork of state laws in this area will only become further muddled with an additional layer of federal regulation. Consequently, we would like to see language in the TSR that addresses the preemption issue.

On behalf of our client group, we appreciate the opportunity to comment on the proposed amendments and to participate in the public forum on November 4, 2009.

Very truly yours,

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[17] Briesch, *supra*. at 2.

Michael Mallow
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Settlement Company Resolution Statistics

Company	# of Settlements	Original Debt Amount	Settled Amount	Amount Saved by Consumers	Settlement Percentage	Percentage Saved
Company 1	326	$2,442,490.33	$1,001,421.03	$1,441,069.30	41.00%	59.00%
Company 2	18	$223,622.92	$69,317.46	$154,305.46	31.00%	69.00%
Company 3	296	$1,734,036.10	$686,382.88	$1,047,653.22	39.58%	60.42%
Company 4	166	$1,025,147.43	$412,334.58	$612,812.85	40.22%	59.78%
Company 5	13,828	$123,506,559.85	$75,668,995.82	$47,837,564.03	61.27%	38.73%
Company 6	73	$567,735.99	$160,891.23	$406,844.76	28.34%	71.66%
Company 7	142	$744,951.13	$265,167.51	$479,783.62	35.60%	64.40%
Company 8	4,953	$30,704,934.00	$15,129,618.00	$15,575,316.00	49.27%	50.73%
Company 9	474	$54,624,511.00	$27,009,869.00	$27,614,642.00	49.45%	50.55%
Company 10	3,310	$134,756,000.00	$71,764,000.00	$62,992,000.00	53.25%	46.75%
GRAND TOTAL:	**23,586**	**$350,329,988.75**	**$192,167,997.51**	**$158,161,991.24**	**54.85%**	**45.15%**