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the consumer's income and total debt load. Repayment options, known as "concessions," include reduced interest rates, elimination of late or over limit fees, and extensions of the term for repayment.

[32] GP (Oct. 22, 2009) at 2; Davis at 2; CCCS NY at 2; FECA (Oct. 26, 2009) at 2-3; DebtHelper at 1; Cambridge (Oct. 26, 2009) at 1 ("Roughly 85% of the individuals who contact Cambridge [a credit counseling agency] simply have questions about a particular aspect of their finances or wouldn't qualify for creditor concessions due to too much or too little income. Nevertheless, they receive the same financial analysis and Action Plan offered to Cambridge's DMP clients, and are also offered ongoing counseling, educational guides and web resources, free of charge."). In fact, Section 501(c)(3) of the Internal Revenue Code ("IRC"), 26 U.S.C. 501(c)(3), dictates that nonprofits must provide a substantial amount of free education and counseling to the public and prohibits them from refusing credit counseling services to a consumer if the consumer cannot pay. FECA (Oct. 26, 2009) at 4.

[33] Cambridge (Oct. 26, 2009) at 1; NWS (Oct. 22, 2009) at 6 (*see* attached Hasnain Walji, *Delivering Value to Consumers in a Debt Settlement Program* at 6 (Oct. 16, 2009) ("Walji paper")) (the average account set up fee is $25 and monthly maintenance fee is $15); *see also* Cards & Payments, Vol. 22, Issue 2, *Credit Concessions: Assistance for Borrowers on the Brink* (Feb. 1, 2009) (nonprofit agencies' counseling fees average about $25 per month); Miami Herald, *Credit Counselors See Foreclosures on the Rise,* July 13, 2008, (CCAs charge an initial fee of $25 and a $25 monthly fee).

These fees are often limited by state law. *See, e.g.*, Me. Rev. Stat. Ann. Tit. 17, § 701, et seq., tit. 32 § 6171, et seq. (limiting fees to $75 for set-up and $40 monthly charge); Md. Code Ann. § 12-901 et seq. (limiting fees to $50 consultation fee and the lesser of $40 per month or $8 per creditor per month); Ill. Com. Stat. Ann., § 205 ILCS 665/1 et seq. (limiting fees to an initial counseling fee of $50, provided the average initial counseling fee does not exceed $30 per debtor for all debtors counseled, and $50 per month for each debtor, provided the average monthly fee does not exceed $30 per debtor for all debtors counseled); N.C. Gen. Stat. § 14-423 et seq. (limiting fees to $40 for set-up and 10% of the monthly payment disbursed under the DMP, not to exceed $40 per month).

[34] GP (McNamara), Tra7m6the monra7 Tra7m6t86the monra7 Tra7m6t86the m7 Trhe mbm0 TD009) at 64itial fee of $25 5Tf77 Charge97678Dtfor B: T1 Tfmp28 Tes,ram 5t up 4.1632Ton the Rise, Walji paper

[44] In 2006, the IRS examined all tax-exempt CCAs, resulting in revocation or proposed revocation of the existing tax-exempt status of 41 of them, as well as increased scrutiny of new applications for tax-exempt status. *TSR Proposed Rule,* 74 FR at 41992; Hunter at 1; AICCCA at 5; FECA (Oct. 26, 2009) at 4; CareOne at 4; Eileen Ambrose, *Credit firms' status revoked; IRS says 41 debt counselors will lose tax-exempt standing*, Baltimore Sun, May 16, 2006.

[45] Pension Protection Act of 2006, Pub. L. No. 109-280, Section 1220 (Aug. 2006) (codified as 26 U.S.C. 501(q)).

[46] *See* 26 U.S.C. 501(q). Section 501(q) also limits the total revenues that a tax-exempt CCA may receive from creditors for DMPs and prohibits tax-exempt CCAs from making or receiving referral fees and from soliciting voluntary contributions from a client. 26 U.S.C. 501(q)(1)-(2); *see also* FECA (Oct. 26, 2009) at 4-5.

[47] Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, consumers must obtain credit counseling before filing for bankruptcy and must take a financial literacy class before obtaining a discharge from bankruptcy. *See* Pub L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. 101 et seq.). CCAs seeking certification as approved providers of the required credit counseling must submit to an in-depth initial examination and to subsequent re-examination by the EOUST. *See Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies by United States Trustees; Notice of Proposed Rulemaking*, 73 FR 6062 (Feb. 1, 2008) (seeking comment on proposed rule setting forth additional procedures and criteria for approval of entities seeking to become, or remain, approved nonprofit budget and credit counseling agencies). A list of EOUST-approved credit counselors is available to consumers at (*http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm*).

[48] *Supra* note 33; *see also* CareOne at 4. Some of the state laws apply to for-profit credit counseling companies as well; others do not.

[49] Able (Oct. 21, 2009) at 17; CFA at 2-3; Weinstein (Oct. 26, 2009) at 7 (*see* attached Weinstein paper at 6); *see also* USOBA Workshop Comment at 9.

[50] In April 2010, FTC staff conducted a surf of debt settlement websites, based on a sample of the websites that a consumer searching for debt settlement services on a major search engine would encounter. In conducting the surf, staff searched on Google for the term "debt settlement services," obtaining more than 24,000 results. To best duplicate what a typical consumer searching for these services would find, staff narrowed the results to the websites that appeared on the first six pages of the search results and eliminated duplicates. The staff found that 86% of the 100 debt settlement websites reviewed represented that the provider could achieve a specific level of reduction in the amount of debt owed.

See also, e.g., FTC v. Better Budget Fin. Servs., Inc., No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (Complaint, ¶ 12) (defendants' websites represented that they could "reduce the amount of the consumer's debt by as much as 50% - 70%."); *infra* note 566; *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers: Hearing on The Debt Settlement Industry: The Consumer's Experience Before the Sen. Comm. On Commerce, Science, & Transportation,* 111th Cong. (2010) (testimony of the U.S. Government Accountability Office) ("GAO Testimony") at 13.

[51] Of the 100 websites FTC staff reviewed, *see supra* note 50, 57% represented that they could settle or reduce *all* unsecured debts (websites made claims such as "Become Debt Free," "Debt free in as little as 24-48 months," and "Achieve $0.00 Debt In 12-60 Months."); *see also, e.g., FTC v. Edge Solutions, Inc.*, No. CV-07-4087 (E.D.N.Y. filed Sept. 28, 2007) (Complaint, ¶ 16) (defendants' websites represented that "we can reduce your unsecured debt by up to 60% and sometimes more and have you debt free in 18 to 30 months."); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (Complaint, ¶ 26) (the company's website "represent[ed] that, by using DRS's debt negotiation services, consumers can pay off their credit card debt for fifty percent or less of the amount currently owed and be debt free within three to 36 months.

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[100] These 321 commenters consist of: 35 industry representatives, 10 industry trade associations and groups, 26 consumer groups and legal services offices, six law enforcement organizations, three academics, two labor unions, the Uniform Law Commission, the Responsible Debt Relief Institute, the Better Business Bureau, and 236 individual consumers. Of these commenters, three sought and obtained confidential treatment of data submitted as part of their comments pursuant to FTC Rule 4.9(c), 16 CFR 4.9(c).

[101] *See, e.g.,* TASC (Oct. 26, 2009) at 2; USOBA (Oct. 26, 2009) at 3. Two industry commenters supported a partial advance fee ban allowing debt relief providers to receive fees to cover administrative expenses before providing the promised services. CRN (Oct. 2, 2009) at 10-11; USDR (Oct. 20, 2009) at 2.

[102] MD (Oct. 26, 2009) at 4.

[103] ACCORD (Oct. 9, 2009) at 1; FCS (Oct. 27, 2009) at 1; CareOne at 1.

[104] NAAG (Oct. 23, 2009) at 1; NACCA at 1; CFA at 2; SBLS at 1; QLS at 2; AFSA at 3; ABA at 2.

[105] The public record in this proceeding, including the transcript of the forum, is available at (

[112] 15 U.S.C. 6105(b) (providing that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the FTC Act).

[113]

supported a broad definition that includes debt management plans and debt settlement arrangements.[131] On the other hand, a nonprofit credit counseling agency stated that CCAs and debt management plans should be excluded entirely from the debt relief services definition because they provide consumers with financial education.[132]

After considering the comments, and other than the addition of the word "program," as noted in footnote 123, the Commission has determined not to change the proposed rule's definition of "debt relief service." The Commission believes that this definition appropriately covers all current and reasonably foreseeable forms of debt relief services, including debt settlement, debt negotiation, and debt management, as well as lead generators for these services.[133] This definition is consistent with the goal of ensuring that consumers are protected regardless of how a debt relief service is structured or denominated. The Commission does not believe there is sufficient basis for excluding CCAs and debt management plans from the definition. Indeed, the record shows that some for-profit CCAs have engaged in the types of deceptive or abusive practices that the Rule is designed to curtail.

2. Limitation to Unsecured Debts

Several comments related to the definition's limitation to *unsecured* debt. A creditor trade association expressed concern that the Rule would not cover relationships with most installment lenders, title lenders, auto finance lenders, secured card issuers, or residential mortgage lenders, all of which typically provide secured credit.[134] By contrast, a representative of an association of state legislators agreed with the limitation to unsecured debts because secured debts are governed by the Uniform Commercial Code, which may conflict with some elements of the Rule.[135]

The Commission has determined to keep the proposed rule's limitation of debt relief services to unsecured debt. The definition in the Final Rule covers all types of unsecured debts, including credit card, medical, and tax debts. There is no evidence in the record of deceptive or abusive practices in the promotion of services for the relief of non-mortgage secured debt.[136] The Commission notes that it is addressing the practices of entities that purport to negotiate changes to the terms of mortgage loans or avert foreclosure in a separate rulemaking proceeding.[137] Commenters generally agreed that concerns regarding mortgage relief services are appropriately addressed in a separate rulemaking.[138]

3. Coverage of Products

Some commenters recommended that the Commission add the term "products" to the term "debt relief services" to ensure that providers cannot evade the Rule by selling books, CDs, or other tangible materials promising debt relief, or by including such products as part of the service.[139] Another commenter disagreed, stating that products should be excluded from the definition. This commenter noted that a consumer who purchases a product (*e.g.,* a book) intended to help relieve debt is himself responsible for taking the steps stated therein; in contrast, an individual who purchases a service is paying the seller to provide that service.[140]

The Commission declines to modify the Rule to include products in the definition of debt relief services. The Rule is targeted at practices that take place in the provision of services, and the record does not indicate that deceptive or abusive practices in the sale of products, such as books or other goods containing information or advice, are common. This limitation, however, should not be used to circumvent the

[131] CareOne at 3; USDR (Oct. 20, 2009) at 12.

[132] CCCS CNY at 1.

[133] Depending on the facts, lead generators for debt relief services may be covered under the TSR's primary provisions or its assisting and facilitating provision. *See* 16 CFR 310.3(b).

[134] AFSA at 7 ("There does not appear to be a reason in the Rule for limiting debt repair services to relationships only with unsecured creditors.").

[135] ULC (Kerr), Tr. at 252. In addition, the evidence in the record suggests that debt relief services generally do not seek to alter secured debts such as installment loans and title loans. NACCA (Keiser), Tr. at 250; *see also* USDR (Oct. 20, 2009) at 12 (supporting the definition's limitation to unsecured debts).

[136] To the extent any entity markets debt relief related to automobile title loans or other secured debts, Section 5 of the FTC Act covers such marketing.

[137] *Mortgage Assistance Relief Services Notice of Proposed Rulemaking*, 75 FR 10707 (Mar. 9, 2010). This rulemaking addresses the industry of for-profit companies purporting to obtain mortgage loan modifications or other relief for consumers facing foreclosure. Under the proposed rule in that proceeding, companies could not receive payment until they have obtained for the consumer a documented offer from a mortgage lender or servicer that comports with the promises they have made.

[138] FCS (Oct. 27, 2009) at 3; FDR (Linderman), Tr. at 115.

[139] CFA at 7; ULC (Kerr), Tr. at 258; AFSA (Sheeran), Tr. at 259-60; FDR (Linderman), Tr. at 256 (for products that are sold with a guarantee).

[140] Centricity (Manganiello), Tr. at 239; *see also* MP at 3 (stating that expanding the definition to products is "completely unnecessary," as "the FTC already has adequate authority to deal with deceptive marketing of such products." The commenter also stated that "where the true intention of the product offering is to 'up-sell' consumers to a full-service debt program, then the proposed rule-change would already govern.").

[141] TASC (Oct. 26, 2009) at 13 ("Consumers should be entitled to the same protections whether or not their provider is an attorney."); ACCORD (Noonan), Tr. at 236-37 (recommending an exception for attorneys who attempt to settle debts as a *de minimis*, incidental part of their primary businesses); *see also* CFA (Grant), Tr. at 240.

[142] MN LA (Elwood), Tr. at 233. Another commenter noted that the Commission has played an active role in policing unfair and deceptive practices by attorneys in other industries, such as credit repair and debt collection. ACCORD (Noonan), Tr. at 237.

[143] FDR (Linderman), Tr. at 234; *see also* TASC (Young), Tr. at 238; *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. June 10, 2004) (Supplement to Report of Temporary Receiver's Activities, First Report to the Court at 2) (defendant would assign certain debt settlement contracts with consumers to a law firm because of certain state qualification restrictions). The FTC has filed a number of lawsuits against mortgage assistance relief service providers, in an analogous context, that affiliated themselves with attorneys in order to come within attorney exemptions in state statutes. In those cases, the Commission has named both the providers and the attorneys themselves as defendants. *See, e.g., FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009) *; FTC v. LucasLawCenter "Inc.,"* No. 09-CV-770 (C.D. Cal. filed July 7, 2009); *FTC v. Fed. Loan Modification Law Ctr., LLP,* No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

[144] USOBA (Ansbach), Tr. at 231; USOBA (Oct. 26, 2009) at 42; MD (Oct. 26, 2009) at 28, 38, 57-58.

[145] MN LA (Elwood), Tr. at 232-33.

[146] In fact, the only exemption for attorneys found in the TSR is a very limited one that permits attorneys who help consumers recover funds lost as a result of telemarketing fraud to collect an upfront fee. *See* 16 CFR 310.4(a)(3); *TSR Final Rule*, 60 FR at 43854 ("[T]he Commission does not wish to hinder legitimate activities by licensed attorneys to recover funds lost by consumers through deceptive telemarketing.").

[147] 16 CFR 310.2(cc).

[148] *See* 16 CFR 310.6(b)(3). The Commission considered whether it should explicitly exempt attorneys representing clients in bankruptcy proceedings from the Rule's coverage, as attorneys in such proceedings generally advise their clients about handling their debt. The Commission determined that such an exemption was unnecessary, because bankruptcy attorneys typically would not be involved in "telemarketing," and, in any event, likely would meet with their clients face-to-face.

[149] *See* 16 CFR 310.6(b)(3). Sellers engaged in telemarketing that qualify for the face-to-face exemption must not fail to comply with the National Do Not Call Registry provisions; call outside permissible calling hours; abandon calls; fail to transmit Caller ID information; threaten or intimidate a consumer or use obscene language; or cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called. *Id.*

[150] *See, e.g.,* Model Rules of Prof. Conduct 7.3(a); Cal. Rules of Prof. Conduct 1-400; Florida Rules of Prof. Conduct 4-7.4(a).

[151] *See, e.g.,* Model Rules of Prof. Conduct 5.5 (prohibiting attorneys from providing legal services to consumers outside of the state in which he or she is licensed).

[152] *See, e.g.,* Model Rules of Prof. Conduct 1.1, 1.3, & 1.5. For example, some state bars recently suggested that attorneys who refuse to meet in person with prospective clients may be violating some of these basic requirements. *See* Press Release, CA Bar, *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Sept. 18, 2009) ("The State Bar suggests that consumers be wary of attorneys offering loan modification services . . . [who are] too busy or not willing to meet personally with prospective clients."), *available at* (*http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395*); Helen Hierschbiels, *Working with Loan Modification Agencies*, Oregon State Bar Bulletin, Aug./Sept. 2009 (attorneys who join companies that "do not contemplate the lawyer ever meeting or speaking with the client . . . risk violating the duties of competence, diligence and communication"). Additionally, the Ohio Supreme Court has sanctioned attorneys hired by a foreclosure "rescue" company for, *inter alia*, failing to engage in adequate preparation and failing to properly pursue clients' individual objectives. In so doing, it noted that the attorneys relegated responsibility for meeting with clients to non-attorneys at the company and "did not as a rule meet with [the company's] clients." *See Cincinnati Bar Ass'n v. Mullaney*, 894 N.E. 2d 1210 (Ohio 2008).

[153] [illegible] . *Cf.* Supreme Court of New Jersey Adv. Comm. Professional Ethics & Comm. on Unauthorized Practice of Law, *Lawyers Performing Loan or Mortgage Modification Services for Homeowners*, 197 N.J.L.J. 59 (June 26, 2009) (incey 0sku

effective when enforced, have not eliminated these practices.

Finally, the Commission's determination not to extend a special exemption to attorneys is consistent with the existing scope of the TSR and several other statutes and FTC rules designed to curb deception, abuse, and fraud. For example, the Credit Repair Organizations Act ("CROA") contains no exemption for attorneys.[157] The fact that the CROA and TSR cover attorneys reflects the reality that the number of attorneys who have engaged in unfair, deceptive, and abusive acts that fall within the Commission's law enforcement authority is not *de minimis*.[158]

In light of the above factors, the Commission concludes that attorneys who choose to offer debt relief services using telemarketing should be treated no differently under the TSR than non-attorneys who do the same.

C. Section 310.4: Abusive Telemarketing Acts or Practices - Advance Fee Ban

As noted earlier, the existing TSR bans the abusive practice of collecting advance fees for three other services – credit repair services, recovery services, and offers of a loan or other extension of credit, the granting of which is represented as "guaranteed" or having a high likelihood of success.[159] Section 310.4(a)(5) of the proposed rule would have prohibited as "abusive" the request or receipt by a debt relief provider of payment of any fee from a consumer until the provider obtained a valid settlement contract or agreement showing that the particular debt had been renegotiated, settled, reduced, or otherwise altered. The Final Rule includes an advance fee ban, but in a form modified from the proposed rule. In short, the Final Rule sets forth three conditions before a debt relief provider may collect a fee for resolving a particular debt: (1) the consumer must execute a debt relief agreement with the creditor or debt collector; (2) the consumer must make at least one

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[157] 15 U.S.C. 1679-1679j.

[158] *See, e.g., FTC v. Credit Restoration Brokers, LLC*, No. 2:10-cv-0030-CEH-SPC (M.D. Fla. filed Jan. 19, 2010) (alleging, inter alia, violations of CROA by attorney engaged in credit repair); *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009)(alleging violations of FTC Act and TSR against attorney purporting to provide mortgage assistance relief services); *FTC v. Rawlins & Rivera, Inc.*, No. 07-146 (M.D. Fla. filed Jan. 31, 2007) (alleging violations of the FDCPA against attorney); *U.S. v. Entrepreneurial Strategies, Ltd.*, No. 2:06-CV-15 (WCO)(N.D. Ga. filed Jan. 24, 2006) (alleging violations of TSR against attorney assisting debt relief entity); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007) (alleging violations of the FTC Act and TSR against attorney engaged in debt relief); *U.S. v. Schrold*, No. 98-6212-CIV-ZLOCH (S.D. Fla. filed Mar. 3, 1998) (alleging violations of the FTC Act and CROA against attorney credit repair provider); *FTC v. Capital City Mortgage Corp.*, No. 98-237 (JHG) (D.D.C. Sec. Am. Compl. filed Mar. 19, 2003) (alleging FDCPA violations against attorney); *FTC v. Watson*, No. 98-C-1218 (N.D. Ill. filed Feb. 26, 1998) (alleging violations of CROA and FTC Act against attorney); *FTC v. Gill*, No. 98-1436 LGB (Mcx) (C.D. Cal. filed Mar. 2, 1998) (same).

[159] 16 CFR 310.4(a)(4).

[160] *See infra* Section III.C.5.c.

[161] The Telemarketing Act authorizes the Commission to promulgate Rules "prohibiting deceptive telemarketing acts or practices and *other abusive telemarketing acts or practices*." 15 U.S.C. 6102(a)(1) (emphasis added). In determining whether a practice is "abusive," the Commission has used the Section 5(n) unfairness standard. *See TSR Amended Rule*, 68 FR at 4614.

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

[163] As explained below, the advance fee ban in the Final Rule differs from that in the proposed rule in certain respects. The discussion of the commenters' views refers to the proposed version.

[164] NAAG (Oct. 23, 2009) at 1-2 & NAAG (July 6, 2010), supplemented by Commission staff research; *see* State Case List, *supra* note 27. Of the 127 state debt settlement cases, 84 were brought by state attorneys general and 43 by state regulatory agencies. In addition, state attorneys general have brought 21 cases against credit counseling companies and 14 cases against debt negotiation companies. States have also brought 64 actions against debt relief companies for failure to file requisite state registrations or obtain proper licenses.

[165] *See* State Case List, *supra* note 27, for names of companies under investigation by New York and Florida.

[166] NAAG (Oct. 23, 2009) at 10; NAAG (July 6, 2010) at 1 ("A prohibition on advance fees for debt settlement services is the most essential element of the proposed Rule.").

[167] NAAG (Oct. 23, 2009)at 9.

[168] NACCA at 2 (providing general statement of support without elaboration).

[169] CO AG at 5. These consumers executed a total of 1,357 consumer agreements with about 13 companies.

[170] *Id.* at 5.

[171] CFA at 8; *see also* NC AG Testimony, *supra* note 25, at 5 ("the advance fee ban

program) obtain significant reductions in their debt. Therefore, debt settlement is a useful product for many people, the benefits of which would be lost if providers went out of business because they could not collect fees necessary to fund their operations until they settled the debts.

The commenters advanced a number of specific arguments in support of this position, including the following: (1) debt settlement and other forms of debt relief services provide significant benefits to consumers, which, according to industry's comments, is demonstrated by survey data and the numerous consumers who are satisfied with their debt settlement programs; (2) consumers obtain better outcomes from debt settlement services than other debt relief options; (3) advance fees provide needed cash flow for debt settlement providers to fund their operations; (4) advance fees compensate debt settlement providers for services undertaken before settlement occurs; (5) advance fees ensure that debt settlement providers get paid; (6) the advance fee ban violates the First Amendment; (7) state regulation of debt relief services is preferable to federal regulation; (8) the TSR is not the appropriate mechanism for regulating debt relief services; (9) the problematic practices in the debt settlement industry are limited to a relatively few "bad actors," and the services are not "fundamentally bogus;" and (10) an advance fee ban does not provide proper incentives for debt settlement companies. The following section addresses each point in turn.

a. Point 1: Debt Relief Services Provide Benefits to a Significant Number of Consumers

Several industry commenters sought to demonstrate that debt relief services provide benefits to a significant proportion of their customers.[193] Some debt settlement providers and their representatives submitted data about the number of debts that they or their members have settled in recent years.[194] Several credit counseling companies also submitted information about the number of DMPs they have arranged for their customers.[195] In contrast, no debt negotiation company provided any data or other information showing that it successfully achieved interest rate reductions or other debt alterations for consumers.

Debt Settlement Data

With respect to debt settlement, some commenters submitted specific data purporting to show that they obtain substantial savings for a significant share of their customers. The industry association TASC submitted results from a 2009 survey covering 75% of customer debt enrolled in its members' programs ("TASC survey"). In addition, 17 commenters provided individual debt settlement company data. Collectively, these data fall into five primary categories:[196] (1) completion and dropout rates, (2) outcomes for dropouts, (3) average percentage savings and savings-to-fee ratios, (4) settlement rates for all enrollees, and (5) testimonials from satisfied consumers. Each category is examined in turn in the following section.

(1) Completion and Dropout Rates

Completion and dropout rates are important measures of the effectiveness of a debt settlement program; only consumers who complete the program are able to eliminate their debts by using the service.[197] Only a small number of parties submitted company-specific completion rate data, however, even after FTC staff sent letters to commenters in late December 2009 asking detailed follow-up questions relating to completion rates.[198]

The TASC member survey and seven individual commenters provided some information about debt settlement completion and dropout rates. The TASC survey estimated that 24.6% of consumers who remained in a debt settlement program for three years completed the program – defined as having settlements for at least 75% of their overall debt amount – with another 9.8% still active at the three-year point.[199]

The TASC survey methodology has several limitations. First, the survey is not representative of the entire industry's performance. Only 12 debt settlement companies reported sufficient data to determine a three-year dropout rate, a very small number relative to the hundreds of operating debt settlement providers.[200] These companies may not be representative of the industry as a whole and, in fact, may have been comparatively more successful.[201] Indeed, it is unlikely that providers that have low success rates would identify themselves by participating in a survey the results of which will be provided to a federal agency with enforcement authority over

[193] The FTC has sought data on this issue from the industry since July 2008. *See* (*http://www.ftc.gov/opa/2008/07/debtsettlement.shtm*) (Topics for Comment link). In response to the July 2008 request, only TASC provided some information about success and cancellation rates. It submitted a so-called "preliminary study" purporting to show "completion rates" ranging from 35% to 60% for consumers in TASC member debt settlement programs. TASC, *Study on the Debt Settlement Industry*, at 1 (2007). The study's probative value, however, was limited due to methodological issues. *See TSR Proposed Rule,* 74 FR at 41995 n.104; *see also* NAAG (Oct. 23, 2009) at 8-9.

[194] *E.g.,* TASC (Oct. 26, 2009) at 2 (respondents to a TASC survey settled in the aggregate almost 95,000 accounts in 2008); FCS (Oct. 27, 2009) at 1 (FCS and its family of companies have obtained over 70,000 settlements since 2003); FDR (Oct. 26, 2009) at 3 (FDR has obtained more than 100,000 settlements); Loeb at 1-2 (10 companies settled 23,586 accounts between 2003 and 2009); Confidential Comment at 2 (company has obtained 21,651 settlements for 24,323 active clients from March 2007 to Sept. 2009). Although the absolute number of debts that providers have settled over the years may be sizable, as discussed below, the record indicates that many consumers either receive no settlements or save less than the fees and other costs that they pay.

[195] Cambridge (Jan. 15, 2009) at 1 (171,089 accounts enrolled in DMPs between July 1, 2004 and December 31, 2009); GP (Jan. 15, 2010) at 1 (75,485 accounts enrolled in a total of 13,328 DMPs in 2009); CareOne at 1 (over 225,000 consumers enrolled in DMPs); AICCCA at 1 (member CCAs serve about 500,000 clients enrolled in DMPs).

Only two for-profit credit counseling companies, CCC and CareOne, commented in this proceeding. Only CareOne provided data, stating that (1) over 700,000 consumers have called the company for counseling assistance; (2) over 225,000 customers enrolled in a DMP; (3) nearly 700,000 customer service calls have been made; (4) over nine million creditor payments were processed; (5) nearly $650 million in payments have moved from consumers to their creditors; and (6) fewer than 35 Better Business Bureau complaints were filed in the previous year on approximately 70,000 new customers, and all had been successfully resolved. CareOne at 1-2.

[196] Most of these commenters did not submit data in all five categories.

[197] *See* USDR (Oct. 20, 2009) at 3 (citing retention rates and graduation rates as important indicators of debt relief service success); RDRI at 6 (the percent of customers that complete the program within 39 months is an "essential metric").

A commenter stated that the Commission should not impose a "100% standard" on debt settlement companies. FDR (Oct. 26, 2009) at 8; *see also* Franklin at 17; MD (Mar. 22, 2010) at 13. Nothing in the Final Rule would require providers to achieve any particular completion rate; rather, they must deliver whatever they claim. For example, if a provider expressly or by implication represents that it will eliminate consumers' debt, consumers have a right to expect that all of the debts they enroll in the program will be resolved.

[198] The request was in connection with the November 2009 public forum. The letters are posted at (*http://www.ftc.gov/os/comments/tsrdebtrelief/index.shtm*).

[199] TASC (Oct. 26, 2010) at 10.

[200] TASC (Mar. 15, 2010) at 4-5. TASC stated that the survey as a whole was based on 75% of customer debt enrolled in its members' programs, as several very large members participated in the survey. TASC sent the survey questionnaires only to the 20 largest TASC members, representing approximately 80% of the debt settlement consumers served by TASC members. TASC (Mar. 15, 2010) at 4. The survey included data on over 43,000 consumers who had enrolled in a debt settlement plan offered by one of the 12 firms that responded to the survey. TASC (Oct. 26, 2009) at 9.

[201] TASC stated that its membership represented about 25% of the industry. TASC (Housser), Tr. at 61.

[214] Summary of Communications (June 16, 2010) at 2 (consumer group comments).

[215] SBLS (Tyler), Tr. at 187-88; *see* discussion of industry data on outcomes for dropouts in Section III.C.2.

[216] TASC (Oct. 26, 2009) at 10; CRL at 4.

[217] TASC (Mar. 15, 2010) at 3.

[218] To this point, TASC asserted that because interest and fees continued to accrue during the course of the program, if a consumer is in the program for two years and settles his debt for the amount that he owed at enrollment, he received a large benefit from the program. TASC (Young), Tr. at 56-57. Consumers reasonably expect, however, that the program will substantially reduce the debt they carry when they enter the program, not that much or all of the "benefit" is from a reduction in the additional debt that accrues during the program. In one case, the Commission found that a telemarketer represented that the company could "negotiate your debt down to about 50 cents on the dollar . . . [so that] you're looking at about $15,000, $16,000 in debt as opposed to [the] $30,000" owed at the time of the call. *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM, Mem. Supp. Mot. T.R.O. at 9-10 & Exh. D (D. Colo. Mar. 20, 2007); *see also id.* Exh. N (telemarketer representing that "on $30,000 [owed], our settlement would be about $19,500"); *see also FTC v. Edge Solutions, Inc.*, No. CV-07-4087, Mem. Supp. Mot. T.R.O., Exh. PX-6 (E.D.N.Y. Sept. 28, 2007) (consumer stating that "[a]fter telling [the telemarketer] what my credit card balances were, [he] informed me that [defendant] could settle my $18,882 debt for $11,880").

In a similar example, a large TASC member, FDR, reported that the 4,496 customers who dropped out of its program before completion reduced their debt by approximately $9.1 million, based on their debt at the time of enrollment, and paid $8.7 million in fees. FDR (Jan. 13, 2010) at 4; *see also* FDR (Oct. 26, 2009) at 10. Thus, on average, each of the 4,496 terminated customers during this period saved $89.

[219] According to Dr. Briesch, dropouts received settlements at a similar rate to consumers who stayed active in the program. *See* Briesch (dated Oct. 27, 2009, and filed with the FTC on Nov. 5, 2009) at 1-2 (stating that these dropouts settled at least one account, and the average settlement percentage on the settled accounts was 58%, meaning that the average savings percentage was 42%).

[220] SDS (Jan. 22, 2010) at 3.

[221] In its review of 100 debt settlement websites, *supra* note 50, FTC staff found that 86% of websites made specific savings claims. The most frequently used percentage claims were 40% to 60%, 50%, and up to 70%; *see also* GAO Testimony, *supra* note 50, at 19.

[222] TASC (Oct. 26, 2009) at 11 (average debt reductions were 55% of outstanding balances in 2008 and 58% in the first six months of 2009 for 14 respondents in TASC survey); USOBA (Jan. 29, 2010) at 3 (51 respondents provided information to the trade association; the average percentage reduction from the amount owed at enrollment ranged from 27.9% to 72%, and the mean percentage reduction for all respondents was 53.23%); FDR (Oct. 26, 2009) at 3 (55.3% in 2008); JH (Oct. 24, 2009) at 35 (*see* attached Briesch paper at 17) (among consumers who received settlement of at least one account, savings were over 50% of the original amount owed); FCS (Oct. 27, 2009) at 1 (49% reduction of the debt calculated from the time of enrollment); CRN (Jan. 12, 2010) at 3 (savings of 67% of the debt at the time of enrollment); SDS (Jan. 22, 2009) at 1 (savings of 51.19% of the debt at the time of enrollment); Orion (Jan. 12, 2010) at 4 ("For those consumers who have completed the program, the settlements have typically been between 50-75% of their incoming

[223] Of the 100 websites FTC staff reviewed, *supra* note 50, staff found that only 14% of debt settlement websites disclosed the specific fees that

the amount of the debt at the time of enrollment, which would equate to savings of 47%. USOBA reported that this company had settled 32,450 accounts totaling $174 million in debt settled. USOBA provided no other information about the methodology used to arrive at these figures, making it difficult to evaluate its reliability. USOBA (Oct. 26, 2009) at 28-29.

Another debt settlement company stated that it had settled between 257 and 992 accounts with each of ten creditors and that debt reductions ranged from 58.07% to 61.57%. MD (Mar. 22, 2010) at Exh. E-8. The company provided information only for the "top ten" largest creditors; it did not explain whether these creditors were representative or why it chose to highlight results from these creditors. The comment provided virtually no information about the total population of accounts, nor any information about the amount of fees that consumers paid to the provider.

a DMP.[246] The paper included a hypothetical example of a consumer with $10,000 in debt who is on a DMP that lowers his credit card interest rates to 10%, requires the consumer to pay his debt over a period of five years, and charges a fee of $15 per month. Based on these assumptions, that consumer would pay $13,648 in total payments and generate $1,537 in revenue for the CCA.[247] In contrast, if the consumer enrolls in a debt settlement program that reduces his debt by 50%[248] and imposes a fee of 15%, that same consumer would pay $6,500 in total payments and generate $1,500 in fees for the debt settlement provider.

However, credit counseling and debt management provide entirely different benefits from debt settlement, and it is misleading simply to measure how much a hypothetical consumer saves from each program.[249] Dr. Briesch's analysis does not account for a significant advantage of DMPs: consumers enrolled in DMPs receive the benefits – in the form of creditor concessions – within a short time, providing more certainty than debt settlement and eliminating additional collection efforts. Late fees and other penalty fees generally stop accruing on a DMP. In contrast, consumers who enter a debt settlement program typically do not receive benefits (*i.e.,* settlements) for many months, if not years. During that extended period, the consumer has no certainty that he or she will be successful, and creditor collection efforts are likely to continue.[250] In addition, consumers obtain some benefits from a DMP even if they do not complete the programs because most of each monthly payment goes to their creditors and reduces their overall debt balance. In contrast, in the typical debt settlement plan, most of the money, for the first several months, goes to the non-refundable fees of the provider.

Dr. Briesch's analysis also failed to consider the relative impact of debt settlement and DMPs on consumers' creditworthiness, a significant factor in determining under which type of program a consumer would obtain a better "outcome."[251] Indeed, Dr. Briesch employed very optimistic assumptions in the debt settlement examples – either the consumer can afford monthly payments of $625 for one year (if the debt reduction is 40% of the original debt balance) or the consumer can obtain debt reductions in the amount of 60% of the original debt balance and can make monthly payments of $458 over one year.[252] These high monthly payment amounts are likely to be unrealistic for many consumers. In contrast, Dr. Briesch estimated that a consumer with $10,000 in debt would pay only $227 per month on a DMP for five years.

Other debt settlement providers similarly argued that, on average,ive benefits (

[246] JH (Oct. 24, 2009) at 39 (*see* attached Briesch paper at 21); *see also* USOBA (Oct. 26, 2009) at 25-26. Dr. Briesch also asserted that credit counseling has a higher dropout rate which, at different points, he asserts is 65% or 74%. The paper provides no citation to support the 65% number and cites to an unnamed NCLC report that relies on a National Foundation for Credit Counseling report for the 74% figure. A 2003 NCLC report actually cites a 79% dropout rate, citing to an earlier report published in 1999. National Consumer Law Center & Consumer Federation of America, *Credit Counseling in Crisis* 23 (April 2003). However, the dropout rates on DMPs are not comparable to dropout rates on debt settlement plans, as the initial fees are generally much lower for DMPs, and consumers have received the promised service – a creditor-approved plan that allows them to pay modified amounts if they make all of the required payments.

[247] JH (Oct. 24, 2009) at 39 (*see* attached Briesch paper at 21).

[248] Dr. Briesch assumes the savings are based on the debt owed at the time of enrollment.

[249] GP (Oct. 22, 2009) at 2 ("With a DMP, the consumer is receiving ongoing benefits each month in the form of waived fees, lower interest rates and lower balances. In debt settlement, the consumer does not receive any benefits until a settlement is actually made, if it occurs at all.").

Additionally, Dr. Briesch's comparison of the relative costs to consumers of credit counseling and debt settlement was skewed. In calculating the "total fees paid" for credit counseling, he included the full amounts of fair share payments that creditors make to the agency. JH (Oct. 24, 2009) at 39 (*see* attached Briesch paper at 21); *see also* CSA at 9; Loeb at 2-3. Consumers do not make these payments, however. Moreover, the author offered no evidence that fair share payments are equivalent to the forgiven principal balance either in terms of dollar amounts or in overall benefits to the creditor. Nor did he consider whether creditors place value on the educational services that most credit counseling services provide, such as advice on budgeting. CU at 3; *see also* Consumer Federation of America, American Express, & Georgetown University Credit Research Center, *Evaluating the Effects of Credit Counseling,* (2006) (finding that effective debt management plans contain a meaningful educational component, "significantly improved credit profiles," and a reduced risk of bankruptcy filing, which the report attributed to "the DMP experience itself, e.g., budgeting to make regular DMP payments, continued interaction with and reinforcement from the counseling agency"); Cambridge (Oct. 26, 2009) at 1.

[250] *See* GP (Jan. 15, 2010) at 2.

[251] The record does not contain conclusive evidence on this issue. The GAO reported that according to FICO, stopping payments to creditors as part of a debt settlement program can decrease credit scores anywhere between 65 to 125 points. GAO Testimony, *supra* note 50, at 10. In addition, missed payments leading up to a debt settlement can remain on a consumer's credit report for seven years, even after a debt is settled. *Id.* A consumer testified that her credit score was harmed due to her enrollment in a debt settlement program. Haas Testimony, *supra* note 73, at 4 ("Our credit scores had gone from excellent to poor. All credit extended to us now is at a higher rate – if at all. Banks who once gladly financed our cars won't look at us. Insurance companies have given us higher quotes due to our credit history."). According to a CCA commenter, the presence of settled accounts on a credit report is "clearly a danger sign." Cambridge (Oct. 26, 2009) at 1.

In contrast, a debt settlement industry commenter asserted that debt settlement may lead to improved creditworthiness and improved credit scores, as compared to bankruptcy or credit counseling. JH (Oct. 24, 2009) at 15. However, the NERA Economic Consulting report cited and attached to the foregoing comment does not address the creditworthiness of consumers who completed credit counseling. *Id.* at 47-54. In addition, the comment acknowledges that the initial effect of a debt settlement program on a consumer's credit score will be negative; it then focuses on creditworthiness after completion of the program. *Id.* at 47-48.

[252] JH (Oct. 24, 2009) at 40 (*see* attached Briesch paper at 22). As stated above, according to the TASC survey results, based on information from 14 debt settlement companies, the average debt reduction for those consumers who obtained settlements was approximately 45.5% of the original debt amount in 2008, and 49.4% of the original debt amount in 2009. TASC (Mar. 15, 2010) at 3.

[253] As an example, a debt settlement provider calculated that a consumer with $39,000 in credit card debt could settle that debt for $30,038 in less than five years by making monthly payments of about $500, given specific assumptions set forth in the comment; by comparison, the same consumer on a DMP would have to pay $775 per month and total payments of $51,150. The stated assumptions were: (i) a 60 month program, (ii) no interest rate adjustments by creditors (that is, the interest rate stays at 24.9%), (iii) the consumer obtained a 40% debt reduction "on current balance," and (iv) the following fee structure: first two months payments of $34.95 per month, plus 25% of the savings amount negotiated. DMB (Oct. 29, 2009) at 3 nn. 7 & 11. Putting aside the question of whether the provider's assumptions were unbiased and realistic, it appears that the provider may not have followed its own assumptions in doing its calculations. Specifically, the assumptions included an interest rate on the debt of 24.9% that continues to accrue throughout the program, as would typically be the case. With that assumption, however, the calculation for the debt settlement plan yields a monthly payment of $1,650 with a total payment over 60 months of over $96,800, substantially more costly than the DMP. The Commission asked the commenter whether it had assumed that interest and fees stopped accruing for a consumer enrolled in debt settlement, but the commenter did not respond to that question. DMB (Feb. 12, 2010) at 8. Alternatively, the commenter actually may have assumed a 40% debt reduction from the balance at the time of enrollment, not on the "current balance," which presumably would be the balance at the time of settlement.

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[265] In addition to funding ongoing operating expenses, providers may have to fund debt payments if they borrowed money to pay costs before they began collecting their fees.

[266] *See* ACCORD (Noonan), Tr. at 21.

[267] FCS (Oct. 27, 2009) at 4.

[268] ACCORD (Oct. 9, 2009) at 1; CareOne at 5; Summary of Communications (June 30, 2010) at 1 (assistant state attorney general stated that some companies that do not charge advance fees are doing business in North Carolina); *see also* Terry Savage, *Debt Manager Put to the Test*, Chicago Sun Times, June 28, 2010, *available at* (*http://www.suntimes.com/business/2439574,terry-savage-debt-manager-062810.article*) (discussing provider that collects a relatively small amount of 3% of the original debt owed over the first two months and 15% of the original debt owed when a successful settlement is obtained; the consumer gets a 1% refund for completing the program).

[269] CDS at 1; Figliuolo at 5; ART at 1; Orion (Oct. 1, 2009) at 2; Franklin at 24-25; MD (Mar. 22, 2010) at 4-6; *see also* ULC at 5. However, in investigations by state attorneys general, debt settlement companies have not demonstrated any justification for advance fees based on the effort required to set up an account. NAAG (Oct. 23, 2009) at 10.

[270] FDR (Oct. 26, 2009) at 6.

[271] According to this commenter, the expenses include personnel costs for the following employees: the representative who explains all of the options to the customer, a second representative who reviews the program a final time with the customer, the processors who handle the paperwork and help establish the account, the assigned negotiator who reviews the accounts and formulates a plan, and the representatives who conduct a 30 to 60 minute "Welcome Call" and bi-weekly coaching calls thereafter. CDS at 1. CDS did not provide any breakdown of the cost by individual service.

[272] This amount is comprised of $59.45 for processing the enrollment paperwork, $16.05 for the Welcome Packet, and $37.02 for three compliance calls. NWS (Oct. 22, 2009) at 11 (*see* attached Walji paper at 11).

[273] ART at 1.

[274] Id.

[275] Id.

[276] *Id.* at 2; *see also* CSA at 8 ("The settlement of one account with one creditor may require more than 30, 40, or 50 phone calls.").

[277] Confidential Comment at 10.

[278] USDR (Oct. 20, 2009) at 11; CRN at 2 (60% to 70% of fees support the sales side of the business); CDS at 1; TASC, *Study on the Debt Settlement Industry* 4 (2007) ("One of the primary costs is the client acquisition

not accept) for every one it accepts and spends at least 45 minutes with each of these consumers providing free advice. *Id.* at 3.

[283] USOBA (Oct. 26, 2009) at 30, 33. Industry groups also argued that if the Commission imposes an advance fee ban, the companies that provide customers with extensive counseling, coaching, and assistance during the period in which they accumulate sufficient savings to enter into debt settlements will be at a competitive disadvantage compared to companies that do not provide these additional services. *Id.* at 34; Summary of Communications (June 14, 2010) at 1. The Commission believes, however, that companies will have incentives to provide customers with counseling and other assistance so that they stay in the program and receive settlements, at which time the provider will get paid.

[284] USOBA (Oct. 26, 2009) at 31; *see also* Palmiero (employee of Century Negotiations, Inc.) at 1 ("I hear the tears of relief that someone is available to listen as well as offer options and solutions to the concerns as they arise."). As discussed above, the USOBA survey consists of self-reported and potentially self-serving responses from an unspecified sampling of employees of an undefined sampling of providers. Thus, the Commission does not accord this survey significant weight.

[285]

[296] *In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 457 (D.N.J. 1998). USOBA's comment in this proceeding criticized the court's reasoning and instead cited to a case invalidating fee regulations applicable to for-profit companies soliciting money on behalf of nonprofit charities. USOBA (Oct. 26, 2009) at 44 (citing *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 789 n.5 (1988)). USOBA ignored the distinction, however, between the established speech interests at stake when charitable solicitations are at issue (*see Riley*, 487 U.S. at 788) as opposed to what is entirely commercial speech relating to the sale of debt relief services. *See Bd. of Trs v. Fox*, 492 U.S. 469, 474-75 (1989) (where speech proposing a commercial transaction touched on educational subjects, such speech was not converted into educational speech).

[297] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

[298] *Fox*, 492 U.S. at 475; *Fla. Bar v. Went for It*, 515 U.S. 618, 623 (1995).

[299] *Cent. Hudson*, 447 U.S. 557.

[300] *Id.* at 566.

[301] *Fox*, 492 U.S. at 480.

[302] *See Edenfield v. Fane,* 507 U.S. 761, 768-69 (1993) ("[T]here is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); *FTC v. Mainstream Mktg. Servs., Inc.,* 345 F.3d 850, 854 (10th Cir. 2003); *see also TSR Amended Rule*; 68 FR at 4635 n.669 ("In some instances, the 'do-not-call' registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers.").

[303] GAO Testimony, *supra* note 50, at 21 ("We identified allegations of fraud, deception and other questionable activities that involve hundreds of thousands of consumers.").

[304] *Infra* Section III.C.3.a.

[305] *Infra* Section III.C.3.

[306] CFA at 10 ("[D]esperate consumers will tend to focus most on the representations made in the advertisements about how these services can relieve them of their debt worries. We see the required disclosures and prohibited misrepresentations as good complements to, but not substitutes for, the proposed ban on advance fees."); CareOne at 4 (the advance fee ban "is likely to have the greatest impact."); Summary of Communications (June 24, 2010) at 1 (state attorney general representatives said that an advance fee ban is the most important

h. Point 8: The TSR Is Not the Appropriate Vehicle for Regulating Debt Relief Services

Some commenters argued that debt relief services should not be regulated through the TSR. One commenter stated that amending the TSR is not warranted "merely because the industry uses telephones in its business."[313] It also stated that the FTC had brought all of its enforcement actions against debt relief companies under Section 5 of the FTC Act and, thus, that any rules should be promulgated under that section as well.[314] This statement is incorrect. The Commission and other law enforcement agencies have investigated and charged a number of debt relief providers with violations of the Telemarketing Act and the TSR.[315]

Two commenters recommended that the FTC expand the scope of its proposed regulations to cover Internet and face-to-face transactions.[316] A third commenter questioned whether issuing these rules as part of the TSR might encourage debt relief providers to switch to an entirely online business model.[317]

The Commission has determined that regulation of the deceptive and abusive practices of debt relief providers can be accomplished appropriately through amendments to the TSR. The record shows that debt relief companies primarily sell their services through national telemarketing campaigns as defined in the TSR.[318] Currently, prevalent forms of advertising (television, radio, Internet, and direct mail) instruct consumers to call a toll-free number for more information.[319] Debt relief service providers then utilize telemarketing to conduct the full sales pitch and obtain consumers' consent to purchase their services.[320] Thus, the Commission concludes that the abusive and deceptive practices in the debt relief services industry should be addressed through amendments to the TSR.

i. Point 9: Very Few Debt Relief Companies Are Engaged in Abuse, and the Services Are Not "Fundamentally Bogus"

Industry representatives have argued that the Commission should not impose an advance fee ban because only a few "bad actors" have engaged in deceptive or abusive practices.[321] To the contrary, the record in this proceeding – including the Commission's law enforcement experience,[322] actions by state law enforcement agencies,[323] consumer complaints,[324] the public comments, and the GAO study – demonstrates that, in fact, debt relief providers commonly fail to produce the results they promise, causing substantial consumer injury.[325] Indeed, the industry's own data show that most consumers who enroll in debt relief services covered by the Final Rule exit the program in worse financial condition than when they started.[326]

Further, some commenters asserted that the Commission should not adopt the ban on advance fees because the services are not "fundamentally bogus," the phrase that the Commission used when promulgating the advance fee bans for credit repair services, recovery services, and offers of certain loans.[327] Nothing in the Commission's statements suggests, however, that advance fee bans are legally permissible only when the services at issue are "fundamentally bogus." The Telemarketing Act does not require that the Commission meet any standard other than "abusive," and the Commission uses the unfairness test to determine which practices are abusive.[328] Here, the Commission has determined that the practice of charging advance fees for debt relief services satisfies the unfairness standard based on the rulemaking record.

j. Point 10: An Advance Fee Ban Will Not Establish the Proper Incentives for Debt Settlement Companies

Certain commenters argued that an advance fee ban will only serve to motivate debt settlement providers to enroll as many consumers as possible, regardless of their suitability for a debt settlement program, in the hope that at least some will complete the program and pay the fees.[329] There is no

preempted if it conflicts with a federal statute. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978). State laws are preempted only to the extent there is a conflict – compliance with both federal and state regulations is impossible or the state law is an obstacle to effectuating the purposes and objectives of Congress. *Id.* The Commission has emphasized that state laws can impose additional requirements as long as they do not directly conflict with the TSR. *TSR Final Rule*, 60 FR at 43862-63; 16 CFR 310.7(b). State laws regulating debt relief services that contain fee caps permit, rather than mandate, that fees for debt relief services be collected before the promised services are provided. *See supra* note 86. As a result, there is no conflict with the Rule and no conflict preemption. Therefore, providers may not charge initial or monthly fees in advance of providing the services, even if state laws specifically authorize such fees.

313 TASC (Oct. 26, 2009) at 3.

314 *Id.* at 4. The FTC has the general authority to promulgate rules addressing unfair or deceptive practices under Section 18 of the FTC Act, 15 U.S.C. 57a. The Commission also enacts rules pursuant to specific Congressional mandates, as it did with the TSR.

315 *See* FTC Case List, *supra* note 27. While the Commission has sued credit counselors and debt negotiators under the Telemarketing Act and the TSR, it has not specifically brought such actions against debt settlement providers. Nevertheless, some state law enforcement agencies have done so. *See, e.g.,* Press Release, Florida Attorney General, *Attorney General Announces Initiative to Clean Up Florida's Debt Relief Industry* (Oct. 15, 2008), *available at* (*http://myfloridalegal.com/newsrel.nsf/newsreleases/BD3AB29E6DDAF150852574E3004DFACD*) (subpoenas served by Florida on debt settlement firms as part of a sweep to assess violations, among others, of Florida laws regulating telephone solicitations, telemarketing, credit counseling organizations, and credit service organizations); *In re PDM Int'l* (Assurance of Voluntary Compliance filed May 29, 2008) (case brought by the West Virginia Attorney General alleging, among other things, that defendant engaged in telemarketing sales without a business license or surety bond).

316 ULC at 6; Orion (Oct. 1, 2009) at 1; *see also* GP (Oct. 22, 2009) at 2.

317 Loeb (Mallow), Tr. at 155-56 (acknowledging that he had not personally seen debt relief companies operating solely online, but some clients had told him that they were aware of companies conducting most, if not all, of their marketing online).

318 CFA (Grant), Tr. at 157; NFCC (Binzel), Tr. at 157. Similarly, other industries regulated by the TSR, such as credit repair services, may market their services through other media in some cases, although the predominant business model at present relies on telemarketing.

319 *Supra* note 52. As a result of the Final Rule in this proceeding, these calls are inbound calls covered by the TSR.

320 *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007)(Complaint, ¶¶ 16-19); FTC Case List, *supra* note 27; CU (Hillebrand), Tr. at 183 ("We heard the TASC folks say four phone calls over two weeks to sign up the client, we heard the Freedom Debt folks in the prior panel say eight phone calls. Phone conversations, signing up the client, telemarketing and telephone communications are a big piece of how consumers get signed up.").

In addition, USOBA asserted that the Commission does not have authority to regulate fees through the Telemarketing Act, stating that the Telemarketing Act focuses on communications that are harmful because of their content, and those issues are distinct from concerns relating to payment or other parts of the commercial relationship. USOBA (Oct. 26, 2009) at 40-41. The Commission believes, however, that regulating the timing of fee collection constitutes a reasonable exercise of authority under the Telemarketing Act under these facts. *See* 16 CFR 310.4(a); *Nat'l Credit Mgmt. Group*, 21 F. Supp. at 457 (upholding advance fee ban on credit repair services).

321 *See, e.g.,* TASC (Apr. 30, 2010) at 2 (arguing that a possible advance fee ban would be "predicated upon the experience, as described in the NPR, of a very few 'bad actors' and a disproportionately small number of injured consumers."); USOBA (Oct. 26, 2009) at 27; DRS (Sept. 29, 2009) at 1; DS at 12; Franklin at 23.

322 *See* FTC Case List, *supra* note 27.

323 *See* State Case List, *supra* note 27.

324 *See infra* Section III.C.3.a.

325 The GAO identified allegations of fraud, deception, and other questionable activities involving hundreds of thousands of consumers. GAO Testimony, *supra* note 50, at 21. Moreover, GAO's own survey of 20 debt settlement firms found that 17 of them were making highly dubious success rate and other claims. *Id.* at 9-21.

326 *See supra* Sections III.C.1. & III.C.2.a.(1)-(2).

327 CSA at 12; TASC (Oct. 26, 2009) at 16; Smith, Tr. at 263; *see TSR Amended Rule,* 68 FR at 4614.

328 *TSR Amended Rule,* 68 FR at 4614.

329 Summary of Communications (June 16, 2010) at 2.

[330] *See* ACCORD (Oct. 9, 2009) at 3 ("The debt settlement company will bear the risk that the consumer will not see the program through to the settlement of her debts."); NAAG (Oct. 23, 2009) at 9.

[331] Summary of Communications (June 16, 2010) at 2.

[332] Id.

[333] *TSR Amended Rule,* 68 FR at 4614.

[334] Thus, the Commission need not demonstrate *actual* consumer injury, but only the *likelihood* of substantial injury. In this proceeding, however, there is sufficient evidence that the practice of collecting advance fees causes actual injury.

[335] *Supra* Section III.C.2.a. According to TASC, the median fee under the predominant debt settlement model calls for a consumer to pay the equivalent of 14% to 18% of the debt enrolled in the program; thus, a consumer with $20,000 in debt

staff identified all complaints coded under "Debt Management/Credit Counseling" that were received directly by the Commission and limited those search results to only those complaints that included specified key words in the complaint comments field. Staff also excluded complaints with certain keywords that produced false hits, such as "credit repair" and "foreclosure," as well as those that were coded as Do Not Call registry and Identity Theft complaints.

In preparing the NPRM, FTC staff utilized the same method, reviewing a computer-generated sample of 100 debt relief complaints received between April 1, 2008, and March 31, 2009, that met the search criteria above. *TSR Proposed Rule,* 74 FR at 42001 n.166. In its comment, AADMO stated that the "evidence in the record" upon which the FTC based its proposed rule was flawed. Via a Freedom Of Information Act request, AADMO obtained all complaints coded under "Debt Management/Credit Counseling" for January 1, 2008, through August 2009, and pointed out that many of the complaints in the Consumer Sentinel database were incorrectly designated as debt relief. AADMO at 2; *see also* CSA at 18. FTC staff did not merely rely on the Consumer Sentinel designations to determine the number and substance of relevant complaints, but substantially refined its analysis as described.

[344] NAAG (Oct. 23, 2009) at 4; NAAG (July 6, 2010) at 2 ("We previously commented that the number of consumer complaints the States have received against debt relief companies, particularly debt settlement companies, have consistently risen. This trend has continued.").

[345] According to data provided to the GAO, the BBB has received thousands of complaints about debt settlement companies in recent years, with the number increasing from eight in 2004 to nearly 1,800 in 2009. GAO Testimony, *supra* note 50, at 12; *see also* Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans*, *supra* note

most consumers drop out of these programs before receiving benefits commensurate with the fees they pay at the outset.[354] For example, the industry-sponsored TASC survey concluded that over 65% of consumers dropped out of the respondents' programs within the first three years.[355] Based on the data collected by the Colorado Attorney General, of those consumers who had been in a debt settlement program for two to three years, barely 8% had completed their programs.[356]

Thus, consumers have suffered substantial injury by paying in advance for debt relief services that were promised but not provided.

(2) The amount and timing of front-loaded fees in the debt relief context cause significant injury

The record demonstrates that collecting fees in advance of providing the represented services is the most common business model in the debt negotiation, for-profit credit counseling, and debt settlement industries.[357] The record, including the Commission's law enforcement experience, further demonstrates that advance fees have been an integral part of the widespread deception and abuse in the debt settlement industry. In the context of debt relief transactions, advance fees create incentives for providers that fundamentally are at odds with the interests of consumers: (1) to enroll as many applicants as possible, without adequate regard to their suitability, (2) to deceive consumers about fundamental aspects of the program in order to entice them to enroll, and (3) to direct more resources to promotion and marketing rather than settling debts.[358]

Indeed, the advance fee requirement impedes the ultimate purpose of the service – helping consumers resolve their debts and restore their financial health.[359] Debt settlement providers, for example, represent the settlement process as a way to pay off each unsecured debt with a one-time, lump sum payment as the consumer accumulates sufficient money to fund the settlement. Financially distressed consumers generally will find it difficult, if not impossible, to pay large advance fees while accumulating the necessary funds for a settlement and enduring extended creditor collection efforts.[360] The practice of taking substantial advance fees makes it far more difficult for consumers to save the money necessary for settlements.[361] In many cases, providers misrepresent or fail to disclose material aspects of their programs, causing consumers to make payments to the providers for several months, not realizing that most of the payments go towards fees, rather than settlement offers.[362] Moreover, not paying creditors leads to late fees, penalties, impaired credit ratings, lawsuits and other negative consequences.[363] Moreover, creditors may garnish consumers' wages, forcing consumers to abandon their debt relief programs.[364] Charging advance fees thus impedes the goal of debt relief and contributes to consumers having to drop out of programs and forfeit the fees already paid.[365]

Commenters also stated that in debt settlement programs, significant numbers of consumers drop out once they realize, contrary to many telemarketers' representations, that their initial payments are going to the provider's fees, not to pay off their debts.[366] Once they drop out, these consumers often end up with higher debt balances than they had before, among other detrimental results, thereby suffering substantial injury.[367] An organization of nonprofit credit counselors reported that, in most cases, after dropping out of a debt settlement service, the consumer's financial position has been so badly damaged that nonprofit CCAs are unable to provide assistance, and often bankruptcy is the consumer's only option.[368] Similarly, legal services lawyers reported that low-income consumers often are more in debt with their original creditors when they leave the debt relief program than before they enrolled.[369] In sum, debt settlement is a high-risk financial product that requires consumers simultaneously to pay significant fees, save hundreds or thousands of dollars for potential settlements, and meet other obligations such as mortgage payments. Failure leads to grave consequences – increased debt, impaired credit ratings, and lawsuits that result in judgments and wage garnishments.[370]

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[354] *Supra* Section III.C.2.a.

[355] *Id.*; *infra* III.C.2.a. The evidence shows that consumers generally dropped out before receiving savings commensurate with the fees, if they received any savings at all.

[356] Of the remaining consumers, 39% were categorized as still active, and 53% had dropped out of the program. CO AG at 5. The average program length was 32.3 months. *Id.* Debt settlement plans are typically 36 months in length. DSA/ADE at 8.

[357] *Supra* Section I.C.; CFA at 9; CRN at 2; GAO Testimony, *supra* note 50, at 7 (discussing debt settlement); *see also, e.g., FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging that consumers paid an advance fee of between $329 and $629 before any debt negotiation was attempted); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-806-SCB-TGW(M.D. Fla. filed May 2, 2006) (alleging that defendants charged between $99 and $499 as an initial fee for credit counseling services that were not, in fact, provided).

[358] *See* CU (July 1, 2010) at 4.

[359] *See* ULC at 5 ("The UDMSA drafting committee likewise recognized that debt settlement firms often charge excessive up-front fees, to the detriment of consumers and to the viability of their efforts to avoid bankruptcy.").

[360] SBLS at 2-4; CFA at 9; CareOne at 4.

[361] USDR (Oct. 20, 2009) at 5 ("The proposed Rule change would have the effect of allowing the consumer to save and settle debt faster since the predatory upfront fees charged by settlement companies would not be restricting of or burdensome to settlement activity."); USDR (Johnson), Tr. at 188; *see also* CFA at 9.

[362] Summary of Communications (June 30, 2010) (teleconference with state attorneys general representatives); QLS at 4; *see also, e.g., FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (alleging that defendant obfuscated the total costs for the products and services by separately reeling off various fees, such as retainer fees, monthly fees, and fees correlated to the percentage of money that a customer saves using the services, without ever disclosing the total cost, which sometimes was in the thousands of dollars); *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (alleging that, in numerous instances, defendants represented that there would be no upfront fees or costs for their debt settlement program, when in fact the defendants required consumers to pay an upfront fee of approximately 8% of the consumer's total unsecured debt); *see also, e.g., Illinois v. SDS West Corp.*, No. 09CH368 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. filed May 4, 2009); *Illinois v. Debt Relief USA, Inc.*, No. 09CH367 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. filed May 4, 2009); *North Carolina v. Commercial Credit Counseling Servs., Inc.*, No. 06CV014762 (Sup. Ct. Wake Cty. filed Oct. 9, 2006); *North Carolina v. Cambridge Credit Counseling Corp.*, No. 04CVS005155 (Sup. Ct. Wake Cty. filed Apr. 15, 2004); *North Carolina v. Knight Credit Servs., Inc.*, No. 04CVS8345 (Sup. Ct. Cumberland Cty. filed Feb. 17, 2004).

[363] NAAG (Oct. 23, 2009) at 3; CFA at 4-5; QLS at 3; SBLS at 3; SOLS at 1; *see also* USDR (Johnson), Tr. at 188. Notably, a banking trade group commented that an average of 63% of accounts known to be part of a debt settlement program ultimately are charged off, likely indicating that the consumer's credit score has suffered. *See supra* note 179. The comparable figure for accounts in a DMP was 16%. ABA at 4.

[364] SBLS at 2-4; CFA at 4; NFCC at 4, 6.

[365] QLS at 3; SBLS at 3.

[366] NAAG (Oct. 23, 2009) at 7; SOLS at 2.

[367] *See, e.g., FTC v. Edge Solutions, Inc.*, No. CV-07-4087 (E.D.N.Y. filed Sept. 28, 2007); *see also FTC v. Debt-Set, Inc.*, No. 07-558, Mem. Supp. Mot. T.R.O. at 16-19 (D. Colo. Mar. 20, 2007); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ, Pls. Mem. Law Supp. T.R.O. at 17 (S.D. Fla. Dec. 11, 2006); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4), Pls. Mem. Law Supp. T.R.O. at 8-9 (D. Mass. filed Nov. 2, 2004); *see also* State Case List, *supra* note 27.

[368] AICCCA at 3.

[369] *See, e.g.*, SOLS at 1.

[370] NAAG (Oct. 23, 2009) at 8 ("[C]onsumers may be led to believe debt settlement is a relatively risk free process with little or no negative consequences, when in fact consumers risk growing debt, deteriorating credit scores, collection actions, and lawsuits that may lead to judgments and wage garnishments."); *see* NC AG Testimony, *supra* note 25, at 4 ("Three months of nonpayment and non-communication lead not only to increased debt, but also increased collection efforts and legal action."); Haas Testimony, *supra* note 73, at 4 ("We joined the program on March 10, 2008. In 6 months time we were about $13K behind from where we started.").

[371] *Supra* note 213 and accompanying text; SBLS at 2-4; CFA at 9; CareOne at 4; QLS at 3.

[372] CFA at 10.

[373] Unfairness Policy Statement, *supra* note 162, at 1074.

[374] *See* 16 CFR 310.4(a).

[375] *FTC v. Debt-Set, Inc.*, No. 1:07-CV-00558-RPM (D. Colo. filed Mar. 19, 2007); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (complaint alleging that "[d]uring sales conversation, consumers are instructed to immediately stop making any payments to their unsecured creditors"); *FTC v. Edge Solutions, Inc.*, No. CV-07-4087, Mem. Supp. Mot. T.R.O., Exs. PX-2 – PX-4 (E.D.N.Y. filed Oct. 1, 2007) (telemarketer pressuring FTC investigators to quickly sign and return written contracts – e.g., within 24 to 48 hours – and misrepresenting aspects of the debt relief program); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR, App. T.R.O. at 9-10 (W.D. Wash. filed Mar. 6, 2006) (in a debt negotiation case, alleging that the defendants' telemarketers "aggressively push consumers to agree to scripted language, spoken very quickly, that either contradicts or omits material representations . . . made in their sales pitches."); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP, Mem. Supp. Mot. T.R.O. at 9-10 (M.D. Fla. filed Feb. 27, 2009) (in a debt negotiation case, alleging that, in order to obtain consumers' consent to enroll, defendants play consumers a "difficult to understand pre-recorded verification [that] contains additional information that is not part of defendants' telemarketing sales pitch," including information on fees).

[376] *TSR Amended Rule*, 68 FR at 4655.

[377] GAO Testimony, *supra* note 50, at 13.

[378] *See* FTC and State Case Lists, *supra* note 27.

[379]

been made; (4) over nine million creditor payments were processed; (5) nearly $650 million in payments have moved from consumers to their creditors; and (6) fewer than 35 Better Business Bureau complaints were filed in the previous year on approximately 70,000 new customers, and all had been successfully resolved. CareOne at 1-2.

[384] In any event, as explained in Section III.C.2. above, the record shows that, in fact, most consumers do not obtain a net benefit from debt settlement services.

[385] According to one commenter, research indicates that consumers have higher success rates when they pay some fees upfront and thereby have a "'stake in the game.'" Loeb at 5-6. Another commenter expressed concern that without advance fees, consumers may be more likely to misrepresent their financial status to get into the program and to drop out because of a lack of commitment. DMB (Feb. 12, 2010) at 5. Neither of these commenters cited any empirical data demonstrating that consumers who pay upfront fees have higher success rates than those who do not. In any event, even if upfront fees strengthened consumers' commitment to the program, requiring consumers to put fees into a dedicated bank account likely would have the same effect.

[386] *Supra* Section III.C.2.a. Similarly, in considering the Holder In Due Course Rule, the Commission determined that readily available credit from a "'fly-by-night' salesperson who does not perform as promised does not benefit consumers." *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose*, 40 FR at 53,520.

[387] *Supra* Section III.C.2.c.

[388] *Supra* Section III.C.2.d. Moreover, a commenter argued that if existing providers' costs increase, they could be forced to increase the prices they charge consumers for their services in order to remain solvent. CSA at 9.

[389] *Supra* Section III.C.2.e.

[390] USOBA (Oct. 26, 2009) at 35; CSA at 10.

[391] CSA at 9; Able (Oct. 21, 2009) at 28; SDS (Oct. 7, 2009) at 3; CRN (Oct. 8, 2009) at 5; TASC (Young), Tr. at 186-87.

[392] *Supra* Section III.C.2.d.

[393] Id.

[394] Orion (Oct. 1, 2009) at 2 (marketing costs can be $500 to $1,200 per enrolled consumer); NWS at 10 (*see* attached Walji paper at 10) (marketing costs at one company averaged $987.50 per enrolled consumer).

[395] *See infra* Section III.C.5.a. Some states already impose licensing and bonding requirements on companies and thus require some capitalization. *See, e.g.,* Kan. Stat. Ann. § 50-1116, et seq.; Me. Rev. Stat. Ann. Tit. 17 § 701, et seq. & tit. 32 §§ 6171-82, 1101-03; S.C. Code Ann. § 37-7-101, et seq.

[396] *See infra* Section III.C.5.a.

[397] Id.

[398] CRN (Bovee), Tr. at 28; *see* CSA at 6 (almost 78% percent of consumers receive at least one settlement offer in the first six months).

[399] *See* WV AG (Googel), Tr. at 43; NC AG Testimony, *supra* note 25, at 4 ("Consumers are taking a big risk, while interest charges mount and the debt settler's fees are being collected, that they will eventually get relief from all their debts," and the debt settlement company "profits whether or not it accomplishes anything for its client."). Consumers clearly are injured by a system that forces them to bear the full risk and burden of sales related abuses. *See Cooling Off Period For Door-to-Door Sales; Trade Regulations Rule and Statement of Basis and Purpose*, 37 FR 22934, 22947 (Oct. 26, 1972).

[400] As discussed above, industry data show that at least 65% of consumers drop out of debt settlement programs. *Supra* Section III.C.2.a.1.

[401] *Infra* Section III.C.5.c. Under the Final Rule, consumers will own the account and be permitted to recoup the money they paid into it if they terminate their enrollment. Thus, some consumers may drop out of the program before receiving any settlements, causing the provider to lose the value of its services up to that point. Providers can limit that risk, however, by more carefully screening prospective customers to ensure that they are

withdraw their money. Ultimately, the risk of nonpayment will have to be factored into providers' pricing decisions. This should lead to a more competitive market. Providers that do better screening and are more effective in obtaining settlements quickly should be able to minimize their losses from dropouts. Such firms may choose to lower their prices and gain a competitive advantage.

[402] 15 U.S.C. 45(n); *see also* Unfairness Policy Statement, *supra* note 162, at 1073.

[403] Unfairness Policy Statement, *supra* note 162, at 1074.

[404] Id.

[405] *See id.*; *In re Orkin Exterminating Co.*, 108 F.T.C. 263, 366-67 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988); *In re Int'l Harvester*, 104 F.T.C. 949, 1066 (1984).

[406] CFA at 10; SOLS at 3 (advertisements lack specific disclosures; subsequent disclosures are buried in fine print contracts).

[407] *See In re Sw. Sunsites*, 105 F.T.C. 7, 81-93 (1985) (holding that land sale companies engaged in an unfair practice by continuing to collect payments on land sales contracts, and refusing to make refunds, for consumers who agreed to purchase land based on deceptive representations made by the companies), *aff'd*, 785 F.2d 1431 (9th Cir. 1986).

[408] As the Commission has noted with respect to another group of vulnerable consumers desperate for a solution to their woes – individuals trying to lose weight – "the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance if not abstinence simply does not pass muster." *In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 865 (1977), *aff'd*, 605 F.2d 294, 297 (7th Cir. 1979) (approving FTC order with "minor exceptions").

[409] *See supra* Sections I.C.2. & III.C.2.; CFA at 10; CCCS CNY at 1; QLS at 2.

[415] *See* CFA at 21 ("[D]ebt relief providers should be required to conduct an individual financial analysis for all potential customers to determine

account and the debt relief service provider.

Fifth and finally, the provider must allow the consumer to withdraw from the debt relief service at any time without penalty; thus, the provider may not charge a termination fee or similar fee. The provider also must ensure that the consumer receives, within seven business days of the consumer's request, all funds in the account, less any money that the provider has earned in fees in compliance with the Rule's provisions, as a result of having settled a debt prior to the consumer's withdrawal from the program.[449] Therefore, the Rule allows the consumer to cancel the program and recoup the money in the account at any time to ensure that the consumer does not pay in advance for services that are not performed.

Moreover, the Commission's law 0 0 6 538.02 53.0997 T9.9091 Tm0 Twtement,

[449] *See* Summary of Communications (July 9, 2010) at 1 (consumer group representative stated that the consumer should be able to withdraw all funds from the account at any time).

[450] *See, e.g.*, *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (alleging that defendants regularly withdrew money from consumers' trust accounts to pay their operating expenses); *FTC v. Edge Solutions, Inc.*, No. CV-07-4087, First Interim Report of Temporary Receiver at 3 (E.D.N.Y. Oct. 23, 2007) (noting that "customer funds in the amount of $601,520 were missing from the receivership defendants' accounts and unaccounted for by the receivership defendants"); *see also* GAO Testimony, *supra* note 50, at 27 (discussing a case study in which the U.S. Department of Justice prosecuted a debt settlement company for using funds in customer escrow accounts to cover overdrafts from the defendant's operating account and make payments to his wife).

[451] The safeguards appear to be consistent with the practices of many industry members. For example, a service provider stated that it is an independent firm and the "special purpose" or dedicated bank accounts that its system manages are owned and controlled by consumers. GCS at 1-2.

[452] Pursuant to the pre-existing TSR, in an outbound telephone call or an internal or external upsell, sellers and telemarketers of debt relief services must promptly disclose several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; and (3) the nature of the goods or services being offered. 16 CFR 310.4(d). They must also, in any telephone sales call, disclose cost and certain other material information before consumers pay. 16 CFR 310.3(a)(1). As discussed in Section III.D.2., the Commission received very few comments addressing these disclosures.

[453] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs.*, 103 F.T.C. 110, 174-83 (1984) ("Deception Policy Statement"); *see also FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Gill,* 265 F.3d 944, 950 (9th Cir. 2001).

[454] Deception Policy Statement, *supra* note 453, at 171.

[455] *FTC v. Simeon Mgmt. Corp.,* 532 F.2d 708, 716 (9th Cir. 1976); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 300 (D.D.C. 1983).

In some circumstances, silence also may be deceptive. Silence associated with the appearance of a particular product, the circumstances of a specific transaction, or ordinary consumer expectations represents that the product is reasonably fit for its intended purpose. Deception Policy Statement, *supra* note 453, at 170. For example, in connection with the sale of a car, consumers assume in the absence of other information that the car can go fast enough for

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vary in their willingness to make concessions, and their position often changes with time. Debt settlement firms must have the latitude to make the most favorable settlements for a client, and this requires flexibility to determine the order and timing of settlements."); *see* CRN (Oct. 8, 2009) at 6 ("Amounts and terms of settlement fluctuate and are hard to predict, so setting a predetermined time or amount of settlement might prevent debt relief providers from getting consumers the best settlement as quickly as possible. Such a result could occur if a creditor unexpectedly makes a settlement offer to a consumer that, if accepted, would disrupt the previously disclosed schedule of time and amount of settlement for the other enrolled debts."); MD (Oct. 26, 2009) at 29-30.

One provider objected to the money accumulation proposed disclosure (§ 310.3(a)(1)(viii)(B)) because programs that allow for payments over time do not require accumulation of the entire amount needed to settle the debt. Able (Oct. 21, 2009) at 26. The Commission believes that the disclosure is warranted even if the consumer only has to accumulate a lesser amount, since that amount still may be substantial, especially for consumers who are in financial distress.

[473] Thus, if a debt settlement provider expects that a creditor will make an initial settlement offer for 95% of the debt owed, but it knows that consumers historically settle debts with that creditor for 60% after a certain amount of time has passed, compliance with this provision requires disclosure of the estimated time it would take and the amount of money the consumer would have to accumulate before the 60% settlement offer is obtained.

[474] The other disclosures required in subsections (A) and (B) do not use the term "specific."

[475] *TSR Proposed Rule*, 74 FR at 49019. In the proposed rule, this was § 310.3(a)(1)(viii)(E).

[476] *See* CFA at 9.

[477] *TSR Proposed Rule,* 74 FR at 41995. *See* WV AG (Googel), Tr. at 44-45.

[478] *See* AFSA at 2; CFA at 18; CFA (Plunkett), Workshop Tr. at 102 (noting that the length of time it takes to achieve settlement, combined with withheld payments, has a negative effect on consumers); *see also* Fair Isaac Corp., *Understanding Your FICO Score*, at 7 (noting that payment history typically is the most important factor used to determine a consumer's FICO score), *available at* (*http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf*); see also TSR Proposed Rule, 74 FR at 42002.

[479] In addition, as frequently noted by the Commission, a consumer's credit score can impact the availability and/or terms of a wide variety of benefits, including loans, employment, rental property, and insurance. *See, e.g.*, FTC, Need Credit or Insurance? Your Credit Score Helps Determine What You'll Pay, *available at* (*http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.shtm*).

[480] The Credit CARD Act of 2009 sets some limits on the fees and penalties that credit card companies can charge delinquent consumers. Pub. L. No. 111-24, § 511(a)(1)&(2), 123 Stat. 1734 (May 22, 2009). That Act, however, does not prohibit default fees and thus does not diminish the importance of this disclosure.

[481] Third party collectors are governed by the FDCPA. 15 U.S.C. 1692a(6), 1692c. Creditors

[484] TASC (Oct. 26, 2009) at 15.

[485] *See* 16 CFR 310.6(b)(3) (exempting "[t]elephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c)").

[486] 11 U.S.C. 109(h); AICCCA at 1.

[487] MD (Oct. 26, 2009) at 30.

[488] *Id.*; MD (Mar. 22, 2010) at E-2.

[489] *See* Able (Oct. 21, 2009) at 26. The commenter noted, however, that his company currently makes this disclosure to consumers.

[490] *TSR Proposed Rule,* 74 FR at 42002.

[491] The stop-payment instruction is especially persuasive in those instances when the provider misrepresents or obscures the fact that some or all of the consumer's payments to the provider are going towards its fees, rather than the consumer's debts. *See* SBLS at 4; *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM, Mem. Supp. Mot. T.R.O. at 8-9 (D. Colo. Mar. 20, 2007) ("Defendants lead consumers to conclude that, once enrolled, the Defendants in

[506] *TSR Proposed Rule*, 74 FR at 49019. Some commenters suggested additional disclosures related to lawsuits,

[499] Able (Oct. 21, 2009) at 26.

[500] CRN at 6.

[501] USOBA (Ansbach), Tr. at 75-76.

[502] Consumer research shows that consumers' ability to process information and make rational choices may be impaired if the quantity of the information is too great. *See generally,* Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment*, 21(3) Psychology & Marketing 159, 177 (Mar. 2004); Yu-Chen Chen et al., *The Effects of Information Overload on Consumers' Subjective State Towards Buying Decision in the Internet Shopping Environment*, 8(1) Electronic Commerce Research and Applications 48 (2009).

[503] 16 CFR 310.3(a)(2)(x).

[504] *Id.* at 42019.

[505] *See* AFSA at 2; ABA at 4; TASC (Oct. 26, 2009) at 15.

[533] CRN at 5;

[531] *See* NACCA (Keiser), Tr. at 217-18; CU (Hillebrand), Tr. at 218-19; QLS at 5; *see also* CFA (Grant), Tr. at 218 (a dropout rate is very important, especially if success claims are permitted and there is no advance fee ban in place).

[532] Among other things, the rule would have to identify the conditions under which a consumer would be considered to have dropped out, *e.g.,* at what point the consumer would be deemed to have completed, or not completed, the program. This could be a difficult determination in that many debt relief services involve payments – and services – that take place over time. Thus, for example, if a consumer terminates a debt settlement program after 80% of his debts were settled, should he be considered a dropout? The rule also would have to account for new entrants into the market that would lack data on which to calculate a drop out rate. Without standardization of all of these factors, consumers could not compare the dropout rates of different providers.

[550] The final provision contains only four minor revisions. First, it corrects two typographical errors by inserting the words "or" and "the" into the prohibition against misrepresenting "the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors *or* debt collectors to negotiate, settle, or modify the terms of *the* customer's debt." (emphasis added). For consistency purposes, the Final Rule also replaces the word "consumer's'" with the word "customer's" in the prohibition against misrepresenting "the effect of the service on collection efforts of the *customer's* creditors or debt collectors." (emphasis added). "Customer" is defined in Section 310.2(l) of the TSR and used throughout the Rule."

Finally, the Commission added the phrase "or make a bona fide offer" to clarify that the misrepresentation provision prohibits misrepresentations about the amount that the customer must accumulate before the provider initiates attempts to settle the debt and/or about the amount that a customer must accumulate before the provider makes a bona fide settlement offer or other offer to renegotiate, settle, or modify the terms of the customer's debt.

[551] *See, e.g.,* TASC (Oct. 26, 2009) at 16; USOBA (Oct. 26, 2009) at 17-18; Orion (Oct. 1, 2009) at 1; CareOne at 4; AICCCA at 5; CFA at 3, 20; NAAG (Oct. 23, 2009) at 11; AFSA at 9 ("Each specified misrepresentation is sufficiently widespread to justify inclusion in the Rule.").

[552] *See, e.g.,* CSA (Witte), Tr. at 65; USOBA (Ansbach), Tr. at 108 ("[The] Commission has got two things down, that I think are widely supported, the disclosures and misrepresentations.").

[553] *See* MD (Oct. 26, 2009) at 37-38; Able (Oct. 21, 2009) at 30.

[554] *See TSR Proposed Rule,* 74 FR at 41991-41997.

[555] *See, e.g.,* NACCA at 4 (recommending that the Commission specifically prohibit misrepresentations concerning whether any savings may be taxable income and the use of lead generators).

[556] *See* Deception Policy Statement, *supra* note 453, at 174-83.

[557] NAAG concurred that the practices prohibited under Section 310(a)(2)(x) are likely already prohibited by the FTC Act and state unfair and deceptive trade practices statutes, but agreed that codifying them under the TSR will clarify the law and debt relief providers' obligations. NAAG (Oct. 23, 2009) at 11; *see also* CFA at 3 (stating that Section 310.3(a)(2)(x) "provides greater clarity to debt relief service providers regarding the types of claims that the FTC will consider to be deceptive").

[558] *See, e.g.,* CRN (Bovee), Tr. at 28; SBLS (Tyler), Tr. at 162; ACCORD (Oct. 9, 2009) at 2; CFA at 4.

[559] *See, e.g., FTC v. JPM Accelerated Servs., Inc.,* No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (alleging that defendant misrepresented that consumers could pay off debt three to five times faster without increasing monthly payes, tw029 Tw

more critically material to a consumer in financial distress.

A second provision of § 310.3(a)(2)(x) prohibits misrepresentations regarding "the effect of the service on a customer's creditworthiness." As described earlier in this SBP, representations on this topic are highly material to consumers for whom lower credit scores will impair their ability to get credit, insurance, or other benefits in the future.

Third, § 310.3(a)(2)(x) prohibits a telemarketer from making misrepresentations about the "effect of the service on collection efforts of the consumer's creditors or debt collectors." This provision will ensure that providers do not misrepresent that they can stop creditors or debt collectors from contacting or attempting to collect from consumers, a practice in which a significant number of providers have engaged.[561] Again, this is highly material information that consumers need to make an informed purchaser's decision.

Fourth, § 310.3(a)(2)(x) prohibits misrepresentations relating to "the percentage of customers who attain the represented results." As discussed above, debt relief providers covered by the Rule commonly make success rate claims in their advertising and telemarketing.[562] These claims are highly material to consumers' purchase decisions. Yet a large percentage of customers of these providers do not obtain the results promised.[563] In fact, it appears that well over half of consumers who enroll in these programs drop out before they have completed them.[564]

Fifth, § 310.3(a)(2)(x) prohibits misrepresentations about "whether a service is offered or provided by a nonprofit entity."[565] Such claims are material because they lend credibility and trustworthiness to the entity making them. The Commission has brought several law enforcement actions against entities that masqueraded as nonprofits when, in fact, they operated for the profit of their principals.[566] This problem was particularly common in the credit counseling industry before the IRS took action to scrutinize and, where appropriate, decertify § 501(c)(3) CCAs.

b. Savings Claims

The sixth example of a misrepresentation barred by § 310.3(a)(2)(x) relates to claims about "the amount of money or the percentage of the debt amount that a customer may save by using such service." Below, the Commission explains in some detail the nature of these misrepresentations and how providers can make non-deceptive claims.

A pivotal claim made in most debt relief advertising and telemarketing pitches is that the offered plan can save the consumer money, either by lowering monthly payments or by eliminating debt altogether through substantially reduced, lump sum settlements. Many of these claims are very specific, promising, for example, settlements for 40% to 60% of the debt owed.[567] In many cases, however, these highly material claims are false or misleading.[568] In particular, the record shows that many debt settlement providers have made specific and unqualified claims about the savings enrollees will receive that greatly exaggerate or misrepresent what consumers are likely to experience.[569]

Based on the record, the Commission has identified four fundamental deficiencies in the data that debt relief providers often use to support their savings claims. All of these deficiencies inflate the savings consumers are likely to obtain.

First, as described above, many providers calculate savings without accounting for the additional debt and costs consumers incur as a result of interest, late fees, and other charges imposed by the creditor(s) or debt collector(s) during the course of the program.[570] Second, providers often omit the fees consumers pay to the provider from their calculations of the savings.[571] By ignoring the creditor and provider-associated costs, the claims overstate the amount consumers actually save. Third, providers frequently exclude from their calculation of savings those consumers who dropped out or were otherwise unable to complete the program, and fourth, providers frequently exclude individual accounts that were not settled successfully.[572] Thus, the savings claimed by the provider

[561] A coalition of consumer groups, in their written comments, urged the Commission also to bar debt relief services from: (1) instructing or advising consumers to stop making payments directly to their creditors; (2) instructing or advising consumers to stop communicating directly with their creditors; or (3) re-routing consumers' bills so that creditors send them to the debt relief service. *See* CFA at 2, 18. The Commission believes that the disclosure requirements in § 310.3(a)(1)(viii)(C) of the Final Rule, along with the prohibition against material misrepresentations, are sufficient to protect consumers.

[562] In its review of 100 debt settlement websites, *supra* note 50, FTC staff found that 86% of the 100 debt settlement websites reviewed represented that the provider could achieve a specific level of reduction in the amount of debt owed. Again, such claims are highly material.

[563] Data from the debt settlement industry support this assertion. *See supra* Section III.C.2.a; *see also* FTC Case List, *supra* note 27.

[564] *Supra* Section III.C.2.a.1.

[565] This prohibition applies only to misrepresentations; thus, it does not prevent a bona fide nonprofit entity from claiming that it is a nonprofit. *See, e.g.*, FECA (Oct. 26, 2009) at 10 (requesting that the Commission clarify the scope of § 310.3(a)(2)(x) regarding the prohibition against misrepresenting nonprofit status).

[566] *Supra* Section I.C.1.

[567] *See, e.g.*, *FTC v. Credit Restoration Brokers, LLC*, 2:10-cv-00030-CEH-SPC (M.D. Fla. filed Jan. 19, 2010) (promising to settle consumers' debts for between 30 cents to 50 cents on the dollar); *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (promising to reduce amount owed to 50% to 60% of amount at time of enrollment); *FTC v. Connelly*,No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006) (promising to reduce overall amount owed by up to 40% to 60%); *FTC v. Nat'l Consumer Council, Inc.*, No. SACV04-0474 CJC (JWJX) (C.D. Cal. filed Apr. 23, 2004); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (promising to reduce consumers' debts by up to 50% to 70%); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (representing it could save consumers up to 70% of debt owed); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (promising to reduce debts by up to 60%); *see also, e.g.*, *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (promising to save consumers $2,500 or more); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (promising to save consumers $2,500 or more); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (promising to save consumers $4,000); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (promising to save consumers $2,500 or more); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *see also, e.g.*, *Florida v. CSA - Credit Solutions of Am., Inc.*, No. 09-CA-026438 (Fl. Cir. Ct. - 13th filed Oct. 2009) (alleging that defendant represented that it could reduce consumers debts by 50% or 60% within 12 to 36 months); Press Release, Illinois Attorney General, Attorney General Madigan Sues Two Debt Settlement Firms (May 4, 2009) (alleging that defendant represented to consumers that it could reduce their credit card debt by 40% to 60% and that consumers would be debt free in as little as 36 months), *available at* (*http://www.illinoisattorneygeneral.gov/pressroom/2009_05/20090504.pdf*); *California v. Freedom Debt Relief*, No. CIV477991 (Super. Ct. San Mateo Cty., consent judgment Oct. 30, 2008) (defendant allegedly represented that it could reduce consumers' debt by 40 to 60% and make consumers debt-free).

[568] *See supra* note 567;*see also, e.g.*, NAAG (Oct. 23, 2009) at 2 ("The primary consumer protection problem areas that have given rise to the States' actions include . . . unsubstantiated claims of consumer savings."); CU (Hillebrand), Tr. at 164-65 ("I think when you say consumers get 50 cents on the dollar is I'm going to save 50 cents on the dollar for all of my debt, and that does not account for tax consequences, does not account for the very serious impact of the unsettled debt . . . [and] it does not account for the fact that many of those consumers are going to finish without settling all of their debt."); NFCC at 3; SBLS at 2-5.

[569] Id.

[570] *Supra* Section III.C.2.a.(3).

[571] *Id.*

[572] *See id.*

[573] An advertiser cannot substantiate a claim based only on supportive data, while ignoring the countervailing data. *See, e.g., In re Kroger Co.*, 98 F.T.C. 639 (1979) (initial decision), *aff'd*, 98 F.T.C. at 721 (1981); FTC, *Dietary Supplements: An Advertising Guide for Industry* (1994) ("Advertisers should consider all relevant research relating to the claimed benefit of their supplement and should not focus only on research that supports the effect, while discounting research that does not."), *available at* (*http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm*).

Nonetheless, broadcast advertisements and

[580] In fact, all of the TSR provisions will now cover this industry, including, *e.g.,* the provision prohibiting assisting and facilitating another engaged in TSR violations, § 310.3(b), the prohibition on the use of threats or intimidating or profane language, § 310.4(a)(1), and the recordkeeping requirements, § 310.5.

[581] § 310.3(a)(2)(i).Some providers request consumers' billing information during the sales call or pressure consumers to return payment authorization forms and signed contracts as quickly as possible following the call. *See, e.g., FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (alleging "[c]onsumers who agree to enroll . . . are sent an initial set of enrollment documents from Debt Set Colorado. During their telephone pitches, the defendants' telemarketers also exhort consumers to fill out the enrollment documents and return the papers as quickly as possible . . . . Included in these documents are forms for the consumer to authorize direct withdrawals from the consumer's checking accors-.0pTgllll 0 Ryhe

[588] *See* § 310.6(b)(5) & (6).

[589] The Commission previously had created certain carve-outs to the general exemption for inbound calls made as part of the sale of products or services that have been the subject of significant fraudulent or deceptive telemarketing activity, such as advertisements relating to investment opportunities and certain business opportunities. *Id.*

[590] Outbound calls to solicit the purchas

[603] Although the Commission received very few comments addressing the recordkeeping requirements, one debt settlement company stated that the recordkeeping requirements may impose a minor cost but should not substantively affect the business. Able (Oct. 21, 2009) at 32.

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

[605] Inbound telemarketing calls in response to advertisements in any medium other than direct mail solicitation are generally exempt from the Rule's coverage under the "general media exemption.

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further estimates that 126,959,820 consumers have one or more credit cards. This figure, in turn, is then multiplied by the most recently available Federal Reserve Board data regarding the delinquency rate for credit cards. The Federal Reserve Board reported that the delinquency rate for credit cards was 6.58% in the third quarter of 2009.[626] Multiplying this delinquency rate by the estimated number of consumers having one or more credit cards – 126,959,820 – results in an estimate of 8,353,956 consumers with delinquent accounts. As before, staff assumes that each of these consumers will receive and place a call for debt relief services in a given year.

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

To determine the number of inbound debt relief calls attributable to general media advertising versus direct mail advertising, staff relied upon the DMA estimate that 78.8% of direct marketing is done by general media methods[627] and that 21.2% of direct marketing is done by direct mail.[628] Applying these percentages to the above-noted estimate of 8,353,956 inbound debt relief calls translates to 6,582,917 calls resulting from general media advertising and 1,771,039 calls arising from direct mail. Staff then estimated that 1/3 of inbound direct mail debt relief calls, or 590,346 such calls, are currently exempt from the TSR because they are in response to direct mail advertising that makes the requisite § 310.3(a)(1) disclosures. The remaining 2/3, or 1,180,692 inbound direct mail calls, are non-exempt.

a. Existing Respondents' Disclosure Burden

As discussed above, the amended Rule includes a new provision, § 310.3(a)(1)(viii), which includes four disclosures specific to providers of debt relief services; moreover, the Commission eliminated three disclosures set forth in the proposed rule. Staff estimates that reciting these disclosures in each sales call pertaining to debt relief services will take 10 seconds.[629]

For outbound calls, the disclosure burden for existing entities from the new debt relief disclosures is 4,112 hours (5,921,500 outbound calls involving debt relief x 10 seconds each (for new debt relief disclosures) x 25% TSR burden).

Similarly, currently non-exempt inbound calls – inbound calls placed as a result of direct mail solicitations that do not include the § 310.3(a)(1) disclosures – will only entail the incremental PRA burden resulting from the new debt relief disclosures. As noted above, this totals 1,180,692 such calls each year. The associated disclosure burden for these calls would be 820 hours (1,180,692 non-exempt direct mail inbound calls x 10 seconds for debt relief disclosures x 25% burden from TSR).

Thus, the total disclosure burden under the amended Rule for all existing respondents is 4,932 hours (4,112 hours for entities conducting outbound calls + 820 hours for entities conducting inbound, non-exempt telemarketing).

b. New Respondents' Disclosure Burden

New respondents – those currently exempt from the Rule's coverage as a result of the direct mail or general media exemptions for inbound calls – will incur disclosure burden not only for the debt relief disclosures in § 310.3(a)(1)(viii), but also for the existing general disclosures for which such entities will newly be responsible.[630]

As noted above, inbound calls responding to debt relief services advertised in general media are currently exempt from the Rule.[631] The disclosure burden for these calls would be 18 seconds each (8 seconds for existing § 310.3(a)(1) disclosures + 10 seconds for debt relief disclosures). Applying this unit measure to the estimated 6,582,917 inbound debt relief calls arising from general media advertising, the cumulative disclosure burden is 8,229 hours per year (6,582,917 inbound debt relief calls in response to general media advertising x 18 seconds x 25% burden from TSR).

Applying the previously stated estimates and assumptions, the 200Cost: $nds,361 non-exemp5 0 TemarEhe 200Cos

credit-card-industry-facts-personal-debt-statistics-1276.php.)

[626] FRB, *Federal Reserve Statistical Release: Charge Offs and Delinquency Rates on Loans and Leases at Commercial Banks, available at* (*http://www.federalreserve.gov/releases/chargeoff/delallsa.htm*) (reporting a 6.58% delinquency rate for credit cards for the third quarter of 2009).

[627] *Id.*

[628] *DMA Statistical Fact Book* at 17.

[629] This estimate considers commenters' input while excluding the time pertaining to disclosures that are not invoked by the amended Rule.

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

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

[632] This rounded figure is derived from the mean hourly earnings shown for computer support specialists found in the National Compensation Survey: Occupational Earnings in the United States 2008, U.S. Department of Labor released August 2009, Bulletin 2720, Table 3 ("Full-time civilian workers," mean and median hourly wages), *available at* (*http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables*).

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

[634] This rounded figure is derived from the mean hourly earnings shown for telemarketers found in the National Compensation Survey: Occupational Earnings in the United States 2008, U.S. Department of Labor released August 2009, Bulletin 2720, Table 3 ("Full-time civilian workers," mean and median hourly wages), *available at* (*http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables*).

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

[636] 5 U.S.C. 601-612.

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

[638] 5 U.S.C. 603.

[639] 5 U.S.C. 604.

[640] 5 U.S.C. 605.

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

[642] USOBA (Oct. 26, 2009) at 20 ("95% of USOBA members would 'certainly' or 'likely' be forced to lay off employees if the advance fee ban were adopted [note that 72% of these USOBA members were 'small businesses' (firms of 25 people or less)]").

[643] Able (Oct. 21, 2009) at 28.

[644] *See* 16 CFR 310.6(b)(3).

[645] Able (Oct. 21, 2009) at 28.

[646] Two other debt settlement companies stated that many small business entities would not be able to enter the market due to significant investment and overhead costs and extended break-even time. SDS (Oct. 7, 2009) at 3; CRN (Oct. 8, 2009) at 5. Again, the commenters did not provide support for the assertions and did not explain why small businesses would fare differently than large businesses in this regard.

[647] With respect to the disclosures, NACCA questioned whether it was realistic that the proposed disclosures could be provided in 20 seconds. NACCA at 2. Moreover, a debt settlement company stated that it provides consumers with 16 mandatory disclaimers, and an additional 6 disclosures if applicable – it estimates that reading the disclaimers, and allowing the consumer to assent to the disclosures, requires approximately four and a half minutes. MD (Oct. 26, 2009) at 21.

[648] One commenter stated that, as a "smaller operation," it would not be able to front employees salaries, as well as account set-up and maintenance costs, but did not provide any data to support these assertions or support the assertion that small

[657] If the disclosures are made in writing, they are

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS CITED IN THE SBP—Continued
TSR Debt Relief Final Rule

Short-name/Acronyms	Commenter
Loeb	Loeb & Loeb, LLC
MP	Manchester Publishing Company, Inc.
McInnis	Saundra McInnis
MD	Morgan Drexen, Inc.
MD AG	Office of the Maryland Attorney General
MN AG	Office of the Minnesota Attorney General
MN LA	Mid-Minnesota Legal Assistance
NACCA	National Association of Consumer Credit Administrators
NAAG	National Association of Attorneys General
Neal	Erin Neal
NYC DCA	N.Y.C. Dept. of Consumer Affairs
NFCC	National Foundation for Credit Counseling
NWS	Nationwide Support Services, Inc.
Orion	Orion Processing, LLC
Palmiero	Diane Palmiero, on behalf of Century Negotiations, Inc.
Paquette	Barbara Paquette
Patel	David Patel
Pratt	Vincent Pratt
QSS	Quality Survey Services
QLS	Queens Legal Services
RDRI	Responsible Debt Relief Institute
RADR	Rise Above Debt Relief
SBLS	South Brooklyn Legal Services
Seigle	John Seigle
Silverman	Jeffrey Silverman
SOLS	Southeastern Ohio Legal Services
SDS	Superior Debt Services
Smith	Andrew Smith
Taillie	Alex Taillie
TASC	The Association of Settlement Companies
TBDR	Two Bridge Debt Resolutions
ULC	Uniform Law Commission/National Conference of Commissioners on Uniform State Laws
USOBA	United States Organizations for Bankruptcy Alternatives
USDR	US Debt Resolve, Inc.
Weinstein	Bernard Weinstein
Wheat	Sharon Wheat
WV AG	Office of the West Virginia Attorney General

List of FTC Law Enforcement Actions Against Debt Relief Companies

1. *FTC v. Dominant Leads, LLC,* No. 1:10-cv-00997 (D.D.C. filed June 15, 2010) (debt settlement)
2. *FTC v. Asia Pacific Telecom, Inc.*, No. 10 C 3168 (N.D. Ill. filed May 24, 2010) (debt negotiation)
3. *FTC v. Advanced Mgmt. Servs. NW,* LLC, No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (debt negotiation)
4. *FTC v. Credit Restoration Brokers,* LLC, No. 2:10-cv-0030-CEH-SPC (M.D. Fla. filed Jan. 19, 2010) (debt settlement and credit repair)
5. *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill., preliminary injunction issued Dec. 17, 2009) (debt negotiation)
6. *FTC v. Econ. Relief Techs., LLC,* No. 09-CV-3347 (N.D. Ga., preliminary injunction issued Dec. 14, 2009) (debt negotiation)
7. *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla., preliminary injunction issued Dec. 31, 2009) (debt negotiation)
8. *FTC v. MCS Programs, LLC*, No. 09-CV-5380 (W.D. Wash., final order July 19, 2010) (debt negotiation)
9. *FTC v. Group One Networks, Inc.*, No. 09-CV-00352 (M.D. Fla., preliminary injunction issued March 25, 2009) (debt negotiation)
10. *FTC v. Edge Solutions, Inc.*, No. CV 07-4087-JG-AKT (E.D.N.Y., final order Aug. 29, 2008) (debt settlement)
11. *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo., final order Apr. 11, 2008) (debt settlement)
12. *FTC v. Select Pers. Mgmt., Inc.*, No. 07-CV-0529 (N.D. Ill., final order May 15, 2009) (debt negotiation)
13. *FTC v. Express Consolidation*, No. 0:06-CV-61851-WJZ (S.D. Fla., final order May 5, 2007) (credit counseling)
14. *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal., final order Oct. 2, 2008) (debt settlement)
15. *United States v. Credit Found. of Am.*, No. CV06-3654 ABC (VBKx) (C.D. Cal., final order June 16, 2006) (credit counseling)
16. *FTC v. Integrated Credit Solutions, Inc.*, No. 8:06-CV-00806-SCB-TGW (M.D. Fla., final order Oct. 16, 2006) (credit counseling)
17. *FTC v. Debt Solutions, Inc.*, No. CV06-0298 (W.D. Wash., final order June 18, 2007) (debt negotiation)
18. *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC(Ex) (C.D. Cal., final order Dec. 12, 2004) (debt settlement)
19. *FTC v. Nat'l Consumer Council, Inc.*, No. ACV04-0474CJC (JWJX) (C.D. Cal., final order Apr. 1, 2005) (credit counseling and debt settlement)
20. *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326 (WG4) (D. Mass., final order Mar. 28, 2005) (debt settlement)
21. *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 8:04-CV-1674-T-17MSS (M.D. Fla., final order Mar. 30, 2005) (credit counseling)
22. *FTC v. Innovative Sys. Tech., Inc.,* No. CV04-0728 (C.D. Cal., final order July 13, 2005) (debt settlement)
23. *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md., final order May 17, 2006) (credit counseling)

List of State Law Enforcement Actions Against Debt Relief Companies

Debt Settlement

Attorney General Actions

1. *Alabama v. Allegro Law LLC*, No. 2:09cv729 (M.D. Ala. 2009). Press Release, Alabama Attorney General, *A.G. King and Securities Commission Sue Prattville Companies Operating Alleged National Debt Settlement Scheme* (July 10, 2009), *available at* (*http://www.ago.state.al.us/news_template.cfm?Newsfile=www.ago.alabama.gov/news/07102009.htm*)

2. *California v. Freedom Debt Relief*, No. CIV477991 (Cal. Super. Ct. San Mateo County 2008). Consent Judgment, Stipulation for Entry of Consent Judgment, and Complaint, *available at* (*http://www.corp.ca.gov/ENF/pdf/f/FDR.pdf*)

3. *In re Clearone Advantage, LLC* (Colo. 2009). Press Release, Colorado Attorney General, *Eleven Companies Settle with the State Under New Debt-Management and Credit Counseling Regulations* (Mar. 12, 2009), *available at* (*http://www.coloradoattorneygeneral.gov/press/news/2009/03/12/eleven_companies_settle_state_under_new_debt_management_and_credit_counseling_*)

4. *In re Credit Answers, LLC* (Colo. 2009). Press Release, *supra* item 3.

5. *In re Debt Relief of Am.* (Colo. 2009). Press Release, *supra* item 3.

6. *In re Fin. Freedom Res., Inc.* (Colo. 2009). Press Release, *supra* item 3.

7. *In re Freedom Debt Relief* (Colo. 2009). Press Release, *supra* item 3.

8. *In re New Beginnings Debt Settlement, LLC* (Colo. 2009). Press Release, *supra* item3.

9. *In re New Life Debt Relief Corp.* (Colo. 2009). Press Release, *supra* item 3.

10. *In re PDL Assistance, Inc.* (Colo. 2009). Press Release, *supra* item 3.

11. *In re Pemper Cos., Inc.* (Colo. 2009). Press Release, *supra* item3.

12. *Colorado v. ADA Tampa Bay, Inc. dba Am. Debt Arbitration, FGL Clearwater, Inc. dba Am. Debt Arbitration, and Glenn P. Stewart* (Colo. 2010).

13. *Florida v. Hess Kennedy Chartered LLC*, No. 08007686 (Fla. Cir. Ct. - 17th 2008). Complaint, *available at* (*http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7C2GSH/$file/HessComplaint.pdf*)

14. *Florida v. New Leaf Assocs., LLC*, No. 05-4612-CI-20 (Fla. Cir. Ct. - 6th 2008). Complaint, *available at* (*http://myfloridalegal.com/webfiles.nsf/wf/mray-6e3juf/$file/newleafcomplaint.pdf*)

15. *Florida v. Hacker*, (Fla. Cir. Ct. - 4th 2008). Complaint, *available at* (*http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7C2GRC/$file/HackerandCaparellaComplaint.pdf*)

16. *Florida v. Ryan Boyd*, No. 16-2008-CA-002909 (Fla. Cir. Ct. - 4th 2008). Press Release, Florida Attorney General, *Two Duval County Debt Negotiation Companies Sued for Alleged Deceptions* (Mar. 5, 2008), *available at* (*http://myfloridalegal.com/__852562220065EE67.nsf/0/1E9B7637235FE16C85257403005C595F?Open&Highlight=0,ryan,boyd*)

17. *Florida v. Credit Solutions of Am., Inc.*, No. 09-CA-026438 (Fla. Cir. Ct. - 13th 2009). Complaint, *available at* (*http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7WYJAU/$file/CSAcomplaint.pdf*)

18. *Florida v. Nationwide Asset Servs., Inc., et al.* (Fla. Cir. Ct. - 6th 2009). Complaint, *available at* (*http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7WYJCD/$file/ADAcomplaint.pdf*)

19. *In re Christian Crossroads*. Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/85256309005085AB.nsf/0/3BEE2927780BC9468525765D0044C534?Open&Highlight=0,christian,crossroads*)

20. *In re Clear Fin. Solutions*. Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/__85256309005085AB.nsf/0/C0634690070A696285257585005670EB?Open&Highlight=0,clear,financial*)

21. *In re Clearview Credit, Inc.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/__85256309005085AB.nsf/0/7FAE8CB0EA0BCE5F852575BD0066D4BD?Open&Highlight=0,clearview,credit*)

22. *In re Debt Settlement USA*. Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/__85256309005085AB.nsf/0/21B6A5099EFC61FE852576A500751189?Open&Highlight=0,debt,services*)

23. *In re Emergency Debt Relief, Inc.* Press Release, Florida Attorney General, *Crist Reaches $230,000 Settlement with Debt Relief Company* (Fla. Apr. 27, 2006), *available at* (*http://myfloridalegal.com/__852562220065EE67.nsf/0/EA12BA531A5B606A8525715D00602067?Open&Highlight=0,emergency,debt*)

24. *In re Genesis Capital Mgmt., Inc.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/85256309005085AB.nsf/0/ACF49525909A2F3585257632005F0071?Open&Highlight=0,genesis*)

25. *In re M & J Life Mgmt.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/__85256309005085AB.nsf/0/A2F454A33AEC8213852574DA0066174E?Open&Highlight=0,life,management*)

26. *In re Sapphire Mktg.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (*http://myfloridalegal.com/__85256309005085AB.nsf/0/CF68D500F2C776FD85257633004B8AE6?Open&Highlight=0,sapphire*)

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balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.

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

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

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

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

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

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

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

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

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

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

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

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

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

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

(z) *Prize promotion* means:

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

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

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

(bb) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

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

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

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[659] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment. In the case of debt relief services, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before the consumer enrolls in an offered program.

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

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

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

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

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

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

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

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

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

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

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

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

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

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

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

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

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

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

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

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

310.4 Abusive telemarketing acts or practices.

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

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

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

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

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

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

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

(5) (i) Requesting or receiving payment of any fee or consideration for any debt relief service until and unless:

(A) the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;

(B) the customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and

(C) to the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:

(1) bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or

(2) is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount actually paid to satisfy the debt.

(ii) Nothing in § 310.4(a)(5)(i) prohibits requesting or requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors or debt collectors in connection with the renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of a debt, provided that:

(A) the funds are held in an account at an insured financial institution;

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

[665]

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

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

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

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

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

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

(*2*) Immediately thereafter disconnects the call; and

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

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

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

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

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

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

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

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

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or -1.1111 o reqr'sj-1 -1.1111) I all other c],l, anor on behon messaghe yon acting on behalf of the seller or -1.ypress-

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

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

maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

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

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

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

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

310.9 Severabilit .

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

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,

Secretary.

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