



Federal Trade Commission

CONSUMER PROTECTION AND THE DEBT SETTLEMENT INDUSTRY: A VIEW FROM THE COMMISSION

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before

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I. INTRODUCTION

My remarks today will be about consumer protection challenges in the debt settlement industry. To begin with, though, I'd like to engage in some "straight talk" from Washington about the credit situation in the U.S. today, and how we got here.

You all know about the "subprime lending" that has occurred, and the foreclosure crisis it has partially spawned. With the downturn in the economy and record job losses, credit card debt is said to be emerging as the next financial crisis.² According to the Federal Reserve Board's

¹The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner. I would like to express my appreciation to Carolyn Hann, my attorney advisor, for her contributions to this speech.

²See "Consumers Feel the Next Crisis: It's Credit Cards," Oct. 29, 2008, *The New York Times*, available at:
<http://www.nytimes.com/2008/10/29/business/29credit.html?scp=10&sq=credit%20card&st=cse>

most recent estimate, American consumers carry approximately \$973.6 billion in revolving debt.³ As troubled borrowers fall behind on their payments, many creditors anticipate substantial defaults on credit card debt this year.⁴

Whose fault is it that we Americans have borrowed too much money – whether for houses, tuition, cars, or for other goods or services? It’s not the for-profit debt settlement firms. Not surprisingly, the industry offering debt settlement services to consumers has grown exponentially, from about a dozen firms 10 years ago to at least 500 to date.⁵ To be sure, a number of debt settlement scams are now occurring, and I’ll get to those in a moment. But they didn’t cause the credit bubble in the first place.

Neither, arguably, is the American consumer to blame. To the contrary, for years, we were told American

³See Federal Reserve Board, G.19 Statistical Release (released Mar. 6, 2009) (preliminary estimate), *available at* <http://www.federalreserve.gov/releases/G19/Current/> (last accessed Mar. 23, 2009).

⁴“Credit Card Companies Willing to Deal Over Debt,” Jan. 2, 2009, *The New York Times*, *available at* <http://www.nytimes.com/2009/01/03/business/03collect.html>.

⁵“Desperate Debtors are Ripe Targets; Promises to Wipe Credit Slate Clean Often Prove Empty,” Aug. 3, 2008, *Chicago Tribune*. *See also* “Look Out for That Lifeline: Debt-Settlement Firms are Doing a Booming Business – and Drawing the Attention of Prosecutors and Regulators,” Mar. 17, 2008, *Business Week*.

E.g., FTC v. First Alliance Mortgage Co., No. 00-964 (C.D. Cal. 2000).

me start by sharing with you the views of some others about the state of the industry.

First, a

⁷“Desperate Debtors are Ripe Targets; Promises to Wipe Credit Slate Clean Often Prove Empty,” Aug. 3, 2008, *Chicago Tribune*.

⁸See FTC, “Consumer Protection and the Debt Settlement Industry: An FTC Workshop” (Sept. 25, 2008) (“FTC Workshop”), *available at* <http://www.ftc.gov/bcp/workshops/debtsettlement/index.shtm>.

⁹*See, e.g.*, O’Neill, FTC Workshop Transcript (“Tr.”), *available at* <http://www.ftc.gov/bcp/workshops/debtsettlement/OfficialTranscript.pdf>, at 94, 98, 119; Flores, Tr. at 164-170; Plunkett, Tr. at 99-106.

¹⁰*Id.*

See “Help With My

¹³All of these cases ended in settlement orders against the defendants. *See FTC v. Debt-Set, Inc.* (“*Debt-Set*”), No. 07-00558 (D. Colo. 2007); *FTC v. Dennis Connelly, et al.* (“*Dennis Connelly*”), No. 06-701 (C.D. Cal. 2006); *FTC v. Innovative Systems Technology, Inc., d/b/a Brig*

¹⁵FTC news release, “Debt Reduction Companies Settle with FTC” (Feb. 14, 2008); FTC news release, “Debt Reduction Defe

Third, debt settlement ads should disclose, clearly and conspicuously, the negative impact that participation in a program may have on a consumer's credit score, and how long that impact may linger. This disclosure should not be made only in the written contract, but in the ad itself.

Fourth, if a debt settlement firm promises to refund debt settlement service fees to consumers if their debt settlement negotiations are unsuccessful, the firm must honor that promise. Moreover, if the refund is subject to certain terms and conditions, they should be clearly and conspicuously disclosed before the consumer signs up for the program.²⁰

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any Finally, I believe certain practices should be prohibited in the debt settlement industry.

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²⁰*See, e.g., FTC v. Debt Solutions, Inc.* (“*Debt Solutions*”), No. 06-0298 (W.D. Wash. 2006)(defendants allegedly guaranteed a “full refund” if consumers did not see a savings of at least \$2500, but did not adequately disclose that refund eligibility was conditioned on the consumer's following a specific computer-generated debt reduction payment schedule, not on the defendants' successful negotiation).

²¹*See* Credit Repair Organizations Act, 15 U.S.C. § 1679b(b) (“No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before any such service is fully performed.”).

the consumer's express, prior written consent.

Ultimately, the goal should be that consumers have complete and accurate information about debt settlement, as well as other options such as credit counseling and bankruptcy, before they choose a course of action.

III. OPTIONS FOR IMPROVING DEBT SETTLEMENT

I see four possible ways to improve practices in the debt settlement industry. The first is Magnuson-Moss Act rulemaking, which the FTC can start on its own initiative. The second is rulemaking under the Administrative Procedure Act. Third, are law enforcement actions, which are an ongoing FTC priority. Last, but certainly not least, are self-regulatory efforts by the debt settlement industry.

A. Magnuson-Moss Act Rulemaking

The FTC's rulemaking authority was codified in 1975 by the Magnuson-Moss Act,²² which added Section 18 to the FTC Act. Section 18 authorizes the FTC to issue trade regulation rules – that is, “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5 of the FTC Act.²³ For example, in the past the FTC has issued trade regulation rules on credit practices, negative

²²Pub. L. No. 93-637, § 202(a), 88 Stat. 2183 (1975).

²³15 U.S.C. § 57a(a)(1)(B).

²⁴16 C.F.R. §§ 444 (credit practices), 425 (negative option plans), 460 (home insulation).

²⁵15 U.S.C. § 45(m)(1)(C).

²⁶15 U.S.C. § 57b(b).

²⁷*See, e.g., Katharine Gibbs School v. FTC*, 612 F.2d 658 (2d Cir. 1979)(holding that trade regulation rule penalizing vocational schools for every student dropout, regardless of cause, did not adequately identify unfair or deceptive acts or practices in the industry “with specificity”).

15 U.S.C. § 57a(b)(1)(A).

must allow parties to present rebuttal evidence and cross-examination.³⁰ In past Mag-Moss rulemaking, the procedures have taken three to 10 years to complete.³¹ The risk and cost to consumers in the interim may be too great.

B. Administrative Procedure Act Rulemaking

The FTC also can issue rules under a number of statutes other than the FTC Act that address particular conduct. For example, the Telemarketing and Consumer Fraud and Abuse Prevention Act³² directs the FTC to issue rules prohibiting deceptive or abusive telemarketing practices. These rules can be promulgated using Administrative Procedure Act rulemaking procedures. Like Mag-Moss, APA rulemaking requires the FTC to publish a notice of proposed rulemaking and allow interested parties to submit comments.³³ However, in contrast to Mag-Moss, APA procedures do not require a hearing, an opportunity for rebuttal and cross-examination, or a determination of prevalence.

On the positive side, APA rulemaking enables the FTC to streamline its rule promulgation. In fact, in some instances, the FTC has completed APA rulemaking in less than a

³⁰15 U.S.C. § 57a(c)(2).

³¹For example, promulgation of the FTC's Credit Practices Rule, 16 C.F.R. § 444, took almost ten years.

³²15 U.S.C. §§ 6101 *et seq.*

³³5 U.S.C. § 553(b)-(c).

year.³⁴ However, a potential down side is the range of enforcement tools available for APA rule violations. Specifically, the FTC cannot always seek civil penalties or consumer redress for violations of these rules, as it can for violations of Mag-Moss rules. Rather, whether violations of a particular APA rule are subject to civil penalties and consumer redress will depend on the express language of that rule's enabling statute.³⁵

C. Law Enforcement Actions

Case-by-case law enforcement in this area is an ongoing FTC priority. Since 2001, the FTC has brought 14 cases against defendants offering debt relief services.³⁶ Half of these cases

³⁴Examples include APA rulemaking by the FTC pursuant to the Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (2003). *See, e.g.*, Prescreen Opt-Out Disclosure Rule, 69 Fed. Reg. 58861 (Oct. 10, 2004) (proposed rule), 70 Fed. Reg. 5022 (Jan. 31, 2005) (final rule), effective Aug. 1, 2005; Free Annual File Disclosures Rule, 69 Fed. Reg. 13192 (March 16, 2004) (proposed rule), 69 Fed. Reg. 35468 (June 24, 2004) (final rule), effective Dec. 1, 2004.

³⁵*E.g.*, Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102 (providing that a violation of rules promulgated pursuant to the Telemarketing Act “shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act . . . regarding unfair or deceptive acts or practices,” thus enforceable through civil penalties and consumer redress); Truth in Lending Act, 15 U.S.C. § 1607 (“TILA”) (designating the FTC as one of the agencies responsible for enforcing TILA, does *not* provide civil penalty or consumer redress authority).

³⁶*FTC v. Edge Solutions, Inc.* (“*Edge Solutions*”), No. 07-4087 (E.D.N.Y. 2008); *Debt-Set*, No. 07-00558 (D. Colo. 2007); *FTC v. Select Personnel Mgmt, Inc.*, No. 07-0529 (N.D. Ill. 2007); *Dennis Connelly*, No. 06-701 (C.D. Cal. 2006); *FTC v. Randall Leshin, d/b/a Express Consolidation, et al.*, No. 06-61851 (S.D. Fla. 2006); *U.S. v. Credit Found. of Am.*, No. 06-3654 (C.D. Cal. 2006); *Debt Solutions*, No. 06-0298 (W.D. Wash. 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674 (M.D. Fla. 2004); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-00806 (M.D. Fla. 2006); *FTC v. National Consumer Council, Inc.*, No. 04-0474 (C.D. Cal. 2004); *FTC v. Better Budget Fin. Servs., Inc.* (“*Better Budget Fin. Servs.*”), No. 04-12326 (D. Mass. 2004); *Innovative Sys. Tech.*, No. 04-0728 (C.D. Cal. 2004); *FTC v. AmeriDebt, Inc., et al.*, No. 03-3317 (D. Md. 2003); *Jubilee Fin. Servs*, No. 02-6468 (C.D. Cal 2002).

³⁷*Edge Solutions*, No. 07-4087 (E.D.N.Y. 2008); *Debt-Set*, No. 07-00558 (D. Colo. 2007); *Dennis Connelly*, No. 06-701 (C.D. Cal. 2006); *Debt Solutions*, No. 06-0298 (W.D. Wash. 2006); *Better Budget Fin. Servs.*, No. 04-12326 (D. Mass. 2004); *Innovative Sys. Tech.*, No. 04-0728 (C.D. Cal. 2004); *Jubilee Fin. Servs.*, No. 02-6468 (C.D. Cal 2002).

³⁸*Id.*

³⁹*E.g.*, *Edge Solutions*, No. 07-4087 (E.D.N.Y. 2008).

⁴⁰*E.g.*, *Better Budget Fin. Servs.*, No. 04-12326 (D. Mass. 2004).

⁴¹*E.g.*, *Jubilee Fin. Servs.*, No. 02-6468 (C.D. Cal 2002).

⁴²*E.g.*, *Debt Solutions*, No. 06-0298 (W.D. Wash. 2006); *Innovative Sys. Tech.*, No. 04-0728 (C.D. Cal. 2004).

⁴³*E.g.*, *Debt-Set*, No. 07-00558 (D. Colo. 2007).

⁴⁴*E.g.*, *Dennis Connelly*, No. 06-701 (C.D. Cal. 2006).

Second, the Commission sought restitution of money lost by consumers pursuant to 15 U.S.C. § 13(b), which authorizes a federal district court to grant equitable relief whenever consumers are injured by violation of any law enforced by the agency. For example, in *Jubilee Financial Services*, th

⁴⁵“Jubilee Financial Services Defendants Banned from Providing Debt Negotiation Services” (Aug. 29, 2003), *available at* <http://www.ftc.gov/opa/2003/08/jubilee.shtm>.

⁴⁶*See, e.g.*, Remarks by J. Thomas Rosch, “Looking Backward and Forward: Some Thoughts on Consumer Protection” (Mar. 11, 2009), *available at* <http://www.ftc.gov/speeches/rosch/090311backwardforward.pdf>; Remarks by J. Thomas Rosch, “Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement” (Sept. 23, 2008), *available at* <http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf>; Remarks by J. Thomas Rosch, “The Importance of Self-Regulation: A View from the Federal Trade Commission” (Apr. 24, 2007), *available at* <http://www.ftc.gov/speeches/rosch/070424AmericanTeleservicesAssoc.pdf>.

the FTC to focus more efficiently on the activities of those who don't comply with the self-regulatory regime. Moreover, the judgment and experience of an industry in crafting rules themselves also can be of great benefit, especially where the business practices are complex and industry members have inside knowledge and experience to craft "best practices."

The best self-regulatory programs carry several hallmarks. First, they clearly address the problems they seek to remedy. Second, they are flexible and able to adapt to new developments within the industry. Third, they are widely followed by affected industry members. Fourth, they are visible and accessible to the public. Fifth, they are administered in a fashion that avoids conflicts of interest between the regulated firms, on the one hand, and the body doing the regulating, on the other hand. Finally, they objectively measure member performance and impose sanctions for noncompliance.

I would like to acknowledge the efforts of three trade associations, the American Association of Debt Management Organizations ("AADMO"), the United States Organizations for Bankruptcy Alternatives ("USOBA"), and The Association of Settlement Companies ("TASC"). Each of these organizations already meets some of the ha

⁴⁷For example, AADMO offers a State Law Guide for its members. A summary of this guide is available at www.aadmo.org/ci/php.

See <http://>

file its standards as an attachment to a public comment filed with the FTC, *see* <http://www.ftc.gov/os/comments/debtsettlementworkshop/536796-00036.pdf>, but this may not be an obvious resource for most consumers.

The public portion of USOBA's web site provides a brief description of the