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Federal Trade Commission

16 CFR Part 310

Telemarketing Sales Rule; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission ("Commission" or "FTC").

ACTION: Final rule amendments.

SUMMARY: In this document, the Commission adopts amendments to the Telemarketing Sales Rule ("TSR" or "Rule") that address the telemarketing of debt relief services. These amendments define debt relief services, prohibit debt relief providers from collecting fees until after services have been provided, require specific disclosures of material information about offered debt relief services, prohibit specific misrepresentations about material aspects of debt relief services, and extend the TSR's coverage to include inbound calls made to debt relief companies in response to general media advertisements. The amendments are necessary to protect consumers from deceptive or abusive practices in the telemarketing of debt relief services.

DATES: These final amendments are effective on September 27, 2010, except for § 310.4(a)(5), which is effective on October 27, 2010.

ADDRESSES: Requests for copies of these amendments to the TSR and this Statement of Basis and Purpose ("SBP") should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room 130, Washington, D.C. 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final amendments to the TSR and SBP, are available at (*http://www.ftc.gov*).

FOR FURTHER INFORMATION CONTACT: Alice Hrdy, Allison Brown, Evan Zullow, or Stephanie Rosenthal, Attorneys, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room NJ-3158, Washington, D.C. 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION:

I. Overview and Background

A. Overview

This document states the basis and purpose for the Commission's decision to adopt amendments to the TSR that were proposed and published for public comment on August 19, 2009.[1] After careful review and consideration of the entire record on the issues presented in this rulemaking proceeding, including public comments submitted by 321 interested parties,[2] the Commission has decided to adopt, with several modifications, the proposed amendments to the TSR intended to curb deceptive and abusive practices in the telemarketing of debt relief services. The Rule provisions will: (1) prohibit debt relief service providers[3] from collecting a fee for services until a debt has been settled, altered, or reduced; (2) require certain disclosures in calls marketing debt relief services; (3) prohibit specific misrepresentations about material aspects of the services; and (4) extend the TSR's coverage to include inbound calls made to debt relief companies in response to general media advertisements.

Beginning on September 27, 2010, sellers and telemarketers of debt relief services will be required to comply with the amended TSR requirements, except for § 310.4(a)(5), the advance fee ban provision, which will be effective on October 27, 2010.

B. The Commission's Authority Under the TSR

Enacted in 1994, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") targets deceptive and abusive telemarketing practices, and directed the Commission to adopt a rule with anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services.[4] Specifically, the Act directed the Commission to issue a rule defining and prohibiting deceptive and abusive telemarketing acts or practices.[5] In addition, the Act mandated that the FTC promulgate regulations addressing some specific practices, which the Act designated as "abusive."[6] The Act also authorized state attorneys general or other appropriate state officials, as well as private persons who meet stringent jurisdictional requirements, to bring civil actions in federal district court.[7]

Pursuant to the Act's directive, the Commission promulgated the original TSR in 1995 and subsequently amended it in 2003 and again in 2008 to add, among other things, provisions establishing the National Do Not Call Registry and addressing the use of pre-recorded messages.[8] The TSR applies to virtually all "telemarketing," defined to mean "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."[9] The Telemarketing Act, however, explicitly states that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the Federal Trade Commission Act ("FTC Act").[10] As a result, some entities and products fall outside the scope of the TSR.[11]

In addition, the Rule wholly or partially exempts several types of calls from its coverage. For example, the Rule generally exempts inbound calls placed by consumers in response to direct mail or general media advertising.[12]

[1] *TSR Proposed Rule,* 74 FR 41988 (Aug. 19, 2009). The TSR is set forth at 16 CFR 310.

[2] The comments and other material placed on the rulemaking record are available at (*http://www.ftc.gov/os/comments/tsrdebtrelief/index.shtm*). In addition, a list of commenters cited in this SBP, along with their short citation names or acronyms used throughout the SBP, follows Section V of this SBP. When a commenter submitted more than one comment, the comment is also identified by date.

[3] Throughout the SBP, the Commission uses the term "providers" to refer to "sellers and telemarketers" as defined in the TSR. "Seller" is defined as "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." 16 CFR 310.2(aa). "Telemarketer" is defined as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor." 16 CFR 310.2(cc).

[4] 15 U.S.C. 6101-6108. Subsequently, the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act's definition of "telemarketing" to encompass calls soliciting charitable contributions, donations, or gifts of money or any other thing of value.

[5] 15 U.S.C. 6102(a).

[6] 15 U.S.C. 6102(a)(3).

[7] 15 U.S.C. 6103, 6104.

[8] *TSR and Statement of Basis and Purpose and Final Rule ("TSR Final Rule"),* 60 FR 43842 (Aug. 23, 1995); *Amended TSR and Statement of Basis and Purpose ("TSR Amended Rule"),* 68 FR 4580 (Jan. 29, 2003); *Amended TSR and Statement of Basis and Purpose ("TSR Amended Rule 2008"),* 73 FR 51164 (Aug. 29, 2008).

[9] 16 CFR 310.2(cc) (using the same definition as the Telemarketing Act, 15 U.S.C. 6106(4)). The TSR excludes from the definition of telemarketing:

> 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.

Id.

[10] 15 U.S.C. 6105(b).

[11] *See* 15 U.S.C. 44, 45(a)(2), which exclude or limit from the Commission's jurisdiction several types of entities, including bona fide nonprofits, bank entities (including, among others, banks, thrifts, and federally chartered credit unions), and common carriers, as well as the business of insurance.

[12] 16 CFR 310.6(b)(5)-(6). Moreover, the Rule exempts from the National Do Not Call Registry provisions calls placed by for-profit telemarketers to solicit charitable contributions; such calls are not exempt, however, from the "entity-specific" do not

However, there are certain "carve-outs" from some of the TSR's exemptions that limit their reach, such as the carve-out for calls initiated by a customer in response to a general advertisement relating to investment opportunities.[13]

The TSR is designed to protect consumers in a number of different ways. First, the Rule includes provisions governing communications between telemarketers and consumers, requiring certain disclosures and prohibiting material misrepresentations.[14] Second, the TSR requires telemarketers to obtain consumers' "express informed consent" to be charged on a particular account before billing or collecting payment and, through a specified process, to obtain consumers' "express verifiable authorization" to be billed through any payment system other than a credit or debit card.[15] Third, the Rule prohibits as an abusive practice requesting or receiving any fee or consideration in advance of obtaining any credit repair services;[16] recovery services;[17] or offers of a loan or other extension of credit, the granting of which is represented as "guaranteed" or having a high likelihood of success.[18] Fourth, the Rule prohibits credit card laundering[19] and other forms of assisting and facilitating sellers or telemarketers engaged in violations of the TSR.[20] Fifth, the TSR, with narrow exceptions, prohibits telemarketers from calling consumers whose numbers are on the National Do Not Call Registry or who have specifically requested not to receive calls from a particular entity.[21] Finally, the TSR requires that telemarketers transmit to consumers' telephones accurate Caller ID information[22] and places restrictions on calls made by predictive dialers[23] and those delivering pre-recorded messages.[24]

C. Overview of Debt Relief Services

Debt relief services have proliferated in recent years as the economy has declined and greater numbers of consumers hold debts they cannot pay.[25] A range of nonprofit and for-profit entities – including credit counselors, debt settlement companies, and debt negotiation companies – offer debt relief services, frequently through telemarketing. Thus, consumers with debt problems have several options for which they may qualify. Those who have sufficient assets and income to repay their full debts over time, if their creditors make certain concessions (*e.g.*, a reduction in interest rate), can enroll in a debt management plan with a credit counseling agency. On the other end of the spectrum, for consumers who are so far in debt that they can never catch up, declaring Chapter 13 or Chapter 7 bankruptcy might be the most appropriate course. Debt settlement is ostensibly designed for consumers who fall between these two options, *i.e.*, consumers who cannot repay their full debt amount, but could pay some percentage of it.[26]

Over the last several years, the Commission has addressed consumer protection concerns about debt relief services through law enforcement actions,[27] consumer education,[28] and outreach to industry and other relevant parties.[29] The brief description of the debt relief services industry in the next section is based upon information in the record, the enforcement activities of the FTC and the states, and independent research by Commission staff.[30]

1. Credit Counseling Agencies

Credit counseling agencies ("CCAs") historically were nonprofit organizations that worked as liaisons between consumers and creditors to negotiate "debt management plans" ("DMPs"). DMPs are monthly payment plans for the repayment of credit card and other unsecured debt, enabling consumers to repay the full amount owed to their creditors under renegotiated terms that make repayment less onerous.[31] To be eligible for a DMP,

call provisions or the TSR's other requirements. 16 CFR 310.6(a).

[13] *See, e.g.,* 16 CFR 310.6(b)(5)-(6) (provisions related to general advertisements and direct mail solicitations).

[14] The TSR requires that telemarketers soliciting sales of goods or services promptly disclose several key pieces of information in an outbound telephone call or an internal or external upsell: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win. 16 CFR 310.4(d); *see also* 16 CFR 310.2(ee) (defining "upselling"). Telemarketers also must disclose in any telephone sales call the cost of the goods or services and certain other material information. 16 CFR 310.3(a)(1).

In addition, the TSR prohibits misrepresentations about, among other things, the cost and quantity of the offered goods or services. 16 CFR 310.3(a)(2). It also prohibits making false or misleading statements to induce any person to pay for goods or services or to induce charitable contributions. 16 CFR 310.3(a)(4).

[15] 16 CFR 310.4(a)(7); 16 CFR 310.3(a)(3).

[16] 16 CFR 310.4(a)(2).

[17] 16 CFR 310.4(a)(3). As the Commission has previously explained, [in] recovery room scams . . . a deceptive telemarketer calls a consumer who has lost money, or who has failed to win a promised prize, in a previous scam. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again.

TSR Final Rule, 60 FR at 43854.

[18] 16 CFR 310.4(a)(4); *see TSR Amended Rule,* 68 FR at 4614 (finding that these three services were "fundamentally bogus").

[19] 16 CFR 310.3(c).

[20] 16 CFR 310.3(b).

[21] 16 CFR 310.4(b)(iii).

[22] 16 CFR 310.4(a)(7).

[23] 16 CFR 310.4(b)(1)(iv) (a call abandonment safe harbor is found at 16 CFR 310.4(b)(4)).

[24] 16 CFR 310.4(b)(1)(v).

[25] *See, e.g.,* TASC (Oct. 26, 2009) at 7; NFCC at 2; Federal Reserve Board, *Charge-off and Delinquency Rates* (May 24, 2010), *available at* (*http://www.federalreserve.gov/releases/chargeoff/delallsa.htm*) (charting recent increase in credit card delinquency rate); *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers: Hearing on The Debt Settlement Industry: The Consumer's Experience Before the S. Comm. on Commerce, Science, & Transportation,* 111th Cong. at 1 (2010) (statement of Philip A. Lehman, Assistant Attorney General, North Carolina Department of Justice) ("NC AG Testimony").

[26] *See* Weinstein (Oct. 26, 2009) at 8 (*see* attached Bernard L. Weinstein & Terry L. Clower, *Debt Settlement: Fulfilling the Need for An Economic Middle Ground* at 7 (Sept. 2009) ("Weinstein paper")). It is not clear, however, how wide a "slice" of the debt-impaired population is suitable for debt settlement programs. *See* Summary of Communications (June 16, 2010) at 1 (according to industry groups, consumers who can afford to pay 1.5-2% of their debt amount each month should enter debt settlement). Moreover, even for those consumers for whom debt settlement might be appropriate, the practice of charging large advance fees makes it much less likely that those consumers can succeed in such a program. CFA at 9; CareOne at 4; *see* SBLS at 2-3.

[27] *See* List of FTC Law Enforcement Actions Against Debt Relief Companies, following Section V of the SBP, for a list of cases that the FTC has prosecuted since 2003 ("FTC Case List"). In addition, as detailed in the subsequent List of State Law Enforcement Actions Against Debt Relief Companies ("State Case List"), state law enforcement agencies have brought at least 236 enforcement actions against debt relief companies in the last decade.

[28] *See, e.g.,* FTC, *Settling Your Credit Card Debts* (2010); FTC, *Fiscal Fitness: Choosing a Credit Counselor* (2005); FTC, *For People on Debt Management Plans: A Must-Do List* (2005); FTC, *Knee Deep in Debt* (2005).

[29] In September 2008, the Commission held a public workshop entitled "Consumer Protection and the Debt Settlement Industry" ("Workshop"), which brought together stakeholders to discuss consumer protection concerns associated with debt settlement services, one facet of the debt relief services industry. Workshop participants also debated the merits of possible solutions to those concerns, including the various remedies that were subsequently included in the proposed rule. An agenda and transcript of the Workshop are available at (*http://www.ftc.gov/bcp/workshops/debtsettlement/index.shtm*). Public comments associated with the Workshop are available at (*http://www.ftc.gov/os/comments/debtsettlementworkshop/index.shtm*). As discussed below, in November 2009, the Commission held a public forum on issues specific to the rulemaking proceeding.

[30] A more detailed description of the history and evolution of these different forms of debt relief can be found in Section II of the Notice of Proposed Rulemaking in this proceeding.

[31] GP (Oct. 22, 2009) at 2; Cambridge (Oct. 26, 2009) at 1. Each creditor determines what, if any, repayment options to offer the consumer based on

Continued

a consumer generally must have sufficient income to repay the full amount of the debts, provided that the terms are adjusted to make such repayment possible. Credit counselors typically also provide educational counseling to assist consumers in developing manageable budgets and avoiding debt problems in the future.[32]

Nonprofit CCAs generally receive funding from two sources. First, consumers typically pay for their services: usually $25 to $45 to enroll in a DMP, followed by a monthly charge of roughly $25.[33] The second source of funding is creditors themselves. After a consumer enrolls in a DMP, the consumer's creditors often pay the CCA a percentage of the monthly payments the CCA receives. In the past, this funding mechanism, known as a "fair share" contribution, has provided the bulk of a nonprofit CCA's operating revenue, but these agencies now typically receive less than 10% of their revenue from such contributions.[34]

Over the past decade, a number of larger CCAs entered the market. Many of these CCAs obtained nonprofit status from the Internal Revenue Service. Other CCAs openly operated as for-profit companies. In response to illegal practices by some of these new entrants, the FTC and state attorneys general brought a number of enforcement actions challenging these practices.[35] Specifically, since 2003, the Commission has brought six cases against credit counseling entities for deceptive and abusive practices. In one of these cases, the FTC sued AmeriDebt, Inc., at the time one of the largest CCAs in the United States.[36] The defendants in these cases allegedly engaged in several common patterns of deceptive conduct in violation of Section 5 of the FTC Act.[37] First, most made allegedly deceptive statements regarding their nonprofit nature.[38] Second, they allegedly made frequent misrepresentations about the benefits and likelihood of success consumers could expect from their services. These included false promises to provide counseling and educational services[39] and overstatements of the amount or percentage of interest charges a consumer might save.[40] Third, the Commission alleged that these entities misrepresented material information regarding their fees, including making false claims that they did not charge upfront fees[41] or that fees were tax deductible.[42] In addition to allegedly violating the FTC Act, some of these entities were engaging in outbound telemarketing and allegedly violating the TSR, particularly the Rule's disclosure requirements and prohibitions of misrepresentations, as well as its provisions on certain abusive practices, including violations of the National Do Not Call Registry provision.[43]

Over the last several years, in response to abuses such as these, the

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), Transcript of Public Forum on Debt Relief Amendments to the TSR ("Tr."), at 77-78; RDRI at 2 (creditor fair share has fallen to 4% to 5% of consumer debt amounts and in some cases has been eliminated); NWS (Oct. 22, 2009) at 5 (*see* attached Walji paper at 5) (fair share is 4% to 10%); *see also* National Consumer Law Center, Inc. & Consumer Federation of America, *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants* at 10-12 (April 2003); NFCC (Binzel), Transcript of "Consumer Protection and the Debt Settlement Industry" Workshop, September 2008 ("Workshop Tr.") at 37; *but see* JH (Oct. 24, 2009) at 8 (without citation, the commenter states that CCAs receive 22.5% of the total amount collected from each consumer).

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

[36] *FTC v. AmeriDebt, Inc.,* No. PJM 03-3317 (D. Md., final order May 17, 2006). On the eve of trial, the FTC obtained a $35 million settlement and thus far has distributed $12.7 million in redress to 287,000 consumers. *See* Press Release, FTC, *FTC's AmeriDebt Lawsuit Resolved: Almost $13 Million Returned to 287,000 Consumers Harmed by Debt Management Scam* (Sept. 10, 2008), (*http://www.ftc.gov/opa/2008/09/ameridebt.shtm*).

[37] *See, e.g., FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *U.S. v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. AmeriDebt, Inc.,* No. PJM 03-3317 (D. Md. filed Nov. 19, 2003).

[38] *See U.S. v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Integrated Credit Solutions, Inc.,* No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006) *; FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *FTC v. Debt Mgmt. Found. Servs., Inc.,* No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004); *FTC v. AmeriDebt, Inc.,* No. PJM 03-3317 (D. Md. filed Nov. 19, 2003). Although the defendants in these cases had obtained IRS designation as nonprofits under IRC § 501(c)(3), they allegedly funneled revenues out of the CCAs and into the hands of affiliated for-profit companies and/or the principals of the operation. Thus, the FTC alleged defendants were "operating for their own profit or that of their members" and fell outside the nonprofit exemption in the FTC Act. *See* 15 U.S.C. 44, 45(a)(2).

As the Commission has stated in testimony before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, significant harm to consumers may accrue from misrepresentations regarding an entity's nonprofit status. *See Consumer Protection Issues in the Credit Counseling Industry: Hearing Before the Permanent Subcomm. on Investigations, S. Comm. on Governmental Affairs*, 108th Cong. 2d Sess. (2004) (testimony of the FTC) ("[S]ome CCAs appear to use their 501(c)(3) status to convince consumers to enroll in their DMPs and pay fees or make donations. These CCAs may, for example, claim that consumers' 'donations' will be used simply to defray the CCA's expenses. Instead, the bulk of the money may be passed through to individuals or for-profit entities with which the CCAs are closely affiliated. Tax-exempt status also may tend to give these fraudulent CCAs a veneer of respectability by implying that the CCA is serving a charitable or public purpose. Finally, some consumers may believe that a 'non-profit' CCA will charge lower fees than a similar for-profit."), *available at* (*http://www.ftc.gov/os/2004/03/040324testimony.shtm*).

[39] *See, e.g., FTC v. Integrated Credit Solutions*,No. 06-806-SCB-TGW(M.D. Fla. filed May 2, 2006); *U.S. v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. filed Apr. 23, 2004).

[40] *See U.S. v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Integrated Credit Solutions, Inc.,* No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004).

[41] *See FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. filed Nov. 19, 2003).

[42] *See FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *U.S. v. Credit Found. of Am.,* No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006). Other defendants allegedly claimed to have "special relationships" with the consumers' creditors. *See FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) .

[43] *See 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).

IRS has challenged the tax-exempt status of a number of purportedly nonprofit CCAs – both through enforcement of existing statutes and new tax code provisions.[44] To enhance the IRS's ability to oversee CCAs, in 2006 Congress amended the IRC, adding § 501(q) to provide specific eligibility criteria for CCAs seeking tax-exempt status as well as criteria for retaining that status.[45] Among other things, § 501(q) of the Code prohibits tax-exempt CCAs from refusing to provide credit counseling services due to a consumer's inability to pay or a consumer's ineligibility or unwillingness to enroll in a DMP; charging more than "reasonable fees" for services; or, unless allowed by state law, basing fees on a percentage of a client's debt, DMP payments, or savings from enrolling in a DMP.[46] In addition to receiving regulatory scrutiny from the IRS, as a result of changes in the federal bankruptcy code, 158 nonprofit CCAs, including the largest such entities, have been subjected to rigorous screening by the Department of Justice's Executive Office of the U.S. Trustee ("EOUST").[47] Finally, nonprofits must comply with state laws in 49 states, most of which set fee limits.[48]

2. For-Profit Debt Settlement Services

Debt settlement companies purport to offer consumers the opportunity to obtain lump sum settlements with their creditors for significantly less than the full outstanding balance of their unsecured debts. Unlike a traditional DMP, the goal of a debt settlement plan is for the consumer to repay only a portion of the total owed.

The Promotion of Debt Settlement Services

Debt settlement companies typically advertise through the Internet, television, radio, or direct mail.[49] The advertisements generally follow the "problem-solution" approach – consumers who are over their heads in debt can be helped by enrolling in the advertiser's program. Many advertisements make specific claims that appeal to the target consumers – for example, claims that consumers will save 40 to 50 cents on each dollar of their credit card debts[50] or will become debt-free.[51] The advertisements typically then urge consumers to call a toll-free number for more information.[52]

Consumers who call the specified phone number reach a telemarketer working for or on behalf of the debt settlement provider. The telemarketer obtains information about the consumer's debts and financial condition and makes the sales pitch, often repeating the claims made in the advertisements as well as making additional ones. If the consumer agrees to enroll in the program, the provider mails a contract for signature. Providers sometimes pressure consumers to return payment authorization forms and signed contracts as quickly as possible following the call.[53]

The Debt Settlement Program

In the typical scenario, consumers enroll one or more of their unsecured debts into the program and begin making payments into a dedicated bank account established by the provider.[54] These payments are apportioned in some fashion between the provider's fees and money set aside for settlements of the debts. According to industry representatives, debt settlement providers assess each consumer's financial condition and, based on that individualized assessment and the provider's historical experience, calculate a single monthly payment that

[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."); GAO Testimony, *supra* note 50, at 18.

[52] In its review of debt settlement websites, *see supra* note 50, FTC staff found that 91% of websites reviewed directed the consumer to call a telephone number to learn more about the service. The Commission also has observed this practice in its law enforcement experience. *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-CV-00558-RPM (D. Colo. filed Mar. 19, 2007); *FTC v. Edge Solutions*, *Inc.,* No. CV-07-4087 (E.D.N.Y. filed Sept. 28, 2007); *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Jubilee Fin. Servs., Inc.,* No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002).

[53] *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (Complaint ¶ 20) (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 account, to identify the amounts owed to various creditors, and a Client Agreement.").

[54] *See* SBLS at 1; USDR (Oct. 20, 2009) at 14; Orion (Jan. 12, 2009) at 5; NWS (Oct. 29, 2009) at 10 (*see* attached Walji paper at 10). In fact, most state debt management laws, including the Uniform Debt-Management Services Act ("UDMSA"), require providers to keep client funds in separate, dedicated bank accounts. ULC at 2; CareOne at 6.

the consumer must make to both save for settlements and pay the provider's fee.[55] The providers typically tell consumers that the monthly payments – often in the hundreds of dollars – will accumulate until there are sufficient funds to make the creditor or debt collector an offer equivalent to an appreciable percentage of the amount originally owed to the creditor. The provider generally will not begin negotiations with creditors until the consumer has saved money sufficient to fund a possible settlement of the debt.[56] The provider pursues settlements on an individual, debt-by-debt basis as the consumer accumulates sufficient funds for each debt. According to industry representatives, the process of settling all of a consumer's debts can take three years or more to complete.[57]

While the consumer is accumulating funds, the debt settlement provider often advises the consumer not to talk to the associated creditors or debt collectors.[58] In addition, some providers instruct the consumer to assign them power of attorney[59] and to send creditors a letter, directly or through the provider, instructing the creditor to cease communication with the consumer.[60] In some cases, providers have even executed a change of address form substituting their address for the consumer's, thereby redirecting billing statements and collection notices so that the consumer does not receive them.[61] Some providers represent that they maintain direct contact with the consumer's creditors or debt collectors and that collection calls and lawsuits will cease upon the consumer's enrollment in the debt settlement program.[62]

Debt Settlement Fee Models

Many debt settlement providers charge significant advance fees. Some require consumers to pay 40% or more of the total fee within the first three or four months of enrollment and the remainder over the ensuing 12 months or fewer.[63] These fees must be paid whether or not the provider has attempted or achieved any settlements. An increasing number of providers utilize a so-called "pay as you go" model, spreading the fees over the first fifteen months or more of the program, yet still requiring consumers to pay hundreds of dollars in fees before they receive a single settlement.[64] Even when providers spread the fee over the anticipated duration of the program (usually three years), consumers typically are required to pay a substantial percentage of the fee before any portion of their funds is paid to creditors.[65]

Many debt settlement companies break their fee into separate components, such as an initial fee, monthly fees, and/or contingency fees based on the amount of savings the company obtains for the consumer.[66] While fee models vary greatly, they generally require a substantial portion of the fee in advance of any settlements.[67] As described more fully below, the large initial commitment required of consumers has contributed to the high

[55] *See, e.g.,* FDR (Jan. 14, 2010) at 2; TASC (Oct. 26, 2009) at 7.

[56] USOBA (Oct. 26, 2009) at 32. A trade association reported that creditors may not consider settlements until an account is at least 60 days delinquent. USOBA (Oct. 26, 2009) at 32. If consumers are current on their debts, debt settlement providers sometimes advise them to stop making payments to their creditors so that they can achieve the duration of delinquency necessary for the provider to initiate negotiations. *Infra* note 73.

[57] DSA/ADE at 8; *see also* CO AG at 5 (based on data submitted by industry members, the average program length was 32.3 months).

[58] *See* CFA at 9; SOLS at 2; AFSA at 2; JH (Oct. 24, 2009) at 14; NC AG Testimony, *supra* note 25, at 3-4 ("The whole premise of debt settlement is based on consumers not paying their debts and not communicating with creditors."); *see also, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002).

[59] AFSA at 5 ("Debt settlement providers frequently use such means to block communication between the creditor and the consumer. This prevents the creditor from being able to put together a workout plan that would be free for the consumer."). However, ACA International ("ACA"), a trade organization representing third-party debt collectors, stated that the power of attorney documents prepared by debt settlement providers frequently are legally deficient under state law. *See* ACA Workshop Comment (Dec. 1, 2008) at 5-8. Further, unless presented by an attorney, a power of attorney may permit, but does not require, a creditor to contact the debt settlement provider. Accordingly, it appears that this strategy often does not stop collection calls, lawsuits, or garnishment proceedings, but instead may actually escalate the collection process. *See, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007)(alleging defendants sent power of attorney documents to consumers); *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (alleging that consumers were instructed to sign power of attorney forms); *FTC v. Nat'l Credit Council*, Case No. SACV04-0474 CJC (JWJx) (C.D. Cal. 2004) (alleging that defendants used power of attorney documents).

[60] AFSA at 6; RDRI at 5 ("The issuance of 'cease and desist' letters from debt settlement companies to creditors provides a false sense of security to consumers that their accounts are being successfully negotiated and that there is not any threat of impending legal action."); *see also* ACA Workshop Comment (Dec. 1, 2008) at 4-7; Consumer Bankers Association Workshop Comment (Dec. 1, 2008) at 2-3. Creditors have expressed displeasure, however, that once debt settlement providers intercede on behalf of consumers, the providers are not responsive to creditor contacts. *See, e.g.,* AFSA at 2. One workshop panelist representing the American Bankers Association ("ABA") noted that, even when successful, attempts to inhibit direct communication with consumers prevent creditors from informing consumers about available options for dealing with the debt and the ramifications of the failure to make payments. *See* ABA (O'Neill), Workshop Tr. at 96.

[61] *See, e.g., FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (alleging defendants instructed consumers, among other things, to submit change of address information to creditors so that mail would go directly to defendants); *FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM, Exs. Supp. Mot. T.R.O., at Exh. 7 (D. Colo. Mar. 20, 2007) (same).

[62] NACCA at 5; AFSA at 8; *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans* (Mar. 2, 2009) *, available at* (*http://www.bbb.org/us/article/bbb-on-differences-between-debt-consolidation-debt-negotiation-debt-elimination-plans-9350*).

[63] USDR (Oct. 20, 2009) at 2; NAAG (Oct. 23, 2009) at 3; CFA at 4, 8-10; SBLS at 4; QLS at 2; SOLS at 2; *see also, e.g., FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006) (alleging that defendants required consumers to make a "down payment" of 30% to 40% of the total fee in the first two or three months with the remainder paid over the following six to 12 months). A debt settlement trade association (USOBA) obtained information about providers' fee structures from 58 providers and reported that six of the 58 primarily use this "front end fee model." USOBA (Jan. 29, 2010) at 3 (providing no information as to whether the 58 respondents are representative of the trade association or the industry as a whole).

[64] DRS (Jan. 12, 2010) at 1 (fee of 15% of enrolled debt balance is collected over 15 months); FDR (Oct. 26, 2009) at 14 (fees are collected over the first 18 months or longer of the program); JH (Jan. 12, 2010) at 4 (The first payment goes toward fees; the remainder of the fee is collected in installments over one-half of the program. The company's total fee is 15% of enrolled debt, plus a $49 per month maintenance fee. Formerly, the company collected the 15% fee over the first 12 months.); Hunter at 3 ("[I]t is becoming more common for companies to charge a one-time, flat enrollment fee and prorate the remaining percentage of the fee over at least half the life of the program."); NC AG Testimony, *supra* note 25, at 4 ("a significant portion of the consumer's initial payments is diverted to the settlement company's fees.").

[65] *See* USOBA (Jan. 29, 2010) at 3; CSA (Witte), Tr. at 64 (company collects its entire fee monthly, in even amounts, throughout the program); USDR (Johnson), Tr. at 187 (same); SDS (Jan. 22, 2010) at 1-2 (no fee is taken from the first payment; the fee is then taken in equal amounts from the next 20 payments for 36-month programs).

[66] CRN (Jan. 21, 2010) at 4; FCS (Oct. 27, 2009) at 2; ACCORD (Oct. 9, 2009) at 2-3; SBLS at 4 (Financial Consulting Services, National Asset Services, and American Debt Arbitration, three different companies that share identical websites, have charged a "set-up fee" of $399, an "enrollment fee" equal to half of each of the first six monthly payments, a $49 monthly maintenance fee, a $7.20 monthly bank fee, and a settlement fee of 29% of the savings on each settlement. Two other providers, Debt Choice and the Palmer Firm, have charged an 8% set-up fee, a $65 monthly fee, and a 33% settlement fee on realized savings at the time of settlement. A debt settlement company called Allegro Law has charged a 16% fee collected over 18 months and a $59.99 monthly fee; the 16% fee is due immediately if the customer drops out of the program within the first 18 months. Morgan Drexen and the Eric A. Rosen law firm have charged a set-up fee of 5%, monthly fees of $48, and a 25% settlement fee based on realized savings at time of settlement).

[67] GAO Testimony, *supra* note 50, at 9. The wide variety of fee models makes it difficult for consumers to shop for the lowest cost service. *See* Loeb (Mallow), Tr. at 206.

rate at which consumers drop out of these programs before their debts are settled.

Consumer Protection Concerns

Debt settlement plans, as they are often marketed and implemented, raise several consumer protection concerns. First, many providers' advertisements and ensuing telemarketing pitches include false, misleading, or unsubstantiated representations, including claims that

- the provider will or is highly likely to obtain large debt reductions for enrollees, *e.g.,* a 50% reduction of what the consumer owes;[68]
- the provider will or is highly likely to eliminate the consumer's debt entirely in a specific time frame, *e.g.*, 12 to 36 months;[69]
- harassing calls from debt collectors and collection lawsuits will cease;[70]
- the provider has special relationships with creditors and expert knowledge about available techniques to induce settlement;[71] and
- the provider's service is part of a government program, through the use of such terms as "credit relief act," "government bailout," or "stimulus money."[72]

Many providers also tell consumers that they can, and should, stop paying their creditors, while not disclosing that failing to make payments to creditors may actually increase the amounts consumers owe (because of accumulating fees and interest) and will adversely affect their creditworthiness.[73] The rulemaking record, discussed in detail below, establishes that a large proportion of consumers who enter a debt settlement plan do not attain results close to those commonly represented.

In the context of the widespread deception in this industry, the advance fee model used by many debt settlement providers causes substantial consumer injury. Consumers often are not aware that their initial payments are taken by the provider as its fees and are not saved for settlement of their debt; in many instances, providers deceptively underestimate the time necessary to complete the program.[74] As a result, many consumers fall further behind on their debts, incur additional charges, harm their creditworthiness, including credit scores, and, in some cases, suffer legal action against them to collect the debt.[75] Moreover, in a large percentage of cases, consumers are unable to continue making payments while their debts remain undiminished and drop out of the program, usually forfeiting all the payments they made towards the provider's fees.[76]

Both the Commission and state enforcers have brought numerous law enforcement actions targeting deceptive and unfair practices in the debt settlement industry.[77] Since 2001, the Commission has brought nine actions against debt settlement entities under the FTC Act for many of the abuses detailed above.[78] As in the FTC's actions against deceptive credit counselors, these suits commonly alleged that the provider misrepresented, or failed to disclose adequately, the amount and/or timing of its substantial advance fees.[79] Additionally, the Commission alleged that the defendants in these cases falsely promised high success rates and results that were, in fact, unattainable;[80] misrepresented their refund policies;[81] and failed to disclose the accumulation of creditor late fees and other negative consequences of their programs.[82]

The states also have been active in attacking abuses in this industry. State regulators and attorneys general have filed numerous law enforcement actions against debt settlement providers[83] under their state unfair and deceptive acts and practices statutes[84] or other state laws or regulations.[85] In addition, many states have enacted statutes specifically designed to combat deceptive debt settlement practices;[86] in

[68] *Supra* note 50; *infra* note 566.

[69] *Supra* note 51.

[70] *See, e.g., 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); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002); GAO Testimony, *supra* note 50, at 13; *see also, e.g., In re Positive Return, Inc.* (Cal. Dep't of Corps., desist and refrain order May 28, 2004).

[71] *See, e.g., 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); Press Release, Florida Attorney General, *Two Duval County Debt Negotiation Companies Sued for Alleged Deceptions* (Mar. 5, 2008), *available at* (*myfloridalegal.com/__852562220065EE67.nsf/0/1E9B7637235FE1 6C85257403005C595F?Open&Highlight=0,ryan,boyd*); *In re Am. Debt Arb.*, No. 06CS01309 (Cal. Dep't of Corps., desist and refrain order June 30, 2008).

[72] *See, e.g.,* NAAG (July 6, 2010) at 2; *FTC v. Dominant Leads, LLC,* No. 1:10-cv-00997 (D.D.C. filed June 15, 2010); GAO Testimony, *supra* note 50, at 13-14; Steve Bucci, Bankrate.com, *Settle Credit Card Debt For Pennies?* (Feb. 2, 2010), *available at* (*http://www.bankrate.com/finance/credit-cards/settle-credit-card-debt-for-pennies-1.aspx*).

[73] *See, e.g.*, *FTC v. Connelly*,No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002); *see also* Texas Attorney General, Press Release, *Attorney General Abbott Pursues Restitution for Texans from "Debt Settlement Company" in Bankruptcy Court* (Aug. 20, 2009), *available at* (*http://www.oag.state.tx.us/oagNews/release.php?id=3088*); *Florida v. Hacker* (Fl. Cir. Ct. - 4th filed Feb 21, 2008); GAO Testimony, *supra* note 50, at 9; NC AG Testimony, *supra* note 25, at 4 ("The theory is that the older and more delinquent the debt, the easier it will be to negotiate."); *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) (Statement of Holly Haas) ("Haas Testimony"), at 2 ("We were instructed by [the debt settlement company] not to pay our credit card bills because the credit card companies would not negotiate settlements with current accounts."); RDRI at 5.

[74] *See, e.g.,* Debt Settlement USA, *Growth of the Debt Settlement Industry*,at 10 (Oct. 17, 2008) ("Fraudulent firms also regularly fail to provide the services promised to consumers by claiming that they can help them become debt free in an unrealistically short amount of time and/or promise too low of a settlement."); *see also, e.g., FTC v. Debt-Set, Inc.,* No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007).

[75] One of the Commission's enforcement actions, *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006), is particularly illustrative of the risk of litigation. In that case, between 2004 and 2005, nearly a third of defendants' 18,116 customers were sued by creditors or debt collectors. *See id.,*Trial Exs. 382, 561, 562, 623 & Schumann Test., Day 4, Vol. III, 37:21 - 40:12; 34:17 - 37:4.

[76] NC AG Testimony, *supra* note 25, at 4 ("If the consumer drops out before the settlement process is concluded, as is usually the case, he or she will lose the fee payments, while facing increased debt account balances."); *see infra* Section III.C.2.a.(1); FTC Case List, *supra* note 27.

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

[78] *See* FTC Case List, *supra* note 27.

[79] *See, e.g., FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (alleging that defendants misrepresented that they would not charge consumers any upfront fees before obtaining the promised debt relief, but in fact required a substantial upfront fee).

[80] *See, e.g., id; FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006).

[81] *See, e.g., FTC v. Innovative Sys. Tech., Inc.,* No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (defendants misrepresented that they would refund consumers' money if unsuccessful).

[82] *See, e.g., id.*; *FTC v. Connelly*,No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007).

[83] *See* State Case List, *supra* note 27.

[84] *See, e.g. State of Illinois v. Clear Your Debt, LLC,* No. 2010-CH-00167 (Cir. Ct. 7th Judicial Cir. filed Feb. 10, 2010); *State of Texas v. CSA-Credit Solutions of Am., Inc.*, No. 09-000417 (Dist. Travis Cty. filed Mar. 26, 2009); *State of Florida v. Boyd*, No. 2008-CA-002909 (Cir. Ct. 4th Cir. Duval Cty filed Mar. 5, 2008).

[85] *See, e.g.,* 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.ago.state.co.us/press_detail.cfmpressID=957.html*).

[86] Some states restrict the amount and timing of fees, including initial fees and subsequent monthly charges. In 2005, the Uniform Law Commission ("ULC") drafted the UDMSA in an attempt to foster consistent regulation of both for-profit and nonprofit debt relief services across the United States. ULC at 2. Among the key consumer protection provisions in the UDMSA are: a fee cap, mandatory education requirements, a requirement

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fact, six states have banned for-profit debt settlement services entirely.[87] Most state laws, however, allow these services but impose certain requirements or restrictions, for example, banning advance fees,[88] requiring that providers be licensed in the state,[89] providing consumers with certain key disclosures (*e.g.*, a schedule of payments and fees),[90] and granting consumers some right to cancel their enrollment.[91]

3. Debt Negotiation

In addition to credit counseling and debt settlement, there is a third category of debt relief services, often referred to as "debt negotiation." Debt negotiation companies offer to obtain interest rate reductions or other concessions to lower the amount of consumers' monthly payment owed to creditors.[92] Unlike DMPs or debt settlement, debt negotiation does not purport to implement a full balance payment plan or obtain lump sum settlements for less than the full balance the consumer owes.

Debt negotiation providers often market to consumers through so-called "robocalls."[93] Like debt settlement companies, some debt negotiation providers charge significant advance fees.[94] Additionally, like some debt settlement companies, debt negotiators may promise specific results, such as a particular interest rate reduction or amount of savings that will be realized.[95] In some cases, the telemarketers of debt negotiation services refer to themselves as "card services" or a "customer service department" during telephone calls with consumers in order to mislead them into believing that the telemarketers are associated with consumers' credit card companies.[96] In other cases, debt negotiators represent that they can secure savings for consumers, but the sole service provided is creation of an accelerated payment schedule that recommends increased monthly payments.[97] Although increased monthly payments would result in interest savings, consumers seeking these services usually cannot afford the recommended payments.

The FTC has brought nine actions against defendants alleging deceptive and abusive debt negotiation practices.[98] In each case, the defendants used telemarketing to deliver representations that they could reduce consumers' interest payments by specific percentages or minimum amounts. In many of these cases, the Commission also alleged that the defendants falsely purported to be affiliated, or have close relationships, with consumers' creditors.[99] Finally, in each case, the Commission charged defendants with violations of the TSR.

II. Overview of the Proposed Rule and Comments Received

On August 19, 2009, the Commission published its Notice of Proposed Rulemaking ("NPRM") proposing revisions to the TSR ("proposed rule") to cover debt relief services. The Commission proposed amendments to:

- Define the term "debt relief service" to cover any service to renegotiate, settle, or in any way alter the terms of a debt between a consumer and any unsecured creditor or debt collector, including a reduction in the balance, interest rate, or fees owed;
- Prohibit providers from charging fees until they have provided the debt relief services;
- Require providers to make six specific disclosures about the debt relief services being offered;
- Prohibit misrepresentations about material aspects of debt relief services, including success rates and whether a provider is a nonprofit entity; and
- Extend the TSR to cover calls consumers make to debt relief service

that the provider employ certified counselors, and accreditation requirements for sellers of debt management services. *Id.* To date, six states have adopted the UDMSA with some modifications; additional state legislatures currently are considering doing so. *Id.*

[87] *See, e.g.*, La. Rev. Stat. § 14:331, et seq.; N.D. Cen. Code § 13-06-02; Wyo. Stat. Ann. § 33-14-101, et seq.; Haw. Rev. Stat. Ann. § 446-2; Mass. Gen. Laws Ann. Ch. 180 § 4A; N.J. Stat. Ann. § 17:16G-2.

[88] N.C. Gen. Stat. § 14-423 et seq.

[89] *See, e.g.,* Kan. Stat. Ann. § 50-1116, et seq.; Me. Rev. Stat. Ann. Tit. 17 § 701, et seq. & tit. 32 § 6171, et seq., 1101-03; N.H. Rev. Stat. Ann. § 339-D:1, et seq.; Va. Code Ann. § 6.1-363.2, et seq.

[90] *See, e.g,.* Kan. Stat. Ann. § 50-1116, et seq.; N.H. Rev. Stat. Ann. § 339-D:1, et seq.; S.C. Code Ann. § 37-7-101, et seq.; Wash. Rev. Code § 18.28.010, et seq.

[91] *See, e.g.,* S.C. Code Ann. § 37-7-101, et seq.; Va. Code Ann. § 6.1-363.2, et seq.; Wash. Rev. Code § 18.28.010, et seq.

[92] NAAG (Oct. 23, 2009) at 3-4; MN AG at 2 ("Minnesotans are being deluged with phone calls and advertising campaigns promising to lower credit card interest rates, reduce bills, or repair damaged credit"); *see, e.g., FTC v. Advanced Mgmt. Servs. NW, LLC,* No. 10-148-LRS (E.D. Wash. filed May 10, 2010); *FTC v. Econ. Relief Techs., LLC,* No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009); *FTC v. Select Pers. Mgmt.,* No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *see also, e.g.,* Press Release, West Virginia Attorney General, *Attorney General McGraw Announces WV Refunds of $214,000 in Debt Relief Companies Settlement* (Jan. 13, 2010), *available at* (*http://www.wvago.gov/press.cfm?ID=500&fx=more*); Press Release, Minnesota Attorney General, *Attorney General Swanson Files Three Lawsuits Against companies Claiming to Help Consumers Lower Their Credit Card Interest Rates* (Sept. 22, 2009), *available at* (*http://www.ag.state.mn.us/consumer/pressrelease/090922ccinterestrates.asp*).

[93] *See, e.g., FTC v. Advanced Mgmt. Servs. NW, LLC,* No. 10-148-LRS (E.D. Wash. filed May 10, 2010); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) .

[94] NAAG (Oct. 23, 2009) at 3-4; *FTC v. Advanced Mgmt. Servs. NW, LLC,* No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (alleging defendants charged an upfront fee of $499 to $1,590); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (alleging defendants charged an upfront fee of $990 to $1,495); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (alleging defendants charged an upfront fee of $495 to $1,995); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (alleging defendants charged an upfront fee of $495 to $995); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009) (alleging defendants charged an upfront fee of $595 to $895); *FTC v. Select Pers. Mgmt.,* No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007) (alleging defendants charged an upfront fee of $695); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging defendants charged an upfront fee of $399 to $629).

[95] *See, e.g., FTC v. Advanced Mgmt. Servs. NW, LLC,* No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (alleging defendants represented that if the consumer did not save the promised amount of $2,500 or more in a short time, the consumer would receive a full refund); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (alleging defendants represented that if consumers did not save a "guaranteed" amount – typically $4,000 or more – they could get a full refund of the upfront fee); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (alleging defendants claimed that their interest rate reduction services would provide substantial savings to consumers, typically $2,500 or more in a short time); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (same); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009) (alleging defendants represented they would provide consumers with savings of $1,500 to $20,000 in interest) *; FTC v. Select Pers. Mgmt.,* No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007) (alleging defendants represented consumers would save a minimum of $2,500 in interest); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging defendants promised to save consumers $2,500).

[96] MN AG at 2; *see also, e.g., FTC v. JPM Accelerated Servs., Inc.*, No. 09-cv-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010).

[97] NAAG (Oct. 23, 2009) at 3-4; *see also, e.g., FTC v. Advanced Mgmt. Servs. NW, LLC,* No. 10-148-LRS (E.D. Wash. filed May 10, 2010).

[98] *See* FTC Case List, *supra* note 27.

[99] *See, e.g., FTC v. Econ. Relief Techs., LLC*, No. 09-cv-3347 (N.D. Ga. filed Nov. 30, 2009); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26- MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009) (alleging defendants claimed to have "close working relationships with over 50,000" creditors); *FTC v. Select Pers. Mgmt.,* No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007) (alleging defendants claimed to be affiliated with consumers' credit card companies); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging that defendants claimed to have "special relationships" with creditors); *see also* MN AG at 2.

providers in response to general media advertising.

During the course of this rulemaking, the Commission received comments from 321 stakeholders, including representatives of the debt relief industry, creditors, law enforcement, consumer groups, and individual consumers.[100] Most industry commenters supported parts of the proposal but opposed the advance fee ban.[101] One industry member opposed virtually the entire proposal,[102] while a few supported the proposal as a whole.[103] In contrast, state attorneys general and regulators, consumer advocates, legal aid attorneys, and creditors generally supported the proposed amendments, including the advance fee ban.[104] The comments and the basis for the Commission's adoption or rejection of the commenters' suggested modifications to the proposed rule are analyzed in detail in Section III below.

On November 4, 2009, the Commission held a public forum to discuss the issues raised by the commenters in this proceeding. Many of those who had filed comments on the proposed rule participated as panelists at the forum, and members of the public had the opportunity to make statements on the record. A transcript of the proceeding was placed on the public record.[105] After the forum, Commission staff sent letters to trade associations and individual debt relief providers that had submitted public comments, soliciting additional information in connection with certain issues that arose at the public forum.[106] Sixteen organizations responded and provided data. Finally, Commission staff met with industry and consumer representatives to discuss the issues under consideration in the rulemaking proceeding.

III. Summary of the Final Amended Rule and Comments Received

The Commission has carefully reviewed and analyzed the entire record developed in this proceeding. The record, as well as the Commission's own law enforcement experience and that of its state counterparts, shows that amendments to the TSR are warranted and appropriate.[107] As discussed in detail in this SBP, the Final Rule addresses deceptive and abusive practices of debt relief service providers and includes the following elements:

- Defines the term "debt relief service" as proposed in the NPRM;
- Prohibits providers from charging or collecting fees until they have provided the debt relief services, but (1) permits such fees as individual debts are resolved on a proportional basis, or if the fee is a percentage of savings,[108] and (2) allows providers to require customers to place funds in a dedicated bank account that meets certain criteria;
- Requires four disclosures in promoting debt relief services, in addition to the existing disclosures required by the TSR: (1) the amount of time it will take to obtain the promised debt relief; (2) with respect to debt settlement services, the amount of money or percentage of each outstanding debt that the customer must accumulate before the provider will make a bona fide settlement offer; (3) if the debt relief program entails not making timely payments to creditors, a warning of the specific consequences thereof; and (4) if the debt relief provider requests or requires the customer to place funds in a dedicated bank account, that the customer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty, and receive all funds remitted to the account.
- Prohibits misrepresentations about material aspects of debt relief services, including success rates and a provider's nonprofit status; and
- Extends the TSR to cover calls consumers make to debt relief services in response to advertisements disseminated through any medium, including direct mail or email.

The final amended Rule adopted here is substantially the same in most respects to the proposed rule, but includes certain important modifications. The Commission bases these modifications on the entire record in this proceeding, including the public comments, the forum and workshop records, consumer complaints, recent testimony on debt settlement before Congress, and the law enforcement experience of the Commission and state enforcers. The major differences between the proposed amendments and the final amendments are as follows:

- The advance fee ban provision now explicitly sets forth three conditions before a telemarketer or seller may charge a fee: (1) the consumer must execute a debt relief agreement with the creditor; (2) the consumer must make at least one payment pursuant to that agreement; and (3) the fee must be proportional either to the fee charged for the entire debt relief service (if the provider uses a flat fee structure) or a percentage of savings achieved (if the provider uses a contingency fee structure);
- Notwithstanding the advance fee ban, the Final Rule allows providers to require consumers to place funds for the provider's fee and for payment to consumers' creditors or debt collectors into a dedicated bank account if they satisfy five specified criteria; and
- The Final Rule eliminates three of the proposed disclosures that the Commission has determined are unnecessary, and it adds one new disclosure.

A. Section 310.1: Scope

Many commenters raised concerns regarding the TSR's scope as applied to the debt relief industry, in particular its treatment of nonprofits, creditors, and debt collectors.[109] First, several commenters expressed concern that while nonprofit entities are a major part of the debt relief industry, the Rule does not apply to them, thus establishing a potential competitive imbalance. Some of these commenters requested that the FTC explicitly apply the Rule to nonprofits.[110] Others argued that the TSR is not an appropriate vehicle for regulating the debt relief industry because the FTC cannot regulate bona fide nonprofits through it.[111]

As stated above, the FTC Act exempts nonprofit entities, and, pursuant to the

[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 (*http://www.ftc.gov/bcp/rulemaking/tsr/tsr-debtrelief/index.shtm*) and in Room 130 at the FTC, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, telephone number: 202-326-2222.

[106] The letters are posted at (*http://www.ftc.gov/os/comments/tsrdebtrelief/index.shtm*).

[107] The Commission's decision to amend the Rule is made pursuant to the rulemaking authority granted by the Telemarketing Act to protect consumers from deceptive and abusive practices. 15 U.S.C. 6102(a)(1) and (a)(3).

[108] *See infra* Section III.C.5.b.

[109] The proposed rule did not modify the scope of the TSR.

[110] SOLS at 3; Orion (Oct. 1, 2009) at 1; CareOne at 8; TASC (Oct. 26, 2009) at 29.

[111] USOBA (Oct. 26, 2009) at 40; MD (Mar. 22, 2010) at 16 n.9; TASC (Young), Tr. at 229; *see also* USOBA (Ansbach), Tr. at 231-32; ULC at 6.

Telemarketing Act, this jurisdictional limit applies to the TSR.[112] As a result, the Commission has no discretion to include nonprofits in the Final Rule.[113] Nonprofits, however, must comply with 49 state laws and stringent IRS regulations.[114] These regulations include strict limitations on fee income.[115] Additionally, based on examination of consumer complaints and other research, and in light of the IRS and EOUST programs, it appears many of the concerns about deceptive practices, including deceptive claims of nonprofit status, have been addressed.[116] Thus, the Commission does not believe that the TSR's exclusion of nonprofits is likely to create an unfair competitive disadvantage for for-profit debt relief services.[117]

Some commenters raised concerns that the proposed rule could be read to apply to creditors and others collecting on unsecured debts to the extent that they offer concessions to individual debtors. For example, a financial services industry association expressed concern that the proposed rule would potentially cover an affiliate entity servicing an unsecured loan or credit card account on behalf of a creditor.[118] A banking trade group stated that the FTC should clarify that the Rule is not intended to apply to the legitimate outreach and loss mitigation activities of creditors and their agents or affiliates.[119] Similarly, an association of debt collectors sought to clarify that the Rule would exclude routine communications between consumers and credit grantors or debt collectors about settling debts, restructuring debt terms, waiving fees, reducing interest rates, or arranging for other account changes.[120]

The TSR only covers the practice of "telemarketing," defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services . . . ."[121] The types of debt collection and debt servicing activities described by the commenters do not fall within this definition because they are not intended to induce purchases. Therefore, it is unnecessary to explicitly exempt creditors or debt collectors from compliance with this provision of the Final Rule.[122]

B. Section 310.2: Definitions

The Final Rule defines "debt relief service" as "any service or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." This definition is virtually unchanged from the proposed rule.[123]

The Commission received several comments about the definition of "debt relief service" with respect to its (1) breadth, (2) limitation to unsecured debts, (3) product coverage, and (4) application to attorneys.

1. Breadth of Definition of Debt Relief Service

Several commenters addressed the breadth of the debt relief service definition. For example, the National Association of Attorneys General ("NAAG") supported the proposed definition, stating that because the debt relief industry is constantly evolving, the definition of "debt relief" should be broad enough to account for future developments in the industry.[124] NAAG noted that in recent years, the debt settlement industry has engaged in particularly abusive practices, but the same concerns exist with respect to all forms of debt relief.[125] The National Association of Consumer Credit Administrators ("NACCA") emphasized that many providers of debt relief services purchase consumer contact information from so-called "lead generators" – intermediaries that produce and disseminate advertisements for debt relief services to generate "leads" that they then sell to actual providers.[126] NACCA recommended that lead generators be covered by the Rule.[127] A coalition of consumer groups commented that the definition should be broad and include debt management, debt settlement, and debt negotiation,[128] noting that some companies provide a range of debt relief options.[129] A consumer law professor also advocated a definition that covers credit counseling and debt settlement, asserting that many of the abuses are common to both types of services.[130] Moreover, some industry commenters

[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] 15 U.S.C. 44 and 45(a)(2) (setting forth certain limitations to the Commission's jurisdiction with regard to its authority to prohibit unfair or deceptive acts or practices). Although nonprofit entities are exempt, telemarketers or sellers that solicit on their behalf are nonetheless covered by the TSR. *See TSR Amended Rule,* 68 FR at 4631. Indeed, several commenters requested that the Commission carve out an explicit exemption for nonprofits. *See, e.g.,* CareOne (Croxson), Tr. at 243. The Commission, however, believes it is unnecessary to state in the Rule what is already clear in the Telemarketing Act, and it therefore declines to include an express statement in the Rule that nonprofits are exempt. *See TSR Amended Rule,* 68 FR at 4586.

[114] *Supra* Section I.C.1; GP (McNamara), Tr. at 245-46. In addition, 158 nonprofit CCAs, including the largest entities, have been approved by the EOUST after rigorous screening.

[115] *Supra* note 33.

[116] The Commission is continuing to monitor this industry, particularly for evidence of a resurgence of sham nonprofits. *See* CareOne at 4 ("A wave of tough state debt management laws and increased federal oversight over the past several years has helped clean up the debt management side of the debt relief industry.").

[117] In any event, the government need not "regulate all aspects of a problem before it can make progress on any front." *FTC v. Mainstream Mktg. Servs., Inc.,* 358 F.3d 1228, 1238 (10th Cir. 2004) (holding that the FTC's Do Not Call Registry, which applies to commercial calls but not calls made by charities or politicians, was not unconstitutionally underinclusive under the First Amendment).

[118] AFSA at 7; *see also* FSR at 1-2 (the rule should clarify that the proposal does not include "the legitimate activities of servicers seeking collection on loans they own or service for others pursuant to *bona fide* servicing relationships.").

[119] ABA at 3.

[120] ACA at 6. NACCA also commented that it was not clear whether the Rule excludes holders of the debt or entities that are contracted to service the debt for the debt holder, and recommended that it exclude such entities. NACCA at 2.

[121] 16 CFR 310.2(dd).

[122] *See TSR Amended Rule,* 68 FR at 4615. In the event that a creditor or debt collector is engaging in the sale of a service to assist in altering debts of the consumer that it does not itself own or service, the entity would be subject to the Rule. More generally, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692, governs the debt collection practices of third-party collectors; creditors collecting on their own debts are not covered by the FDCPA, but are subject to the general prohibition of unfair or deceptive acts or practices in Section 5 of the FTC Act.

[123] The only difference is the addition of the word "program" to the definition to clarify that the term "service" is not intended to be limiting in any way. Thus, regardless of its form, anything sold to consumers that consists of a specific group of procedures to renegotiate, settle, or in any way alter the terms of a consumer debt, is covered by the definition. The definition is not intended, however, to cover services or products that offer to refinance existing loans with a new loan as a way of eliminating the original debts, as such a process would result in a new extension of credit that replaces the existing debts rather than altering them.

[124] NAAG (Oct. 23, 2009) at 4.

[125] Id.

[126] NACCA at 3 (representing 49 state government agencies that regulate non-depository consumer lending and debt relief companies); *see also* ULC at 7 ("The regulations go further than the UDMSA in reaching lead generation firms that solicit debtors for debt relief providers but provide no direct consumer services themselves. The ULC whole-heartedly supports this additional regulation."); *FTC v. Dominant Leads, LLC,* No. 1:10-cv-00997 (D.D.C. filed June 15, 2010) (alleging that defendants misrepresented that they were the government, or were affiliated with the government, on multiple websites, then provided consumers toll-free numbers connecting them to third-party companies that marketed purported debt relief services for a fee).

[127] NACCA at 3; *see also* GP (Oct. 22, 2009) at 2.

[128] CFA at 7-8.

[129] *Id.* at 7.

[130] Greenfield at 1.

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 rule by calling a service – in which the provider undertakes certain actions to provide assistance to the purchaser – a "product." Nor can a provider evade the rule by including a "product," such as educational material on how to manage debt, as part of the service it offers. The Commission further notes that deceptive or abusive practices in the telemarketing of products already are prohibited by the TSR and/or the FTC Act. Therefore, the Final Rule does not add the term "product" to the definition of "debt relief services."

4. Coverage of Attorneys

A number of commenters expressed views as to whether the Rule should cover attorneys who provide debt relief services. Several commenters argued that attorneys generally should be covered by the Rule when they are providing covered services.[141] One commenter stated that exempting attorneys would create a major loophole for providers engaged in deception or abuse.[142] A second commenter agreed that an exemption would make it easy for debt relief companies to ally themselves with lawyers to escape the Rule.[143] By contrast, two commenters argued that attorneys should be exempt from the Rule because state bars separately license them, and the bars' ethics rules and complaint systems

[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).

govern their behavior.[144] A different commenter, however, questioned whether state bar rules are effective in deterring unfair and deceptive practices.[145]

The existing TSR currently covers attorneys who engage in telemarketing.[146] Based on the record in this proceeding, the Commission has concluded that an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services is not warranted. The Commission believes that the final amended Rule strikes the appropriate balance between permitting attorneys to provide bona fide legal services and curbing deceptive and abusive practices engaged in by some attorneys in this industry. Several factors support this conclusion.

First, as a threshold matter, the TSR applies only to persons, regardless of their professional affiliation, who engage in "telemarketing" – i.e., "a plan, program, or campaign which is conducted to induce the purchase of goods or services" and that involves interstate telephone calls.[147] In general, attorneys who provide bona fide legal services do not utilize a plan, program, or campaign of interstate telephonic communications in order to solicit potential clients to purchase debt relief services. Thus, an attorney who makes telephone calls to clients on an individual basis to provide assistance and legal advice generally would not be engaged in "telemarketing."

Second, even if an attorney is engaged in telemarketing as defined in the TSR, it is common for the attorney to meet with prospective clients in person before agreeing to represent them. These attorneys would not be covered by the TSR under the Rule's exemption for transactions where payment is not required until after a face-to-face meeting.[148] It should be noted, however, that even in transactions falling within the face-to-face exemption, telemarketers must abide by certain restrictions in the Rule.[149]

Third, the Commission believes that attorneys acting in compliance with state bar rules and providing bona fide legal services already fall outside of the TSR's coverage in most instances. For example, state bar rules typically prohibit attorneys from making outbound telemarketing calls to prospective clients.[150] State bar rules also restrict another practice common to telemarketers – the provision of services to consumers in multiple states or nationwide.[151] State bar rules also require an attorney to provide basic, competent legal services and to charge a reasonable fee.[152] Accordingly, attorneys who limit their contact with clients to telemarketing calls and then charge hundreds or thousands of dollars for those services may also violate these rules. Finally, based on the Commission's experience, telemarketers frequently split fees, pay for referrals, and engage in other activity that would run afoul of other state bar rules.[153]

Fourth, it is important to retain Rule coverage for attorneys, and those partnering with attorneys, who principally rely on telemarketing to obtain debt relief service clients, because they have engaged in the same types of deceptive and abusive practices as those committed by non-attorneys and that are proscribed by the Rule. For example, attorneys have been sued in numerous law enforcement actions alleging deceptive practices in violation of the TSR.[154] In some cases, law enforcement authorities have alleged that a law firm served as a referral service for a non-attorney third party, and many consumers selected the company believing they would be represented by a law firm.[155] Some public comments also detailed deception and abuse by attorneys.[156] State bar rules, while important and

[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] *Id.* Model Rules of Prof. Conduct 5.4, 7.2(b) . *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) (noting that attorneys are being approached by mortgage loan modification entities and asked to enter impermissible fee sharing agreements).

[154] *See, e.g., FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007) (a Florida attorney, his debt management services company, and a telemarketer charged with using abusive telemarketing and deception to sell debt management services to consumers nationwide); *Florida v. Hess*, No. 08007686 (17th Jud. Cir., Broward Cty. 2008) *; Alabama v. Allegro Law LLC,* No. 2:2009cv00729 (M.D. Ala. 2009) *; North Carolina v. Hess Kennedy Chartered, LLC*, No. 08CV002310, (N.C. Super. Ct., Wake Cty. 2008); *California Dep't of Corps. v. Express Consolidation, Inc.*, No. 943-0122 (2008) *; In re The Consumer Protection Law Ctr.* (California Dep't of Corps. Amended Desist and Refrain Order filed Jan. 9, 2009); *(WV) State ex rel. McGraw v. Hess Kennedy Chartered LLC,* No. 07-MISC-454 (Cir. Ct., Kanawha Cty. 2007); *see also, e.g.,* Alabama State Bar, *The Alabama Lawyer*, 71 Ala. Law. 90, 91 (Jan. 2010) (noting suspension of attorney purporting to provide debt settlement services to over 15,000 consumers nationwide); Press Release, Maryland Attorney General, *Richard A. Brennan Jailed for Contempt: Brennan Ordered to Pay More Than $2.5 Million in Restitution* (July 31, 2009), *available at* (*http://www.oag.state.md.us/Press/2009/073109.htm*).

[155] Press Release, Alabama Attorney General, *A.G. King and Securities Commission Sue Prattville Companies Operating Alleged National Debt Settlement Scheme*, *available at* (*http://www.ago.state.al.us/news_template.cfm?Newsfile=http://www.ago.alabama.gov/news/07102009.htm*).

[156] For instance, a legal services lawyer identified six consumers who were harmed by law firms offering debt relief services or partnering with companies that offered the services. SBLS at 2-4; *see also* TASC (Young), Tr. at 229. A consumer advocate noted that public websites contain numerous complaints about law firms engaging in unfair or deceptive debt relief practices. CFA (Grant), Tr. at 241.

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 payment pursuant to that agreement; and (3) the fee must be proportional, *i.e.*, the same fraction of the total fee as the size of the debt resolved is of the total debt enrolled, or, alternatively, the fee collected must be based on a percentage of savings that the debt relief company achieves for the consumer. In addition, the Final Rule allows the provider to require consumers to place funds in a dedicated bank account for fees and payments to their creditor(s) or debt collector(s) in advance of securing the debt relief, provided certain conditions are met.[160]

The Commission concludes that the collection of advance fees in transactions that frequently are characterized by deception is an abusive practice. In reaching this conclusion, the Commission has applied the unfairness analysis set forth in Section 5(n) of the FTC Act,[161] finding that this practice: (1) causes or is likely to cause substantial injury to consumers that (2) is not outweighed by countervailing benefits to consumers or competition and (3) is not reasonably avoidable.[162] The Commission's decision to adopt the advance fee ban is based on its review of the entire record in this proceeding, including the public comments, the forum and workshop records, consumer complaints, recent testimony on debt settlement before Congress, and the law enforcement experience of the Commission and state enforcers. In this section, the Commission: (1) reviews comments supporting the advance fee ban, (2) reviews comments opposing the advance fee ban, (3) sets forth its legal analysis, and (4) describes the operation of this provision of the Final Rule.

1. Comments Supporting the Proposed Ban on Advance Fees

Numerous commenters supported the proposed ban on advance fees.[163] In supporting the advance fee ban, NAAG, representing over forty state attorneys general, cited its law enforcement experience in this area. Over the past decade, 29 states have brought at least 236 enforcement actions against debt relief companies, at least 127 of which targeted debt settlement providers.[164] Typical allegations in these cases targeted deceptive television and radio advertising, deceptive telemarketing pitches, and failure to provide promised services. In 2009, the New York and Florida Attorneys General announced investigations of 19 debt settlement companies, which are still pending.[165]

NAAG further stated that prohibiting the collection of advance fees would provide regulators and enforcement authorities a bright line method to identify entities that merit immediate investigation and prosecution.[166] NAAG further asserted that debt relief providers currently have minimal incentives to perform promised services because they collect substantial advance fees whether or not they negotiate debt reductions for the consumer.[167] NACCA also filed a comment supporting the advance fee ban.[168]

The Colorado Attorney General filed a supplemental comment supporting the Commission's advance fee ban. It cited data supplied by debt relief providers showing that only 7.81% of Colorado consumers who had entered a debt settlement program since the beginning of 2006 had completed their programs

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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).

by the end of 2008.[169] At the end of that period of less than three years, 39% of the consumers were still active, while 53% had dropped out of the program.[170] Thus, over half of enrolled consumers had dropped out in less than three years.

A coalition of 19 consumer advocacy groups filed a comment stating that an advance fee ban is "essential" to protect consumers who pay fees in advance but receive few, if any services.[171] According to this comment, debt settlement firms often mislead consumers about the likelihood of a settlement and the consequences of the settlement process on debt collection activities and the consumer's creditworthiness. The coalition asserted that having to pay advance fees prevents consumers from saving enough money to fund settlement offers satisfactory to creditors or debt collectors.[172]

Three legal services offices also submitted comments supporting the advance fee ban.[173] The comment by SBLS highlighted eight consumers whose financial situations had deteriorated as a result of entering debt settlement programs; each of them paid over $1,000 in fees to debt settlement companies while receiving virtually no benefits.[174] QLS commented that consumers who leave debt settlement programs after several months typically have accumulated little, if any, money to fund settlements because of the large upfront fees they were required to pay.[175] QLS recounted the experience of a husband and wife who paid $3,200 in fees to a debt settlement provider, only to be sued by a creditor within five months. The provider refused to refund the fees, even though it had not settled any of the couple's debts.[176]

A law professor commented in support of the advance fee ban, stating that debt settlement companies should not be allowed to collect and retain a fee before any beneficial service is provided.[177] Two creditor trade groups also supported the advance fee ban.[178]

One group stated that its members often get one or two letters from a debt settlement service provider, but then stop hearing from the provider entirely, even when the creditor requests a response.[179]

Some debt relief industry commenters also supported the proposed rule's advance fee ban. One debt settlement company (CRN) credits its success in obtaining settlements to its practice of not charging fees until the service is performed and the creditor is paid.[180] Another debt settlement company (FCS) stated that it has been implementing a debt settlement program that does not require any advance fees.[181] A small trade association, ACCORD, of which FCS is a member, also supported the advance fee ban.[182] It stated that a ban on advance fees and a requirement that fees be based on the savings achieved would protect consumers from debt settlement programs that leave them in worse financial shape than when they started.[183]

A third debt settlement company (USDR) commented that, if an advance fee ban were imposed, consumers would be able to evaluate debt relief companies more easily, and poorly performing companies would need to improve their service levels in order to get paid.[184] Moreover, consumers would be able to change providers if they were dissatisfied with a company's services without forfeiting the large sums they had paid in fees, thus increasing competition in the debt relief market.[185]

For-profit debt relief company CareOne Services also supported a form of an advance fee ban,[186] noting that the predominant business model of the debt settlement industry has been based on significant upfront fees that make it difficult for consumers to amass funds for a settlement, while forcing them to endure extensive creditor collection efforts.[187] CareOne posited that it would be economically feasible for it to provide effective debt settlement services even with an advance fee ban.[188]

Two associations of nonprofit credit counselors, NFCC and AICCCA, supported the advance fee ban.[189] AICCCA stated that its member CCAs saw the victims of debt settlement scams on a regular basis,[190] and asserted that an advance fee ban would both protect consumers from paying for promised benefits that may prove entirely illusory, and force debt settlement providers to deliver on their promises if they wish to be compensated. Other commenters opined that an advance fee ban would motivate providers to engage in a more robust qualification process to ensure that the program is suitable for the consumer.[191]

2. Comments Opposing the Proposed Ban on Advance Fees for Debt Relief Services

Numerous commenters – in particular, members of the debt settlement industry – opposed the advance fee ban.[192] The overall theme of most of these comments can be summarized as follows: many enrollees in debt settlement programs (including some who drop out before completing the

[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 . . . is the key to preventing fraud and ensuring that debt settlement services will be performed.").

[172] CFA at 4-5.

[173] QLS at 2-3; SBLS at 8; SOLS at 2. In addition, two additional legal services offices, Mid-Minnesota Legal Assistance and Jacksonville Area Legal Aid, were part of the coalition of consumer groups discussed above.

[174] SBLS at 2-4.

[175] QLS at 3.

[176] Id.

[177] Greenfield at 1-2.

[178] AFSA at 3; ABA at 2.

[179] AFSA at 9. The second group claimed that an average of 63% of identified accounts enrolled in debt settlement programs are charged off, as compared to only 16% of accounts placed by a credit counseling agency into a debt management plan. ABA at 4. Charged off debt is the term used to describe debt that is written off as a nonperforming asset by a creditor because of severe delinquency, typically after 180 days. If a creditor charges off the debt or sends it to a collection agency, it "will likely have a severe negative impact" on a consumer's credit score. *See* Fair Isaac Corp., *Credit Q&A, What are the different categories of late payments and how does your FICO score consider late payments?*, *available at* (*http://www.myfico.com/CreditEducation/Questions/Late-Credit-Payments.aspx*).

[180] CRN (Oct. 8, 2009) at 1. CRN recommended allowing a nominal monthly service fee. *Id.* at 10-11.

[181] FCS (Oct. 27, 2009) at 2.

[182] ACCORD (Oct. 9, 2009) at 1. Another debt settlement industry association asserted that ACCORD only has one member. USOBA (Oct. 26, 2009) at 48. As of July 2010, the ACCORD website lists six members. *See* (*http://www.accordusa.org/members-area.html*).

[183] ACCORD (Oct. 9, 2009) at 2.

[184] USDR (Oct. 20, 2009) at 2, 12. USDR encouraged the FTC to allow an initial set-up fee and monthly fees consistent with the Uniform Act.

[185] *Id.* at 2.

[186] CareOne at 4-5. CareOne has traditionally provided consumers with credit counseling and DMP services. In 2009, CareOne began a pilot debt settlement program designed for consumers who do not qualify for a DMP and who are not candidates for bankruptcy. *Id.* at 2.

[187] *Id.* at 4.

[188] *Id.* at 5.

[189] NFCC at 1, 12; AICCCA at 6. AICCCA supported the ban on the condition that the Final Rule explicitly exempt nonprofit debt relief providers. AICCCA at 6.

[190] AICCCA at 2. Other CCAs stated that they, too, regularly counsel consumers who paid debt settlement companies but never received the promised services. FECA (Oct. 26, 2009) at 4; GP (Oct. 22, 2009) at 1.

[191] CRN (Oct. 8, 2009) at 4; WV AG (Googel), Tr. at 222; ACCORD (Noonan), Tr. at 275-76.

[192] Twenty companies, five trade associations, two employees of debt settlement companies, three other entities, and over 190 consumers filed comments opposing the proposed advance fee ban. Of these commenters, two industry members supported a partial ban that would allow debt relief providers to receive fees to cover administrative expenses in advance of delivering settlements. CRN (Oct. 2, 2009) at 10-11; USDR (Oct. 20, 2009) at 2; *see also* CSA at 14 ("if the FTC chooses to regulate the fees charged for debt settlement services," it should follow the UDMSA framework and allow specific set-up fees and monthly fees).

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.

them.[202] Second, many of the consumers counted as "completed" had significant debts left after exiting the program.[203] Third, TASC members themselves reported the data to an accountant hired by the organization; neither the accountant nor any other entity validated that the data were complete or accurate.[204]

In any event, even assuming that (1) the survey accurately represents overall industry performance, (2) 75% of debts settled is an appropriate demarcation of "success," and (3) the 9.8% "still active" consumers ultimately receive the promised results, nearly two-thirds of enrolled consumers dropped out of the programs within the first three years.[205]

In addition to the TASC survey, individual debt settlement providers reported a range of dropout rates. A paper by Dr. Richard Briesch reported on a sample of 4,500 consumers from one company, finding that the cancellation rate was 60% over two years.[206] Three other commenters reported dropout rates of 71.9%,[207] 54.4%,[208] and 20%.[209] Some debt settlement providers reported that careful screening, strong customer service, and full disclosure greatly reduced the number of dropouts.[210]

As several commenters noted, not all dropouts are attributable to the failure of the provider.[211] Several commenters, on the other hand, asserted that providers are primarily responsible for the dropouts, because they enroll consumers who are not financially suitable for the program, collect large fees in advance that are not adequately disclosed, and ultimately fail to settle the debts.[212] Several commenters provided survey information about the reasons consumers drop out, finding that consumers drop out for various reasons, *e.g.*, because they paid off the debts themselves, settled the debts themselves, failed to save enough money for settlements, filed for bankruptcy, or experienced "buyer's remorse."[213]

In any event, the relevant issue for purposes of determining whether the advance fee ban is justified is the extent to which enrollees receive a net benefit

[202] In general, self-selection and self-reporting bias can result in an over-representation of successful respondents. *See, e.g.,* Alyse S. Adams, et al., *Evidence of Self-report Bias in Assessing Adherence to Guidelines*, *International Journal for Quality in Health Care* 11:187-192 (1999). In addition, providers that join trade associations may tend to conform to higher standards than nonmembers. USOBA (Ansbach), Tr. at 106; TASC (Oct. 26, 2009) at 4-5.

[203] As noted above, "completion" was defined as settlement of at least 75% of the individual's total debt amount enrolled. TASC (Oct. 26, 2009) at 9. *See* CU (Hillebrand), Tr. at 55 ("[c]onsumers are not getting what they expected to get, if only 25 percent are even getting close.").

[204] TASC (Housser), Tr. at 60. *See FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fla. 1999) (holding that defendant's weight loss claims were unsupported where, inter alia, defendant failed to obtain proper scientific validation of those claims); *FTC v. Cal. Pac. Research, Inc.*, 1991 WL 208470, at *5 (D. Nev. Aug. 27, 1991) (holding that defendants failed to properly substantiate hair loss claims because studies they cited did not meet basic scientific requirements demonstrating validity and reliability).

Law enforcement authorities' experience has shown that self-reported data may not be reliable. For example, the New York Attorney General reported to the GAO that a consumer testified that she received a "congratulations" letter from the company for completing a debt settlement program, citing to settlements on four small accounts, even though the largest balance included in the program was not settled, and the creditor sued the consumer for the full amount of that debt, plus penalties and interest. GAO Testimony, *supra* note 50, at 26. In addition, the GAO reported that some consumers who finished a debt settlement program "complained of being deceived and harmed by the group. Nearly half of them actually paid more than they owed." *Id.* at 25.

[205] The Commission analyzes industry data on outcomes for dropouts in the following subsection, Section III.C.2.a.(2).

[206] JH (Oct. 24, 2009) at 20 (*see* attached paper, Richard A. Briesch, *Economic Factors and the Debt Management Industry* 2 (Aug. 2009) ("Briesch paper")). The paper is based on data from Credit Solutions, identified on page 15 of the Briesch paper in a footnote.

[207] SDS (Jan. 22, 2010) at 2. Of consumers enrolled in the program at least 36 months earlier, fewer than 17% had completed the program and 11.2% were still active.

[208] DMB (Feb. 12, 2010) at 6. Of consumers who had enrolled in the program at least 36 months earlier, about 40% had completed the program and about 5% were still active.

Debt settlement provider FDR provided data about completion rates, but its data also comprised a very substantial part of the TASC data; accordingly, its data are not a separate reference point. Specifically, FDR stated that 32% of the enrollees who remained in its program for three years or more completed the program with 100% of debts settled, while 10.3% were still active. These numbers were based on 7,803 consumers who had enrolled in the FDR program at least 36 months before the analysis was performed. FDR (Oct. 26, 2009) at 10. Therefore, 57.7% of consumers dropped out within three years of entering the program. *See id.*

Debt settlement company Orion also provided some completion data. It stated that out of 825 customers who had made at least one payment, approximately 29% had completed the program, and 12.7% were still active. Orion (Jan. 12, 2010) at 5. It noted that the numbers were based upon its former business model, in which customers saved funds to be used for settlements in their own bank accounts, rather than in special purpose accounts monitored by the company. *Id.*

[209] JH (Jan. 12, 2010) at 5. Of consumers who had enrolled in this debt settlement program at least two years and nine months earlier, about 41% had completed the program and about 39% were still active. The company considered fewer than 1,000 consumers in calculating the dropout rate, as it had only been providing services for two years and nine months at the time of the response. Summary of Communications with FTC Staff Placed on the Public Record (Apr. 13, 2010).

[210] ACCORD (Oct. 9, 2009) at 3. In addition, debt settlement provider CRN reported that of all consumers that had enrolled in its program from April 2007 through September 2009, 39% had completed the program. CRN (Jan. 21, 2010) at 6. CRN has enrolled 1,218 consumers in total, and it stated that its practice of refraining from charging fees other than the initial membership fee of $495 allows its customers to achieve success sooner. *Id.* at 2, 4; CRN (Oct. 8, 2009) at 1. CRN's business model is unique; after receipt of the initial membership fee, it provides instructions to consumers on how to achieve debt settlements by calling creditors themselves. Subsequently, if the consumer specifically requests help, the company negotiates on the customer's behalf and charges additional fees if it obtains successful settlements. CRN (Oct. 8, 2009) at 1. CRN did not provide data separately for consumers using its do-it-yourself model and those using its negotiation services. *See* CRN (Jan. 21, 2010) at 2, 6.

[211] JH (Oct. 24, 2009) at 34 (*see* attached Briesch paper at 16); Loeb at 4 (citing Briesch paper); Arnold & Porter (Mar. 17, 2010) at Exhs. 4 & 5; MD (Mar. 22, 2010) at Exhs. E-8 & E-9; *see also FTC v. Connelly,* 2006 WL 6267337, at *11-12 (C.D. Cal. Dec. 20, 2006) (holding that the reasons for the approximately 75% dropout rate for a debt settlement program were genuine issues of fact. Defendants claimed that consumers dropped out because of their inability to save money for settlement purposes, whereas the FTC contended that consumers dropped out because of lawsuits, garnishments, property liens and other negative, undisclosed consequences of participation in the program.).

[212] NAAG (Oct. 23, 2009) at 4-8, CFA at 9; SBLS at 1-4; CareOne at 4; *see* GP (Oct. 22, 2009) at 3; ACCORD (Feb. 5, 2010) at 3 ("the more the fee structure is weighted toward the settlement fee, the higher the completion rate.").

[213] JH (Oct. 24, 2009) at 34 (*see* attached Briesch paper at 16). This survey does not establish how many borrowers fall into each category, as 56% of consumer respondents chose "other" as the reason they dropped out. *Id.* In any event, the survey responses do not establish who is responsible for the dropouts. Indeed, if a consumer cannot afford to make the payments or files bankruptcy, it is not clear whether the consumer failed to complete the program because the provider misled the consumer about the amount of the monthly payments or the timing of the fees; the provider failed to engage in an effective suitability analysis; or the consumer took on new debt that made the program unsustainable.

A different survey of 129 consumers who enrolled with a particular debt settlement provider and dropped out of the program after completing 50% of the program found that: 32% cancelled because they decided to settle the debts on their own; 42% could no longer afford or were not paying the monthly payment; 9% were generally dissatisfied; 9% were categorized as "account lost through collection activity; could no longer collect;" 5% were categorized as "unwilling to go through the legal process," and 5% were categorized as "other." QSS (Oct. 22, 2009) at 2.

A third provider submitted survey information about 20,166 consumers who dropped out of the program. The most frequent responses were: customer decided to file bankruptcy (24.9%); customer made other arrangements (16.8%); and customer did not have sufficient money in bank account for payments (11%). Arnold & Porter (Mar. 17, 2010) at Exhs. 4 & 5.

Finally, a provider submitted results of a customer exit survey of an unspecified number of consumers who dropped out of the provider's program; the most frequent responses were: customer did not have sufficient money in bank account for payments (28.6%); customer could not afford payments (15.9%); customer decided to file bankruptcy (14%); and customer made other arrangements (9.5%). MD (Mar. 22, 2010) at Exh. E-8.

from the program. The net benefit takes into account whether consumers save more money than they paid in fees and other costs; it also considers other harms to consumers that result from participation in the program, such as harm to creditworthiness and continued collection activity in many cases. In addition, by enrolling in a debt settlement program, consumers forgo other alternatives, such as filing for bankruptcy, borrowing money from a relative, negotiating directly with creditors, or enrolling in a credit counseling program that may be better alternatives for them. Thus, many consumers suffer an opportunity cost when they enroll in debt settlement programs that do not benefit them.[214] As discussed below, consumers who drop out of the program prior to completion generally do not obtain a net benefit.[215]

(2) Outcomes for Dropouts

As stated above, a major concern with debt settlement services is that most consumers drop out of the program after paying large, unrefunded fees to the provider. In response, industry commenters provided data purporting to show that a significant number of their dropouts obtained at least some value from the program in the form of one or more settled debts, prior to dropping out. It is true that some consumers who enroll in debt settlement programs, including some of those who subsequently drop out, may obtain some savings. For the reasons explained below, however, the submitted data provide little information about the proportion of dropouts who receive a net benefit from the program. To the extent that the net benefit can be estimated, it appears that dropouts generally pay at least as much in fees and other costs as they save in reduced debts.

Several industry members or groups provided statistics on the number of settlements that dropouts obtained prior to exiting the program. TASC reported that 34.8% of the dropouts in its survey received at least one settlement – which means that 65.2% of the dropouts (representing over 42% of all consumers who enrolled) received no settlements.[216] It also reported that the dropouts saved $58.1 million in the aggregate (based on debt amounts at the time of settlement).[217] These dropouts paid $55.6 million in fees, however, which alone virtually cancel out the savings. When the other costs associated with the program (*e.g.,* creditor late fees and interest) are factored in, it is likely that the costs exceed the benefits.[218] Moreover, as described earlier, there are a number of methodological concerns about this survey that likely skew the results in the direction of showing greater success.

Dr. Briesch also analyzed a second company's data regarding dropouts. In that analysis, 43% of the dropouts settled at least one account.[219] The 57% of dropouts who did not settle any accounts clearly did not obtain a net benefit from the program, having paid and forfeited at least some amount of fees. Even as to those consumers who did obtain one or more settlements before dropping out, Dr. Briesch did not report how much consumers paid in fees, nor did he report how many accounts were settled out of the total number of accounts enrolled in the program.

Another debt settlement provider reported that it had settled at least one account for 30% of its dropouts.[220] In that company's case, 70% of dropouts did not receive any benefit from the program, and even as to the remaining 30%, there is no evidence that the consumers received savings significantly greater than the fees and costs they paid.

(3) Average Percentage Savings and Savings-to-Fee Ratios

Many debt settlement providers advertise that consumers using their services achieve debt reductions within a range of percentages, often 40% to 60%.[221] In their public comments, debt settlement providers reported that they achieved average savings ranging from 39% to 72%.[222] The Commission

[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 debt."); Loeb at 9 (providing raw numbers for ten unnamed companies without any description of the methodology; percentage saved ranged from 38.73% to 71.66% and averaged 45.15%); DRS (Jan. 21, 2010) at 1 (savings of 44% of the debt at the time of enrollment; 53% at the time of settlement).

In addition, QSS conducted surveys on behalf of TASC and NWS. The QSS-TASC survey consisted of 691 exit interviews of former customers of "certain TASC members," including both dropouts and successful graduates, and reported that 69% of settled accounts experienced a balance reduction of at least 40%. QSS (Oct. 22, 2009) at 7. The QSS-NWS survey consisted of 329 exit interviews and reported that 79% of consumers settled their credit card debts at a discount of at least 40% or more of the outstanding balance. *Id.* at 18. In reporting on these surveys, QSS provided limited information about the sample surveyed, such as the proportion of the relevant consumer population the interviewees represented or whether the TASC members involved were representative of the industry generally. NWS (Feb. 17, 2010) at 2-3. Moreover, the labels on the electronic files submitted by QSS indicate that the interviews were conducted with consumers from no more than five companies. QSS requested and received confidential treatment pursuant to FTC Rule 4.9(c), 16 CFR 4.9(c), for the recorded interviews contained on the electronic files.

The USOBA comment provided selected data about one of its member companies, which it claimed to have verified. The comment asserted that this member had settled significant numbers of consumer debts for 53 cents on the dollar, based on

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believes, however, that the methodology used to calculate these percentages is fundamentally flawed. Specifically, the calculations do not account for (1) interest, late fees, and other creditor charges that accrued during the life of the program; (2) the provider's fees; (3) consumers who dropped out or otherwise failed to complete the program; and (4) debts that were not settled successfully. By failing to account for these factors, the providers substantially inflate the amount of savings that consumers generally can expect. The following paragraphs discuss each of these points in turn.

First, some commenters calculated "savings" without accounting for the additional debt and losses 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. For example, if a consumer enrolls $10,000 in debt, and the provider represents that it can achieve a 40% reduction, the consumer reasonably expects to have to pay $6,000 to completely resolve his debts. If, however, the size of the debt increases over the course of the program due to interest and creditor fees of $2,000, the consumer will have to pay $6,000 *plus* an additional $1,200 to cover the additional creditor charges (the 40% reduction would apply to the $2,000 in creditor charges as well as the original balance). Accordingly, the consumer must actually pay a total of $7,200 to settle the $10,000 in debt he enrolled, and he saves $2,800. Thus, the percentage of actual savings is lower than the 40% represented by the provider. In this example, putting aside the other issues, the percentage of savings would be 28%.

Second, the industry data generally exclude provider fees in calculating percentage savings and thereby inflate the actual amount consumers saved. For example, if the provider charges $3,000 in fees to consumers with $10,000 in debt and represents that the consumers will obtain a 40% reduction, consumers who expected to be debt-free with the payment of $6,000 actually must pay $9,000, not counting possible penalties and interest. The actual percentage savings would be 10%, putting aside the other issues. Although consumers likely presume the provider charges some fees, it is unlikely they would realize that the fees are so substantial that they exceed savings for many consumers, especially because debt settlement advertisements and websites generally do not disclose the fees.[223] Even an industry representative has stated that the various debt settlement fee models are confusing.[224]

Third, commenters often considered only the savings associated with consumers for whom settlements were obtained and excluded all those who dropped out of the programs.[225] One analysis removed 78% of the provider's customers from the sample and merely reported the settlements received by the remaining customers, excluding those who had dropped out of the program and those who were still active but had not yet settled a debt.[226] Fourth, even among the group that had settled at least one debt and therefore was included in the analysis, the savings calculations accounted only for those individual accounts that actually were settled, excluding those that were not.[227]

No commenter provided the information necessary for the Commission to calculate actual average savings amounts using an appropriate methodology. Because the savings amounts reported by commenters were calculated using methodologies that substantially overstate the savings,[228] the Commission concludes that the actual savings, if any, generally achieved by consumers in a debt settlement program are significantly lower than the average savings amounts commenters reported.[229]

In addition to savings percentages, several commenters provided "savings-to-fee ratios." These ratios purport to compare the debt reductions consumers have received from debt settlement programs to the amount consumers have paid in fees to show the value provided to consumers.[230] The ratios, however,

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.

[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 a consumer will have to pay upon enrollment in the service. An additional 34 out of the 100 websites mentioned fees but did not provide specific fee amounts. The Commission's law enforcement experience bears this out as well. *See, e.g.*, *FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007); *see also New York v. Credit Solutions*, No. 401225 (N.Y. Sup. Ct. N.Y. Cty. filed May 19, 2009) (Complaint, ¶ 17).

[224] Smart Money, *Debt Settlement: A Costly Escape* (Aug. 6, 2007)(quoting Jenna Keehnen, the executive director of USOBA, as saying, "I have seen every kind of (fee) model you can think of . . . . It's very confusing."), *available at* (*http://articles.moneycentral.msn.com/SavingandDebt/ManageDebt/DebtSettlementACostlyEscape.aspx*).

[225] *See supra* note 222.

[226] JH (Oct. 24, 2009) at 33 (*see attached* Briesch paper at 15). In Dr. Briesch's comment to the FTC following publication of the paper, he reported that among active consumers in the sample, only 55.7% had obtained at least one settlement. Briesch (dated Oct. 27, 2009 and filed with the FTC on Nov. 5, 2009) at 6-7. In arriving at the 78% figure stated in the text, the FTC calculated that 60%, or 2,700, of the 4,500 consumers in the database had dropped out; out of 1,800 active consumers, 44.3%, or 797, had not obtained any settlements at the time the data were collected. Thus, only 1,003, or 22.3% of the sample, were actually included in the analysis. *See* CU at 6.

[227] For example, Dr. Briesch stated that on average, about 50% of the consumer's debts were settled. JH (Oct. 24, 2009) at 35 (*see* attached Briesch paper at 17).

[228] *See supra* note 222.

[229] In further support of their contention that debt settlement service providers obtain successful outcomes for consumers, some commenters asserted that debt settlement providers obtain more favorable settlements than consumers could obtain on their own. *See* Figuliuolo at 4 ("Debt settlement companies generally have substantial experience dealing with creditors, have access to large quantities of data, can engage in sophisticated analysis of those data, have a good understanding of what sorts of deals can realistically be struck with particular creditors, develop ongoing relationships with those creditors, and importantly their clients generally have the capital to fulfill the negotiated settlement at the time of negotiation."); Franklin at 8-13. These commenters provided limited evidence in support of their assertions. Moreover, even if the assertions were true, they do not support the sorts of specific savings claims that providers have made, nor do they counsel against imposition of an advance fee ban.

[230] The TASC survey reported that customers of the companies that participated in the survey, including dropouts, received $245 million in savings at a cost of $126 million in fees, a savings-to-fee ratio of nearly 2 to 1. TASC (Oct. 26, 2009) at 10. The calculations, however, do not account for interest, late fees, and other creditor charges that accrued during the life of the program.

FDR asserted that active customers who had been in the program for at least three years reduced their debt by $6.5 million and paid $3.3 million in fees, a 1.97 to 1 ratio; completed customers reduced their debt by $25.2 million and paid $8.8 million in fees, a 2.86 to 1 ratio; and terminated customers reduced their debt by $9.1 million and paid $8.7 million in fees, a 1.05 to 1 ratio. On average, each of the 4,496 terminated customers saved $89. FDR also calculated that enrollees as a whole reduced their debt by $40.8 million and paid $20.8 million in fees, a 1.96 to 1 ratio. FDR (Jan. 14, 2010) at 4-5. In these calculations, FDR estimated the amount consumers owed at enrollment to determine the savings.

NCC reported that its savings-to-fee ratio was 1.5 to 1. Arnold & Porter (Mar. 17, 2010) at Exh. 1. Total fees paid were approximately $3 million, and total customer savings were approximately $4.5 million, a 1.5 to 1 savings-to-fee ratio. *Id.* NCC provided no information regarding whether the calculations use balances at enrollment or at settlement, the number of consumers who completed the program, or whether the data covered all consumers who completed the program.

A debt settlement company provided confidential information, pursuant to FTC Rule 4.9(c), 16 CFR only account for debts that are settled; they fail to account for increased balances on debts that were not settled. Assessing whether consumers benefitted from the programs would require review of individual consumer circumstances, as well as determining harm to creditworthiness and harm resulting from continued collection activity. Additionally, neither the TASC survey respondents nor the individual commenters are representative of the industry; TASC selected its largest members, and only some of them provided responsive information. Thus, although the savings-to-fee ratios provided to the Commission suggest that some consumers of debt relief services may have benefitted to a certain extent, they do not establish that consumers generally achieved more in savings than they paid in fees and other expenses for their debts as a whole.

(4) Settlement Rates for All Enrollees

Several commenters asserted that many consumers receive settlement offers soon after enrollment and before they pay substantial fees to the provider.[231] The CSA comment reported that among consumers who remained in CSA's program for one month or more, 56% received at least one settlement offer.[232] The CSA comment, however, did not provide any information as to whether consumers accepted, or were able to fund, the offers.[233] Moreover, the data do not measure the drop out rate or the success of enrollees as a whole.[234] The CSA comment also did not disclose the amounts of the debts that were the subjects of the early offers, and it may be the case that the early settlements tended to be for relatively small debts.[235] Finally, as was true with the Briesch study, CSA did not provide the amount of savings from the early settlements, nor the amount paid in fees by consumers. Thus, the data do not show whether consumers in CSA's program experienced a net benefit or net loss.

A second provider stated that in recent years, 40.4% of its customers had settled at least one debt within the first year after enrolling.[236] Thus, almost 60% failed to settle even one debt within that first year. Furthermore, the company provided no information about the amount of savings dropouts obtained from settlements, nor the amount consumers paid in fees.[237]

(5) Testimonials from Satisfied Consumers

Two-hundred thirty-nine consumers filed comments about their experiences with debt settlement companies, 193 of which expressed positive views. Several industry commenters also incorporated positive consumer testimonials into their comments.[238]

The Commission does not question that some consumers have had favorable experiences with debt settlement. That fact, however, does not establish that consumers generally benefit from these programs, or that they receive the results they were promised.[239] Individual consumer testimonials are, by their nature, anecdotal; they do not constitute a representative sample of consumers who have enrolled in debt settlement programs.[240] Moreover, it is not clear for many of the testimonials in the record that the individual consumer actually benefitted financially from the program. Many of the consumers did not provide any specific information about their debt settlement experiences,[241] and, for some other consumers, it was not clear that they had obtained any settlements at the time they submitted their comment.[242]

In addition to the individual consumer comments, the QSS-TASC customer survey discussed previously included a satisfaction question. The survey concluded that 88% of consumers said they were "satisfied" or "very satisfied" with their settlement amounts.[243] As explained above, however, QSS did not provide any information as to whether the consumers were representative in any sense of the population of consumers who use debt settlement services.[244]

b. Point 2: Debt Settlement is Superior to Other Debt Relief Services

Several industry commenters argued that the Commission should not impose an advance fee ban on debt settlement services because they provide better outcomes for consumers than other types of debt relief, particularly bankruptcy and DMPs.[245] The Briesch paper contended that consumers pay less overall in payments and fees in a successful debt settlement plan than in

4.9(c), reporting that its savings-to-fee ratio was 1.2 to 1, as total fees paid were almost $900,000 and total customer savings were slightly over $1 million. The company provided no information regarding whether the savings calculation used balances at enrollment or at settlement, the number of consumers who completed the program, or whether the data covered all consumers who completed the program.

[231] If consumers obtain settlements soon after enrollment, providers should not be adversely affected by a ban on collecting fees before they procure settlements. As explained below, however, the record does not support this assertion.

[232] For consumers who stayed in the program for a minimum of three months, 67% received at least one offer (and 47% received at least three); among consumers who stayed in the program for a minimum of six months, 77% received at least one offer and 58% received three or more offers. All consumers who stayed in the program for 36 months received five or more offers. CSA at 5-6; *see also* CSA (Witte) at 29-30 ("And in the first month, we're able to get 56 percent of the people one offer and 28 percent of the people five or more offers, just in the first month. And I think everyone can agree that's pretty remarkable and sort of stands against what was in the [NPRM] that no work is being done at the beginning.").

[233] *See* SBLS (Tyler), Tr. at 40 ("I had a client who got three offers. She had no money in the escrow account. She had no money to pay the offer.").

[234] The comment only reported results for consumers who remained in the program until – or beyond – each time interval. Therefore, consumers who dropped out of the program by the end of each interval were excluded from the calculations of the next group of consumers.

[235] *See* RDRI at 5 (noting that settlement companies may begin with customer accounts that have the smallest balances or with "friendly" creditors).

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

[237] Another commenter stated that its figures were difficult to estimate but provided rough figures. The commenter estimated that of its customers who stayed in the program for at least four months, 75% received at least one settlement in the first year. It also estimated that, of customers who stayed in the program for at least one year, more than 95% had at least one debt settled within two years. Finally, it estimated that about 15% to 20% of its customers drop out without settling any debts. The commenter noted that a significant portion of customers revoke their enrollment before six months and receive a refund; these individuals were not counted in any of the above statistics. Orion (Jan. 12, 2010) at 5.

[238] USOBA (Oct. 26, 2009) at 85-212; CSA at 22-47; DRS (Sept. 29, 2009) at 3-13; *see also* Franklin at 7-8.

[239] Similarly, in assessing whether a success or performance claim is deceptive under Section 5 of the FTC Act, courts consistently have held that the existence of some satisfied consumers is not adequate substantiation. *See, e.g., FTC v. Amy Travel Serv.*, 875 F.2d 564, 572 (7th Cir.1989), *cert. denied,* 493 U.S. 954 (1989); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1273 (S.D. Fla. 1999).

[240] This is especially true here, where some providers actively solicited positive comments from specific consumers. Ho at 2 (attaching email from debt settlement company encouraging the consumer to send positive comments to the FTC).

[241] *See, e.g.,* Allen at 1; Clement at 1; Garner at 1; Gecha at 1; Houghton at 1; Kaiser at 1; McInnis at 1; Neal at 1; Seigle at 1; Taillie at 1.

[242] *See, e.g.,* Wheat at 1; Silverman at 1; Paquette at 1; Pratt at 1. Although an industry association argued that positive comments from consumers before they achieve any settlements shows that the companies provide value aside from obtaining settlements (USOBA (Oct. 26, 2009) at 33-34), the overriding purpose for which consumers enroll in debt relief programs is to resolve their debts, not to receive other "benefits." *See* WV AG (Googel), Tr. at 45; SBLS (Tyler), Tr. at 38. Indeed, in some of the consumer comments, it was not even clear that the consumer had actually participated in a debt settlement program. *See, e.g.,* Atkins at 1; Brodie at 1; Cheney at 1; Hargrove at 1; Hinksor at 1.

[243] QSS (Oct. 22, 2009) at 8. In addition, the survey reported that 82% of consumers had an "Excellent" or "Good" experience in the debt settlement program. *Id.* at 9.

[244] *Supra* note 222.

[245] In fact, the Final Rule applies to for-profit DMPs as well as debt settlement and other debt relief services.

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, consumers who complete debt settlement plans pay lower monthly payment amounts and lower amounts overall than consumers who complete DMPs.[253] Where consumers actually obtain debt settlements, this may be true, but the comparison fails to examine fully the costs and benefits of each type of program with respect to consumers who fail to complete them. As described above, DMPs offer more certainty than debt settlement, provide a reprieve from collection efforts, and result in decreasing debt balances with every payment.

Several debt settlement commenters also argued that their programs help

[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.

consumers avoid bankruptcy, which, they assert, has consequences that are worse for consumers.[254] One commenter submitted a research paper stating that debt settlement may result in a better credit rating for the consumer than would bankruptcy.[255] Even if that were true, however, the relative benefits and costs of bankruptcy and debt settlement cannot be gauged on the basis of a single characteristic. In particular, if a consumer files for bankruptcy, creditors must cease collection efforts.[256]

USOBA argued that completion rates for debt settlement are better than for bankruptcy.[257] Although many consumers do not complete Chapter 13 bankruptcy plans,[258] there are many reasons for this that are unique to bankruptcy proceedings and are not indicative of a "failure." In some instances, a Chapter 13 bankruptcy is converted to a Chapter 7; in other cases, the debtor might not be eligible for a discharge because of previous discharge or misconduct, or the debtor could have filed a Chapter 13 bankruptcy simply to decelerate and cure a mortgage default without intending to seek a discharge of other debts.

In short, the relative costs and benefits of debt settlement programs and bankruptcy cannot be generalized. Whether one or the other option is best depends entirely on the individual consumer's circumstances, and, most importantly, whether the consumer has sufficient assets to fund settlements.

c. Point 3: Numerous Debt Settlement Companies Will Go Out of Business

Representatives and members of the debt settlement industry argued that many providers will go out of business if the FTC imposes an advance fee ban.[259] The trade association USOBA submitted a survey of its members who reported that the following would occur if an advance fee ban were imposed:

- 84% would "almost certainly" or "likely" have to shut down their operations;
- 95% would "certainly" or "likely" lay off employees; and
- 85% would stop offering debt settlement services to new and existing customers.[260]

The Commission concludes that this survey is not reliable and is of little probative value. USOBA did not provide the number of its members or their employees who responded to the survey, what proportion of the industry they comprise, or whether they were in any sense a representative sample.[261] The survey elicited self-reported, conclusory, and possibly self-serving statements of opinion without any evidence to support those opinions, such as data on the financial impact of a ban. Furthermore, it appears that the survey respondents were reacting to a complete advance fee ban, without the option of requiring consumers to place funds in a dedicated bank account until services are performed and receiving appropriate fees from the account as each debt is settled, as the Final Rule permits.

The trade association TASC submitted a cash flow analysis, presumably based on its members' historical experience, that purports to show that it would take 49 months for a provider to break even under an advance fee model.[262] The Commission finds this analysis unpersuasive for at least three reasons.

First, TASC assumes that providers will find it profitable to continue to follow the same marketing strategy that many of them follow today. Many debt settlement providers currently incur significant costs to acquire customers through general audience advertising, even though a large portion of the consumers drawn in by the advertisements are unsuitable for the program and subsequently drop out. For example, TASC's analysis assumes that sales, general, and administrative expenses ("SG&A") and "support" expenses total $1,326 per consumer in the first two months. It is not clear exactly what costs are included in these expense figures, but they appear to be based on an extensive advertising campaign of the kind that many debt settlement providers employ under the existing business model. Although the impact of the advance fee ban in the rule cannot be predicted with precision, one reasonable outcome could be that providers will have to improve the cost-effectiveness of their customer acquisition strategies by more narrowly tailoring them to the segment of the population that may be suitable for debt settlement services, rather than to the general population. In a competitive market, those providers that are more efficient in targeting their advertising to consumers who are most likely to enroll and stay in the programs will spend less on advertising and, thus, be able to make a profit sooner.

Second, the predicted break even point in TASC's analysis also depends crucially on what is assumed about the dropout rate and the amount of the contingency fee. With a lower dropout rate or a higher contingency fee, the break even point occurs earlier.[263] In fact, dropout rates are likely to decrease once the advance fee ban is in place because, among other reasons, providers will have the incentive to carefully screen borrowers before enrolling them.[264]

Finally, the model assumes that the provider is a new entrant that does not have any cash flow from existing

[254] USOBA (Oct. 20, 2009) at 23-24; Palmiero (employee of Century Negotiations, Inc.) at 1; CSA at 3; JH (Jan. 12, 2010) at 1; Weinstein (Oct. 26, 2009) at 8 (*see* attached Weinstein paper at 7).

[255] JH (Oct. 24, 2009) at 47-54. In fact, the report acknowledges that, because the algorithms used in determining a consumer's credit score are proprietary, the author cannot really determine how debt settlement – or bankruptcy – would affect a consumer's credit score.

[256] Filing bankruptcy stays collection efforts, including on delinquent mortgage accounts.

[257] USOBA (Oct. 26, 2009) at 28; *see also* Franklin at 19. Relying on the preliminary TASC study discussed in footnote 194, USOBA stated that the purported debt settlement completion rate of 45% to 50% exceeds the completion rates for both Chapter 13 bankruptcy (stated to be 33%) and credit counseling programs (stated to be 21%). USOBA (Oct. 26, 2009) at 28. In fact, the revised TASC data suggest much lower completion rates for debt settlement than are stated in TASC's "preliminary" study submitted in connection with the workshop – an average of 24.6% rather than 45% to 50%. TASC (Oct. 26, 2009) at 10.

[258] Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 Creighton L. Rev. 473, 505 & n.70 (2006) ("The overall discharge rate for the debtors in the seven districts covered by the Project was exactly the oft-repeated statistic of one-third."); Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, 19 Am. Bankr. Inst. J. 22, 22 & 34-35 (July–Aug. 2000); Henry E. Hildebrand, III, *Administering Chapter 13—At What Price?*, 13 Am. Bankr. Inst. J. 16, 16 (July–Aug. 1994).

[259] SDS (Oct. 7, 2009) at 2-3; MD (Oct. 26, 2009) at 25; RADR at 1; Orion (Oct. 1, 2009) at 2; CDS at 1; D&A at 2; *see also* ULC at 6; CSA at 10 (stating generally that the advance fee ban "could put a legitimate company out of business"); FDR (Oct. 26, 2009) at 16-17; Hunter at 1; MP at 3; CCC at 1 (for-profit credit counseling company would go out of business if the Commission promulgates the advance fee ban). One debt settlement company said that no other businesses can afford to operate by accepting payment "only **after** the customer has received and **agrees to be satisfied** with that service." JH (Oct. 24, 2009) at 6 (emphasis in original).

[260] USOBA (Oct. 26, 2009) at 20.

[261] *Cf. infra* note 576.

[262] TASC (July 1, 2010) at 1-2. Specifically, TASC states that its model shows that the cumulative breakeven (which is the point at which the net of all losses as compared to gains in the prior months turns from negative to positive) occurs at 49 months if, where settlements involve multiple payments, providers collect their fee for each settlement after the *first* installment payment. *See id.* n.3. Providers may do so under the Final Rule and, thus, this is the applicable cumulative breakeven point in the TASC model. TASC also reports that, if providers cannot collect their fees until the last installment payment is received, the cumulative breakeven would not occur until month 74. However, as noted, the Final Rule imposes no such restriction, so this cumulative breakeven point is inapplicable.

[263] For instance, the provider's cash flow would change significantly if it increased the fee amount to 40% of savings or experienced a 3% dropout rate in each of the first three months instead of a 6% dropout rate.

[264] CU (July 1, 2010) at 4; ACCORD (Feb. 5, 2010) at 3 ("the more the fee structure is weighted toward the settlement fee, the higher the completion rate.").

customers. The model does not show what the impact of the advance fee ban would be on existing companies. Presumably, an existing company would already have significant monthly revenue associated with its current customers, and therefore would have a more favorable cumulative cash flow than a new entrant.

More generally, there is little reliable evidence in the record to substantiate the concerns raised by debt settlement providers about their future viability. Certainly, under an advance fee ban, providers would have to capitalize their businesses, at least initially, until they began settling debts and collecting their fees. After that initial period, however, providers presumably could fund their ongoing operations with the earnings from prior transactions.[265] This is not an unusual business model; for example, many professionals, such as realtors, obtain payment only after they have completed their services to the client.[266] These professionals often must expend considerable time and resources to perform those services. One debt settlement company commenter stated that, in its experience, using a business model that does not rely on advance fees is feasible for well-managed and well-capitalized firms,[267] and other commenters agreed.[268] Thus, the Commission is not persuaded that an advance fee ban would make it infeasible for legitimate debt settlement providers to operate their businesses.

d. Point 4: Debt Settlement Companies Incur Significant Costs in Providing Pre-Settlement Services

Related to the financial viability questions discussed in the previous section, many commenters addressed the issue of the types and quantity of services that debt settlement providers must perform, and the costs they must finance, before settling a debt. Industry commenters asserted that they provide substantial services and incur significant costs well before obtaining settlements and need advance fees to pay for those services. Several commenters stated that debt settlement is labor-intensive and that a substantial amount of a debt settlement company's work occurs before the first settlement is finalized.[269] For example, a large debt settlement company stated that it employs approximately 500 people, 150 of whom are responsible for communicating with consumers, compared to 130 who are responsible for negotiating with creditors.[270] Another debt settlement provider stated that the vast majority of its expenses are incurred within the first 12 months of the program to attain new customers and provide customer service.[271]

Several commenters provided estimates of debt settlement providers' pre-settlement costs. A researcher estimated that a provider's average administrative cost to enroll a consumer is $112.53.[272] A provider estimated that the combined cost to acquire a customer and engage in required administrative work to set up the account ranges from $715 to $1,365, depending on the advertising and marketing media used.[273] According to this commenter, in order to properly service a customer on an ongoing basis, the provider must handle basic customer inquiries, input data entry changes to the customer's file, provide assistance on creditor harassment concerns, call customers to assist them in fulfilling their commitment to the program, handle calls involving emotionally distraught customers, and provide access to an attorney network to advise about possible violations of the FDCPA.[274] The commenter estimated that $50 per month would cover these services.[275] The commenter also pointed to the significant costs involved in negotiating settlements, stating that it may make as many as 50 phone calls to negotiate with a single creditor.[276] Another provider submitted an analysis showing that 22% of its expenses were dedicated to the intake of new customers. These expenses included marketing, payroll, office and related occupancy expenses, other general and administrative expenses, professional fees, depreciation, and taxes.[277]

The comments indicate that a large percentage of the pre-settlement costs incurred by providers is for marketing and other customer acquisition efforts.[278] One provider estimated that marketing costs range from $500 to $1,200 per customer.[279] A researcher stated that average marketing costs per customer at the company he studied were $987.50.[280] Overall, the record shows that advertising and marketing constitute the largest portion – and in many cases a substantial majority – of upfront costs for debt settlement providers.

Some industry commenters also claimed that they provide services to customers other than settling debt.[281] One provider asserted that it provides education and support to consumers well before any debt settlements are finalized.[282] USOBA asserted that its

[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. . . . Since the concept of debt settlement is not well-known to the public, debt settlement companies must spend more time, effort and money marketing their services. The lead cost for acquiring one debt settlement client ranges from $300 to $400. Once the intake costs associated with contacting the potential clients and the overhead costs are factored into the lead costs, the cost to acquire and set up a single debt settlement client can range from approximately $425 to $1,000. The data reveals that most debt settlement companies report this cost at $700 to $1,000 range. This necessitates debt settlement companies to charge a greater portion of fees during the initial phase of the program.").

[279] Orion (Oct. 1, 2009) at 2.

[280] NWS (Oct. 22, 2009) at 10 (*see* attached Walji paper at 10); *see also* CRN (Bovee), Tr. at 28 (lead generators receiving commissions of more than 25% of revenue).

[281] Summary of Communications (June 14, 2010) at 1 (industry groups stated that providers conduct a budget analysis of each consumer to determine "fit" with the debt settlement model and provide budgeting advice and educational information about consumers' rights with respect to debt collection calls and harassment).

[282] SDS (Oct. 7, 2009) at 2. It also asserted that it speaks with 30 potential customers (that it does

members offer budgeting advice, financial literacy information, emotional support, and education on debtor rights.[283] In a survey commissioned by USOBA, 86% of employees of debt settlement companies reported that they provide value or service to consumers other than settling debt, and 72% stated that they talk to consumers every day as part of their job.[284]

Based on the above and other evidence in the record, the Commission has reached the following conclusions about the cost issues:

- Debt settlement providers must perform certain tasks prior to settling their customers' debts, ranging from customer acquisition to recordkeeping to customer support. These tasks entail costs.[285]
- In most cases, the largest component of pre-settlement costs that providers incur is for customer acquisition, *i.e.,* advertising and marketing.[286]
- Some providers may offer ancillary services such as education and financial advice, but there is no reliable evidence in the record to establish how many providers offer these services, how extensive they are, or what they cost.[287]
- The types and amounts of services providers perform and the costs of performing them appear to vary widely. Frequently, the nonmarketing costs are relatively small.[288]

Even accepting the commenters' cost estimates at face value, the record does not support the assertions by some industry members that initial costs are so substantial that they could not operate without collecting their fees in advance. Charging large advance fees is not the only business model in the debt settlement industry. Several providers use payment schedules that are less front-loaded and entail payments over a longer term, require no advance fees at all, or tie payments to successful outcomes for consumers.[289] The record shows that these business models are feasible and that at least some debt settlement providers have adopted such models successfully.

As noted, the bulk of the upfront costs that providers incur are for advertising and customer acquisition, which are within the control of the provider and do not confer any direct benefit on consumers. To a large extent, providers have funded their marketing efforts with money forfeited by consumers who enrolled in these programs as a result of that marketing, paid large advance fees, and then dropped out, because they were financially unsuitable to be in a debt settlement program in the first place. The Commission has concluded that the interests of providers in obtaining advance fees primarily to fund their marketing efforts is outweighed by the likelihood of substantial injury to many of these financially-distressed consumers from paying hundreds or thousands of dollars without obtaining a commensurate benefit, or any benefit at all.

e. Point 5: Advance Fees Are Necessary to Ensure that Companies Get Paid and Consumers Fulfill Their Obligations

Industry commenters also contended that charging fees in advance is needed to protect them against the risks of nonpayment by consumers after delivery of the services.[290] One commenter stated that relegating the debt settlement provider to the position of other unsecured creditors would hinder its ability to service its customers.[291]

The risk of nonpayment may be significant given the precarious financial situation of consumers who enroll in debt relief programs. Accordingly, the Final Rule permits debt relief providers to require consumers to make payments into a dedicated bank account, assuming certain conditions are satisfied, from which the consumer can pay the provider's fee as each of the consumer's debts is settled. The specific operation of this provision of the Final Rule is explained in Section III.C.5.c. below.

Other commenters expressed concern that, under an advance fee ban, consumers could avoid having to pay the provider by refusing reasonable settlement offers, failing to save money, or otherwise taking actions to prevent settlements.[292] Although this may be theoretically possible, most consumers would have an incentive to agree to reasonable settlement offers. In any event, providers can take these risks into account in their screening procedures and pricing policies.[293]

f. Point 6: The Advance Fee Ban Violates the First Amendment

An industry association argued that an advance fee ban would run afoul of the First Amendment.[294] The association stated that the ban targets protected speech, preventing debt relief providers from receiving fees for speaking to their customers and providing educational, coaching, and counseling information.[295]

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] FDR (Oct. 26, 2009) at 6; CDS at 1; NWS (Oct. 22, 2009) at 11 (*see* attached Walji paper at 11); ART at 1.

[286] USDR (Oct. 20, 2009) at 10-11; CRN at 2; CDS at 1; MD AG (Sakamoto-Wengel), Tr. at 105 ("And in complaints and the investigations that we have had, at the state level, what we have found is that rather than the trained counselors . . . a lot of the people that are hired as counselors are really salespeople, without counseling experience, without financial experience, but they're there to sell a product."); TASC, *Study on the Debt Settlement Industry* 4 (2007).

[287] *See* TASC (Oct. 26, 2009) at 18; USOBA (Oct. 26, 2009) at 30.

[288] CDS at 1; NWS (Oct. 22, 2009) at 11 (*see* attached Walji paper at 11); ART at 1.

[289] FDR (Oct. 26, 2009) at 14 (fees are collected over the first 18 months or longer of the program); JH (Jan. 12, 2010) at 4 (entire first payment is collected as a fee; the remainder is collected in installments over one-half of the program); Hunter at 3 ("[I]t is becoming more common for companies to charge a one-time, flat enrollment fee and prorate the remaining percentage of the fee over at least half the life of the program."); CRN (Jan. 21, 2010) at 4 (company charges an "initial membership fee" of $495 and, for consumers seeking additional assistance, $100.00 per account, a $50 monthly membership fee, and 15% of savings for any debt settled); FCS (Oct. 27, 2009) at 1 ("FCS has two program types, a blended fee approach and a settlement fee-only approach. The Debt Negotiation Company is a registered trade name of Financial Consulting Services. It offers only The Simple Plan, the settlement fee-only program."); *see also* ACCORD (Feb. 25, 2010) at 2-3 ("ACCORD supports the collection of a fee after a creditor agrees to a negotiated settlement amount and when the consumer transmits the funds to the creditor").

[290] *See, e.g.,* Patel at 1; Orion (Oct. 1, 2009) at 2; Loeb at 6-7; CSA at 9.

[291] RADR at 1.

[292] CSA at 9; D&A at 2.

[293] Other service providers who charge upon delivery of results experience the same risk. For example, realtors may spend considerable time and money unsuccessfully trying to sell a client's home and never get paid for those efforts.

[294] USOBA (Oct. 26, 2009) at 43-47.

[295] *Id.* at 43 ("advice or legal assistance" is communication entitled to full First Amendment protection, especially because information regarding statutory rights is "vital"). It is worth noting that this "communication" portion of the service is a relatively minor part of a commercial transaction.

The Commission concludes that the advance fee ban adopted here is permitted under the First Amendment. The advance fee ban does not restrain advertising, educational services, or other forms of communications, but is simply a restriction on the timing of payment. In denying a similar challenge to an advance fee ban in the TSR for certain offers of credit, a federal court found that it merely regulated "when payment may be collected" and did not impair the sale of educational materials produced by the company.[296]

Even assuming the advance fee ban were a restriction on speech, it would be scrutinized under the commercial speech test. Commercial speech is communication related solely to the economic interests of the speakers, in this case for-profit debt relief companies.[297] The First Amendment accords a lesser degree of protection to commercial speech than to other constitutionally guaranteed expression.[298] In *Central Hudson*, the Supreme Court established an analytical framework for determining the constitutionality of a regulation of commercial speech that is not false or misleading, and does not otherwise involve illegal activity.[299] Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance that interest; and (3) may extend only as far as the interest it serves – that is, it must be "narrowly tailored to achieve the desired objective."[300] In explaining the framework, the Court has said that the fit between the restriction's purpose and the means chosen to accomplish it must be "reasonable" but "not necessarily the least restrictive means" available to achieve the desired objective.[301]

The advance fee ban in the Final Rule comports with this test. First, preventing abusive sales practices is a substantial governmental interest.[302] Hundreds of thousands of financially distressed consumers have lost large sums of money to debt relief providers engaged in such practices.[303] Second, the advance fee ban directly advances this interest by protecting consumers from paying fees for services that are not rendered as promised. Thus, it will prevent the substantial harm, described in detail in this SBP, that arises when consumers pay in advance for debt relief services.[304] Finally, the advance fee ban is narrowly tailored to protect consumers from abuse, while nonetheless permitting legitimate firms to receive timely payment for services they provide to consumers. Without the carefully crafted advance fee ban adopted here, vulnerable consumers who enroll in debt settlement programs must pay hundreds or thousands of dollars in fees months or years before they receive any benefit from those payments, if they ever receive a benefit at all. This constitutes substantial consumer injury. As discussed below, therefore, charging an advance fee for debt settlement services is an abusive practice.[305] The modified advance fee ban, crafted to be no broader than absolutely necessary to remedy the identified significant consumer harm, will stop that abuse.[306] In addition, the advance fee ban provides enforcement authorities an efficient and essential law enforcement tool to ensure that practices in this burgeoning industry do not continue to harm consumers.[307] Accordingly, the advance fee ban, even if it is considered a regulation of "speech," is an appropriate restriction under the First Amendment.

g. Point 7: State Regulation Is Preferable to Federal Regulation

Several commenters discussed whether the Commission should forgo federal regulation and leave regulation of the debt relief industry to state governments. USOBA argued that the Commission should not impose an advance fee ban because it would usurp state regulatory prerogatives and prevent states from experimenting with diverse approaches to fee regulation.[308] On the other hand, several commenters asserted that FTC regulation was preferable to state regulation because (1) the FTC, with its regulatory expertise regarding advertising and telemarketing claims, is in a better position than state regulators to regulate debt relief firms, especially in that such marketing frequently crosses state lines;[309] (2) state law enforcement activity is uneven;[310] and (3) a state that finds a law violation can only protect and provide restitution to that state's residents, unless the company happens to reside within the enforcing state.[311]

The Commission believes that state law enforcement agencies play a valuable role in enforcing state laws against deceptive or abusive debt relief providers. A number of states have enacted laws or regulations restricting industry members in various ways, including setting maximum fees and, in some cases, even banning certain debt relief services. The Commission agrees with the commenters who noted the advantages of a federal standard that is enforceable both by the FTC and the states, in particular the ability to obtain nationwide injunctive relief and consumer redress.[312]

[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 provision in the FTC's proposed rule and is necessary to stop abusive practices of debt relief companies). Disclosures are often of limited benefit in inoculating consumers from being deceived. *See, e.g.,* FTC, Letter to Jennifer L. Johnson, Secretary, FRB, in response to a request for public comments regarding the "Home Equity Lending Market," Docket No. OP-1253, Sept. 14, 2006, *available at* (*http://www.ftc.gov/os/2006/09/docketop-1253commentfedreservehomeeqlenditextv.pdf*).

The TSR prohibits the collection of advance fees by purveyors of credit repair services, money recovery services, and guaranteed loans or other extensions of credit even though the Rule also bans deceptive claims and requires disclosures in marketing those products and services. *See* TSR, 16 CFR 310.1.

[307] NAAG (Oct. 23, 2009) at 10.

[308] USOBA (Oct. 26, 2009) at 36; *see also* Weinstein (Oct. 26, 2009) at 12 (*see* attached Weinstein paper at 11) (state regulation "is a better approach because it preserves the states' traditional prerogatives of overseeing the provision of financial services while establishing a flexible regulatory structure for an evolving industry").

[309] ULC at 4.

[310] SOLS at 2.

[311] SBLS at 9-10.

[312] Where, as here, Congress has not totally foreclosed state regulation, a state statute is

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.

evidence in the record to support this assertion. Given that enrolling and servicing consumers entails at least some costs, it is more likely that, under an advance fee ban, providers will be more discriminating in enrolling those consumers most likely to be successful and thus generate fees.[330] This would represent an improvement over the predominant fee structure in place currently – in which providers get paid no matter how, or if, they perform – which provides little incentive for providers to expend the resources necessary to obtain settlements quickly or effectively.

Debt settlement industry representatives also stated that an advance fee ban would encourage employees of debt settlement companies, when negotiating with creditors or debt collectors, to accept the first offer extended, regardless of whether it is the best possible offer for the consumer.[331] They further argued that banning advance fees would result in a power shift to the creditors and debt collectors, who would be able to offer less favorable settlements on the assumption that the debt settlement provider would take any settlement in order to get paid.[332] Again, there is no evidence in the record to substantiate these predictions. Moreover, it is based on the unsupported assumption that it is the provider, rather than the consumer, who makes the decision on whether a particular settlement offer is acceptable and affordable. Creditors and debt collectors should still have substantial incentives to settle debts at amounts that consumers can afford.

3. The Commission's Conclusion that Advance Fees for Debt Relief Meet the Test for Unfairness

The Commission uses the unfairness test set forth in Section 5(n) of the FTC Act to determine whether an act or practice is "abusive" under the Telemarketing Act.[333] An act or practice is unfair if: (1) it causes or is likely[334] to cause substantial injury to consumers, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is not reasonably avoidable by consumers. Based on the record in this proceeding, the Commission concludes that the collection of advance fees by debt relief services meets the unfairness test and, thus, is an abusive practice.

a. Advance Fees Charged by Debt Relief Services Cause or Are Likely to Cause Substantial Injury

The record shows that collecting fees for debt relief services prior to delivering services causes or is likely to cause substantial injury to consumers. Consumers in the midst of financial distress suffer monetary harm – often in the hundreds or thousands of dollars – when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results that, in most cases, never materialize.[335] Further, in the case of debt settlement as currently structured, providers often instruct or advise consumers to stop paying their creditors and begin paying the provider's fees instead.[336] These consumers not only suffer direct monetary injury from the late charges and interest that accrue when creditors are not paid, but they also suffer lasting harm to their creditworthiness such that future efforts to obtain credit, insurance, or other benefits will become more difficult and more expensive.

The Commission received many comments on the unfairness analysis in the NPRM. These comments are discussed in the following sections as they relate to consumer injury.

(1) Consumers are injured because they pay for services that are promised but not provided

Many commenters supported the injury analysis in the NPRM, contending that most consumers who purchase debt relief services pay in advance for promised benefits they never receive.[337] The Commission also has considered federal and state law enforcement actions, consumer complaints received by government and private organizations, and certain statewide data reported to the Colorado Attorney General. The evidence shows that the number of injured consumers is substantial. First, the FTC's cases have helped over 475,000 consumers who have been harmed by deceptive and abusive practices by debt relief companies.[338] Moreover, with respect to debt settlement companies alone, federal and state law enforcement agencies have brought actions challenging the practices of dozens of companies with, in the aggregate, hundreds of thousands of customers.[339] Twenty-nine states have brought at least 236 enforcement actions against debt relief companies.[340] These cases consistently have alleged that the defendants employed deception in order to enroll consumers, and then did not produce the results they promised.[341] As an example, the New York Attorney General filed cases against two debt settlement companies alleging that these entities had provided the represented services to only one percent and one-third of one percent (0.33%), respectively, of their customers.[342] Undoubtedly, many more consumers have been injured by providers that have not been the subject of formal law enforcement action. Thus, the Commission has determined that debt relief companies engage in widespread deception, frequently fail to produce the results they promise, and have caused injury to a large number of consumers.

Second, a significant and growing number of consumers have filed complaints about debt relief companies. Complaints to the FTC about debt relief increased approximately 18% from 2008 to 2009, rising from 1,073 to 1,263.[343]

[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 would pay between $2,800 and $3,600 for debt settlement services. Consumers complaining to the FTC have reported paying fees in very substantial amounts – often $2,500 to $11,000, depending on the company, the amount of the debt, and the length of time the consumer participated in the program.

[336] *Supra* note 73.

[337] *Supra* Section III.C.1. (citing NAAG (Oct. 23, 2009) at 2-5; MN AG at 1; CFA at 4; AFSA at 4).

[338] *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 Federal Trade Commission) at 2.

[339] GAO Testimony, *supra* note 50, at 21 (tallying customers of debt settlement companies subject to enforcement actions, not all types of debt relief companies); *see* FTC and State Case Lists, *supra* note 27; *supra* Section III.C.1.

[340] *Supra* Section III.C.1.

[341] NAAG (Oct. 23, 2009) at 2-5.

[342] Press Release, New York Attorney General, *Attorney General Cuomo Sues Debt Settlement Companies for Deceiving and Harming Consumers* (May 20, 2009), *available at* (*http://www.oag.state.ny.us/media_center/2009/may/may19b_09.html*). Similarly, in one FTC case, the Commission alleged that only 1.4% of consumers enrolled in the defendants' debt settlement plan obtained the results defendants promised. *See FTC v. Nat'l Consumer Council, Inc.,* No. SACV04-0474 CJC(JWJX) (C.D. Cal. filed Apr. 23, 2004) (calculating completion rates over a 40-month period without controlling for the time of enrollment).

[343] Commission staff used the following method to analyze debt relief complaints in the Commission's Consumer Sentinel database. FTC

NAAG reported that the number of complaints the states have received against debt relief companies, particularly debt settlement companies, has been rising and has more than doubled since 2007.[344] Moreover, consumers have filed numerous complaints with the Better Business Bureaus ("BBB") about debt settlement and debt negotiation companies.[345] The BBB categorizes these companies as "Inherently Problematic Businesses," indicating that it has fundamental concerns about the industry as a whole.[346] In March 2009, the BBB reported that complaints against debt consolidation and negotiation companies had risen by almost 19% in 2008 over the previous year.[347] Based on the complaints it had received, the BBB concluded that debt settlement and negotiation companies often charge substantial advance fees, make promises that cannot be fulfilled, mislead consumers about the impact of the services on their credit scores, and exaggerate the negative effects of bankruptcy to make their own services seem more appealing.[348] The BBB also found that some customers of debt negotiation and debt settlement providers stopped communicating with their creditors only to find that the providers, even after accepting payment, never contacted their creditors.[349]

The Commission recognizes that consumer complaints do not constitute a statistically representative sample of the population of purchasers of debt relief services. At the same time, such complaints usually are the "tip of the iceberg" in terms of the actual levels of consumer dissatisfaction.[350] In any event, the conclusion that collecting advance fees causes substantial consumer injury is not based on this body of evidence alone. The Commission has decades of experience in drawing inferences from the number and types of consumer complaints it receives. Complaint trends often are used for purposes of focusing law enforcement resources and identifying targets for prosecution. In this matter, the sheer number and consistency of the complaints received by the Commission and others, in the context of the Commission's overall Consumer Sentinel database, raise, at minimum, a strong inference of widespread consumer protection problems in the debt relief industry, including frequent misrepresentations and, ultimately, nonperformance, and that the collection of advance fees causes substantial injury to large numbers of consumers. Therefore, the Commission relies on the consumer complaint data as corroborative of the other types of evidence in the record.

Finally, as part of its injury analysis, the Commission considered the evidence regarding consumer outcomes in the record. Debt negotiation companies, which often operate through robocalls offering purported interest rate reductions, did not provide any data at all. Consumers who accept these offers are confronted with advance fees of hundreds or thousands of dollars and typically do not receive any services beyond placement of a single call to a creditor or providing a document instructing the consumer to accelerate their debt payments.[351]

Similarly, no member of the for-profit credit counseling industry submitted any kind of comprehensive data on the extent to which members of their industry provide the promised counseling services, or the extent to which they endeavor to screen out consumers for whom a DMP is unsuitable.[352] In fact, statewide data from Colorado suggest that most consumers who start DMPs do not finish them. In its comment, the Colorado Attorney General submitted data collected directly from debt relief providers, as required by statute. Of Colorado consumers who had been on DMPs for two to three years, less than nine percent had completed them.[353] The data do not distinguish between for-profit and nonprofit credit counseling providers, however.

With respect to debt settlement, as described at length above, the data that industry members provided showed that

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 62; BBB at Attachment A. The BBB defines debt negotiation and debt settlement companies as those claiming to negotiate with creditors to lower the total amount of a consumer's debt in exchange for an upfront fee.

[346] NAAG (Oct. 23, 2009) at 4 n.5. According to information provided to the GAO, the BBB's rating system incorporates information known to the BBB and its experience with the industry under assessment. Companies can apply to be removed from the category by demonstrating they deliver what they promise, make certain disclosures to consumers, have adequate procedures for screening out customers who are not appropriate candidates for debt settlement, and that a majority of its customers successfully complete its program. No debt settlement firm had successfully demonstrated that it met these criteria as of March 2010. GAO Testimony, *supra* note 50, at 12-13; *see also* Candice Choi, *Beware: Debt-Settlement Firms Often Promise More Than They Can Deliver*, The Boston Globe, Nov. 6, 2009, *available at* (*http://www.boston.com/business/personalfinance/articles/2009/11/06/beware_debt_settlement_firms_often_promise_more_than_they_can_deliver/*).

[347] Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans*, *supra* note 62.

[348] Better Business Bureau, *Debt Settlement and Debt Negotiation: Buyer Beware, It's a Jungle Out There*, May 21, 2009, *available at* (*http://louisville.bbb.org/article/debt-settlement-and-debt-negotiation–buyer-beware-its-a-jungle-out-there-10569*); *see also* Orion (Jan. 12, 2010) at 1-2 (acknowledging that, after contact from the BBB, it sought to eliminate systemic sales issues such as (1) selling a "Client Service Agreement" as an application; (2) guaranteeing or over-promising the product; (3) failing to fully disclose service fees; and (4) discussing only positive effects on consumer credit scores).

[349] Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans*, *supra* note 62.

[350] *See, e.g.*, Dennis E. Garrett, *The Frequency and Distribution of Better Business Bureau Complaints: An Analysis Based on Exchange Transactions*, 17 Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior 88, 90 (2004) (noting that only a small percentage of dissatisfied consumers complain to third-party entities or agencies); Jeanne Hogarth et al., *Problems with Credit Cards: An Exploration of Consumer Complaining Behaviors*, 14 Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior 88, 98 (2001) (finding that only 7% of consumers having problems with their credit card company complained to third party entities or agencies).

[351] NAAG (Oct. 23, 2009) at 3; CFA at 4, 8-10; SBLS at 4; QLS at 2; SOLS at 2; MN AG at 2 ("many debt relief services companies have no intention of delivering the services that they promise."); *see* FTC and State Case Lists, *supra* note 27.

[352] *Supra* note 195 (describing data from one for-profit credit counseling company about the number of consumers who called for counseling assistance and the number who enrolled in DMPs).

[353] Of the remaining consumers, 43.87% were categorized as still active, and 47.78% had dropped out of the program. CO AG at 4. The average program length was 40 months. *Id.*

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]

[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.").

Consumers drop out of debt relief programs for many reasons, but the record shows that providers' practice of charging substantial advance fees is a significant cause.[371] The injury that results from consumers paying in advance for promised services that frequently do not materialize is substantial.

(3) The context in which debt relief services are offered has contributed to the substantial injury

The Commission concludes that several aspects of debt relief transactions have contributed to the substantial injury caused by advance fees in the debt relief context. First, debt relief services are directed to financially distressed consumers, who are particularly vulnerable to the providers' claims.[372] The Commission has long recognized that sellers may exercise undue influence over highly susceptible classes of purchasers.[373] For this reason, the TSR prohibits advance fees for credit repair services and certain loan offers, services that also target financially distressed consumers.[374]

Second, debt relief services, as they are currently marketed, frequently take place in the context of high pressure sales tactics, contracts of adhesion, and deception. For example, many Commission cases have alleged that telemarketers of debt relief services have exhorted consumers to fill out the enrollment documents and return the papers as quickly as possible.[375] Notably, these enrollment documents typically include a power of attorney form, which providers use to cut off communication between the consumers and their creditors or debt collectors.

Third, as Congress recognized in enacting the Telemarketing Act, telemarketing calls are more susceptible to deception than face-to-face transactions because consumers do not have the opportunity to assess credibility or visual cues.[376] Indeed, the record shows that there has been a high level of deception in the telemarketing of debt relief services. For example, in its investigation, the GAO found numerous instances of companies providing fraudulent or deceptive information in telemarketing sales calls, such as debt reduction guarantees or government affiliation claims.[377] As described above, the Commission has charged 23 debt relief firms with deceptive practices in recent years, and the states have charged numerous additional firms with such violations.[378] Thus, the manner in which debt relief services have been sold has impeded the free exercise of consumer decisionmaking. The Commission historically has viewed such an impediment as one of the hallmarks of an unfair practice.[379]

A final factor in the injury calculation with respect to this industry is that charging an advance fee requires consumers to bear the full risk of the transaction, when the seller is in a better position to assume that risk. Consumers often have limited means to evaluate whether they are good candidates for debt relief, and therefore, consumers rely on the sellers' claims. Providers frequently hold themselves out as experts in determining the right course of action for the indebted consumer.[380] Moreover, only the provider knows the historic dropout rate for the service, as providers do not disclose their actual success rates. Thus, providers are better situated than individual consumers to know which consumers are likely to be able to complete the programs. The Commission long has held that consumers are injured by a system that forces them to bear the full risk and burden of sales-related abuses, particularly, as in this context, where the seller is in a better position to know and understand the risks.[381]

b. The Harm to Consumers Is Not Outweighed by Countervailing Benefits

The second prong of the unfairness test recognizes that costs and benefits attach to most business practices, and it requires the Commission to determine whether the harm to consumers is outweighed by countervailing benefits to consumers or competition.[382] In this proceeding, no debt negotiator provided any comments or evidence of countervailing benefits from advance fees. For-profit credit counselors provided only minimal evidence that they provide the promised services.[383]

[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] Unfairness Policy Statement, *supra* note 162, at 1074; *In re Amrep*, 102 F.T.C. 1362 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985) ("[A] 100% forfeiture clause, appearing in an adhesion contract for the sale of land, signed in an atmosphere of high pressure sales tactics, unequal bargaining power and deceptive misrepresentations, violated Section 5's proscription of unfair practices."); *In re Horizon Corp.*, 97 F.T.C. 464 (1981) (same); *In re Sw. Sunsites*, 105 F.T.C. 7, 340 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986) ("Respondents' practices resulted in substantial monetary injury to consumers, because they induced consumers to continue paying substantial amounts. . . through a variety of continuing misrepresentations.").

[380] *See FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo., final order Apr. 11, 2008); *FTC v. Nat'l Consumer Council, Inc.*, No. ACV04-0474CJC (JWJX) (C.D. Cal., final order Apr. 1, 2005). A debt settlement industry association stated that, based on its members' experiences, there are certain characteristics that make it more likely that a consumer will be able to achieve the benefits offered by a debt settlement program. TASC (Apr. 30, 2010) at 3; FDR (Linderman), Tr. at 96 (stating his company employs "25 to 30 people who do nothing more than analyze the information we receive from consumers regarding the appropriateness of the program for these consumers").

[381] *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) (codified at 16 CFR 429); *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose*, 40 FR 53,506, 53,523 (Nov. 18, 1975) (codified at 16 CFR 433) (same); *In re Orkin Exterminating*, 108 F.T.C. at 263, 364 ("By raising the fees, Orkin unilaterally shifted the risk of inflation that it had assumed under the pre-1975 contracts to its pre-1975 customers."); *In re Thompson Medical Co., Inc.*, 104 F.T.C. 648 (1984) (noting that marketers must provide a high level of substantiation to support "claim[s] whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves").

[382] Unfairness Policy Statement, *supra* note 162, at 1073-74 ("The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."); *see also* J. Howard Beales III, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, *available at* (*http://www.ftc.gov/speeches/beales/unfair0603.shtm*) (noting that "[g]enerally, it is important to consider both the costs of imposing a remedy (such as the cost of requiring a particular disclosure in advertising) and any benefits that consumers enjoy as a result of the practice, such as the avoided costs of more stringent authorization procedures and the value of consumer convenience").

[383] CareOne was the only for-profit provider that submitted data; it stated 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

Continued

The bulk of the comments and data submitted relating to the second prong of the unfairness test came from the debt settlement industry which essentially made two arguments.

First, members of the debt settlement industry commented that many consumers receive substantial benefits from debt settlement programs. In fact, as explained in Section III.C.2. above, the record shows that most consumers do not obtain a net benefit from debt settlement services. In any event, the Final Rule does not ban debt settlement services or restrict the amount of debt settlement company fees; it only bars collection of advance fees.[384] There is no empirical evidence in the record that paying large advance fees has any benefits for consumers.[385] Given the large percentage of consumers who drop out of debt settlement programs – in large part due to having to pay advance fees – the Commission concludes that any countervailing benefits to consumers that might possibly derive from paying advance fees is greatly outweighed by the substantial injury that practice causes.[386]

Second, several commenters, principally from the debt settlement industry, predicted that significant numbers of debt relief companies would be harmed or go out of business if the advance fee ban were implemented,[387] because (1) they would not have the cash flow necessary to administer settlement plans and provide customer service;[388] (2) they may not get paid for the services they rendered given their customers' already precarious financial condition;[389] and (3) scam operators would ignore the advance fee ban, profiting at the expense of debt settlement companies that complied with the law.[390] Other commenters posited that no new companies would enter the market, further injuring competition.[391]

Although the Commission cannot predict with precision what impact the advance fee ban will have on the debt relief industry, the Commission concludes, based on the record evidence, that any injury to competition resulting from the elimination of any companies unable to succeed under the modified advance fee prohibition adopted here would be outweighed by the benefits to consumers that would result from this provision. The record suggests that legitimate providers of debt relief services can operate their businesses without collecting advance fees.[392] The record contains scant evidence about the costs debt relief providers typically incur prior to settling debt, and the estimated costs appear to vary widely.[393] The large bulk of those costs, however, are for marketing and customer acquisition.[394] As in many other lines of business, debt relief companies would have to capitalize their businesses adequately in order to fund their initial operations. Further, the record indicates that they could start recouping their expenses relatively quickly. Providers only need sufficient capitalization to operate until they begin receiving fees generated by performance of the promised services.[395] The Final Rule allows providers to receive fees as they settle each debt.[396] CCAs generally will be able to collect fees at the beginning of the DMP, after the consumer enrolls and makes at least one payment.[397] With respect to debt settlement, if information submitted by commenters is accurate, providers often can start settling debts as early as five or six months into the program.[398]

The Commission acknowledges that the ban on advance fees will shift some of the transactional risk from the consumer to the provider. At present, however, consumers bear the full risk – they must pay hundreds or thousands of dollars with no assurance that they will ever receive any benefit in return.[399] Moreover, the transaction inherently is one in which many consumers are doomed to fail, because they are already financially distressed and cannot afford to pay the large advance fees, make payments to creditors, and save enough money to fund settlements. The record in this proceeding bears this out – a large majority of consumers drop out of the program, in most cases before they receive savings commensurate with the fees and other costs they paid.[400]

In any event, the Final Rule substantially mitigates the provider's risk of nonpayment. As described in more detail below, providers will be able to require customers to make payments into a dedicated bank account. As each debt is settled, the consumer can pay the provider's fee from that account.[401]

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 financially suitable for the program and by obtaining settlements more quickly. There is no reason to believe that consumers would attempt to "game" the system by dropping out of the program and getting their money back before the provider obtains any settlements; since the purpose of enrolling in the first place is to obtain settlements, consumers would have no incentive to drop out prior to obtaining them. Moreover, to the extent that consumers must pay fees to the bank or other entity holding their accounts, they will stand to lose at least some money if they later quit the program and

Given that most consumers who pay advance fees receive little, if any, benefit from the debt relief services covered by the Final Rule, any injury to individual providers resulting from the advance fee ban does not outweigh the consumer injury resulting from current fee practices.

c. Consumers Cannot Reasonably Avoid the Injury

The third and final prong of the unfairness analysis precludes a finding of unfairness in cases where the substantial injury is one that consumers reasonably can avoid.[402] The extent to which a consumer can reasonably avoid injury is determined in part by whether the consumer can make an informed choice. In this regard, the Unfairness Policy Statement explains that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary.[403] The Commission finds a practice unfair "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[404]

Consumers can reasonably avoid harm only if they understand the risk of injury from an act or practice.[405] In the context of debt relief service fees, consumers can avoid the injury only if they understand the payment arrangement, and its implications, and are aware of the risks of paying in advance. Consumers are unlikely to know that the services do not benefit most consumers who enroll and that they are at significant risk of losing the large sums of money they pay in advance fees.[406] This is especially true because of the widespread deception surrounding the marketing of debt relief services[407] and because purchasers of debt relief services typically are in serious financial straits and are thus particularly vulnerable to the providers' glowing claims.[408] Relying on the representations made in advertisements and in telemarketing calls, these vulnerable consumers have every reason to expect to receive the promised benefits from those who purport to be experts and have no way of knowing that, in fact, they are unlikely to receive those benefits, if they receive any benefits at all.[409] Consumers are unaware that when they purchase debt relief services, they are at high risk of failure and the concomitant loss of hundreds or thousands of dollars that they can ill afford to lose.[410] As described earlier, debt relief programs with large advance fees force consumers in financial distress to do what most of them cannot do: simultaneously pay the provider, save for settlements, and meet other obligations such as mortgage payments.

Moreover, consumers typically cannot mitigate their harm by seeking a refund. Debt relief providers often advertise generous refund policies, but frequently consumers lose much of their money.[411]

d. Public Policy Concerning Advance Fees

The Commission's unfairness analysis permits it to consider established public policies in determining whether an act or practice is unfair, although those policies cannot be the primary basis for that determination.[412] In this regard, nearly all states have adopted laws that regulate the provision of some or all debt relief services. In fact, six of these laws ban receiving any payment as a for-profit debt settlement company.[413] Consistent with these statutes and its law enforcement experience, NAAG filed comments strongly advocating that the Commission issue a rule prohibiting the charging of advance fees for debt relief services.[414] These state laws provide further support for the Commission's finding that this practice is unfair.

Accordingly, the Commission concludes that the practice of charging advance fees is an abusive practice under the Telemarketing Act because it meets the statutory test for unfairness – it causes or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable.

4. Recommendations to Restrict Other Abusive Practices

A number of commenters proposed additional remedial provisions, as discussed below. The Commission declines to adopt these additional remedies in the Final Rule.

a. Suitability Analysis

A coalition of consumer groups and other commenters recommended that the Commission require providers to employ a suitability or screening analysis of prospective customers to ensure that only those who meet the financial requirements to successfully complete the offered debt relief program

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.

[410] Having paid in advance and having not received a refund, the only remaining recourse consumers would have for a nonperforming debt relief service provider is to file a lawsuit for breach of contract, hardly a viable option for financially distressed consumers. *Orkin*, 108 F.T.C. at 379-80 (Oliver, Chmn., concurring) (suing for breach of contract is not a reasonable means for consumers to avoid injury). The cost of litigating makes it impossible or impractical for many consumers to seek legal recourse. Many consumers who are in financial distress may not even be aware that filing an action against the provider for breach of contract is available as an alternative. Therefore, the possibility of taking legal action does not sufficiently mitigate the harm to consumers from paying an advance fee.

[411] MN AG at 2 (attaching complaints in cases against Priority Direct Marketing, Inc., Clear Financial Solutions, and Moneyworks, LLC); *see, e.g., FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (defendants advertised money-back guarantees, yet allegedly refused to honor them); *New York v. Credit Solutions*, No. 401225 (N.Y. Sup. Ct. N.Y. Cty. 2009 filed May 19, 2009); QLS at 3; CFA at 5, 9; WV AG (Googel), Tr. at 84. Moreover, a requirement that debt relief services honor refund requests is not sufficient to address this harm because obtaining a refund has a cost to consumers. *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) ("This might be a tenable argument if obtaining a refund were costless, but of course it is not. It is a bother. No one would buy something knowing that it was worthless and that therefore he would have to get a refund of the purchase price.").

[412] 15 U.S.C. 45(n).

[413] La. Rev. Stat. § 14:331; N.D. Cen. Code § 13-06-02; Wyo. Stat. Ann. § 33-14-102; Mass. Gen. Laws Ann. Ch. 180 § 4A; N.J. Stat. Ann. § 17:16G-2; Haw. Rev. Stat. Ann. § 446-2.

[414] NAAG (Oct. 23, 2009) at 1.

are permitted to enroll.[415] Several commenters asserted that providers' failure to do such analyses contributes to consumers' inability to stay in the program, and thus to the injury they suffer when they drop out.[416]

The Commission has concluded that it is unnecessary at this time to institute explicit suitability requirements in the Final Rule. The existing provisions of the Final Rule should provide incentives for providers to screen out consumers who cannot afford both to save funds for settlement and to pay the provider's fee, because if a consumer cannot do both and drops out before settling or otherwise resolving any debts, the provider cannot collect its fees.[417] Certainly the Commission regards it as a best practice to implement screening procedures to maximize the likelihood that enrollees will have the wherewithal to complete and benefit from a service. The Commission will continue to monitor the industry to ensure that debt relief providers establish and maintain reasonable policies and procedures to screen prospective customers for suitability. If it finds that significant numbers of providers continue to enroll consumers who are unsuitable for their programs, the Commission may consider further amendments to the TSR to solve the problem.

b. Right of Rescission or Refund Provision

Several commenters also recommended that the Final Rule grant consumers a right to rescind their contracts within a certain period of time and receive a refund of fees paid to debt relief providers.[418] They argue that such a requirement would provide consumers with more time to assess whether the service is beneficial for them and also discourage providers from enrolling consumers who are unlikely to benefit from their services. The Commission also considered whether requiring providers to give consumers refunds for a certain period of time would mitigate any harm consumers suffered from advance fees.

The Commission concludes that the modified advance fee restrictions in § 310.4(a)(5) adequately address these concerns. A consumer who receives no benefit from a program will not be required to pay a fee and can simply terminate the program. Because any funds that the consumer pays into a dedicated bank account remain the property of the consumer until the debts are settled, enabling the consumer to cancel the program and recoup his money, the advance fee ban effectively provides a right of rescission and refund. Moreover, a rescission or refund right on its own leaves significant risk with consumers that the provider will not respond to a request for rescission or refund, or it will be out of business before providing the contract rescission or refund.[419] Finally, if a refund right only lasts until the consumer receives the first settlement, the company would have the incentive to settle a small debt very quickly in order to extinguish the refund right, which does not provide a substantial benefit to the consumer.[420]

c. Fee Caps

Industry representatives also have argued that, instead of prohibiting advance fees, the Final Rule should set limits or caps on such fees similar to those currently imposed by many states.[421] The Commission declines to set fee limits in this proceeding. While the Commission concludes that the collection of advance fees by debt relief providers is an abusive practice, it does not believe that the Telemarketing Act authorizes the Commission to regulate the *amount* of fees a provider charges, absent some other type of deceptive or abusive conduct that interferes with a competitive market.[422] In general, fee-setting is best done by a competitive market, and the Commission's role is to remove obstacles to consumers making the informed choices that are necessary to a properly functioning market. The provisions of the Final Rule, including the narrowly tailored ban on advance fees, are designed to ensure that the debt relief market functions properly and to eliminate the risk that consumers will pay thousands of dollars and receive little or nothing in return.[423] In any event, the Commission believes that any decision to set fees is made more appropriately by legislative bodies, as several states have done with respect to debt relief services.[424]

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[415] *See* CFA at 21 ("[D]ebt relief providers should be required to conduct an individual financial analysis for all potential customers to determine whether the service is suitable for and will provide a tangible net benefit to them before enrolling them."); CareOne at 7 ("Providers should be required to . . . attest to and document the suitability of the service sold to the consumer."); TASC (Apr. 30, 2010) at 1-2; *see also* RDRI (Manning), Tr. at 220-21.

[416] *See* NAAG (Oct. 23, 2009) at 2 ("The primary consumer protection problem areas that have given rise to the States' action include . . . lack of screening and analysis to determine suitability of debt relief programs for individual debtors."); CareOne at 7 ("One of the greatest concerns about abuse of consumers in the debt relief industry relates to whether consumers are appropriately placed into plans that represent the most suitable approach for addressing their debt problems."); MP at 2 ("The reality is that the majority of consumers being enrolled into traditional debt settlement programs are not suitable candidates for this strategy."); NACCA (Keiser), Tr. at 66 ("I think one problem might be is too many people might be getting into programs that aren't appropriate for them that they cannot afford, and that's where you hear the horror stories."); WV AG (Googel), Tr. at 84 ("[T]he classic complaint that I think most states have received is consumers who have paid thousands and thousands of dollars up front, who probably weren't even suitable candidates for debt settlement."). *But see, e.g.,* TASC (Housser), Tr. at 224 ("I do want to point out that we think we do a pretty good job and TASC members think they do a pretty good job of suitability analysis of consumers"); FDR (Linderman), Tr. at 95 (arguing that "we take the time to do a thorough suitability analysis").

[417] Final Rule, § 310.4(a)(5). *See, e.g.,* ACCORD (Noonan), Tr. at 275-76 ("[I]f you have a ban on advance fees . . . no one will have an incentive to have a high drop-out rate, they won't be paid for those clients. . . . [E]veryone will continue to have an incentive, as we do now, to do a proper suitability study, because we won't want unsuitable people in our plans."); WV AG (Googel), Tr. at 222 ("[O]ne of the best ways to require or to bring about a suitability analysis, without even specifically requiring it, would be the advance fee ban, because then there would be that, you know, meeting of interest, it would be in everybody's interest to do it."); CRN (Bovee), Tr. at 120; CU (July 1, 2010) at 4.

[418] *See, e.g.,* CFA at 19; CFA (Grant), Tr. at 209; NFCC at 13; CRN at 7; TASC (Apr. 30, 2010) at 6-7.

[419] Summary of Communications (June 16, 2010) (meeting with consumer groups); *see supra* note 411.

[420] Summary of Communications (June 16, 2010) at 1 (meeting with consumer groups).

[421] *See, e.g.*, TASC (Apr. 30, 2010) at 1-2, 7-9. Additionally, TASC recommended that the Commission mandate that companies spread their collection of fees over a specified period of months. This fee structure, however, allows providers to collect fees regardless of whether they have achieved results and therefore suffers from the flaws discussed in this subsection and results in the abuse described in Section III.C.3. *See* SOLS at 2 (recommending fee caps in addition to an advance fee ban).

[422] The purpose of the FTC's unfairness doctrine is not to permit the Commission to obtain better bargains for consumers than they can obtain in the marketplace. *Am. Fin. Servs. Ass'n v. FTC,* 767 F.2d 957, 964 (D.C. Cir. 1985). Instead, it is to prohibit acts and practices that may unreasonably create or take advantage of an obstacle to the ability of consumers to make informed choices. *See id.* at 976.

[423] Simply capping the fees might reduce the amount of consumer injury, but, so long as consumers are induced to pay some amount of money for services that may never be rendered, would not eliminate the injury.

[424] Moreover, any federally established maximum advance fee might well become the de facto *actual* fee for debt relief services. F. M. Scherer, *Industrial Market Structure and Economic Performance* 190-93, 204 (1980); F.M. Scherer, *Focal Point Pricing and Conscious Parallelism*, *in Competition Policy, Domestic and International*, 89-97 (2000). Further, fee caps can quickly become obsolete, as changes in market conditions and technologies render the fixed maximum fee too low (*e.g.*, if the costs of providing the service rise) or too high (*e.g.*, if new technology lowers the cost of providing the service or if market participants would compete on price absent regulation). *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

5. The Advance Fee Ban – Final Rule Amendment

The amended Rule § 310.4(a)(5)(i) would prohibit:

(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.[425]

The Final Rule places no restriction on the *amount* of fees that providers can charge or mandate a formula for calculating fees,[426] but does establish rules about *when* they can collect them. In short, the Rule prohibits providers from charging any fee in advance of providing the debt relief services. If the provider settles, renegotiates, reduces, or alters debts sequentially, it may collect part of its fee after each individual settlement or other alteration. Four issues arising from this provision merit further discussion: the contractual agreement, fee requirements, bank account practices, and effective date.

a. The Contractual Agreement

The Final Rule specifies that, in order to collect a fee, providers must have obtained a settlement or other alteration of a debt, pursuant to a settlement agreement, DMP, or other valid contractual agreement between the consumer and the creditor or debt collector that is executed by the customer. The provider may obtain an oral or written execution of the agreement in order to allow providers to proceed efficiently. The consumer must execute the specific agreement, however; a contract signed at the outset specifying, for example, that any offer that involves the payment of a certain amount will be deemed acceptable to the consumer is **not** sufficient to comply with the Rule.[427] Moreover, the provider may not rely on authority obtained through a power of attorney to execute the contract on the consumer's behalf. The requirement that consumers execute the agreements is necessary to ensure that the offers are legitimate, final, and acceptable to the consumers.[428] The Rule further specifies that the provider cannot collect its fee until the consumer makes at least one payment to the creditor or debt collector to resolve the debt. This provision, which was not included in the proposed rule but was recommended by commenters, will help ensure that the consumer has the necessary funds to satisfy the offer.[429]

In order to collect its fee, the provider must have documentation evidencing the debt resolution, as specified by § 310.4(a)(5)(i)(A) of the Final Rule.[430] Different types of debt relief services may generate different types of documentation. With regard to debt negotiation, an executed contract showing that a creditor has agreed to the concession (*e.g.*, a lower interest rate for a particular credit card), along with evidence that the consumer has made at least one payment under the new terms, would suffice. For a DMP, the CCA must provide a debt management plan containing the altered terms and executed by the customer that is binding on all applicable creditors. The CCA also must have evidence that the consumer has made the first payment to the CCA for distribution to creditors.[431] In the case of debt settlement, the provider must obtain documentation showing that the account at issue has been successfully settled and at least one payment has been made toward the settlement, before receiving the fee for that debt.[432] Examples of such documentation include a letter or receipt from the creditor or debt collector stating that the debt has been satisfied, or a payment has been made toward satisfaction and the amount of the payment received.[433] Once the consumer executes the agreement, the debt relief entity may collect the fee associated with the individual debt and need not wait until all debts have been settled or otherwise altered.

[425] The provisions currently contained in §§ 310.4(a)(5)-310.4(a)(7) will be renumbered to accommodate the new § 310.4(a)(5) and will shift to §§ 310.4(a)(6)-310.4(a)(8), respectively.

[426] The Final Rule does require providers to clearly and prominently disclose their fees. 16 CFR 310.3(a)(1).

[427] *See* CFA at 17.

[428] Commenters supported such a requirement. *See* CFA at 15-16; SOLS at 2.

[429] FCS (Oct. 27, 2009) at 4 ("If a company is permitted to collect its fee after merely negotiating a settlement, but before the creditor receives payment from the consumer, consumers may find themselves paying fees regardless of their ability to meet the settlement payment obligations to their creditors. This provision should be changed to allow the debt settlement company to collect its fee only when the consumer's payment is sent to the creditor."); ACCORD (Oct. 9, 2009) at 2.

[430] 16 CFR 310.4(a)(5)(i)(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") (emphasis added). *See* AFSA at 10 ("It is appropriate to require provision of documents proving that a debt has, in fact, been renegotiated, settled, reduced or otherwise altered."); Weinstein (Oct. 26, 2009) at 8 (*see* attached Weinstein paper at 7) ("When a consumer and a creditor reach a mutual agreement, the debt settlement company provides a written agreement to the consumer and assists with arranging the consumer's payment to the creditor.").

[431] CCAs renegotiate all of the consumer's eligible debts at one time, and creditors generally grant concessions immediately upon enrolling consumers in the DMP. GP (Mar. 5, 2010) at 1. Thus, CCAs do not renegotiate debts individually, and Final Rule § 310.4(a)(5)(i)(C) does not apply to them. CCAs commonly charge consumers not only an initial set-up fee, but also periodic (usually monthly) fees throughout the consumer's enrollment in the DMP. Laws in most states cap these fees. Final Rule § 310.4(a)(5) prohibits CCAs from charging a set-up or other fee before the consumer has enrolled in a DMP and made the first payment, but it would not prevent the CCA from collecting subsequent periodic fees for servicing the account.

[432] The "at least one payment" provision applies specifically to the case of bona fide installment settlements, in which a creditor or debt collector contracts to accept the settlement amount in installments over time. If the creditor or debt collector requires a single payment to satisfy the debt, the provider cannot divide the settlement into separate parts and collect its fees upon a payment from the consumer that only partially satisfies the debt. The Commission will monitor fee practices relating to installment settlements to ensure that providers are not manipulating settlement offers to collect their fee to the detriment of consumers.

[433] *See* CRN (Jan. 12, 2010) at 7 ("All creditors and their assignees provide documentation of settlement and/or payment agreements."). A letter containing an offer to settle by itself does not meet the Rule's requirements, but may be one part of the necessary documentation. Some commenters stated that some creditors or debt collectors may not provide a document confirming that the payment has been accepted and the debt has been satisfied. MD (Oct. 26, 2009) at 53 (some collection agents refuse to provide documentation that clearly establishes the debt has been extinguished); ART at 2 (some creditors do not provide timely documentation).

b. Fee Requirements

The purpose of the advance fee ban could be thwarted if debt settlement providers collect a disproportionately large percentage, or even the entire amount, of the fee after settling a single debt. The Final Rule addresses this concern: in situations in which providers settle debts individually over time, the fee collected by the provider must bear the same proportional relationship to the total fee as the individual debt bears to the entire debt amount. Further, the Final Rule requires that, in calculating this proportion, the provider must use the amount of the individual debt and the entire debt at the time the consumer enrolls in the program (i.e., before any interest or creditor fees have accrued).[434]

Alternatively, the provider can collect a percentage of savings achieved.[435] In that case, the fee for each debt settled or otherwise altered must be an unchanging percentage of the amount saved as a result of the service.[436] The amount saved must be based on the difference between the amount of debt at the time the consumer enrolls in the program and the amount of money required to satisfy the debt. Using either fee structure, the fee or consideration must be accurately disclosed in compliance with § 310.3(a)(1)(i).[437]

Two commenters recommended that the Commission *require* that the amount of the provider's fee be based on the percentage of savings realized by the consumer.[438] As stated earlier, the Final Rule does not set fee maximums or dictate a formula for calculating fees but simply governs when the fees can be collected. The provisions of the Final Rule, including the required disclosures, prohibitions on misrepresentations, and advance fee ban, should spur price competition in the market.[439]

c. Dedicated Bank Accounts

In the NPRM, the Commission stated that it did not intend the proposed rule to prohibit consumers from using dedicated bank accounts, and it requested comments on this issue.[440] In response, some commenters expressed views, assuming the Final Rule included an advance fee ban, on whether the Rule should permit consumers, or allow providers to require consumers, to put funds into a dedicated bank account until the services are delivered. A coalition of consumer groups stated that an advance fee ban should allow consumers to use legitimate bank accounts that they control.[441] An industry member stated that allowing providers to require consumers to set money aside in a dedicated bank account is "absolutely necessary" to ensure that the money available is adequate to cover the settlement amount and the provider's fee.[442] Additionally, a municipal consumer protection agency stated that dedicated bank accounts would ensure that a debt settlement company could collect its fees once it has settled a consumer's debt.[443]

Section 310.4(a)(5)(ii) of the Rule permits debt relief providers to require consumers to place funds designated for the company's fees and for payment to the consumer's creditors or debt collectors in a dedicated bank account, provided certain conditions are met. Once a settlement agreement is executed and the payment (or first payment, in the case of an installment agreement) is made, the provider may require that the appropriate fee payment be sent from the account to the company. This provision will assure providers that, once they settle a consumer's debt, they will receive the appropriate fee.

To ensure that consumers are protected, the Final Rule specifies five conditions that the provider must meet if it wishes to require the consumer to set aside funds for its fee and for payment to creditors or debt collectors in a dedicated bank account.[444] First, the account must be located at an insured financial institution.[445] Second, all funds in the account must remain the property of the consumer, and, if the money is held in an interest-bearing account, all interest that accrues must be paid to the consumer.[446] Third, the agent holding the funds must be independent – that is, not under the control of or affiliated with the debt relief provider.[447] Fourth, to further ensure that the account provider is truly independent, the debt relief provider may not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service.[448] The Commission intends this provision to be read broadly to prohibit all fee splitting between the entity or entities administering the

[434] In other words, if the amount of the debt that is settled is one-third of the entire debt amount enrolled in the program, the provider can collect one-third of its total fee.

For the purposes of calculating a proportional fee, the provider must include as part of the entire debt amount any additional debts that the consumer enters into the program after the original date of enrollment. Further, the provider must use the amount of the additional individual debt at the time the consumer entered that debt into the program. For example, suppose that a consumer enrolls in a debt settlement program with a total of two $10,000 debts – totaling $20,000. Six months after enrolling in the program, the consumer places one additional debt with a balance of $10,000 into the program. Under § 310.4(a)(5)(ii)(C)*(1)*, the consumer's entire debt amount is now $30,000. Thus, if the provider settles any one of the consumer's three debts, it may only collect one-third of its total fee ($10,000 divided by $30,000).

[435] This alternative can be used when the provider uses a contingency-based fee model.

[436] This requirement explicitly prevents providers from front-loading the fee by collecting a disproportionately large percentage of savings for any debts settled early in the program.

[437] 16 CFR 310.3(a)(1)(i).

[438] CareOne at 5; FCS (Oct. 27, 2009) at 4 ("We also urge the Commission to consider requiring fee structures that are based on the savings the company negotiates for the consumer. . . . Allowing companies to collect flat fees (even fees that are capped, as some states provide) disconnects the amount of the fee from the value the consumer receives. In contrast, success-based fees ensure the fee is proportionate to the benefit and still allow debt settlement companies to compete on price."). Several companies use a contingency fee model, charging consumers a specific percentage of savings that they obtain. CRN (Jan. 21, 2010) at 4 (15% of savings); FCS (Oct. 27, 2009) at 2; ACCORD (Oct. 9, 2009) at 2-3; TBDR at 1; *see also* SBLS at 4. One commenter raised concerns whether assessing fees based on settlement activity would lead to the best outcomes for consumers. FDR (Oct. 26, 2009) at 15-16 ("Where fees are based exclusively on settlement activity or on the timing of achieving settlements, the debt settlement services provider has an incentive to complete settlements with the creditor and on the account that creates the most revenue.").

[439] *See* USDR (Oct. 20, 2009) at 2.

[440] *TSR Proposed Rule*, 74 FR 41988, 42017 (Aug. 19, 2009).

[441] CFA at 17; CFA (Plunkett), Tr. at 141.

[442] CRN (Bovee), Tr. at 142 (stating that his company does not use escrow accounts and has outstanding uncollected fees of more than $100,000).

[443] NYC DCA at 2.

[444] If a provider is going to require a dedicated bank account, it may not require the use of a dedicated bank account solely to set aside funds for the provider's fees.

[445] This requirement does not prevent an intermediary that is not an insured financial institution from providing services in connection with the account as well. For example, GCS and Noteworld Servicing Center provide account management and transaction processing services relating to special purpose bank accounts that clients of debt settlement companies use. *See* GCS at 1. If such an intermediary is used, the bank and the nonbank both are "entities administering the account" under the Final Rule.

[446] *See* Summary of Communications (June 24, 2010) at 2 (state attorney general representative stated that consumers could be injured if they were not able to use money in the accounts for living expenses if necessary; a second state attorney general representative stated that if providers own the accounts, the money could be subject to claims by the company's creditors); Summary of Communications (July 9, 2010) at 1 (consumer group representative stated that the consumer should have control over the account, and it should be in the consumer's name).

[447] *See* Summary of Communications (June 24, 2010) at 2 (a state attorney general representative described risks of service provider collusion with fraudulent companies).

[448] *See* Summary of Communications (June 24, 2010) at 2 (a state attorney general representative stated that the rule should ensure that debt settlement companies do not split fees with the account providers or charge unreasonable fees for the accounts).

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 enforcement cases show that there is a risk that providers will utilize funds in consumers' accounts for their own purposes.[450] Thus, the Rule includes five specific safeguards discussed in this section to guard against such illegal activity.[451]

The Rule does not prohibit an independent entity that holds or administers a dedicated bank account meeting the above criteria from charging the consumer directly for the account. However, the Commission will be monitoring practices related to these fees, and it may take further action, if needed, to address any deceptive or abusive fee practices in connection with the accounts.

d. Effective Date

The advance fee ban provision, § 310.4(a)(5) of the Final Rule, takes effect on October 27, 2010. The Commission is allowing debt relief providers an additional month after the effective date of the other provisions of the Rule, because compliance with the advance fee ban may entail adjustments to many providers' operations. The Final Rule does not apply retroactively; thus, the advance fee ban does not apply to contracts with consumers executed prior to the effective date.

D. Section 310.3: Deceptive Telemarketing Acts or Practices

The Final Rule mandates four debt relief-specific disclosures, which complement the existing, generally applicable disclosures currently in the TSR.[452] The Final Rule requires debt relief service providers to disclose, clearly and conspicuously, before the consumer consents to pay: (1) the amount of time necessary to achieve the represented results; (2) the amount of savings needed before the settlement of a debt; (3) if the debt relief program includes advice or instruction to consumers not to make timely payments to creditors, that the program may affect the consumer's creditworthiness, result in collection efforts, and increase the amount the consumer owes due to late fees and interest; and (4) if the debt relief provider requests or requires the customer to place funds in a dedicated bank account at an insured financial institution, that the customer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty, and receive all funds in the account. Together, these disclosure requirements will ensure that consumers have the material information they need to make an informed decision about whether to enroll in a debt relief program.

Section 310.3(a)(1)(viii) of the proposed rule contained three other debt relief-specific disclosures. After consideration of the record, the Commission has decided to delete those disclosures:

- that creditors may pursue collection efforts pending the completion of the debt relief service (proposed Section 310.3(a)(1)(viii)(D)), which has been combined with another required disclosure;
- that any savings from the debt relief program may be taxable income (proposed Section 310.3(a)(1)(viii)(F)); and
- that not all creditors will accept a reduction in the amount owed (proposed § 310.3(a)(1)(viii)(c)).

The Final Rule also modifies the preamble to the general disclosure requirements in § 310.3(a)(1) to clarify that sellers or telemarketers must make disclosures before a consumer **consents to pay** for the goods or services offered.

This section discusses: (1) the debt relief-specific disclosure obligations added as a result of this proceeding, (2) the disclosures in the proposed rule that were not adopted in the Final Rule, (3) the general disclosure obligations under the TSR, (4) the timing of the required disclosures, and (5) additional disclosures that commenters recommended, but which the Commission did not adopt in the Final Rule.

1. Amendments to Section 310.3(a)(1): Debt Relief-Specific Disclosure Obligations

In assessing the six new disclosures in the proposed rule, the Commission considered whether omitting the information would cause consumers to be misled, the need for those disclosures, and their likely effectiveness. The Commission applies its deception standard in determining the legal basis for disclosures: an act or practice is deceptive if (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation is material to consumers.[453] Injury is likely if inaccurate or omitted information is material.[454] A claim is deceptive if it either misrepresents or omits a material fact such that reasonable consumers are likely to be misled.[455] Application of

[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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this analysis leads the Commission to conclude that each of the four items of information that the provisions adopted herein require to be disclosed are material and that, absent disclosure of these items of information, consumers seeking debt relief draw reasonable but incorrect conclusions about the benefit of purchasing such service, and are therefore likely to be misled. Thus, failure to disclose any of these four items of information is a deceptive practice.

a. Need for Debt Relief-Specific Disclosures

Commenters generally supported the proposed rule's approach of requiring debt relief-specific disclosures in connection with the telemarketing of debt relief services or programs. NAAG supported the proposed disclosures, stating that although they alone might not be sufficient to curb abusive conduct by debt relief providers, consumers are entitled to the basic information that the proposed disclosures provide.[456] A coalition of 19 consumer advocacy groups "strongly" supported the proposed disclosures, noting that they will ensure that consumers understand how debt relief services work and whether the program will satisfy their needs.[457]

Most debt relief providers also supported the proposed disclosures.[458] One debt relief industry trade association recommended that the Rule require "full and complete disclosure" to consumers of the risks of debt settlement before a consumer enters a plan, noting that the FTC's proposed new disclosures were similar to the model disclosures contained in trade association guidelines.[459] Individual debt relief providers expressed support for the proposed disclosures because consumers who fully understand all aspects of a debt relief program are more likely to complete it successfully,[460] and because the disclosures would make it more difficult for fraudulent companies to operate.[461]

A comment submitted by an association of credit counseling agencies also supported the proposed disclosures for debt relief services.[462] An individual nonprofit CCA commented that the proposed disclosures are necessary to ensure that consumers understand that some of the money they pay to the provider goes towards the provider's fees rather than to pay creditors.[463]

b. Debt Relief-Specific Disclosures

As explained in the NPRM and in Section I above, consumers often do not understand the mechanics of debt relief, making them more susceptible to deception.[464] The debt relief-specific disclosures are intended to ensure that consumers have accurate information, thereby enabling them to make informed purchasing decisions and that they are not misled by the omission of key information. As modified in the Final Rule and discussed herein, § 310.3(a)(1) explicitly mandates that all of the required disclosures be made "[b]efore a customer consents to pay for goods or services offered." Language added to the existing Footnote 1 of the Rule clarifies that the provider must make the required disclosures before the consumer enrolls in an offered program.[465]

After review and analysis of the record, the Commission has adopted three of the six proposed disclosures in the Final Rule, having determined that the remaining three are duplicative or likely to detract from the efficacy of the required disclosures. It also has adopted one additional disclosure regarding the use of dedicated bank accounts.

The next three sections discuss the four disclosures adopted in the Final Rule.

(1) Sections 310.3(a)(1)(viii)(A) and (B)

The proposed rule would have required telemarketers of debt relief services to make the following disclosures:

- the amount of time necessary to achieve the represented results and, if the service entails making settlement offers[466] to customers' creditors, the specific time by which the provider will make a bona fide settlement offer to each creditor or debt collector;[467] and
- to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the amount of money, or the percentage of each outstanding debt, that the customer must accumulate before the provider will make a bona fide settlement offer to each creditor or debt collector.[468]

These disclosures were designed to prevent deception by ensuring that consumers understand the time and monetary commitment necessary for the plan to succeed, and thus the risks involved in enrolling in a debt relief program in which the provider may not begin to negotiate relief for months or even years.

The Commission received several comments on these two disclosures. Several commenters and forum participants recommended modifying the disclosures to allow estimates or projections of the time for program completion and the amount a consumer would have to save.[469] One industry trade association explained that it likely would be impossible for a provider to state with certainty the time by which it will achieve settlements or the amount of money the consumer would have to accumulate before the provider made a settlement offer.[470] Similarly, a debt relief provider objected to the time disclosure in proposed § 310.3(a)(1)(viii)(A) because it failed to account for market conditions that are "beyond anyone's range of knowledge other than a best guess."[471] Other commenters echoed these views.[472]

ordinary use on a freeway. If the car cannot, the seller's silence on this point may have been deceptive.

[456] NAAG (Oct. 23, 2009) at 11.

[457] CFA at 2-3, 20; *see also* MN AG at 2.

[458] FCS (Oct. 29, 2009) at 3; Able (Oct. 21, 2009) at 30; CareOne at 4; CSA at 1; DS at 18; DMB (Oct. 29, 2009) at 5; DSA/ADE at 1-2.

[459] TASC (Oct. 26, 2009) at 15. TASC, however, objected to the proposed disclosures on the ground that they were targeted primarily to the risks of debt settlement and did not inform consumers adequately of the risks of nonprofit credit counseling and bankruptcy. *Id.* As explained above, the FTC does not have jurisdiction to regulate the activities of bona fide nonprofit credit counselors. Moreover, the Commission believes that the revised debt relief-specific disclosures in the Final Rule adequately address the most harmful conduct by debt relief providers, including debt settlement providers, for-profit credit counselors, and debt negotiators.

[460] FCS (Oct. 29, 2009) at 3.

[461] CSA at 1.

[462] AICCCA at 2; *see also* CCCS CNY at 2 (full disclosures will give consumers accurate information on which they can base their financial decisions and possibly help consumers put money they would have spent on debt relief toward more pressing bills).

[463] GP (Oct. 22, 2009) at 1.

[464] *TSR Proposed Rule,* 74 FR at 42001.

[465] 16 CFR 310.3(a)(1) & n.1.

[466] A settlement offer is an offer to extinguish an unsecured debt for less than what the debtor owes the creditor or debt collector. *See* Weinstein (Oct. 26, 2009) at 6 (*see* attached Weinstein paper at 5).

[467] *TSR Proposed Rule,* 74 FR at 42019. In so doing, the provider would have to disclose the fact that negotiations will not take place with all creditors simultaneously but rather sequentially, if such is the case. The record supports disclosure of this information because consumers may not understand the amount of time necessary to achieve the represented results or that there may be prerequisites to obtaining debt relief. *See* CFA (Grant), Tr. at 175.

[468] *TSR Proposed Rule,* 74 FR at 42019.

[469] Loeb (Mallow), Tr. at 204; TASC (Housser), Tr. at 202; CFA (Grant), Tr. at 207; USOBA (Oct. 26, 2009) at 15-17; FCS (Oct. 29, 2009) at 3.

[470] USOBA (Oct. 26, 2009) at 15-16; *see also* FCS (Oct. 29, 2009) at 3; DS at 19 ("the exact amount a given creditor will settle a debt account for and the precise time the same will be accomplished varies.").

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

[472] FCS (Oct. 29, 2009) at 3 ("We support these disclosures, in principle, but recommend revision to the extent they would require a company to determine in advance the timing and order in which each specific debt will be settled. Creditors

Based on the record, the Commission has determined to require these two disclosures, but is clarifying that providers may make a good faith estimate of the necessary time and money commitments entailed in the service. Providers must have a reasonable basis to support their estimates. With respect to the paragraph (A) disclosure, the provider's estimate of the amount of time necessary to achieve the represented results should be based on the type of program or service offered, the consumer's particular debts, and available historical data regarding similarly-situated consumers' experiences with creditors. With respect to the paragraph (B) disclosure, the provider should base its estimate on its historical experience and other information indicating the threshold amount of money that, if offered to the particular creditor, is reasonably likely to result in a successful settlement that is consistent with results represented by the provider.[473] Providers should keep consumers informed throughout the duration of the program of any changes in creditor policies that may impact the projected time or amount of money needed before completion.

The Final Rule makes two modifications to the language of the proposed rule to accomplish this clarification. Paragraph (A) in the proposed rule would have required disclosure of "the *specific* time by which the debt relief service provider will make a bona fide settlement offer." The Final Rule deletes the word "specific," which could have been read to require a time certain rather than a good faith estimate.[474] Paragraph (B) in the proposed rule required disclosure of "the *specific* amount of money or the percentage of each outstanding debt that the customer must accumulate before the debt relief service provider will make a bona fide settlement offer." Like the revision of paragraph (A), the Final Rule deletes the word "specific," which could have been read to require a disclosure with certainty of the amount of money or percentage of debt, rather than a good faith estimate. As modified, these provisions will help ensure that consumers are not deceived and have the information they need to make informed decisions, while recognizing that certain information may only be estimated at the time disclosure is required.

(2) Section 310.3(a)(1)(viii)(C)

Section 310.3(a)(1)(viii)(C) of the Final Rule adopts the proposed rule's requirement that debt relief providers whose programs entail consumers not making timely payments to creditors disclose that the program may affect the consumer's creditworthiness; may result in continued collection efforts, including lawsuits; and may increase the amount the consumer owes due to late fees and interest.[475] The adverse consequences of not paying creditors would be highly material to reasonable consumers in deciding whether to purchase the service or, if they do purchase it, whether to stop paying creditors. This disclosure is especially important in the debt settlement context where many consumers must choose between paying their creditors or saving funds for possible settlements.[476]

Debt settlement providers often encourage consumers to stop paying creditors, or consumers stop on their own because they simply cannot afford simultaneously to make monthly payments to their creditors, set aside funds for settlements, and pay fees to the debt settlement company.[477] The record shows, however, that consumers' credit ratings are harmed, often substantially, as a result of not making payments to creditors.[478] Lower credit scores raise the cost of obtaining credit – or make it more difficult to obtain it at all.[479] Another serious and negative consequence that may result from a consumer's decision to enter a debt relief plan in which he or she stops paying creditors is the accrual of late fees or interest on the accounts, which can significantly increase the consumer's ultimate obligation.[480] Finally, if a consumer stops making payments, his likelihood of being sued by creditors will increase. Indeed, even while a consumer is enrolled in a debt relief program, creditors and debt collectors may continue to make collection calls pending resolution of the consumer's debts and may proceed with lawsuits and subsequent enforcement of any judgments, such as through garnishment of wages.[481] Disclosure of these potentially serious negative consequences is necessary to prevent deception and the consumer injury that arises from consumers enrolling in debt relief plans and ceasing to pay creditors.[482]

The Commission received comments both supporting and opposing this proposed disclosure. The American Bankers Association filed a comment in support, arguing that the disclosure will help consumers understand the increased risks to their creditworthiness if they stop communicating with their creditors.[483] TASC also voiced support, but expressed concern that the disclosure was linked primarily to debt settlement programs. TASC therefore recommended that the Commission require bankruptcy providers to make the same disclosure about the effect of

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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 collecting their own debts are not subject to the FDCPA, but are subject to Section 5 of the FTC Act.

[482] *TSR Proposed Rule*, 74 FR at 49002; *see* JH (Oct. 24, 2009) at 6.

[483] ABA at 4.

nonpayment on creditworthiness.[484] The Commission notes that bankruptcy providers who are telemarketers of debt relief services would be subject to the TSR. Thus they would be required to make the TSR's disclosures unless they have a face-to-face meeting with the client.[485] Moreover, consumers seeking to file bankruptcy must participate in pre-filing credit counseling with a certified credit counselor.[486] These credit counselors generally inform consumers that bankruptcy negatively impacts their credit rating, remains on their credit report for ten years, and may make obtaining credit in the future more difficult and expensive.

The Final Rule requires these disclosures to be made only "to the extent that any aspect of the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors." In general, DMPs do not rely upon the customer failing to make timely payments to creditors or debt collectors. Thus, this disclosure typically will not apply to debt relief providers offering DMPs.

One debt relief provider objected to the required disclosures on the basis of a "pilot survey" it conducted of its customers that purported to show that the customers' FICO scores were higher at completion of the program than at enrollment. Thus, it argued, the creditworthiness disclosure would be inaccurate.[487] The survey, however, only included 12 consumers, and the comment provided no information indicating that these consumers were representative of the universe of consumers enrolled in the program.[488] Moreover, the survey only measured FICO scores at enrollment and completion, providing no information regarding whether consumers' scores deteriorated during the time that they were enrolled in the debt settlement program and, in many cases, not paying their creditors. For these reasons, the Commission does not consider the survey to be reliable or probative.

The Commission addressed in the NPRM some of the concerns with this disclosure that were raised by the comments. Specifically, one debt relief provider objected to the disclosure because it relates to actions taken by creditors against consumers that are not directly caused by the consumer's enrollment in the debt relief program.[489] In the NPRM, the Commission acknowledged that some consumers considering debt relief already have stopped making payments and may be subject to late fees or other charges regardless of whether they enroll in the program.[490] The record shows, however, that in a significant number of instances, consumers are induced by the provider's instructions not to make payments that they otherwise would have made.[491] This is particularly true for debt settlement services.[492] Moreover, even as to those consumers who already have ceased paying their creditors, the provider's instruction may persuade them not to resume payments. A disclosure about the adverse consequences of not paying creditors is therefore highly material to many consumers' purchase or use decisions. For these reasons, the Final Rule includes § 310.3(a)(1)(viii)(C) as proposed.

(3) New Section 310.3(a)(1)(viii)(D)

Section 310.3(a)(1)(viii)(D) of the Final Rule imposes an additional disclosure requirement on debt relief providers who request or require the customer to place money for its fee and for payment to customers' creditors or debt collectors, in a dedicated bank account at an insured financial institution. These providers must disclose that the consumer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty and receive all funds currently in the account. This information would be highly material to reasonable consumers in deciding whether to enroll in the service; the right to cancel and receive a refund is a key right for consumers under the rule, but it is only meaningful if consumers know that they have the right.[493]

2. Proposed Disclosures Not Adopted in the Final Rule

After reviewing the record, and as explained below, the Commission has decided not to adopt in the Final Rule three of the disclosures included in the proposed rule, because they are largely duplicative or likely to detract from the efficacy of the required disclosures. The omitted disclosures are: (1) that not all creditors will accept a reduction in the amount of debt owed; (2) that creditors may pursue collection efforts pending the completion of the debt relief services; and (3) that any savings from the debt relief program may be taxable income.

a. Proposed Section 310.3(a)(1)(viii)(C)

Section 310.3(a)(1)(viii)(C) of the proposed rule would have required telemarketers of debt relief services to disclose that "not all creditors or debt collectors will accept a reduction in the balance, interest rate, or fees a customer owes such creditor or debt collector."[494] USOBA supported this disclosure, stating it is one of the disclosures that USOBA encourages its members to make.[495] Some creditors refuse to work with third-party debt relief providers in certain situations, or not all,[496] and many consumers may not realize this is the case. It is difficult to predict with certainty, however, the circumstances under which a particular creditor will or will not be willing to negotiate the debt with a third party.[497] In fact, even those creditors that claim not to work with debt relief providers may do so in certain situations.[498] One commenter explained that, while some 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 turn will disburse consumers' monthly payments to the appropriate creditors every month."); *Illinois v. SDS West Corp.*, No. 09CH368 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. 2009); *Illinois v. Debt Relief USA, Inc.*, No. 09CH367 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. 2009); *North Carolina v. Knight Credit Servs., Inc.* (Sup. Ct. Wake Cty. 2004).

[492] *Supra* note 73.

[493] *See* Summary of Communications (June 16, 2010) at 2 (meeting with consumer groups).

[494] *TSR Proposed Rule,* 74 FR at 42019.

[495] USOBA (Oct. 26, 2009) at 14.

[496] *TSR Proposed Rule,* 74 FR at 42002; *see, e.g.,* CFA (Plunkett), Workshop Tr. at 101 ("[T]here is no guarantee . . . or reasonable chance of a guarantee of a reduction in the amount of debt owed by consumers who meet required conditions. In fact, some creditors insist that they won't settle."); American Express (Flores), Tr. at 164 ("[O]ur policy is not to . . . accept settlements from debt settlement companies."); *see also, e.g.,* Phil Britt*, Debt Settlement Companies Largely Ignored by Banks,* Inside ARM, Nov. 3, 2008(noting statement by Discover Financial Services spokesman that "[w]e choose not to work with debt settlement companies"), *available at* (*http://www.insidearm.com/go/arm-news/debt-settlement-companies-largely-ignored-by-banks*).

[497] MD (Oct. 26, 2009) at 30; FCS (Oct. 29, 2009) at 3; ABA at 2; CRN at 6; CFA (Grant), Tr. at 175.

[498] *See* USOBA (Ansbach), Tr. at 75-76 ("[O]ne of our largest members had a financial institution [that allegedly does not work with debt settlement companies] call up and say, we would like to scrub our financial data against yours and offered [settlements of] cents on the dollar.").

might refuse to negotiate a debt balance in the early stages of delinquency, rarely would they continue to do so as the account becomes increasingly delinquent. This is the case because the creditor typically collects more from negotiation with a debt relief program than through other alternatives.[499] One debt relief provider commented that it is very rare that an account cannot be negotiated, especially after the creditor charges off the debt and sells it to a debt buyer who, in turn, initiates its own collection efforts.[500]

In sum, the record indicates that many creditors and debt collectors settle at least some debts for some consumers, and creditor policies and practice may change depending on the length and severity of the delinquency, other features of the debt, or external factors such as the creditor's need for liquidity.[501] Accordingly, the usefulness of a general disclosure about the fact that not all creditors will negotiate debts would vary from case to case. In addition, eliminating this disclosure from the Final Rule reduces the amount of information consumers must absorb, thus making the remaining disclosures more effective, and lessens the burden on industry.[502] Moreover, the Final Rule prohibits any misrepresentation by a debt relief provider relating to whether creditors or debt collectors will modify a debt.[503] For these reasons, the Commission has decided not to adopt proposed § 310.3(a)(1)(viii)(C)).

b. Proposed Section 310.3(a)(1)(viii)(D)

Proposed § 310.3(a)(1)(viii)(D) would have required debt relief providers to disclose "that pending completion of the represented debt relief services, the customer's creditors or debt collectors may pursue collection efforts, including initiation of lawsuits."[504] This information could be valuable to consumers considering whether to purchase the service and whether to stop paying their creditors.[505] However, another of the proposed disclosures – that, if applicable, the customer may be sued by creditors or debt collectors – essentially makes the same point: enrollment in a debt relief program does not prevent creditors and collectors from continuing to pursue the debtor. Thus, the Commission has decided not to adopt proposed § 310.3(a)(1)(viii)(D).[506]

c. Proposed Section 310.3(a)(1)(viii)(F)

Proposed § 310.3(a)(1)(viii)(F) would have required that a telemarketer of debt relief services disclose "that savings a customer realizes from use of a debt relief service may be taxable income."[507] It is likely that many consumers do not understand this fact, which would limit the financial benefits of the service.[508] This provision generated only a small number of comments. According to one commenter, several of his clients claimed that they would not have enrolled in the debt relief program if they had been aware of the tax consequences.[509] Consumer advocates also supported this disclosure.[510]

Other commenters objected to this proposed disclosure. One asserted that the information is not relevant to all consumers, such as those who are insolvent before or at the time of the forgiveness of debt.[511] NACCA commented that this disclosure is not accurate for consumers who enroll in a DMP, which generally does not involve debt forgiveness and thus would not result in a tax liability.[512]

After reviewing the record, the Commission has decided not to adopt proposed § 310.3(a)(1)(viii)(F) as part of the Final Rule. As noted by some of the commenters, in many cases this disclosure might not be accurate. Further, as is true with the other two proposed disclosures that are omitted from the Final Rule, this disclosure would add verbiage and complexity to the information consumers receive, and thereby potentially diminish the effectiveness of the more important disclosures.[513]

3. Application of Section 310.3(a)(1) to Debt Relief Services: General Disclosure Obligations

Under the Final Rule, debt relief service providers that promote their services through inbound or outbound telemarketing are subject both to the debt relief-specific disclosure requirements and the existing disclosure and other provisions of the TSR. Consumer advocacy groups noted the importance of applying the TSR's pre-existing disclosure requirements to the telemarketing of debt relief services.[514] Three of those pre-existing disclosures would provide critical information for consumers in the context of debt relief services: the total cost of the services; material restrictions, limitations, or conditions on purchasing, receiving, or using the services; and the seller's refund policy.[515]

Forum participants agreed that a total cost disclosure is important in the sale of debt relief services. This is especially true for debt settlement plans, for which the costs are often substantial and complex.[516] Similarly, in the sale of debt management plans, disclosure of total costs is crucial to ensure that consumers are not misled about the amount of those costs.[517]

[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.

[506] *TSR Proposed Rule*, 74 FR at 49019. Some commenters suggested additional disclosures related to lawsuits, *e.g.* that the longer a consumer is enrolled in a debt relief program the more likely the consumer is to be sued and possibly have wages or bank accounts garnished. CRN at 6; MN LA at 1. The Commission believes that the disclosure in Section 310.3(a)(1)(viii)(C) is adequate to inform consumers of the most common risks involved in debt relief, such as the possibility of continuing collection efforts and lawsuits.

[507] *TSR Proposed Rule*, 74 FR at 42019.

[508] IRS, *Publication 525 - Taxable and Nontaxable Income* 19-20 (Feb. 19, 2009) ("Generally, if a debt you owe is canceled or forgiven, other than as a gift or bequest, you must include the canceled amount in your income."), *available at* (*http://www.irs.gov/pub/irs-pdf/p525.pdf*).

[509] RDRI at 5.

[510] CFA at 20. *See* CU (Hillebrand), Tr. at 165-66; *see also* DSUSA (Craven), Workshop Tr. at 91 ("Amounts greater than $600 in savings obtained through a settlement may be reported to the IRS. Again, this has to be disclosed to consumers."); AMCA (Franklin), Workshop Tr. at 223 ("Unless they get that early disclosure that they may have the tax consequence, they may opt for the – what sounds to be the better of the two, which would be the debt settlement, which might not be the best solution for them. So, there has to be some sort of a disclosure that says look, this is it. If you're going to settle a debt for greater than $600, you're going to have an IRS tax consequence this year.").

[511] Able (Oct. 21, 2009) at 26; *see also* Franklin at 22 ("a large portion of debt settlement clients are not actually solvent"); IRS, *Publication 525 - Taxable and Nontaxable Income* 20 (Feb. 19, 2009) ("Do not include a canceled debt in your gross income . . . [if] the debt is cancelled when you are insolvent."), *available at* (*http://www.irs.gov/pub/irs-pdf/p525.pdf*).

[512] NACCA at 3.

[513] The Commission encourages debt relief providers to advise consumers about the tax consequences in those cases where such consequences are likely to exist.

[514] CFA at 20.

[515] *See* 16 CFR 310.3(a)(1)(i)-(iii).

[516] 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. Using this formula, a consumer with $20,000 in debt would pay between $2,800 and $3,600 for debt settlement services. *See* USOBA (Keehnen), Tr. at 209.

[517] *See* JH (Jan. 12, 2010) at 2. In the FTC cases brought against sham nonprofit credit counselors, consumers allegedly were misled not only as to the total costs, but also that the fees were "voluntary contributions" used to offset the operating expenses

Continued

Several forum participants stated that at least some debt service providers currently disclose costs to consumers even when they are not required to do so.[518] Often, however, fee disclosures made in the telemarketing call are contradicted by the written contract.[519] Many providers say little, if anything, about fees or misrepresent the amount and/or timing of fee payments.[520] Broadcast advertisements and websites offering debt relief services typically are silent as well about how much a consumer must pay for the advertised service.[521] The complexity of the fee structure used by many debt relief providers exacerbates the potential for consumer confusion or deception.[522] As a result, consumers often enroll in programs under a false impression or are confused about what they have to pay or when they have to pay it. Bringing inbound calls within the coverage of § 310.3(a)(1) will help to diminish this problem. Furthermore, while § 310.3(a)(1) only requires disclosure of the total fee, the failure to clearly and conspicuously disclose material payment terms, such as the fees for individual settlements, may mislead consumers and thus constitutes a deceptive practice prohibited by Section 5 of the FTC Act.

In addition to fees, § 310.3(a)(1)(ii) of the TSR requires providers to disclose "[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer."[523] Two common conditions that commenters suggested should be disclosed are (1) the consumer must have a minimum amount of debt to be eligible,[524] and (2) the debt relief services will extend only to unsecured debt, if that is the case.[525] The Commission believes both of these conditions are material and must be disclosed under the TSR.

Section 310.3(a)(1)(iii) of the TSR requires that if the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, it must disclose this policy to consumers.[526] Further, if the seller or telemarketer makes a representation about a refund policy, it must state all material terms and conditions of the policy. Application of this provision to providers of debt relief services is important in light of the record evidence that many consumers either are not apprised that refunds are available or are misled about key limitations and conditions of the refund policy.[527]

4. Timing of Required Disclosures

The TSR specifies the point in the transaction at which disclosures must be made. The pre-existing TSR required all disclosures to be made "[b]efore a customer pays for goods or services offered."[528] The proposed rule would have modified this language by adding the phrase "and before any services are rendered." In the Final Rule, the Commission has determined to modify the TSR language in a different manner from the proposed rule. Specifically, § 310.3(a)(1) of the Final Rule now provides that all required disclosures must be made "[b]efore a customer consents to pay." This formulation more closely comports with the Commission's intent in the original language to trigger the disclosure requirement before any agreement is executed, when the information is most useful, rather than only after the consumer has made a payment on that agreement.[529] Moreover, the phrase "consents to pay" encompasses the conduct that the Commission has previously identified as triggering the disclosure requirement under the pre-existing TSR.[530] Under the Final Rule, the disclosures must be made before any act or communication that signifies the consumer's consent to pay, such as sending full or partial payment; providing credit card, bank account or other billing information, stating agreement to a transaction, or invoking an electronic process used to electronically sign an agreement. This change applies to all disclosures required by the TSR, and not just those

of the allegedly nonprofit service provider. *See, e.g., FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. filed Nov. 19, 2003) (alleging that, "[i]n response to the question, 'How much will it cost me to be on the Debt Management Program,' AmeriDebt's website . . . stated, 'Due to the fact that AmeriDebt is a nonprofit organization, we do not charge any advance fees for our service. We do request that clients make a monthly contribution to our organization to cover the costs involved in handling the accounts on a monthly basis.'" In fact, the defendants allegedly retained each consumer's first monthly payment as a fee without notice to the consumer.).

518 *See* USOBA (Keehnen), Tr. at 209.

519 *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx), Opp. to FTC Mot. Summ. J. at 12 (C.D. Cal. filed Aug. 3, 2006) (alleging that defendant failed to disclose to consumers that they would have to pay 45% of their total program fees upfront, before any payments would be made to the consumer's creditors; telemarketing claims contradicted by subsequent written disclosures). Even if true, subsequent disclosures generally are not sufficient to correct misrepresentations made in the initial communications. *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (citing *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497; *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951)); Deception Policy Statement, *supra* note 453, at 182; *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (advertisement was deceptive despite written qualification); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (advertisement was deceptive even though a disclaimer in a written contract later signed by consumers contained accurate, non-deceptive information).

520 *Supra* notes 79, 362; *see also* Loeb (Mallow), Tr. at 206.

521 As noted above, *supra* note 223, FTC staff found that only 14 of 100 debt settlement websites reviewed disclosed the specific fees that a consumer will have to pay upon enrollment in the service. An additional 34 out of the 100 websites mentioned fees but did not provide specific fee amounts.

522 The Commission previously has explained compliance obligations when marketing installment contracts, some of which are particularly applicable to debt relief services. Specifically, in an earlier amendment to the TSR, the Commission noted that "it is possible to state the cost of an installment contract in such a way that, although literally true, obfuscates the actual amount that the consumer is being asked to pay." *TSR Proposed Rule,* 67 FR 4492, 4502 (Jan. 30, 2002). The Commission went on to state that "[t]he Commission believes that the best practice to ensure the clear and conspicuous standard is met is to *do the math for the consumer* wherever possible. For example, where the contract entails 24 monthly installments of $8.99 each, the best practice would be to disclose that the consumer will be paying $215.76. In open-ended installment contracts, it may not be possible to do the math for the consumer. In such a case, particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand." *Id.* at n.92. (emphasis supplied, internal quotations omitted).

523 16 CFR 310.3(a)(1)(ii).

524 DMB (Oct. 29, 2009) at 5-6.

525 *See* MN LA (Elwood), Tr. at 251. Another commenter proposed modifying § 310.3(a)(1)(ii) to require that only "reasonable" material restrictions be disclosed. Able (Oct. 21, 2009) at 25. The definition of materiality – "likely to affect a person's choice of, or conduct regarding, goods or services" – is a well established limiting principle codified in the Commission's Deception Policy Statement, *supra* note 453; *see also TSR Final Rule*, 60 FR at 43845 (citing *In re Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)). The Commission declines to change it in this Rule.

526 16 CFR 310.3(a)(1)(iii). This requirement reflects the Commission's determination that a seller's unwillingness to provide refunds is a material term about which a consumer must be informed before paying for goods or services.

527 *See* WV AG (Googel), Tr. at 84; CFA at 9; *see also, e.g., FTC v. Select Pers. Mgmt., Inc.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007); *FTC v. Connelly,* No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004); *FTC v. Debt Mgmt. Found. Servs.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004).

528 16 CFR 310.3(a)(1).

529 In the SBP to its TSR amendments in 2003, the Commission interpreted the original TSR language to mean that telemarketers must make required disclosures "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment," *i.e.*, before the agreement is executed. *TSR Amended Rule,* 68 FR at 4599 (citing the original Rule's TSR Compliance Guide); *see also* Loeb (Mallow), Tr. at 212-13 ("the FTC law of [when a company must make disclosures under the TSR] is pretty clear, it has to be prior to contracting."); CFA at 20.

530 *See TSR; Final Amended Rule*, 68 FR at 4599 (disclosures must be made "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment").

specific to debt relief services. In the case of debt relief services, a footnote added to the Final Rule clarifies that the provider must make the required disclosures before the consumer enrolls in an offered program. Thus, debt relief providers must make the disclosures at the time the provider is marketing the service and before the consumer signs an enrollment contract or otherwise agrees to enroll, and not at the time the consumer executes a debt relief agreement pursuant to the advance fee ban provision.

5. Recommended Additional Changes to the Disclosure Provisions Not Adopted in the Final Rule

Commenters and forum participants recommended several additional modifications to the proposed disclosures that the Commission has decided not to adopt. First, several consumer advocates proposed that the Final Rule require debt relief providers to disclose their dropout rate, *i.e.*, the percentage of consumers who enroll in a program but drop out before completing it.[531] The Commission agrees that the dropout rate of a particular program is likely to be valuable information for consumers considering enrollment in that program. The Commission has concluded, however, that requiring disclosure of dropout rates is unnecessary and would be difficult to implement. As discussed in detail in Section III.E.b, providers making savings claims must use a calculation that takes into account all of the provider's customers, including those who dropped out, in order for the claim to be truthful and non-deceptive. In addition, there is no single defined way to calculate a dropout rate, and any disclosure requirement would have to be very prescriptive in specifying the formula the provider would have to use to calculate the rate, including all of the different variables that must be factored in.[532]

Second, a commenter recommended that the Rule require that disclosures be in writing to allow consumers additional time to consider their decision, rather than immediately enrolling in a program over the phone.[533] Two forum participants, on the other hand, recommended against requiring written disclosures, asserting that they would come too late in the consumer's decision- making process[534] and noting that consumers often sign documents with written disclosures they do not understand.[535]

The Final Rule does not specify the precise manner or mode in which disclosures must be made.[536] The Commission has determined that it is unnecessary to require that disclosures be in writing, but notes that they must be made in a "clear and conspicuous" manner, prior to the time that the consumer enrolls in the service.[537] The Commission concludes that these requirements, in conjunction with the advance fee ban, will be adequate to protect consumers of debt relief services from deceptive or abusive practices.

Commenters and forum participants recommended that the Commission adopt a variety of additional disclosures, including, among others: (1) identifying contact and other background information about the provider;[538] (2) a list of the consumer's debts to be included in the program;[539] (3) a statement that "other debt relief options may be more appropriate for the consumer;"[540] (4) a statement that consumers will not achieve settlement results until they have accumulated sufficient funds;[541] (5) a notice to consumers when they are collecting funds for debt settlements at a rate more accelerated than a pro rata arrangement;[542] (6) the percentages of clients who complete the program after 39 months and who file for bankruptcy after paying fees to a debt relief provider;[543] (7) the percentage of settlements consummated after charge off;[544] (8) annual retention rates;[545] (9) the length of time the provider has been operating;[546] and (10) the number of complaints and lawsuits filed against the company over the prior three years.[547] The Commission has declined to adopt any of these additional disclosures. The disclosures required in the Final Rule will provide consumers with the most important material information they need to avoid deception and make well-informed choices. Adding more disclosures would risk overshadowing more important information and place a potentially unnecessary burden on providers.

6. Effective Date

This provision will be effective September 27, 2010. The Commission expects prompt compliance with this provision, as it ensures that consumers receive basic information about the advertised services.

E. Sections 310.3(a)(2) & 310.3(a)(4): Misrepresentations

The Final Rule supplements the existing TSR prohibitions against misrepresentations with a provision specifically intended to target deceptive practices by debt relief service providers.[548] As stated above, an act or practice is deceptive if: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation or omission is material to consumers.[549]

The new provision prohibits sellers or telemarketers of debt relief services from making misrepresentations regarding any material aspect of any debt relief service and provides several illustrative examples, including misrepresentations of:

- the amount of money or the percentage of the debt amount that a customer may save by using such service;
- the amount of time necessary to achieve the represented results;
- the amount of money or the percentage of each outstanding debt that

[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.

[533] CRN at 5; *see* NACCA at 2.

[534] *See* CU (Hillebrand), Tr. at 211.

[535] *See* SBLS (Tyler), Tr. at 214.

[536] As stated earlier, after-the-fact written disclosures do not cure deceptive claims made earlier in the transaction. *See supra* note 519.

[537] 16 CFR 310.3(a)(1). If the provider markets to consumers in a language other than English, the disclosures must be provided in the language the provider is using for the marketing, in order to meet the clear and conspicuous requirement. *See* 16 CFR 14.9 (foreign language disclosures in advertising); 16 CFR 308.3(a)(1) (foreign language disclosures under Pay Per Call Rule); 16 CFR 429.1(a) (foreign language disclosure of right to cancel door-to-door sales); 16 CFR 455.5 (Spanish language version of FTC's used car disclosures); 16 CFR 610.4(a)(3)(ii) (foreign language disclosures in marketing free credit reports).

[538] NFCC at 10-11, RDRI at 6.

[539] NFCC at 10-11.

[540] CareOne at 7; *see also* NFCC at 14.

[541] MD (Oct. 26, 2009) at 33, 35.

[542] NACCA at 3-4.

[543] RDRI at 6.

[544] Id.

[545] Id.

[546] Id.

[547] Id.

[548] The Final Rule does not change any of the existing TSR prohibitions on misrepresentations.

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

the customer must accumulate before the provider will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt;

- the effect of the service on a customer's creditworthiness;
- the effect of the service on the collection efforts of the customer's creditors or debt collectors;
- the percentage or number of customers who attain the represented results; and
- whether a service is offered or provided by a nonprofit entity.

This provision is largely unchanged from proposed § 310.3(a)(2)(x) of the proposed rule.[550]

In this Section of the SBP, the Commission discusses the amended TSR's prohibitions against misrepresentations and their applicability to debt relief services. Specifically, it provides an analysis of new § 310.3(a)(2)(x) of the Final Rule and the public comments received on the proposed version of this provision. It also provides further detail on the requirements for making truthful and substantiated savings claims under the amended Rule. Finally, this section explains how the existing provisions of §§ 310.3(a)(2) and 310.4(a)(4) of the TSR – those that predate, and were unaltered by, this rulemaking – would apply to inbound telemarketing of debt relief services.

1. Public Comments on Proposed Section 310.3(a)(2)(x)

As described above, § 310.3(a)(2)(x) adds several debt relief-specific examples of misrepresentations that are prohibited by the TSR. The vast majority of commenters who addressed this provision in the proposed rule, including representatives of the debt relief industry, strongly supported it.[551] Additionally, participants in the public forum voiced general support for the proposal.[552] All but two of the comments that recommended changes to § 310.2(a)(2)(x) focused on relatively minor revisions; these comments are discussed, as applicable, in the analysis of the Final Rule below.

Two debt relief service providers opposed this provision, arguing that it is wholly unjustified because material misrepresentations are not widespread in the debt relief industry.[553] As detailed in this SBP and the NPRM, however, the record demonstrates that the misrepresentations banned by § 310.3(a)(2)(x) are common in this industry.[554]

Some commenters recommended that the Commission add additional examples of prohibited misrepresentations to § 310.3(a)(2)(x).[555] The examples included in § 310.3(a)(2)(x) are common misrepresentations observed in FTC and state law enforcement actions. The Commission reiterates that these examples are not intended to be an exhaustive list and that this provision encompasses *any* material misrepresentation made in connection with any debt relief service.

2. Final Section 310.3(a)(2)(x)

a. Claims Other Than Savings Claims

Section 310.3(a)(2)(x), which is added to § 310.3(a)(2) of the TSR as a result of this rulemaking, prohibits material misrepresentations specifically related to the sale of debt relief services.[556] The new provision lists several illustrative examples of prohibited misrepresentations. Although the examples already may be covered by the existing provisions of §§ 310.3(a)(2) and 310.3(a)(4), including them explicitly provides additional guidance to debt relief providers of their obligations to ensure that their claims are true and substantiated.[557]

With respect to the individual examples, § 310.3(a)(2)(x) first prohibits telemarketers of debt relief services from misrepresenting "the amount of time necessary to achieve the promised results" and "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 or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt." As set forth in detail above in the discussion of § 310.3(a)(1)(viii), consumers often have little understanding of the mechanics of the debt relief process. According to commenters, including those representing the industry, it usually takes many months, if not years, for a provider, if it is even able to do so, to achieve final resolution of all of a consumer's debts.[558] This is information that certainly would influence a reasonable consumer's purchasing decisions. Often, however, telemarketers of these services tell consumers that results can be achieved more quickly.[559] Further, in the context of debt settlement, providers may deceive consumers about how their monthly payments are being used, suggesting that the funds are being accumulated for settlements when, in fact, some or all of them go towards the provider's fees.[560] It is difficult to imagine information

[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 payments); *FTC v. Econ. Relief Techs., LLC,* No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (same); *FTC v. 2145183 Ontario, Inc.,* No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (alleging that defendants misrepresented that consumers could pay off debts three to five times faster); *FTC v. Debt Solutions, Inc.,* No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006) (alleging that defendants misrepresented that debt relief would be achieved before consumers' next billing cycle); *FTC v. Better Budget Fin. Servs., Inc.,* No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004)(alleging defendant told consumers it could shorten period of time to pay off debts).

[560] *See supra* notes 519-20.

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.*

represent only those of the successful cases, and not of consumers generally.[573]

To comply with § 310.3(a)(2)(x), providers' representations, including those promising specific savings or other results, must be truthful, and the provider must have a reasonable basis to substantiate the claims.[574] When a debt relief service provider represents that it will save consumers a certain amount or reduce the debts by a certain percentage, it also represents, by implication, that this savings claim is supported by competent and reliable, methodologically sound evidence showing that consumers generally who enroll in the program will obtain the advertised results.[575] When a debt relief service makes only general savings claims (*e.g.*, "we will help you reduce your debts"), without specifying a percentage or amount of debt reduction, these claims are likely to convey that consumers can expect to achieve a result that will be beneficial to them, and that the benefit will be substantial.[576] Generally, savings claims should reflect the experiences of the provider's past customers[577] and must account for several key pieces of information.[578] Below, the Commission provides additional guidance on the proper methodology for doing this historical experience analysis.[579]

First, savings claims must be calculated based on the amount of debt

[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 websites for debt settlement services routinely imply that these services can obtain the represented savings for the typical consumer who enrolls in the program. *See supra* note 567; *see also*, *e.g., FTC v. Edge Solutions, Inc.*, No. CV-07-4087, Mem. Supp. Mot. T.R.O. at 7, 11 (E.D.N.Y. Sept. 28, 2007) (alleging that although defendants promised they could settle consumers' debts for 50% to 60% of the amount owed, they often settled just a single debt and "allow[ed] other debts to languish"); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4), Mem. Supp. Mot. T.R.O. at 8 (D. Mass. filed Nov. 2, 2004) (alleging that "defendants' program does not result in a 50% savings on their debt, as promised by defendants . . . [because] [m]any consumers find that defendants settle some of their accounts but not others . . . [and some] consumers see none of their accounts settled").

[574] It is an unfair and deceptive practice to make an express or implied objective claim without a reasonable basis supporting it. *See, e.g., FTC v. Pantron I Corp.,* 33 F.2d 1088, 1096 (9th Cir. 1994); *Removatron Int'l Corp.*, 111 F.T.C. 206, 296-99 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *In re Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see also generally* 1984 Policy Statement Regarding Advertising Substantiation, appended to *Thompson Med. Co.*, 104 F.T.C. at 813 ("Advertising Substantiation Policy Statement"); *see also* Amended Franchise Rule, 16 CFR 436.5(s), 436.9(c); *Amended Franchise Rule Statement of Basis and Purpose*, 72 FR 15444, 15449 (Mar. 30, 2007).

If the advertisement expressly or impliedly represents that it is based on a particular level of support (*e.g.,* "tests prove"), the advertiser must possess at least that support. *See* 1984 Policy Statement Regarding Advertising Substantiation, *appended to Thompson Medical Co.,* 104 F.T.C. at 813*; Removatron Int'l,* 111 F.T.C. at 297. If no specific level of support is stated, the necessary level of substantiation is determined by consideration of certain factors, including the type of claim, consequences of a false claim, and the amount of substantiation that experts in the field believe is reasonable. *Id.* Generally speaking, claims must be supported by competent and reliable evidence. The reasonable basis test is an objective standard; an advertiser's good faith belief that its claim is substantiated is insufficient. *See, e.g., FTC v. World Travel Vacation Brokers, Inc.,* 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737 (N.D. Ill. 1992). Similarly, the existence of some satisfied customers does not constitute a reasonable basis. *See, e.g., FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fla. 1999); *In re Brake Guard Products*, 125 F.T.C. 138, 244-45 (1998).

[575] It is deceptive to make unqualified performance claims that are only true for some consumers, because consumers are likely to interpret such claims to apply to the typical consumer. *See FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528-29 (S.D.N.Y. 2000) (holding that, in the face of express earnings claims for multi-level marketing scheme, it was reasonable for consumers to have assumed the promised rewards were achieved by the typical Five Star participant); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *In re Ford Motor Co.*, 87 F.T.C. 756, 778, *aff'd in part and remanded in part*, 87 F.T.C. 792 (1976); *In re J. B. Williams Co.*, 68 F.T.C. 481, 539 (1965), *aff'd as modified*, 381 F.2d 884 (6th Cir. 1967); *FTC v. Feil*, 285 F.2d 879, 885-87 & n.19 (9th Cir. 1960); *cf. Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR 255.2 ("An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service . . . ."); *In re Cliffdale Assocs.*, 103 F.T.C. 110, 171-73 (1984); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 302-03 (7th Cir. 1979).

[576] An efficacy claim conveys to consumers that the result or benefit will be meaningful and not *de minimis. See P. Lorillard Co. v. FTC*, 186 F.2d 52, 57 (4th Cir. 1950) (challenging advertising that claimed that the cigarette was lowest in nicotine, tar, and resins in part because the difference was insignificant); *In re Sun Co.*, 115 F.T.C. 560 (1992) (consent order) (alleging that advertising for high octane gasoline represented that it would provide superior power "that would be significant to consumers"); *Guides for the Use of Environmental Marketing Claims*,16 CFR 260.6(c) (1998) ("Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible."); *FTC Enforcement Policy Statement on Food Advertising*, 59 FR 28388, 28395 & n.96 (June 1, 1994), *available at* (*http://www.ftc.gov/bcp/policystmt/ad-food.shtm*) ("The Commission shares FDA's view that health claims should not be asserted for foods that do not significantly contribute to the claimed benefit. A claim about the benefit of a product carries with it the implication that the benefit is significant.").

[577] Although providers may use samples of their historical data to substantiate savings claims, these samples must be representative of the entire relevant population of past customers. Providers using samples must, among other things, employ appropriate sampling techniques, proper statistical analysis, and safeguards for reducing bias and random error. Providers may not cherry-pick specific categories of consumers or exclude others in order to inflate the savings. *See, e.g., Kroger*, 98 F.T.C. at 741-46 (1981) (claims based on sampling were deceptive because certain categories were systematically excluded and because the advertiser failed to ensure that individuals who selected the sample were unbiased); *FTC v. Litton Indus., Inc.*, 97 F.T.C. 1, 70-72 (1981) (claims touting superiority of microwave oven were deceptive because the advertiser based them on a biased survey of "Litton-authorized" service agencies), *enforced as modified,* 676 F.2d 364 (9th Cir. 1982); *Bristol Myers v. FTC*, 185 F.2d 58 (1950) (holding advertisements to be deceptive where they claimed that dentists used one brand of toothpaste "2 to 1 over any other [brand]" when, in fact, the vast majority of dentists surveyed offered no response). Additionally, the relationship between past experience and anticipated future results must be an "apples-to-apples" comparison. If there have been material changes to the program that could affect the applicability of historical experience to future results, any claims must account for the likely effect of those changes. *See* Amended Franchise Rule, 16 CFR 437.5(s)(3)(ii).

[578] Providers should maintain historical data about their business activities sufficient to meet the substantiation requirements detailed in this Section. *See, e.g.,* USDR (Johnson), Tr. at 168-170 ("I'll speak specifically to my company, why we make a general claim, is on the 40 to 60 reduction is because historically our numbers for five years reflect that this is the results that we get for the consumers.").

Providers should be cautious in purporting to qualify their savings claims to make sure that the qualifications are effectively communicated to consumers. For example, phrases such as "up to" or "as much as" (*e.g.,* "up to 60% savings") likely convey to consumers that the product or service will consistently produce results in the range of the stated percentage or amount. *See, e.g., In re Automotive Breakthrough Sciences, Inc.*, 126 F.T.C. 229, 301 (1998).

[579] In written comments and at the public forum, consumer groups, noting that debt settlement companies often fail to substantiate savings claims properly, urged the Commission to ban outright *any* representations regarding savings amounts or rates, or, alternatively, to require that the provider's historical data demonstrate that it achieved the represented result for 80% of its past customers. *See* CFA at 18-19; CFA (Grant), Tr. at 173 ("[W]e think that any success claims are inherently misleading, and would like to see them prohibited."); *see also* CRN (Oct. 8, 2009) at 8. Although the record shows that false or unsubstantiated savings claims for debt relief services are common, the Commission does not believe that savings claims are inherently deceptive and thus concludes that they should not be prohibited outright. *See Milavetz, Gallop & Milavetz, P.A. v. US*, 176 L. Ed. 2d 79 (2010) (restrictions on nonmisleading commercial speech require a higher level of scrutiny under the First Amendment than restrictions on misleading speech); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (same); *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The Commission is confident that the prohibition in the Final Rule on misrepresentations will be sufficient to address the problem of false or unsubstantiated savings claims without inadvertently stopping truthful claims that may be valuable to consumers.

owed at the time of enrollment, rather than the amount at the time of settlement, in order to account for (a) increases in debt levels from creditor fees or interest charges that accrue during the period of the program, and (b) fees the consumer pays to the provider. The following example illustrates this principle:

> A consumer enrolls a single $10,000 debt with a debt settlement provider. However, between the time the consumer enrolls the debt and the time the debt is settled, the amount owed grows to $13,000 because of accrued interest and late fees. In addition, the consumer must pay the settlement provider a fee of $2,000. The provider settles the debt for $6,000, so that the total amount paid by the consumer is $8,000 ($6,000 paid to settle the debt plus $2,000 in fees). The provider can claim a savings rate of 20%.

Second, in making savings claims, a provider must take into account the experiences of *all* of its past customers, including those who dropped out or otherwise failed to complete the program. The following example illustrates this principle:

> A debt settlement provider has ten customers, each of whom has $10,000 in debt enrolled in the program, for a total of $100,000 in unpaid debt. Five of those customers complete the program, each of whom saves $2,000, for a total savings of $10,000. The remaining five customers drop out of the program before making any settlements, and thus save nothing. In total, the customers have saved $10,000 out of the aggregate $100,000 enrolled in the program. The provider can claim a savings rate of 10%.

Third, in making savings claims, a provider must include *all* of the debts enrolled by each consumer in the program. The provider may not exclude debts that it has failed to settle – including those associated with consumers who dropped out of the program – from its calculation of the average savings percentage or amount of its consumers' debt reduction. The following example illustrates this principle:

> A debt settlement provider has ten customers, each of whom has two $1,000 debts enrolled in the program, for a total of 20 debts and $20,000 in enrolled debt. The provider settles a single debt for each of the ten customers for $800 per debt. The company fails to settle the remaining debt for each of the ten customers. In total, the customers have saved $2,000 out of the aggregate $20,000 enrolled in the program. The provider can claim a savings rate of 10%.

3. Existing TSR Provisions Prohibiting Deceptive Representations and Misleading Statements

In addition to § 310(a)(2)(x) of the TSR, which has been added as a result of this rulemaking, the existing §§ 310.3(a)(2) and 310.3(a)(4) will now apply to inbound or outbound telemarketing of debt relief services.[580] These provisions prohibit misrepresentations of the following information, much of which providers misrepresent in the telemarketing of debt relief services:

- total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the offer.[581] This provision parallels the required disclosure of total costs contained in TSR § 310.3(a)(1)(i).
- material restrictions, limitations, or conditions to purchase, receive, or use the offered goods or services.[582] This provision, too, has a parallel required disclosure in TSR § 310.3(a)(1)(ii).
- any material aspect of the performance, efficacy, nature, or central characteristics of the offered goods or services.[583]
- any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies.[584] The parallel disclosure requirement is in § 310.3(a)(1)(iii) of the TSR.
- the seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.[585]
- any other statements to induce any person to pay for goods or services.[586]

F. Section 310.6: Exemptions

Section 310.6 sets forth the Rule's exemptions. In determining which exemptions to grant, the Commission considered four factors: (1) whether Congress intended a particular activity to be exempt from the Rule; (2) whether the conduct or business in question is already the subject of extensive federal or state regulation; (3) whether the conduct at issue is suitable for the forms of abuse or deception the Telemarketing Act was intended to address; and (4) whether the risk that fraudulent sellers or telemarketers would avail themselves of the exemption outweighs the burden to legitimate industry of compliance with the Rule.[587]

The TSR generally exempts inbound calls placed by consumers in response

[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 account, to identify the amounts owed to various creditors, and a Client Agreement."). The existing TSR prohibits telemarketers from charging consumers' accounts without first obtaining express informed consent in all transactions, and it requires express verifiable authorization in cases where a consumer uses a payment method other than a credit or debit card. *See* §§ 310.3(a)(3), 310.4(a)(6). The amended Rule applies these existing requirements to inbound debt relief telemarketing calls as well.

[582] § 310.3(a)(2)(ii).

[583] § 310.3(a)(2)(iii).

[584] § 310.3(a)(2)(iv).

[585] § 310.3(a)(2)(vii). In several FTC law enforcement actions, debt negotiation companies falsely represented that they were affiliated with consumers' creditors. *See, e.g., FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009); *FTC v. Select Pers. Mgmt., Inc.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007). In other cases, especially with the rise of government economic assistance programs, providers have misrepresented their affiliation with the government or bona fide nonprofits. *See, e.g., FTC v. Dominant Leads, LLC*, No. 1:10-cv-00997 (D.D.C. filed June 15, 2010); *Minnesota v. Priority Direct Marketing*, No. 62-CV-09-10416 (Ramsey Cty., Minn. filed Sept. 21, 2009) (alleging that debt negotiator misrepresented that it was affiliated with the President's stimulus plan); *cf., e.g., FTC v. Washington Data Res., Inc.*, No. 8:08-CV-02309-SDM (M.D. Fla. filed Nov. 12, 2009) (alleging that defendants falsely represented that they were affiliated with the United States government); *FTC v. Cantkier*, No. 1:09-cv- 00894 (D.D.C. filed July 10, 2009) (alleging defendants placed advertisements on Internet search engines that refer consumers to websites that deceptively appear to be affiliated with government loan modification programs).

[586] § 310.3(a)(4). The FTC has brought cases against debt relief providers alleging violations of § 310.3(a)(4) for misleading statements made in connection with outbound telemarketing, including statements that the entity (a) will obtain a favorable settlement of the consumer's debt promptly or in a specific period of time (*see, e.g., FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC (JWJX) (C.D. Cal. filed Apr. 23, 2004)); (b) will stop or lessen creditors' collection efforts against the consumer (*see, e.g., id.*; *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009)); and (c) will secure concessions, such as interest rate reductions, by specific amounts or percentages (*see, e.g., FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004)).

[587] *TSR Final Rule*, 60 FR at 43859; *see also TSR Amended Rule 2008*, 73 FR 51188 (discussing the Commission's legal authority to exempt certain calls or callers from the TSR).

to direct mail or general media advertising.[588] The Final Rule in this proceeding, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption.[589] As a result, virtually all debt relief telemarketing transactions are now subject to the TSR.[590]

Most commenters supported covering inbound calls made to debt relief providers.[591] On the other hand, one debt relief provider opposed it, arguing that not all debt relief providers harm consumers.[592]

The Commission's decision to include inbound debt relief calls is based on its law enforcement experience and the record in this proceeding and is consistent with the existing TSR provisions covering inbound calls related to investment opportunities, certain business opportunities, credit card loss protection plans, credit repair services, recovery services, and certain advance fee loans.[593] Like debt relief services, each of those services frequently has been marketed through deceptive telemarketing campaigns that capitalize on mass media or general advertising to entice their victims to place an inbound telemarketing call. The modification to the exemptions will ensure that sellers and telemarketers who market debt relief are required to abide by the Rule regardless of the medium used to advertise their services.

This provision will be effective September 27, 2010.[594]

G. Section 310.5: Recordkeeping

Section 310.5 of the TSR describes the types of records sellers or telemarketers must keep and the time period for retention.[595] Although the provisions of this section remain unchanged by these amendments, the operation of the amendments will result in some providers of debt relief services being subject to this provision of the TSR for the first time. Very few comments were received on the recordkeeping requirements. One commenter stated that it did not make sense to limit the recordkeeping requirement to 24 months, when 36 to 60 months is typically required for most debt relief customers to become debt free.[596] This commenter also questioned whether the requirement would reduce abuses and provide sufficiently useful data for law enforcement or regulatory purposes.[597] The FTC's law enforcement experience demonstrates that recordkeeping requirements are critical for enabling the agency to ensure compliance. The TSR has long imposed a 24-month retention period, and the Commission does not see a compelling reason to alter it for debt relief providers. To the extent that providers make claims that rely on historical data for substantiation, however, they must retain all material used to support the claims.

This provision will be effective September 27, 2010.

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act ("PRA"), as amended,[598] the Commission is seeking Office of Management and Budget ("OMB") approval of the Final Rule amendments to the TSR under OMB Control No. 3084-0097. The disclosure and recordkeeping requirements under the amendments to the TSR discussed above constitute "collections of information" for purposes of the PRA.[599]

Upon publication of the NPRM, the FTC submitted the proposed rule and a Supporting Statement to OMB. In response, OMB filed a comment indicating that it was withholding approval pending: (1) discussion in the preamble to the Final Rule of how the Commission has maximized the practical utility of the collection of information and minimized the related burden, and (2) the FTC's examination of the public comments in response to the NPRM. The remainder of this section covers those considerations and provides a revised PRA analysis, factoring in relevant public comments and the Commission's resulting or self-initiated changes to the proposed rule.

A. Practical Utility

According to OMB regulations, practical utility means the usefulness of information to or for an agency.[600] The Commission has maximized the practical utility of the debt relief amendments contained in the Final Rule. The Final Rule requires specific new disclosures in the sale of a "debt relief service," as that term is defined in § 310.2(m). The disclosures will provide consumers critical information before they enroll in a debt relief service. In addition, new respondents will be subject to the existing provisions of the TSR, including its general sales disclosures and recordkeeping provisions.[601] The required disclosures are necessary to inform consumers of important information about the debt relief services being offered. Commenters overwhelmingly supported the disclosures.[602] Moreover, the Commission has removed three of the previously proposed disclosures in order to avoid cluttering the most meaningful material information for consumers and to enhance the comprehensibility of the fewer

[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 purchase of debt relief services are already subject to the TSR, including the provisions of § 310.3. The Final Rule continues to exempt telemarketing of debt relief services from compliance with most provisions of the Rule where the sale is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation.

[591] *See* CFA at 20-21;Orion (Oct. 1, 2009) at 1.

[592] Able (Oct. 21, 2009) at 29.

[593] Each of these categories is carved out from the exemptions for inbound calls made in response to both general media and direct mail advertising. Inbound prize promotion calls are carved out only from the direct mail exemption.

[594] In addition, in three subsections of the Exemptions section, the Commission has also made minor, non-substantive amendments to §§ 310.6(b)(2), (5), & (6) to reflect the fact that the Commission has issued *Disclosure Requirements and Prohibitions Concerning Business Opportunities*, 16 CFR 437 (the "Business Opportunity Rule"). Prior to its issuance, this conduct was addressed by 16 CFR 436 (the Franchise Rule) and, therefore, the TSR previously cited only to the latter. Accordingly, §§ 310.6(b)(2), (5), and (6) have been amended to expressly cite both the Franchise Rule and the now-separate Business Opportunity Rule.

[595] 16 CFR 310.5. Specifically, this provision requires that telemarketers must keep for a period of 24 months: all substantially different advertising, brochures, scripts, and promotional materials; information about prize recipients; information about customers, including what they purchased, when they made their purchase, and how much they paid for the goods or services they purchased; information about employees; and all verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

[596] MD (Oct. 26, 2009) at 54.

[597] *Id.*

[598] 44 U.S.C. 3501-3521.

[599] *See* 5 CFR 1320.3(c).

[600] 5 CFR 1320.3(l). In determining whether information will have "practical utility," OMB will consider "whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties or the public, either directly or by means of a third-party or public posting, notification, labeling, or similar disclosure requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." *Id.*

[601] *See* 16 CFR 310.3(a)(1); 16 CFR 310.5. (These provisions have previously been reviewed and cleared by the OMB under the above-noted control number.) Accordingly, as a result of the exceptions to the general media and direct mail exemptions, entities that currently engage exclusively in inbound telemarketing of debt relief services, and thus are likely exempt under the current Rule, would be covered by the amended Rule.

[602] *See, e.g.,* NAAG (Oct. 23, 2009) at 11; CFA at 2-3, 20; MN AG at 2; FCS at 3; Able (Oct. 21, 2009) at 30; CareOne at 4; CSA at 1; DS at 18; DMB at 5; DSA/ADE at 1-2; FCS at 3. In fact, many commenters recommended additional disclosures. *Supra* Section III.D.5. The Commission added one additional disclosure that is critical to consumers' understanding of the services.

remaining disclosures. Finally, the recordkeeping requirements are necessary to facilitate law enforcement by ensuring that debt relief service providers retain records demonstrating their compliance with the Rule.[603]

Thus, the Final Rule will have significant practical utility.

B. Explanation of Burden Estimates Under the Final Rule

The PRA burden of the Final Rule's requirements will depend on various factors, including the number of covered firms and the percentage of such firms that conduct inbound or outbound telemarketing. The definition of "debt relief service" in the Rule includes debt settlement companies, for-profit credit counselors, and debt negotiation companies. As before in the NPRM PRA analysis, staff estimates that 2,000 entities will be covered by the Commission's Final Rule.[604] This includes existing entities already subject to the TSR for which there would be new recordkeeping or disclosure requirements ("existing respondents"), as well as existing entities that newly will be subject to the TSR ("new respondents").[605] Staff arrived at this estimate by using available figures obtained through research and from industry sources of information about the number of debt settlement companies[606] and the number of for-profit credit counselors.[607] Although these inputs suggest that an estimate of 2,000 entities might be overstated, staff has used it in its burden calculations in an effort to account for all entities that would be subject to the amended Rule, including debt negotiation companies, for which no reliable external estimates are available. No comments provided specific information about the number of entities.[608] Thus, the FTC retains these estimates without modification.

The Commission received two comments questioning the staff's estimate that the proposed disclosures could be provided in 20 seconds. Specifically, NACCA questioned whether it was realistic that the proposed disclosures could be provided in 20 seconds.[609] Moreover, a debt settlement company stated that it provides consumers with 16 mandatory disclaimers and an additional six disclosures (if applicable), and it estimated that reading those disclaimers and allowing the consumer to respond to the disclosures requires approximately four and a half minutes.[610]

The FTC's revised disclosure estimates, detailed below, consider commenters' input while excluding time estimates for disclosures made independently of the amended Rule. In addition, although the FTC recognizes that certain entities may require more than the projected time regarding the above-noted tasks, the estimates presented below are intended as an approximate average of incremental burden incurred across all businesses.

Burden Statement:

Estimated Additional Annual Hours Burden: 43,375 hours

As explained below, the estimated annual burden for recordkeeping attributable to the Rule amendments, averaged over a prospective three-year PRA clearance, is 29,886 hours for all industry members affected by the Rule. Although the first year of compliance will entail setting up compliant recordkeeping systems, the PRA burden will decline in succeeding years as they will then have in place such systems. The estimated burden for the disclosures that the Rule requires, including the new disclosures relating to debt relief services, is 13,489 hours for all affected industry members, the same estimate used for the proposed rule. Thus, the total PRA burden is 43,375 hours.

1. Number of Respondents

Based on its estimate that 2,000 entities sell debt relief services, and on the assumption that each of these entities engages in telemarketing as defined by the TSR, staff estimates that 879 new respondents will be subject to the Rule as a result of the amendments. The latter figure is derived by a series of calculations, beginning with an estimate of the number of these entities that conduct inbound versus outbound telemarketing of debt relief services. This added estimate is needed to determine how many debt relief service providers are existing respondents and how many are new respondents because their respective PRA burdens will differ.

Staff is not aware of any source that directly states the number of outbound or inbound debt relief telemarketers; instead, estimates of these numbers are extrapolated from external data. According to the Direct Marketing Association ("DMA"), 21% of all direct marketing in 2007 was by inbound telemarketing and 20% was by outbound telemarketing.[611] Using this relative weighting, staff estimates that the number of inbound debt relief telemarketers is 1,024 (2,000 x 21 ÷ (20 + 21)) and the number of outbound telemarketers is 976 (2,000 x 20 ÷ (20 + 21)).

Of the estimated 1,024 entities engaged in inbound telemarketing of debt relief services, an estimated 217 entities conduct inbound debt relief telemarketing through direct mail; the remaining 807 entities do so through general media advertising and have been thus far largely exempt from the

[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." 16 CFR 310.6(b)(5). Outbound telemarketing and non-exempt inbound telemarketing of debt relief services are currently subject to the TSR. Non-exempt inbound telemarketing would include calls to debt relief service providers by consumers in response to direct mail advertising that does not contain disclosures required by § 310.3(a)(1) of the Rule. *See* 16 CFR 310.6(b)(6) (providing an exemption for "[t]elephone calls initiated by a customer . . . in response to a direct mail solicitation . . . that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule . . . .").

[606] *See* David Streitfeld, *Debt Settlers Offer Promises But Little Help*, N.Y. Times, Apr. 19, 2009 (stating, without attribution, that "[a]s many as 2,000 settlement companies operate in the United States, triple the number of a few years ago"); Weinstein (Oct. 26, 2009) at 9 (*see* attached Weinstein paper at 8) (stating, without attribution, that "some 2,000 firms market themselves as providing 'debt settlement services,'"); Jane Birnbaum, *Debt Relief Can Cause Headaches of Its Own*, N.Y. Times, Feb. 9, 2008 (noting that "[a] thousand such [debt settlement] companies exist nationwide, up from about 300 a couple of years ago, estimated David Leuthold, vice president of the Association of Settlement Companies, which has 70 members and is based in Madison, Wis."); Able Workshop Comment at 5 ("At the time of this FTC Workshop there are nearly a thousand debt settlement companies within the US and a few companies servicing US consumers from outside the US with operations in Canada, Mexico, Argentina, India and Malaysia."). *See also* SIC Code 72991001 ("Debt Counseling or Adjustment Service, Individuals"): 1,598 entities.

[607] According to industry sources consulted by Commission staff, there are believed to be fewer than 200 for-profit credit counseling firms operating in the United States.

[608] One commenter estimated that it manages between 6% to 8% of all debt currently enrolled in debt settlement programs. FDR (Oct. 26, 2009) at 5 n.7. In response to a follow-up question by FTC staff, however, it stated that the statistic was a "good faith estimate based on our awareness of the industry" but did not elaborate further. FDR (Jan. 14, 2010) at 5.

[609] NACCA at 2 ("We find it difficult to believe that the required information can be conveyed in 20 seconds or, if it can be conveyed in 20 seconds, that a consumer who is already distressed can fully understand the information being conveyed.").

[610] MD (Oct. 26, 2009) at 21. This equates to about 12.3 seconds per disclosure.

[611] *See DMA Statistical Fact Book* 1, 17(30th ed. 2008) ("DMA Statistical Fact Book").

Rule's current requirements.[612] Of the 217 entities using direct mail, staff estimates that 72, approximately one-third, make the disclosures necessary to exempt them from the Rule's existing requirements.[613] Thus, an estimated 879 entities (807 + 72) are new respondents that will be newly subject to the TSR and its PRA burden, including burden derived from the new debt relief disclosures.

The remaining 145 entities (217 - 72) conducting inbound telemarketing for debt relief through direct mail would be existing respondents because they receive inbound telemarketing calls in response to direct mail advertisements that do not make the requisite disclosures to qualify for the direct mail exemption.[614] The estimated 976 entities conducting outbound telemarketing of debt relief services are already subject to the TSR and thus, too, would be existing respondents. Accordingly, an estimated 1,121 telemarketers selling debt relief services would be subject only to the additional PRA burden imposed by the newly adopted debt relief disclosures in amended Rule § 310.3(a)(1)(viii).

2. Recordkeeping Hours

Staff estimates that in the first year following promulgation of the Final Rule, it will take 100 hours for each of the 879 new respondents identified above to set up compliant recordkeeping systems. This estimate is consistent with the amount of time allocated in other PRA analyses that have addressed new entrants, i.e., newly formed entities subject to the TSR.[615] The recordkeeping burden for these entities in the first year following the amended Rule's adoption is 87,900 hours (879 new respondents x 100 hours each). In subsequent years, when TSR-compliant recordkeeping systems will, presumably, have already been established, the burden for these entities should parallel the one hour of ongoing recordkeeping burden staff has previously estimated for existing respondents under the Rule.[616] Thus, annualized over a prospective three-year PRA clearance period, cumulative annual recordkeeping burden for the 879 new respondents would be 29,886 hours (87,900 hours in Year 1: 879 hours for each of Years 2 and 3). Burden accruing to new entrants, 100 hours apiece to set up new recordkeeping systems compliant with the Rule, has already been factored into the FTC's existing clearance from OMB for an estimated 75 entrants per year, and is also incorporated within the FTC's current clearance for the TSR under OMB Control No. 3084-0097.[617]

Staff believes that the 1,121 existing respondents identified above will not have recordkeeping burden associated with setting up compliant recordkeeping systems. These entities are already required to comply with the Rule, and thus should already have recordkeeping systems in place. As noted above, these existing respondents will each require approximately one hour per year to file and store records required by the TSR. Here, too, however, this recordkeeping task is already accounted for in the FTC's existing PRA clearance totals and included within the latest request for renewed OMB clearance for the TSR.[618]

3. Disclosure Hours

Industry comments stated that in the ordinary course of business a substantial majority of sellers and telemarketers make the disclosures the Rule requires because doing so constitutes good business practice.[619] To the extent this is so, the time and financial resources needed to comply with disclosure requirements do not constitute "burden."[620] The Commission also streamlined the disclosures required in the final Rule by eliminating three of the disclosures initially proposed. Moreover, some state laws require the same or similar disclosures as the Rule mandates. Thus, the disclosure hours burden attributable to the Rule is far less than the total number of hours associated with the disclosures overall. Staff continues to assume that most of the disclosures the Rule requires would be made in at least 75% of telemarketing calls even absent the Rule.[621]

To determine the number of outbound and inbound calls regarding debt relief services, staff has combined external data with internal assumptions. Staff assumes that outbound calls to sell and inbound calls to buy debt relief services are made only to and by consumers who are delinquent on one or more credit cards.[622] For simplicity, and lacking specific information to the contrary, staff further assumes that each such consumer or household will receive one outbound call and place one inbound call for these services.

The PRA analysis in the NPRM focused on the number of U.S. households having credit cards (91.1 million) as a base for further calculations. One commenter noted that both individuals and couples within a household may file for bankruptcy relief, and a large proportion of households include more than two adults.[623] In response, FTC staff has refocused its analysis on an estimated number of adult (ages 18 and over) decision makers within each household. With that as the revised base, staff then applies the additional calculations and assumptions presented below to project an estimated number of consumers who will receive and place a call for debt relief services in a given year.

Based on U.S. Census Bureau data,[624] FTC staff estimates that there are 162,769,000 decision making units. This estimate is based on the assumptions that couples constitute a single decision making unit, as are single (widowed, divorced, separated, never married) adults within each household. Using households as a proxy for individual decision makers in applying again the previously stated percentage of households (78%) that had one or more credit cards at the end of 2008,[625] staff

[612] According to the DMA, 21.2% of annual U.S. advertising expenditures for direct marketing is through direct mail; the remaining 78.8% is through all other forms of general media (e.g., newspapers, television, Internet, Yellow Pages). *See id.* at 11. Thus, applying these percentages to the above estimate of 1,024 inbound telemarketers, 217 entities (21.2%) advertise by direct mail, and 807 (78.8%) use general media.

[613] The apportionment of one-third is a longstanding assumption stated in past FTC analyses of PRA burden for the TSR. *See, e.g., Agency Information Collection Activities*, 74 FR 25540, 25543 (May 28, 2009); *Agency Information Collection Activities*, 71 FR 28698, 28700 (May 17, 2006). No comments have been received to date with an alternative apportionment or reasons to modify it.

[614] 16 CFR 310.6(b)(6).

[615] *See, e.g., Agency Information Collection Activities*, 74 FR at 25542; *Agency Information Collection Activities*, 71 FR at 28699.

[616] *Id.*

[617] *Agency Information Collection Activities*, 74 FR at 25542 ("The Commission staff also estimates that 75 new entrants per year would need to spend 100 hours each developing a recordkeeping system that complies with the TSR for an annual total of 7,500 burden hours."). The term "new entrant" denotes an entity that has not yet, but may in the future come into being.

[618] *Id.*

[619] *See, e.g.,* MD (Oct. 26, 2009) at 21 & 35-37; TASC (Oct. 26, 2009) at 5, 14-15; Franklin at 19-20; *see also Agency Information Collection Activities*, 74 FR at 25542.

[620] 16 CFR 1320.3(b)(2).

[621] *See, e.g., Agency Information Collection Activities*, 74 FR at 25543; *Agency Information Collection Activities*, 71 FR at 28699. Accordingly, staff has continued to estimate that the hours burden for most of the Rule's disclosure requirements is 25% of the total hours associated with disclosures of the type the TSR requires.

[622] By extension upsells on these initial calls would not be applicable. Moreover, staff believes that few, if any, upsells on initial outbound and inbound calls would be for debt relief.

[623] RDRI at 2.

[624] U.S. Census Bureau, Current Population Survey, 2008 Annual Social and Economic Supplement, Internet Release Date: January 2009.

[625] *See* Ben Woolsey and Matt Schulz, *Credit card statistics, industry facts, debt statistics, available at* (*http://www.creditcards.com/credit-card-news/*

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 disclosure burden for new respondents attributable to currently exempt inbound calls tied to direct mail (i.e., currently exempt when the requisite § 310.3(a)(1) disclosures are made), is 328 hours per year (590,346 exempt inbound direct mail calls x 8 seconds x 25% burden from TSR).

Thus, the total disclosure burden attributable to the Final Rule is 13,489 hours (4,932 + 8,229 + 328).

Estimated Annual Labor Cost: $945,361

Estimated Annual Non-Labor Cost: $58,753

4. Recordkeeping Labor and Non-Labor Costs

a. Labor Costs

Assuming a cumulative burden of 100 hours in Year 1 (of a prospective three-year PRA clearance for the TSR) to set up compliant recordkeeping systems for existing debt relief service providers newly subject to the Rule (879 new respondents x 100 hours each in Year 1 only), and applying to that a skilled labor rate of $26/hour,[632] labor costs would approximate $2,285,400 in the first year of compliance for new respondents.[633] As discussed above, however, in succeeding years, recordkeeping associated with the Rule will only require 879 hours, cumulatively, per year. Applied to a clerical wage rate of $14/hour, this would amount to $12,306 in each of those years. Thus, the estimated labor costs for recordkeeping associated with the Final Rule, averaged over a prospective three-year clearance period, is $770,004.

b. Non-Labor Costs

Staff believes that the capital and start-up costs associated with the TSR's information collection requirements are *de minimis*. The Rule's recordkeeping

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.

requirements mandate that companies maintain records, but not in any particular form. While those requirements necessitate that affected entities have a means of storage, industry members should have that already regardless of the Rule. Even if an entity finds it necessary to purchase a storage device, the cost is likely to be minimal, especially when annualized over the item's useful life.

Affected entities need some storage media such as file folders, electronic storage media or paper in order to comply with the Rule's recordkeeping requirements. Although staff believes that most affected entities would maintain the required records in the ordinary course of business, staff estimates that the previously determined 879 new respondents newly subject to the Final Rule will spend an annual amount of $50 each on office supplies as a result of the Rule's recordkeeping requirements, for a total recordkeeping cost burden of $43,950.

5. Disclosure Labor and Non-Labor Costs

a. Labor Costs

The estimated annual labor cost for disclosures under the Final Rule is $175,357. This total is the product of applying an assumed hourly wage rate of $13.00[634] to the earlier stated estimate of 13,489 hours pertaining to general and specific disclosures in initial outbound and inbound calls.

b. Non-Labor Costs

Estimated outbound disclosure hours (4,112) per above multiplied by an estimated commercial calling rate of 6 cents per minute ($3.60 per hour) equals $14,803 in telephone-related costs.[635]

V. Regulatory Analysis and Regulatory Flexibility Act Requirements

The Regulatory Flexibility Act of 1980 ("RFA") [636] requires a description and analysis of proposed and final Rules that will have a significant economic impact on a substantial number of small entities.[637] The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") [638] with the proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") [639] with the Final Rule, if any. The Commission is not required to make such analyses if a Rule would not have such an economic effect.[640]

As of the date of the NPRM, the Commission did not have sufficient empirical data regarding the debt relief industry to determine whether the proposed amendments to the Rule would impact a substantial number of small entities as defined in the RFA.[641] It was also unclear whether the proposed amended Rule would have a significant economic impact on small entities. Thus, to obtain more information about the impact of the proposed rule on small entities, the Commission decided to publish an IRFA pursuant to the RFA and to request public comment on the impact on small businesses of its proposed amended Rule.

In response to questions in the NPRM, the Commission did not receive any comprehensive empirical data regarding the revenues of debt relief companies or the impact on small businesses of the amended Rule. A trade association stated that a significant number of companies that would be harmed by the advance fee ban were small businesses.[642] One commenter asserted that there are tens of thousands of sole practitioners engaged in financial consulting services that may fall under the Rule's definition of debt relief services.[643] It does not appear, though, that the commenter considered that many sole practitioners would not fall within the Rule's ambit because they meet face-to-face with their customers.[644] The commenter also opined that the rule would subject small businesses to frivolous lawsuits that could jeopardize their businesses.[645] However, the commenter neither provided support for the statement nor asserted that the impact would be more significant on small businesses than large businesses.[646]

A. Need for and Objectives of the Rule

The objective of the amended Rule is to curb deceptive and abusive practices occurring in the telemarketing of debt relief services. As described in Sections II and III, above, the amendments are intended to address consumer protection concerns regarding telemarketing of debt relief services and are based on evidence in the record that deceptive and abusive acts are common in telemarketing of debt relief services to consumers.

B. Significant Issues Raised by Public Comment, Summary of the Agency's Assessment of These Issues, and Changes, If Any, Made in Response to Such Comments

As discussed in Section III above, commenters raised limited concerns about the burden of the proposed disclosures.[647] However, commenters raised more significant concerns about the potential costs and burdens of the advance fee ban, as discussed in Sections III.C.2.c-e. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms.[648] Rather, they argued that the costs to be borne by all firms – including small firms – would be

[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 companies would have a harder time than large companies in capitalizing expenses. *See* RADR at 1.

excessive. As discussed in detail above, two debt settlement trade associations and many debt settlement companies argued that numerous companies would go out of business if the FTC imposes an advance fee ban.[649] A trade association submitted a survey of its members reporting: (1) 84% would "almost certainly" or "likely" have to shut down if an advance fee ban were enacted; (2) 95% would "certainly" or "likely" lay off employees under an advance fee ban; and (3) 85% would stop offering debt settlement services to new and existing consumers.[650] These survey results, however, are not persuasive, as the commenter did not provide basic information about survey respondents and methodology. Moreover, the survey elicited self-reported statements but did not verify the responses' accuracy in any way. Individual debt settlement company commenters similarly asserted that they would go out of business if the Commission imposed an advance fee ban.[651] These statements, however, did not have adequate support. Moreover, the Final Rule permits debt relief providers to require consumers to place funds for provider fees and payments to creditors or debt collectors in a dedicated bank account, provided certain conditions are met. This provision will assure providers that, once they settle a consumer's debt, they will receive the appropriate fee.

C. Description and Estimate of the Number of Small Entities Subject to the Final Rule or Explanation Why No Estimate Is Available

The amendments to the Rule will affect providers of debt relief services engaged in "telemarketing," as defined by the Rule to mean "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."[652] Staff estimates that the amended Rule will apply to approximately 2,000 entities. Determining a precise estimate of how many of these are small entities, or describing those entities further, is not readily feasible because the staff is not aware of published data that reports annual revenue figures for debt relief service providers.[653] Further, the Commission's requests for information about the number and size of debt settlement companies yielded virtually no information.[654] Based on the absence of available data, the Commission believes that a precise estimate of the number of small entities that fall under the amendment is not currently feasible.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Rule and the Type of Professional Skills That Will Be Necessary to Comply

The Final Rule imposes disclosure and recordkeeping burden within the meaning of the PRA. The Commission is seeking clearance from the OMB for these requirements, and the Commission's Supporting Statement submitted as part of that process is being made available on the public record of this rulemaking. Specifically, the Final Rule requires specific disclosures in telemarketing of debt relief services, and it would subject inbound debt relief service telemarketing to the Rule's requirements, including the existing disclosure and recordkeeping provisions.[655] In addition, the Final Rule prohibits a seller or telemarketer of debt relief services from requesting or receiving a fee in advance of providing the offered services.[656]

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

E. Steps the Agency Has Taken to Minimize any Significant Economic Impact on Small Entities, Consistent with the Stated Objectives of the Applicable Statutes

In drafting the amended Rule, the Commission has made every effort to avoid unduly burdensome requirements for entities. The Commission believes that the amendments – including the new disclosures for debt relief services, prohibited misrepresentations, and the advance fee ban – are necessary in order to protect consumers considering the purchase of debt relief services. Similarly, the Commission is extending the coverage of the existing provisions of the Rule to inbound telemarketing of debt relief services. This amendment is designed to ensure that in telemarketing transactions to sell debt relief services, consumers receive the benefit of the Rule's protections. For each of these amendments, the Commission has attempted to tailor the provision to the concerns evidenced by the record to date. In fact, in determining the Final Rule's requirements, the FTC reduced the number of debt relief-specific disclosures from six initially proposed in the NPRM to four in order to reduce the burden on business, including small entities. On balance, the Commission believes that the benefits to consumers of each of the Rule's requirements outweigh the costs to industry of implementation.

The Commission considered, but decided against, providing an exemption for small entities in the amended Rule. The protections afforded to consumers from the amendments are equally important regardless of the size of the debt relief service provider with whom they transact. Indeed, small debt relief service providers have no unique attributes that would warrant exempting them from provisions, such as the required debt relief disclosures. The information provided in the disclosures is material to the consumer regardless of the size of the entity offering the services. Similarly, the protections afforded to consumers by the advance fee ban are equally necessary regardless of the size of the entity providing the services. Thus, the Commission believes that creating an exemption for small businesses from compliance with the amendments would be contrary to the goals of the amendments because it would arbitrarily limit their reach to the detriment of consumers.

Nonetheless, the Commission has taken care in developing the amendments to set performance standards, which establish the objective results that must be achieved by

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

[650] USOBA (Oct. 26, 2009) at 20.

[651] SDS at 2; MD (Oct. 26, 2009) at 25; RADR at 1; Orion (Oct. 1, 2009) at 2; CDS at 1; D&A at 2; *see also* ULC at 6; CSA at 10 (stating generally that the advance fee ban "could put a legitimate company out of business"); FDR (Oct. 26, 2009) at 16-17; CCC at 1 (a for-profit credit counseling company stated that it would go out of business if the Commission promulgates the advance fee ban).

[652] 16 CFR 310.2(cc) (in the proposed amended Rule, this definition is renumbered as § 310.2(dd)).

[653] Directly covered entities under the proposed amended Rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System ("NAICS") as follows: All Other Professional, Scientific and TechnicalServices (NAICS code 541990) with no more than $7.0 million dollars in average annual receipts (no employee size limit is listed). *See* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System codes (Aug. 22, 2008), *available at* (*http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf/*).

[654] *See* Able Workshop Comment at 6 (there are a "thousand plus or minus companies whose business activities are related to debt settlement").

[655] *See* Rule § 310.3(a)(1)(viii).

[656] *See* Rule § 310.4(a)(5).

regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. Moreover, the Rule's disclosure requirements are format-neutral; sellers and telemarketers may make the disclosures in writing or orally, as long as they are clear and conspicuous.[657] In sum, the agency has worked to minimize any significant economic impact on small entities.

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS CITED IN THE SBP

TSR Debt Relief Final Rule

Short-name/Acronyms	Commenter
Allen	Charles Allen
Arnold & Porter	Arnold & Porter on behalf of National Consumer Council
ART	A.R. Trust Services, Inc.
Able	Able Debt Settlement, Inc.
ACA	ACA International
ACCORD	American Coalition of Companies Organized to Reduce Debt
AFSA	American Financial Services Association
AICCCA	Association of Independent Consumer Credit Counseling Agencies
AADMO	American Association of Debt Management Organizations
ABA	American Bankers Association
AMCA	American Credit Alliance
Atkins	Anthony Atkins
BBB	Better Business Bureau of the Southland
Briesch	Richard Briesch
Brodie	Jessica Brodie
CDS	Tim Harris, on behalf of CDS
CCC	Edward McTaggart, on behalf of CCC
Cambridge	Cambridge Credit Counseling Corp.
Clement	Bryan Scott Clement
CRN	Consumer Recovery Network
CareOne	Care One Services
Centricity	Centricity, Inc.
Cheney	Gabriel Cheney
CO AG	Office of the Colorado Attorney General
CCCS CNY	Consumer Credit Counseling Service of Central New York
CFA	Consumer Federation of America, Consumers Union, Consumer Action, National Consumer Law Center, Center for Responsible Lending, National Association of Consumer Advocates, National Consumers League, US Public Interest Research Group, Privacy Rights Clearinghouse, Arizona Consumers Council, Chicago Consumer Coalition, Consumer Assistance Council, Community Reinvestment Association of North Carolina, Consumer Federation of the Southeast, Grass Roots Organizing, Jacksonville Area Legal Aid, Inc., Maryland Consumer Rights Coalition, Mid-Minnesota Legal Assistance, and Virginia Citizens Consumer Council
CU	Consumer's Union
CSA	Morrison & Foerster, LLP on behalf of Credit Solutions of America
D&A	Davis & Associates
Davis	Robert Davis, engaged by AADMO
Debthelper	Debthelper
DRS	Debt Remedy Solutions
DS	Debt Shield, Inc.
DSUSA	Debt Settlement USA
DMB	DMB Financial, LLC
DSA/ADE	Debt Settlement America, Inc. and American Debt Exchange, Inc.
FCS	Financial Consulting Services, LLC
FECA	Financial Education and Counseling Alliance
Figliuolo	Michael Figliuolo
FSR	Financial Services Roundtable
FDR	Freedom Debt Relief, LLC
Franklin	Franklin Debt Relief
Garner	Garner
GCS	Global Client Solutions, LLC
Gecha	Gecha
Greenfield	Professor Michael Greenfield
GP	GreenPath, Inc.
Hargrove	Jason Hargrove
Hinksor	Eric Hinksor
Ho	Andy Ho
Houghton	Rebecca Houghton
Hunter	Hunter Business Solutions
JH	J. Haas Group
Kaiser	Karen Kaiser

[657] If the disclosures are made in writing, they are considered clear and conspicuous "only if they are sent close enough in time to the call so that the consumer associates the call with the written disclosures." FTC, *Complying With the Telemarketing Sales Rule* (May 2009), *available at* (*http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm*).

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*)

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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*)

27. *Illinois v. SDS West Corp.,* No. 09CH368 (Ill. Cir. Ct. - 7th 2009). Press Release, Illinois Attorney General, *Attorney General Madigan Sues Two Debt Settlement Firms* (May 4, 2009), *available at* (*http://www.illinoisattorneygeneral.gov/pressroom/2009_05/20090504.pdf*)

28. *Illinois v. Debt Relief USA, Inc.*, No. 09CH367 (Ill. Cir. Ct. - 7th 2009). Press Release, *supra* item 27.

29. *Illinois v. Clear Your Debt, LLC,* No. 2010CH00167 (Ill. Cir. Ct. - 7th 2010). Press Release, Illinois Attorney General, *Madigan Sues Four Debt Settlement Firms to Stop Abusive, Deceptive Practices* (Feb. 10, 2010), *available at* (*http://www.ag.state.il.us/pressroom/2010_02/20100210.html*)

30. *Illinois v. Endebt Solutions, LLC, d/b/a DebtOne Fin.,* No. 2010CH00165 (Ill. Cir. Ct. - 7th 2010). Press Release, *supra* item 29.

31. *Illinois v. Debt Consultants of Am., Inc.*, No. 2010CH00168 (Ill. Cir. Ct. - 7th 2010). Press Release, *supra* item 29.

32. *Illinois v. Am. Debt Arbitration et al.,* No. 2010CH00166 (Ill. Cir. Ct. - 7th 2010). Press Release, *supra* item 29.

33. *Indiana v. Debt Settlement Amer., Inc.,* No. 87C01-1002-PL-068 (Ind. Cir. Ct. Warrick County 2010).

34. *Kansas v. Philip Manger, Robert Lock, Jr. and CCDN, LLC dba Credit Collection Def. Network* (Kan. 2010).

35. *Kansas v. Blue Harbor Fin.,* No. 10C10 (Kan. Dist. Ct. Shawnee County 2010).

36. *Kansas v. Equity First Fin.,* No. 09C1878 (Kan. Dist. Ct. Shawnee County 2009).

37. *Maine v. Credit Solutions of America*, No. BCD-WB-CV-10-02. (Me. Super. Ct. 2009). Complaint, *available at* (*http://www.maine.gov/ag/news/cases_of_interest.shtml*)

38. *Maryland Attorney General v. Law Offices of Richard A. Brennan,* No. 10-C-08-00503-OC (Md. Cir. Ct. Frederick County 2007). Press Release, Maryland Attorney General, *Attorney General Settles with Companies Selling Debt Repayment Services* (Oct. 19, 2007), *available at* (*http://www.oag.state.md.us/Press/2007/101907.htm*)

39. *Minnesota v. Am. Debt Settlement Solutions, Inc.*, No. 70-CV-10-4478 (Minn. Dist. Ct. - 1st 2010). Complaint, Minnesota Attorney General comment (Feb. 23, 2010), *available at* (*http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00332.pdf*)

40. *Minnesota v. Debt Rx USA, LLC* (Minn. Dist. Ct. - 4th 2010). Complaint, *supra* item 39.

41. *Minnesota v. FH Fin. Serv., Inc.* (Minn. Dist. Ct. - 6th 2010). Complaint, *supra* item 39.

42. *Minnesota v. Morgan Drexen* (Minn. Dist. Ct. - 4th 2010). Complaint, *supra* item 39.

43. *Minnesota v. Pathway Fin. Mgmt., Inc.* (Minn. Dist. Ct. - 4th 2010). Complaint, *supra* item 39.

44. *Minnesota v. State Capital Fin., Inc.*, No. 34-CV-10-117 (Minn. Dist. Ct. - 8th 2010). Complaint, *supra* item 39.

45. *Missouri v. Credit Solutions of Am.*, No. 0922-CC02228 (Mo. Cir. Ct. St. Louis 2009). Press Release, Missouri Attorney General, *Attorney General Koster Files Suit to Stop Company from Falsely Promising Credit-Card Debt Help* (June 2, 2009), *available at* (*http://ago.mo.gov/newsreleases/2009/AG_Koster_Suit_Against_Credit_Solutions*)

46. *Missouri v. Credit Repair and Counseling Specialists, LLC,* No. 1031-CV03404 (Mo. Cir. Ct. Green County 2010). Press Release, Missouri Attorney General, *Attorney General Koster Warns,* "*No Quick Fix*" (Mar. 9, 2010), *available at* (*http://ago.mo.gov/newsreleases/2010/Consumer_protection_week_scam_of_the_day_alert_credit_repair/*)

47. *New York v. Credit Solutions of Am., Inc.,* No. 401225/2009 (N.Y. Sup. Ct. New York County 2009). Press Release, New York Attorney General, *Attorney General Cuomo Sues Debt Settlement companies for Deceiving and Harming Consumers* (May 19, 2009), *available at* (*http://www.ag.ny.gov/media_center/2009/may/may19b_09.html*)

48. *New York v. Nationwide Asset Servs., Inc.*, No. 5710/2009 (N.Y. Sup. Ct. Erie County 2009). Press Release, *supra* item 47.

49. *North Carolina v. Daly & Sinnott Law Ctr., PLLC d/b/a The Law Ctrs. for Consumer Prot., et al.,* No. 01CV013603 (N.C. Super. Ct. Wake County 2002). Press release, North Carolina Attorney General, *Debt Relief Company to Return Money to Consumers, Announces A.G. Cooper* (Jan. 11, 2005), *available at* (*http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Debt-relief-company-to-return-money-to-consumers,-.aspx*)

50. *North Carolina v. Knight Credit Servs., Inc., et al.,* No. 04CVS8345 (N.C. Super Ct. Cumberland County 2004).

51. *North Carolina v. Commercial Credit Counseling Servs., Inc. d/b/a Corporate Turnaround,* No. 06CV14672 (N.C. Super. Ct. Wake County 2006).

52. *North Carolina v. Hess Kennedy Chartered, LLC,* No. 08CV2310 (N.C. Super. Ct. Wake County 2008). Press Release, North Carolina Attorney General, *Debt Relief Firms Ordered to Stop Taking Money in NC, Says A.G.* (Feb. 15, 2008), *available at* (*http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Debt-relief-firms-ordered-to-stop-taking-money-in-.aspx*)

53. *In re Morgan Drexen* (N.C. 2009)

54. *In re Credit Solutions of America* (Or. 2010). Press Release, Oregon Attorney General, *Attorney General John Kroger Bans Nation's Largest Debt Settlement Company From Doing Business in Oregon* (May 7, 2010), *available at* (*http://www.doj.state.or.us/releases/2010/rel050710.shtml*)

55. *Texas v. Debt Relief USA,* No. D-1-GV-09-001570 (Tex. Dist. Ct. - 53rd Travis County 2009). Complaint, *available at* (*http://www.oag.state.tx.us/newspubs/releases/2009/081809debtrelief_pop.pdf*)

56. *Texas v. BC Credit Solution, LLC, et al.* (Tex. Dist. Ct. Travis County 2009). Plaintiff's Original Petition, *available at* (*http://www.oag.state.tx.us/newspubs/releases/2009/052009bccredit_pop.pdf*)

57. *Texas v. FH1 Fin. Servs., Inc. d/b/a FH Fin. Serv.* (Tex. Dist. Ct. Travis County 2009). Plaintiff's Original Petition, *available at* (*http://www.oag.state.tx.us/newspubs/releases/2009/052009lhfinancial_pop.pdf*)

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59. *Texas v. HABR, LLC d/b/a Debtor Solution* (Tex. Dist. Ct. Travis County 2009). Plaintiff's Original Petition, *available at* (*http://www.oag.state.tx.us/newspubs/releases/2009/052009debtsolution_pop.pdf*)

60. *Texas v. Credit Solutions of Am., Inc.*, No. D-1-GV-09-000417 (Tex. Dist. Ct. - 261st 2009). Plaintiff's Original Petition, *available at* (*http://www.oag.state.tx.us/newspubs/releases/2009/032509csa_op.pdf*)

61. *Texas v. DebtXS, L.P.* (Tex. Dist. Ct. Travis County 2006). Press Release, Texas Attorney General, *Attorney General Abbott Gets Debt Settlement Firm to Change Business Practices Harming Consumers* (Sept. 11, 2006), *available at* (*http://www.oag.state.tx.us/oagNews/release.php?id=1729*)

62. *Vermont v. Daly and Sinnott Law Ctrs.* (Vt. 2002). Press Release, Vermont Attorney General, *Consumer Update: Daly and Sinnott* "*Law Centers for Consumer Protection*" (Jan. 27, 2003), *available at* (*http://www.atg.state.vt.us/issues/consumer-protection/documents-and-resources/consumer-update-daly-and-sinnott-law-centers-for-consumer-protection.php*)

63. *In re Boston Debt Solutions, LLC,* No. 1302-09WNCV (Vt. Super. Ct. Washington County 2009). Press Release, Vermont Attorney General, *Debt Adjuster Sanctioned for Violating Licensing and Consumer Laws* (Mar. 9, 2009), *available at* (*http://www.atg.state.vt.us/news/debt-adjuster-sanctioned-for-violating-licensing-and-consumer-laws.php*); Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/Boston%20Debt%20Solutions%202-26-09.pdf*)

64. *In re Century Negotiations, Inc.*, No. 489-7-09WNCV (Vt. Super. Ct. Washington County 2009). Press Release, Vermont Attorney General, *Debt Settlement Company Settles Consumer Claims* (July 14, 2009), *available at* (*http://www.atg.state.vt.us/news/debt-settlement-company-settles-consumer-claims3.php*); Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/Century%20Negotiations%20-%207-2-09.pdf*)

65. *In re Clear Your Debt, LLC*, No. 56-1-10WNCV (Vt. Super. Ct. Washington County 2009) *(Joint action by Attorney General and State Regulator)*. Press Release, Vermont Attorney General, *Debt Settlement Company Settles Consumer Claims* (July 23, 2009), *available at* (*http://www.atg.state.vt.us/news/debt-settlement-company-settles-consumer-claims1.php*); Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/*

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66. *In re CreditAnswers LLC*, No. 766-10-09WNCV (Vt. Super. Ct. Washington County 2009). Press Release, Vermont Attorney General, *Two More Debt Settlement Companies Settle Consumer Claims* (Oct. 13, 2009), *available at* (*http://www.atg.state.vt.us/news/two-more-debt-settlement-companies-settle-consumer-claims.php*); Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/Credit%20Answers%20AOD.pdf*)

67. *In re Liberty Banc Mortgage Group, Inc. dba Liberty Settlement Group*, No. 767-10-09WNCV (Vt. Super. Ct. Washington County 2009). Press Release and Assurance of Discontinuance, *supra* item 66.

68. *In re Debt Remedy Solutions, LLC*, No. 377-5-09WNCV (Vt. Super. Ct. Washington County 2009). Press Release, Vermont Attorney General, *Debt Settlement Company Settles Consumer Claims* (May 27, 2009), *available at* (*http://www.atg.state.vt.us/news/debt-settlement-company-settles-consumer-claims2.php*); Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/Debt%20Remedy%20Solutions%20 LLC.pdf*)

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70. *In re Fin. Freedom of Am., Inc.*, No. 897-11-09WNCV (Vt. Super. Ct. Washington County 2009). Press Release and Assurance of Discontinuance, *supra* item 69.

71. *In re Credit Alliance Group*, No. 172-3-10WNCV (Vt. Super. Ct. Washington County 2010). Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/Credit%20Alliance %20Group%20 AOD.pdf*)

72. *In re Debt Settlement Am.* (Vt. 2010). Press Release, Vermont Attorney General, *Attorney General Settles Consumer Claims With Debt Settlement Company* (Feb. 2, 2010), *available at* (*http://www.atg.state.vt.us/news/attorney-general-settles-consumer-claims-with-debt-settlement-company.php*); Assurance of Discontinuance, *available at* (*http://www.atg.state.vt.us/assets/files/Debt%20Settlement %20America%20 AOD%20-% 202010-1-27.pdf*)

73. *State ex rel. McGraw v. Able Debt Settlement, Inc.* (W. Va. 2009). Press Release, West Virginia Attorney General, *Texas-based Debt Settlement Company, Able Debt Settlement, is Enjoined from Doing Business in West Virginia* (May 15, 2009), *available at* (*http://www.wvago.gov/press.cfm?ID=476&fx=more*)

74. *State ex rel. McGraw v. Patriot Debt Solutions Corp.*, No. 07-Misc.-309 (W. Va. Cir. Ct. Kanawha County 2007).

75. *State ex rel. McGraw v. Credit Collections Defense Network,* No. 09-Misc.-77 (W. Va. Cir. Ct. Kanawha County 2009). Press Release, West Virginia Attorney General, *Illinois Attorney Enjoined from Continuing Debt Settlement Business Until He Complies with Attorney General's Investigation* (Apr. 1, 2009), *available at* (*http://www.wvago.gov/press.cfm?fx=more&ID=471*)

76. *State ex rel. McGraw v. Hess Kennedy Chartered LLC*, No. 07-Misc.-454 (W. Va. Cir. Ct. Kanawha County 2008). Press Release, West Virginia Attorney General, *Florida Attorneys Prevented From Continuing Debt Settlement Business in WV Until They Comply with Attorney General's Investigation* (Dec. 21, 2007), *available at* (*http://www.wvago.gov/press.cfm?ID=417&fx=more*)

77. *State ex rel. McGraw v. Debt Mgmt. Credit Counseling Corp.* (W. Va. 2006). Press Release, West Virginia Attorney General, *McGraw Recovers Nearly $92,000 in Overages* (Jan. 31, 2006), *available at* (*http://www.wvago.gov/press.cfm?ID=62&fx=more*)

78. *In re Excess Debt Solutions, LLC* (W. Va. 2010).

79. *In re Am. Debt Solutions* (W. Va. 2008).

80. *State ex rel. McGraw v. PDM Int'l, Inc.* (W. Va. 2007). Press Release, West Virginia Attorney General, *Attorney General Darrell McGraw Obtains $35,345.00 in Refunds for 38 West Virginia Consumers Misled by a Texas Debt Relief Company* (Feb. 18, 2009), *available at* (*http://www.wvago.gov/press.cfm?ID=465&fx=more*)

81. *In re Accelerated Fin. Ctrs.* (W. Va. 2010).

82. *In re Active Debt Solutions* (W. Va. 2009).

83. *In re Elimidebt Mgmt. Servs.* (W. Va. 2009).

84. *State ex rel. McGraw v. CCDN, LLC*, No. 10-C-632 (W. Va. Cir. Ct. Kanawha County 2010). Press Release, West Virginia Attorney General, *A.G. McGraw Sues to Stop CCDN's Deceptive Debt Settlement Business* (Apr. 12, 2010), *available at* (*http://www.wvago.gov/press.cfm?ID=521&fx=more*)

State Regulator Actions

1. *In re Nationwide Asset Servs., Inc.*, (California Dep't of Corps. 2005). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2005/Nationwide.pdf*)

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38. *In re Global Econ. Corp.* (Wisc. Dep't of Fin. Insts., Dep't of Banking 2008). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/lfs_2008/TheDebtSettlementCompany.pdf*)

39. *In re Nat'l Legal Debt Ctrs.* (Wisc. Dep't of Fin. Insts., Dep't of Banking 2007). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/mb_2007/NationalLegalDebtCenters.pdf*)

40. *In re Debt Relief Network, Inc.* (Wisc. Dep't of Fin. Insts., Dep't of Banking 2007). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/mb_2007/DebtReliefNetworkInc.pdf*)

41. *In re Fin. Freedom Through Negotiations* (Wisc. Dep't of Fin. Insts., Dep't of Banking 2007). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/mb_2007/FinancialFreedom.pdf*)

42. *Wisconsin, Dep't of Fin. Insts., Dep't of Banking v. Eruditio Debt Mgmt. Corp.* (Wisc. 2007). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/mb_2007/EruditioDebtManagementCorp.pdf*)

43. *Wisconsin, Dep't of Fin. Insts., Dep't of Banking v. Worldwide Fin. Servs., Inc.* (Wisc. 2007). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/mb_2007/WorldwideFinancialServicesInc.pdf*)

44. *In re Credit Solutions of Am.* (Wisc. Dep't of Fin. Insts., Dep't of Banking 2009). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/lfs_2007/CreditSolutionsAmerica.pdf*)[658]

VI. Final Amendments

List of Subjects in 16 CFR part 310

Telemarketing, Trade practices.

■ For the reasons discussed in the preamble, the Federal Trade Commission revises 16 CFR part 310 to read as follows:

TELEMARKETING SALES RULE 16 CFR PART 310

Sec.

Authority: 15 U.S.C. 6101–6108.

Source: 68 FR 4669, Jan. 29, 2003, unless otherwise noted.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Debt relief service* means any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the

[658] In addition to the state cases provided in this List, the Commission is aware of 10 additional matters submitted by NAAG in a supplemental comment dated July 6, 2010: *In re United Debt Svcs., LLC* (W. Va. 2010); *West Virginia v. Nat'l Credit Solutions* (W. Va. 2010); *West Virginia v. Sherman Enters., LC dba Nationwide Credit Solutions, GSV Ltd.*, and Glen S. Vondielingen (W. Va. 2009); *Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Solve Debts, Inc.*, No. 2009-CV-1777490 (Ga. 2009); *Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. The Credit Exch. Corp.*, No. 2009-CV-179467 (Ga. 2009); *Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Beacon Debt Settlement, Inc.*, No. 2010-CV-185216 (Ga. 2010); *Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Johnson Law Group* (Ga. 2010).

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 include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(ee) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer consents to pay [659] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer; [660]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and,

[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.

if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643;

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); and

(viii) In the sale of any debt relief service:

(A) the amount of time necessary to achieve the represented results, and to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the time by which the debt relief service provider will make a bona fide settlement offer to each of them;

(B) to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the amount of money or the percentage of each outstanding debt that the customer must accumulate before the debt relief service provider will make a bona fide settlement offer to each of them;

(C) to the extent that any aspect of the debt relief service relies upon or results in the customer's failure to make timely payments to creditors or debt collectors, that the use of the debt relief service will likely adversely affect the customer's creditworthiness, may result in the customer being subject to collections or sued by creditors or debt collectors, and may increase the amount of money the customer owes due to the accrual of fees and interest; and

(D) to the extent that the debt relief service requests or requires the customer to place funds in an account at an insured financial institution, that the customer owns the funds held in the account, the customer may withdraw from the debt relief service at any time without penalty, and, if the customer withdraws, the customer must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) 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 purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643;

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); or

(x) Any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; 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 or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt; the effect of the service on a customer's creditworthiness; the effect of the service on collection efforts of the customer's creditors or debt collectors; the percentage or number of customers who attain the represented results; and whether a debt relief service is offered or provided by a non-profit entity.

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[661] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[662] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[663]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

[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 federal law or state contract law.

(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;

(B) the customer owns the funds held in the account and is paid accrued interest on the account, if any;

(C) the entity administering the account is not owned or controlled by, or in any way affiliated with, the debt relief service;

(D) the entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service; and

(E) the customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C), within seven (7) business days of the customer's request.

(6) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(7) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(8) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[664] of that person; or

(ii) as an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii), unless:

(A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) Includes such person's telephone number and signature;[665] and

(B) In any such call to induce the purchase of any good or service, or to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) Allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) Within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by § 310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

[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] 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.

(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 charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(iv) if:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

(ii) The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) Whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[666]; and

(iv) The seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or

[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.

services were shipped or provided, and the amount paid by the customer for the goods or services;[667]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising," ("Franchise Rule") 16 CFR Part 436, and the sale of business opportunities subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Business Opportunities," ("Business Opportunity Rule") 16 CFR Part 437, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone 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);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided,* however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided,* however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided,* however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided,* however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry

[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 Severability.

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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