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July 1, 2010

Commissioners  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Ave., NW  
Washington DC 20580

The Honorable Chairman and Commissioners,

Re: Telemarketing Sales Rule - Debt Relief Amendments – R411001

The national and local groups submitting this letter are strong supporters of the FTC's proposed advance fee ban amendment to the Telephone Sales Rule. We submit this additional comment to share with the Commission the reasons for our strong opposition to The Association Settlement Companies' (TASC) proposal to undermine the advance fee ban with a safe harbor that would allow the use of advance fees as long as another option is also offered to the consumer.

This letter is submitted on behalf of Consumers Union, the Center for Responsible Lending, the Consumer Federation of America, Consumer Action, U.S. PIRG, the National Consumer Law Center on behalf of its low income clients, and the additional national and regional groups listed below. The record shows that as recently as June 23, 2010, TASC met with one of the Commissioners to advocate for a dramatic weakening of the proposed advance fee ban. The public record of that meeting indicates that TASC is asking the Commission to add a "safe harbor" from any advance fee ban if the debt relief company adopts one of several proposed practices, one of which is offering consumers a "choice" between two fee structures, one that would limit to fees for performance, and the other permitting unearned advance fees. This letter provides a response to that proposal.

We oppose the addition of any safe harbor that would continue to permit the charging of advance fees for debt relief services, including debt settlement. The reasons for our opposition include:

1. Safe harbors should be used rarely, and only to encourage positive behavior. A safe harbor that immunizes the charging of advance fees cannot meet that standard.
2. The experience of the GAO mystery shoppers and others illustrates the risk that debt settlement employees will steer consumers toward advance fees if they are a permitted “option.”
3. The very different base amounts on which a percentage advance fee and a percentage settlement fee would be calculated (whole debt vs. the smaller savings amount) would make comparison of percentage fees highly misleading.
4. A choice for a harmful fee approach would in no way ameliorate the harms from advance fees.
5. Savings-based-only fees are fair to any segment of the debt relief industry that does in fact reduce consumer debt.

## **Discussion**

### **1. A safe harbor should never include a harmful approach such as advance fees.**

A safe harbor is typically something used to encourage positive behavior. It should never be used to immunize harmful behavior. Here, the industry asks the Commission to allow a company to escape a ban on harmful advance fees by continuing to charge advance fees, as long as the company also offers another type of fee model. This is the antithesis of a true safe harbor, and should be rejected.

Having a choice which includes advance fees would do nothing to eliminate the harms caused by advance fees that the Commissioners identified in the NPR. As the NPR so accurately states, “collecting up-front fees for debt relief services causes substantial injury to consumers.”<sup>1</sup> Such an approach should never be immunized through a safe harbor.

### **2. A choice approach will be a false choice due to strong incentives to steer consumers toward advance fees.**

A “choice” approach is a false one. Because most of the debt settlement industry is structured around the advance fee model, it can be expected to simply steer consumers to this choice. Sales representatives can be expected to highlight the differing percentages without emphasis on the very different base amounts to which those percentages will be applied. Subtle (or not so subtle) steering, commission practices, and other marketing techniques can increase the likelihood of the consumer selecting the option that will require fees to be paid even if the consumer gets little or no results in terms of savings from actual settlements. The GAO’s investigation and Congressional testimony revealed that debt settlement

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<sup>1</sup> See *Federal Register: Federal Trade Commission Telemarketing Sales Rule; Proposed Rule 74* Fed. Reg. 159, 41988, at 42006 (Aug. 19, 2009).

companies employ fraudulent or deceptive sales tactics, violating TASC's own "best practices."<sup>2</sup> A so-called choice rule would invite similar types of misleading sales tactics.

No rational consumer would choose to pay significant fees in advance of results, and based on the whole amount of the enrolled debt, if the consumer knew that he or she would have to pay regardless of whether any of his or her debts are ever settled, and that the great majority of consumers – nearly two-thirds – have substantial remaining debt three years after enrolling in debt settlement. The fact that consumers are enrolling in advance fee debt settlement programs now, under these facts, shows that they do not understand that the industry's poor track record makes it unlikely that they will get what they are paying for.

### **3. The very different base amounts on which a percentage advance fee and a percentage settlement fee are calculated would make comparison of percentage fees highly misleading.**

A sales setting that involves a "choice" between two percentages where the lower percentage in fact will usually mean a higher total dollar fee will be inherently misleading. A consumer who is asked if he or she would rather pay 14-16% now or 25-30% later might well choose "pay now" without understanding that the two percentage ranges are not comparable because the lower percentage is applied to a much higher base number – the entire debt. The very different base amounts on which a percentage advance fee and a percentage settlement fee would be calculated will make comparison of percentage fees highly misleading, and is highly likely to facilitate sales abuses. Any choice could easily be presented as if the key decision factor were "pay now vs. pay later," rather than also "pay whether or not you get results vs. pay only for results," and "pay a lower percentage on a much higher base number vs. pay a higher percentage on a lower base number."

### **4. Any approach that continues to permit advance fees will not ameliorate the harms to consumers.**

Any approach that permits advance fees, even as one of two choices, would continue to cause the substantial injury to consumers outlined in the NPR. The proposed rule and explanatory material lays out very clearly the harms to consumers from advance fees in debt settlement and other forms of debt relief that do not reduce the debt over time, but instead require some future event which may occur only after substantial advance fees have been paid. TASC's own data submitted for the record shows that three years after enrolling in debt settlement, nearly two-thirds (65.6%) of consumers have from one quarter to all of their debt still remaining.<sup>3</sup>

The industry groups TASC and USOBA were both quoted by the GAO as saying that achieving savings of more than the fee for at least half of their customers was an "unrealistic measure." (GAO, p. 13) When half of the customers pay more in fees than they save, it is hard to imagine why anyone would sign up

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<sup>2</sup> United States Government Accountability Office, Testimony Before the Committee on Commerce, Science, and Transportation, U.S. Senate, Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers, Statement of Gregory D. Kutz, Managing Director Forensic Audits and Special Investigations, GAO-10-593-T April 22, 2010, p. 9, 13, available at <http://www.gao.gov/new.items/d10593t.pdf>.

<sup>3</sup> The Association of Settlement Companies (TASC), October 26, 2009, comments to the FTC on the proposed amendments to the Telemarketing Sales Rule on the marketing of debt relief services, p. 10. <http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00202.pdf>.

for advance fees except through deception, misleading context, or a simple but fundamental failure to understand the economics of the arrangement.

**5. If the debt settlement companies perform by settling debt, they will earn money under a settlement savings fee.**

It is curious that the debt settlement industry simultaneously opposes an advance fee ban and also claims that it produces strong settlement results for consumers. Under the fee-for-results approach, if the debt settlement company does what it promises – settles debt for a savings– it will get paid. In fact, the better settlement savings the company achieves for the consumer, the more it will get paid. Settlement-based savings fees can yield revenue for a company each time the company settles a debt and provides savings for the consumer. If it provides some savings, it will get some fees; if it provides more savings, it will get more fees. The debt relief company gets no fees only if it achieves no savings. This is the only approach that aligns the interests of the consumer and the provider and ensures that only companies that provide the service they are offering will get paid. A savings fee is the only approach which eliminates the incentive for companies to sign up consumers for whom settlements cannot be achieved.

For these reasons, the thirteen undersigned national and local consumer and community service groups ask the Federal Trade Commission to adopt the advance fee ban as proposed in the notice of proposed rulemaking and to reject false alternatives which would permit advance fees, such as a safe harbor.

Very truly yours,

Gail Hillebrand  
Financial Services Campaign Manager  
Consumers Union

Caryn Becker  
Policy Counsel  
Center for Responsible Lending

Susan Grant  
Director of Consumer Protection  
Consumer Federation of America

Linda Sherry  
Director, National Priorities  
Consumer Action

Ira Rheingold  
Executive Director  
National Association of Consumer Advocates

Andrew G. Pizor  
Staff Attorney  
National Consumer Law Center

Sally Greenberg  
Executive Director  
National Consumers League

Edmund Mierzwinski  
U.S. Public Interest Research Group  
Consumer Program Director

Paul Schrader  
Executive Director  
Consumer Assistance Council  
Hyannis, Massachusetts

Walter Dartland  
Executive Director  
Consumer Federation of the Southeast  
Tallahassee, Florida

Lynn Drysdale, Esquire  
Managing Attorney, Consumer Law Unit  
Jacksonville Area Legal Aid, Inc.  
Jacksonville, Florida

Marceline White  
Executive Director  
Maryland Consumer Rights Coalition  
Baltimore, Maryland

Ron Elwood  
Staff Attorney  
Legal Services Advocacy Project  
Mid-Minnesota Legal Assistance  
St. Paul, Minnesota