Tuesday,
August 10, 2010

Part III

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).


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 providers3 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 address, 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

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7 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.
8 12 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” 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 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 success.18 Fourth, the Rule prohibits granting of which is represented as of a loan or other extension of credit, the call provisions or the TSR’s other requirements.16

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

25 16 CFR 310.4(a)(4);
26 16 CFR 310.3(b).
27 16 CFR 310.4(b)(ii).
28 16 CFR 310.4(a)(7).
29 16 CFR 310.4(b)(1)(iv) [a call abandonment safe harbor is found at 16 CFR 310.4(b)(4)].
30 16 CFR 310.4(b)(1)(iv).
31 16 CFR 310.4(b)(ii).
33 See Weinstein (Oct. 26, 2009) at 8 (see attached Bernard L. Weinstein & Terry L. Clower, Debt Settlement: Full Disclosure for 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
a consumer generally must have sufficient income to repay the full amount of the debt, 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, 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

34 GP (McNamara), Transcript of Public Forum on Debt Relief Amendments to the TSR (“Tr.”), at 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 Walli 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 New Market Entrenchers at 10-12 (April 2003); NFCC (Binzel), Transcript of “Consumer Protection and the Debt Settlement Industry” Workshop, September 2008 (“Workshop”) 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.


38 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. 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); FTC v. Debt Management Servs., No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004).


40 Although the defendants in these cases had obtained IRS determination of their status as an organization described in 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 benefit” and/or fell outside the nonprofit exemption in the FTC Act. See 15 U.S.C. 44, 45(a)(2).

41 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 Subcommittee on Investigations, S. Comm. on Governmental Affairs, 108th Cong. 2d Sess. (2004) (testimony of the FTC) (“Some 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 function. Finally, some consumers may believe that a ‘non-profit’ charge lower fees than a similar for-profit.”), available at (http://www.ftc.gov/os/2004/03/040324testimony.shtm).
IRS has challenged the tax-exempt status of a number of purportedly nonprofit CCAFs — both through enforcement of existing statutes and new tax code provisions. 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. 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. 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”).

Finally, nonprofits must comply with state laws in 49 states, most of which set fee limits.

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. 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 or will become debt-free. The advertisements typically then urge consumers to call a toll-free number for more information.

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.

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. 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
the consumer must make to both save for settlements and pay the provider’s fee. 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. 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 to the associated creditors or debt collectors.59 The providers typically tell the consumer must make to both save for settlements and pay the provider’s fee.55 The providers generally will not begin negotiations with creditors until the consumer has saved money sufficient to fund a possible settlement of the debt.56

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.60 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.61 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.62

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.63 While fee models vary greatly, they generally require a substantial portion of the fee in advance of any settlements.64

As described more fully below, the large initial commitment required of consumers has contributed to the high

54 DRB (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 is due immediately; 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 (“It 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 fee.”)

55 See USOBA (Oct. 26, 2009) at 32. A trade association reported that creditors may not consider settlement offers that are at least 60 days delinquent. USOBA (Oct. 26, 2009) at 32. If consumers are current on their debts, debt settlement providers frequently use such means to block communication between the creditor and the consumer. Providers are not responsive to creditor contacts. See, e.g., FTC v. Jubilee Fin. Servs., Inc., 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).


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57 USDR (Oct. 20, 2009) at 2; NAAG (Oct. 23, 2009) at 3; FTC 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 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 providers offered a so-called “pay as you go” model. USOBA (Jan. 10, 2009) at 3 (providing no information as to whether the 58 respondents are representative of the trade association or the industry as a whole).
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;66
- 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, not disclosing that failure 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, 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

Many providers also represent that they would not charge consumers any upfront fees before obtaining the promised debt relief, but in fact required a substantial upfront fee.81

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 under their state unfair and deceptive acts and practices statutes82 or other state laws or regulations.83

In addition, many states have enacted statutes specifically designed to combat deceptive debt settlement practices;84 in
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 clients 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, 2010, 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 services.

87 NAAG (Oct. 23, 2009) at 3-4; MN AG at 2 (“Minnostans 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. JPM Accelerated Servs., Inc., 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) (alleging defendants represented that if the consumer did not save an amount of $2,500 or more in a short time, the consumer would receive a full refund).

88 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).

89 See FTC Case List, supra note 27.

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

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**Footnotes:**

\(^{100}\) 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 academic entities and two 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.

\(^{104}\) NAAAG (Oct. 23, 2009) at 1; NACCA at 1; CFA at 1; 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/os/comments/tdrdebtsrel/index.shtml) 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/tdrdebtsrel/index.shtml).

\(^{107}\) 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(o)(1) and (o)(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.
The Telemarketing Act, this jurisdictional limit applies to the TSR. Nonprofits, however, must comply with 49 state laws and stringent IRS regulations. These regulations include strict limitations on fee income. 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. Thus, the Commission does not believe the TSR's exclusion of nonprofits is likely to create an unfair competitive disadvantage for for-profit debt relief services.

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.

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. 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.

The TSR only covers the practice of "telemarketing, as defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services . . . ." 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.

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.

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. 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.

The National Association of Consumer Credit Administrators ("NACCA") emphasized that many providers of debt 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. NACCA recommended that lead generators be covered by the Rule. A coalition of consumer groups commented that the definition should be broad and include debt management, debt settlement, and debt negotiation, noting that some companies provide a range of debt relief options. 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. Moreover, some industry commenters replace the existing debts rather than altering them.

1. Breadth of Definition of Debt Relief

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consumers with financial education.132 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 definition 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 observed that selling 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

133 CareOne at 3; USDAR (Oct. 20, 2009) at 12.
134 CCCS CNY at 1.
135 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).
136 ASFSA at 7 (“There does not appear to be a reason in the Rule for limiting debt repair services to relationships only with unsecured creditors.”).
137 ULC (Kerr), Tr. at 252. In addition, the evidence in the record suggests that debt relief services seek to alter secured debts such as installment loans and title loans. NACCA (Keiser), Tr. at 250; see also USDAR (Oct. 20, 2009) at 12 (supporting the definition’s limitation to unsecured debts).
138 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.
139 Mortgage Assistance Relief Services Notice of Proposed Rulemaking, 75 FR 10770 (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 service that complies with the promises they have made.
140 FCS (Oct. 27, 2009) at 9; FDR (Linderman), Tr. at 115.
141 CFA at 7; ULC (Kerr), Tr. at 258; AFSA (Sheeran), Tr. at 259-60; FDR (Linderman), Tr. at 258 (for services that are sold with a guarantee).
142 Centricity (Manganelli), 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.”).
govern their behavior. A different commenter, however, questioned whether state bar rules are effective in deterring unfair and deceptive practices.

The existing TSR currently covers attorneys who engage in telemarketing. 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. 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. 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.

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 engaging in outbound telemarketing calls to prospective clients. State bar rules also restrict another practice common to telemarketers — the provision of services to consumers in multiple states or nationwide. State bar rules also require an attorney to provide basic, competent legal services and to charge a reasonable fee. 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.

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 not proscribed by the Rule. For example, attorneys have been sued in numerous law enforcement actions alleging deceptive practices in violation of the TSR. 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. Some public comments also detailed deception and abuse by attorneys.

State bar rules, while important and

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144 USOBA (Aubach), 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 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 (“The Commission does not wish to hinder legitimate activities by licensed attorneys to recover funds lost by consumers through deceptive telemarketing.”).

147 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.”

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150 See, e.g., Model Rules of Prof. Conduct 7.3(a); Cal. Rules of Prof. Conduct 1-400; Florida Rules of Prof. Conduct 4-7.2. See also, e.g., California Dep’t of Corporations v. Express Consolidation, Inc., No. 943-0212 (2008); Florida Dep’t of Agriculture & Consumer Affairs v. Hess Kennedy Chartered LLC, No. 08CV002310, (N.C. Super. Ct., Wake Cty. 2008); California Dep’t of Corporations v. Express Consolidation, Inc., No. 943-0122 (2008). For example, telemarketers must abide by certain non-statutory requirements, such as telemarketers 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 offer the services). See also, e.g., California Dep’t of Corporations v. Express Consolidation, Inc., No. 943-0122 (2008). See also, e.g., California Dep’t of Corporations v. Express Consolidation, Inc., No. 943-0122 (2008). In re The Consumer Protection Law Ct. (California Dep’t of Corporations, Amended Desist and Refrain Order filed Jan. 9, 2009); (WV) State ex rel. McGraw v. Hess Kennedy Chartered LLC, No. 07-MISC-454 (Ct. Cir., Kanawha Cty. 2007); see also, e.g., Alabama State Bar, The Alabama Lawyer, 71 Alabama, 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 failed for Contempt: Brennan Ordered to Pay More Than $2.5 Million in Restitution (July 31, 2009), available at (http://www.ago.state.md.us/Press/2009/ 073109.htm).

151 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 TANG (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.

G. 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...
by the end of 2009. 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. 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. 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.

Three legal services offices also submitted comments supporting the advance fee ban. 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. 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. 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.

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. Two creditor trade groups also supported the advance fee ban.

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. 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. Another debt settlement company (FCS) stated that it has been implementing a debt settlement program that does not require any advance fees.

A small trade association, ACCORD, of which FCS is a member, also supported the advance fee ban. 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.

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. 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.

For-profit debt relief company CareOne Services also supported a form of an advance fee ban, 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 access funds for a settlement, while forcing them to endure extensive creditor collection efforts. CareOne posited that it would be economically feasible for it to provide effective debt settlement services even with an advance fee ban.

Two associations of nonprofit credit counselors, NFCC and AICCCA, supported the advance fee ban. AICCCA stated that its member CCAs saw the victims of debt settlement scams on a regular basis, 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.

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. 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 program) have found that they were not able to pay off their debt as promised. The comment by AFSA stated that an advance fee ban would both protect consumers from debt settlement providers to deliver on their promises, 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.

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-CreditPayments.aspx).
180 CRN (Oct. 4, 2009) at 1. CRN recommended allowing a nominal monthly service fee. Id. at 10-11.
181 FCS (Oct. 25, 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 2.12. USDR encouraged the FTC to allow an initial set-up fee and monthly fees consistent with the Uniform Act.
184 Id. at 2.
185 Id. at 4.
186 AFSA at 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 5.
188 NFCC at 1, 12; AICCCA at 6. AICCCA supported the ban on the condition that the Final Rule explicitly exempts nonprofit debt relief providers. AICCCA at 6.
189 ACCOA 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.
190 CRN (Oct. 8, 2009) at 4; WV AG (Goegel), Tr. at 222; ACCORD (Noonan), Tr. at 275-76.
191 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. Some debt settlement providers and their representatives submitted data about the number of debts that they or their members have settled in recent years. Several credit counseling companies also submitted information about the number of DMPs they have arranged for their customers. 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:

- (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. 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.

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.

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 completion rate, which may be too small in number of operating debt settlement providers. These companies may not be representative of the industry as a whole and, in fact, may have been comparatively more successful. Indeed, it is unlikely that providers that have the highest completion rates would identify themselves by participating in a survey the results of which will be provided to a federal agency with enforcement authority over

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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 TSB Proposed Rule, 74 FR at 41995 n.104; see also NAAC (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 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); ACCCA at 1 (member CCAs serve about 500,000 clients enrolled in DMPs).

196 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 consumers enrolled in a DMP; (3) nearly 700,000 customer service calls have been made; (4) over $400 million in credit 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 only on approximately 70,000 new customers, and all had been successfully resolved. CareOne at 1-2.

197 Most of these commenters did not submit data in all five categories. 198 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.

199 The request was in connection with the November 2009 public forum. The letters are posted at http://www.ftc.gov/os/comments/tsrdebtservice/index.shtm


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 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, 2008) at 9.

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

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them. Second, many of the consumers counted as “completed” had significant debts left after exiting the program. 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.

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.

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. Three other commenters


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 (“consumers are not getting what they expect to get, if only 25 percent are even getting close.”).


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.

The Commission analyzes industry data on outcomes for dropouts in the following subsection, Section II.C.2.a.

202 [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 SDIS (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 are 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 consumers who had completed 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 [Jan. 12, 2010] at 5. Of consumers who had enrolled in the 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 exit survey of 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 Communication from the 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; 211 JH (Oct. 24, 2009) at 34 (see attached Briesch paper at 16). This survey fails to 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 test; 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 not collect, 5% were categorized as “unwilling to go through the legal process,” and 5% were categorized as “other.” QSS (Oct. 22, 2009) at 2 to 9.

A third provider submitted survey information about 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 188 consumers, finding that the 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 (20.6%); 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, unfunded 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 $35.6 million in fees, however, which alone virtually cancelled 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 SBSL (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, the additional debt that accrues during 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.

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 that the settlement percentage on the settlement accounts was 58%, meaning that the average savings percentage was 42%).

220 TASC (Oct. 26, 2009) at 11 (average debt reductions were 53% 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 (41 respondents provided information to the trade association; the average percentage reduction for all respondents was 51.19%); FDR (Oct. 26, 2009) at 3 (55.3% in 2008); HJ (Oct. 24, 2009) at 35 (attachment Briesch paper at 17) (among consumers who received settlement of at least one account out 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); SDN (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); JT (Jan. 2, 2010) at 4 (“For those consumers who have completed the program, the settlements have typically been between 50-75% of their incoming debt.”)
believe, 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.222 Even an industry representative has stated that the various debt settlement fee models are confusing.223

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.224 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.225 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 individual accounts that actually were settled, excluding those that were not.226

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 10 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. CV 06-058-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) (Comment; ¶ 17).


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,

222 See supra note 222.

223 See supra note 222.

224 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 Figuilusolo 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 $8.1 million and paid $2.7 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 $12.8 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(e)(6), 16 CFR...
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. 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. Thus, almost 60% failed to settle even one debt within that first year. Furthermore, the company provided no information about the amount of savings dropped out from settlements, nor the amount consumers paid in fees.

(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.

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.

who dropped out of the program by the end of each interval were excluded from the calculations of the next group of consumers.

See RDRI at 5 (noting that settlement companies did not begin with customer accounts that have the smallest balances or with “friendly” creditors).

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. Further, the program provided value to about 15% of its customers drop out without settling any debts. The commenter noted that a significant percentage of consumers revoke their enrollment before they achieve any settlements shows that the percentage of consumers who do not benefit 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 comments asserted that many consumers receive settlement offers prior to enrollment and before they pay substantial fees to the provider. 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. The CSA comment, however, did not provide any information as to whether consumers accepted, or were able to fund, the offers. Moreover, the data do not measure the drop-out rate or the success of enrollees as a whole.

The amount consumers paid in fees. 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.").

The comment only reported results for consumers who remained in the program until — or beyond — each time interval. Therefore, consumers 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.

4.9(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; 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.").


234 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).

235 See, e.g., Allen at 1; Clement at 1; Garner at 1; Gecha at 1; Hughton at 1; Kaiser at 1; McNinis at 1; Neal at 1; Seigle at 1; Taillie at 1.

236 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 percentage of consumers who do not benefit 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.

237 QSS (Oct. 22, 2009) at 8. In addition, the commission did not provide any information as to whether consumers in CSA’s program generally benefitted from these programs, or that they received the results they were promised.

238 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 WY AG (Georgia), 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; Hinkors at 1.

239 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 $8,500 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 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 program 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 $456 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

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\(^{246}\) JH (Oct. 24, 2009) at 39 (see attached Brisch paper at 11); 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 support for 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 78% dropout rate from 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 for 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 Brisch paper at 11).

\(^{248}\) 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 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.”)

\(^{250}\) 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 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 likely underestimates the 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 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.
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.

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 17-54. 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. 20, 2009) at 10.


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 TASC model 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 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 operations; and that the provider 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.

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

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

266 See ACCORD (Noonan), Tr. at 21.

267 PCS (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 commits a significant amount of its time to helping consumers settle accounts, that the consumer gets a 1% refund for completing the program).

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270 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.


272 According to this commenter, the expenses include personnel costs for the following employees: the representative who reviews the accounts and formulates 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.

273 This amount is comprised of $59.45 for processing the emergency call, $9.95 for the Welcome Packet, and $17.02 for three compliance calls. NWS (Oct. 22, 2009) at 11 (see attached Walji paper at 11).

274 ART at 1.

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); BDS at 1; TASC, Study on the Debt Settlement Industry 4 (2007)

279 The settlement of one account with one creditor may require more than 30, 40, or 50 phone calls.

280 Id.

281 See also CRN (Bovee), Tr. at 26 (lead generators receiving commissions of more than 25% of revenue).

282 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 education about consumers’ rights with respect to debt collection calls and harassment.

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

- 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.
- In most cases, the largest component of pre-settlement costs that providers incur is for customer acquisition, i.e., advertising and marketing.
- Some providers may offer ancillary services, such as debt counseling 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.
- 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.

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. 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.

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. 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.

An industry association argued that an advance fee ban would run afoul of the First Amendment. 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.

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. One commenter stated that relegating the debt settlement provider to the position of other unsecured creditors would hinder its ability to service its customers.

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An industry association argued that an advance fee ban would run afoul of the First Amendment. 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.
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. 

Even if imposing 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. 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. 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.” In explaining the framework, the Court has said that the fit between the regulation’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. 

The advance fee ban in the Final Rule comports with this test. First, preventing abusive sales practices is a substantial governmental interest. Hundreds of thousands of financially distressed consumers have lost large sums of money to debt relief providers engaged in such practices. 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 thisSBP, that arises when consumers pay in advance for debt relief services. 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. The modified advance fee ban, crafted to be no broader than absolutely necessary to remedy the identified significant consumer harm, will stop that abuse. 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. 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. On the other hand, several commenters asserted that FTC regulation was preferable to state regulation because (1) the FTC, with its regulatory expertise relating to advertising and marketing claims, is in a better position than state regulators to regulate debt relief firms, especially in that such marketing frequently crosses state lines; (2) state law enforcement activity is uneven; 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.

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.

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.


308 USOBA (Oct. 26, 2009) at 3; see also Weinstein (Oct. 26, 2009) at 12 [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 preempted state regulation, a state statute is
Some commenters argued that debt relief services should not be regulated through the TSR. The commenter stated that amending the TSR is not warranted “merely because the industry uses telephones in its business.” 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. 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. Two commenters recommended that the FTC expand the scope of its proposed regulations to cover Internet and face-to-face transactions. A third commenter questioned whether issuing these rules as part of the TSR might encourage debt relief providers to preempt 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 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/newsreleases/newsrelease/BD3A2B985DDAF150852574E004D4FACD] (subpoenas served by Florida on debt settlement firms as part of a sweep to assess violations, among others, of Florida laws regulating telephone solicitation, telemarketing, credit counseling organizations, and credit service providers); In re PDM Int’l (Assurance of Voluntary Compliance filed Mar. 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 (Gram), Tr. at 157; NFCC (Binzler), 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 telephone or deceptive practices.

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-00055-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 and the TSR. See supra note 52.

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 TASC Amended Rule, 68 FR at 4614. 328 TASC Amended Rule, 68 FR at 4614.

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

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

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,

322 See, e.g., FTC v. Debt-Set, Inc., No. 1:07-cv-00055-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.”).

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,” thus requiring that the Commission use when promulgating the advance fee ban 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

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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. 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. 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. 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 Charged by Debt Relief Services 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. An act or practice is unfair if: (1) it causes or is likely 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 creates 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. 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. 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. 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. 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.

Twenty-nine states have brought at least 236 enforcement actions against debt relief companies. These cases consistently have alleged that the defendants employed deception in order to enroll consumers, and then did not produce the results they promised. 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. Undoubtedly, many more consumers have been injured by providers that have not been the subject of formal law enforcement action. 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.

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).


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.


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 Bureau (“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 an event, the conclusion that advancing 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
most consumers drop out of these programs before receiving benefits commensurate with the fees they pay at the outset.\textsuperscript{354} For example, the industry-sponsored TASC survey concluded that over 65% of consumers who had dropped out of the respondents’ programs within the first three years.\textsuperscript{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.\textsuperscript{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, debt credit counseling, and debt settlement industries.\textsuperscript{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.\textsuperscript{358}

Indeed, the advance fee requirement impedes the ultimate purpose of the service – helping consumers resolve their debts and restore their financial health.\textsuperscript{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 extending creditor collection efforts.\textsuperscript{360} The practice of taking substantial advance fees makes it far more difficult for consumers to save the money necessary for settlements.\textsuperscript{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.\textsuperscript{362} Moreover, not paying creditors leads to late fees, penalties, impaired credit ratings, lawsuits and other negative consequences.\textsuperscript{363} Moreover, creditors...
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.\textsuperscript{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.\textsuperscript{372} The Commission has long recognized that sellers may exercise undue influence over highly susceptible classes of purchasers.\textsuperscript{373} For this reason, the TSR prohibits advance fees for credit counseling and certain loan offers, services that also target financially distressed consumers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{378}

Thus, the manner in which debt relief services have been sold has impeded the free exercise of decisionmaking. The Commission historically has viewed such an impediment as one of the hallmarks of an unfair practice.\textsuperscript{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 are more likely to rely on the sellers’ claims. Providers frequently hold themselves out as experts in determining the right course of action for the indebted consumer.\textsuperscript{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.\textsuperscript{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.\textsuperscript{382} In this proceeding, no debt negotiator provided any comments or evidence of countervailing benefits to advance fees. For-profit credit counselors provided only minimal evidence that they provide the promised services.\textsuperscript{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).


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 Amper, 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. 220, 223 (1984) (“The FTC’s Consumer Sutains, 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. filed Mar. 19, 2007); FTC v. Nat’l Consumer Council, Inc., No. ACV04-0474CJC (JWX) (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 429); FTC v. 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 claims 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, 1975) (codified at 16 CFR 433) (same); In re Orkin Exterminating, 37 FR 22934, 22947 (Oct. 26, 1972) (codified at 16 CFR 429).

383 FTC v. Nat’l Consumer Counsel, Inc., No. ACV04-0474CJC (JWX) (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”).
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. There is no empirical evidence in the record that paying large advance fees has any benefits for consumers. 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.

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, because (1) they would not have the cash flow necessary to administer settlement plans and provide customer service; (2) they may not get paid for the services they rendered given their customers’ already precarious financial condition; and (3) scam operators would ignore the advance fee ban, profiting at the expense of debt settlement companies that complied with the law. Other commenters posited that no new companies would enter the market, further injuring competition.

Although the Commission cannot predict with precision what impact the advance fee ban will have on the debt relief industry, the costs and benefits analysis concludes, based on the record evidence, that any injury to competition resulting from the elimination of any companies unable to succeed under the advance fee ban 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. The record contains scant evidence about providers typically incur prior to settling debt, and the estimated costs appear to vary widely. The bulk of those costs, however, are for marketing and customer acquisition. 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. The Final Rule allows providers to receive fees as they settle each debt. CCAs generally will be able to collect fees at the beginning of the DMP, after the consumer enrolls and makes at least one payment. 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.

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. Moreover, the transaction inherently is 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.

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.


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. See 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 “gamble” 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.403 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.404 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.”405

Consumers can reasonably avoid harm only if they understand the risk of injury from an act or practice.406 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.407 This is especially true because of the widespread deception surrounding the marketing of debt relief services408 and because purchasers of debt relief services typically are in serious financial straits and are thus particularly vulnerable to the providers’ glowing claims.409 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.410 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.411 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.412

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 nonpayment will have to be factored into providers’ decisionmaking.404

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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.412

404 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).

406 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”).

407 See supra Sections I.C.2. & III.C.2.; CFA at 10; CCSC CNY at 1; QLS at 2.

409 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.

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403 See id.

408 15 U.S.C. 45(n); see also Unfairness Policy Statement, supra note 162, at 1073.

409 See supra Sections I.C.2. & III.C.2.; CFA at 10; CCSC CNY at 1; QLS at 2.


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

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 commentators 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 commentators 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 that successfully complete the offered debt relief program

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 (Gogol), 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.”).
are permitted to enroll.\footnote{415}{See CFA at 18 (“[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.} 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.\footnote{416}{See Noonan, Tr. at 275-76 (Noonan), Tr. at 275-76 (Noonan).} 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.\footnote{417}{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 strategy.”); NAACCA (Keiser), Tr. at 66 (“I think one problem might be is too many people might be getting settled in individual debt settlement programs are not suitable candidates for this strategy.”); MP at 2 (“The reality is that the majority of consumers being settled in traditional debt settlement programs are not suitable candidates for this strategy.”); FDR (Linderman), Tr. at 95 (arguing that “[w]e take the time to do a thorough suitability analysis”).} 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.

4. 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.\footnote{418}{See, e.g., TASC (Apr. 30, 2010) at 1-2; see also RDRI (Manning), Tr. at 220-21.} 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.\footnote{419}{See, e.g., CFA at 19; CFA (Grant), Tr. at 299; NPCGC at 13; CRN at 7; TASC (Apr. 30, 2010) at 6-7.} 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.\footnote{420}{See, e.g., CFA at 19; CFA (Grant), Tr. at 299; NPCGC at 13; CRN at 7; TASC (Apr. 30, 2010) at 6-7.}

Industry representatives also have argued that, instead of prohibiting advance fees, the Final Rule should set limits or caps on such fees similar to the currently imposed caps in some states.\footnote{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.} 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.\footnote{422}{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.}
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 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.
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).\footnote{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 the fee.}

Alternatively, the provider can collect a percentage of savings achieved.\footnote{This requirement explicitly prevents fee caps, as some states provide) disconnects the unchanging percentage of the amount saved as a result of the service.} The amount saved must be based on the difference between the amount of debt at the time the consumer enters 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).\footnote{This alternative can be used when the provider uses a contingency-based fee model.}

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)(1)(i)(F)(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).\footnote{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.}

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.").

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.\footnote{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.}

First, the account must be located at an insured financial institution.\footnote{This requirement does not prevent an intermediary that is not an insured financial institution from providing services in connection with the account as well.} 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.\footnote{This requirement does not prevent an intermediary that is not an insured financial institution from providing services in connection with the account as well.} Third, the agent holding the funds must be independent — that is, not under the control of or affiliated with the debt relief provider.\footnote{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. The Commission intends this provision to be read broadly to prohibit all fee splitting between the entity or entities administering the account.} 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. The Commission intends this provision to be read broadly to prohibit all fee splitting between the entity or entities administering the account.

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 company’s creditors or debt collectors in a dedicated bank account, 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.\footnote{See USDR (Oct. 20, 2009) at 2.}

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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.\footnote{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).}

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.\footnote{See Summary of Communications (June 24, 2010) at 2 (a state attorney general representative described risks of service provider collusion with fraudulent companies).}

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.\footnote{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).}

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.\footnote{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).}

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.\footnote{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).}

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.\footnote{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).}

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.\footnote{See Summary of Communications (June 24, 2010) at 2 (state attorney general representative described risks of service provider collusion with fraudulent companies).}

Alternatively, the provider can collect a percentage of savings achieved.\footnote{See Summary of Communications (June 24, 2010) at 2 (state attorney general representative described risks of service provider collusion with fraudulent companies).}

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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. 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. 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 account.

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. Injury is likely if inaccurate or omitted information is material. A claim is deceptive if it either misrepresents or omits a material fact such that reasonable consumers are likely to be misled. Application of


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...
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 agrees 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 offers466 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 disclosed 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

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 TSB 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 (Grants), Tr. at 175.

468 TSB Proposed Rule, 74 FR at 42019.

469 Loeb (Mallow), Tr. at 204; TASC (Housser), Tr. at 202; CFA (Grants), 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.”).


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. 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. 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 is consistent with results represented by the Commission.

The record shows, however, that consumers’ credit ratings are harmed, often substantially, as a result of not making payments to creditors. Lower credit scores raise the cost of obtaining credit— or make it more difficult to obtain it at all. 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.

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.

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.

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. 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 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_UYPS_Booklet.pdf); see also TSR Proposed Rule, 74 FR at 42002.

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).

That Act, however, does not prohibit default fees or insurance. 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)(A), 123 Stat. 1734 (May 22, 2009), That Act, however, does not prohibit default fees and thus does not diminish the importance of this disclosure.

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.

The Commission further notes that while creditors collecting their own debts are not subject to the FDCPA, they are subject to Section 5 of the FTC Act.

The Commission recognizes that, despite the above, providing an estimated time or amount of money which the debt relief service provider will make a bona fide settlement offer may create confusion for consumers if the estimate is overly optimistic.

The Commission further notes that, while creditors collecting their own debts are not subject to the FDCPA, they are subject to Section 5 of the FTC Act.

...
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 upon 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 the 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 to cancel.

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 at 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 See Summary of Communications (June 16, 2010) at 2 (meeting with credit card group).
486 See 16 CFR 310.6(b)[3] (exempting “[telephone calls in which the sale of goods or services is consummated by the consumer before the call is 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)]”.
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 See 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-Settled, 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. 09CH3636 (Cir. Ct. of 7th Jud. Dist., Sangamon v. Debt Relief USA, Inc., No. 09CH367 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. 2009); North Carolina v. Knight Credit Servs., Inc. (Cir. Ct. Wake Cty. 2004).
492 Supra note 73.
493 See USOBA (Ansbach), Tr. at 175. Article 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 see your 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 disclosures required 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 Online 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, 11(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, 74 FR at 49020 (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.”).

\(^{509}\) See CR (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.”).

\(^{510}\) 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, 74 FR at 49020 (Feb. 19, 2009) (“Do not include a canceled debt in your gross income . . . [if] the debt is cancelled when you are individually not actually solvent.”);

\(^{511}\) NACCA at 3.

\(^{512}\) The Commission encourages debt relief providers to advise consumers about the tax consequences in those cases where such consequences are likely to exist.

\(^{513}\) 498 (see IRS at 2).

\(^{514}\) See 16 CFR 310.3(a)(1)(i)-(iii).

\(^{515}\) 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 (Keenhen), Tr. at 201.

\(^{516}\) 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.
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.514 Often, however, fee disclosures made in the telemarketing call are contradicted by the written contract.515 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 or how the fee structure is used by many debt relief providers.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 inbounding 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.523

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.”524 Two common conditions that commentators 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 where 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).

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 “[b]efore 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

522 See U.S. O.B.A. (Keehn), Tr. at 209.

519 See, e.g., FTC v. Connolly, 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 809 (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; Removalist Int’l Corp. v. FTC, 894 F.2d 1489, 1497 (1st Cir. 1989) (advertisement was deceptive even though a disclaimer in a written contract later signed by consumers contained accurate, non-deceptive information).

523 See 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 would 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 modifying § 310.3(a)(1), the Commission noted that “it is possible to state the cost of an installment contract in such a way that, although literally true, obscures the actual amount that the consumer is being asked to pay.” FTC 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
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. 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.

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. 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 and noting that consumers often sign documents with written disclosures they do not understand. The Final Rule does not specify the precise manner or mode in which disclosures must be made. 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. 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 other background information about the provider; (2) a list of the consumer’s debts to be included in the program; (3) a statement that “other debt relief options may be more appropriate for the consumer”; (4) a statement that consumers will not achieve settlement results until they have accumulated sufficient funds; (5) a notice to consumers when they are collecting funds for debt settlements at a rate more accelerated than a pro rata arrangement; (6) the percentages of clients who complete the 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.

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. 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.

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 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 429.3(a) (foreign language disclosure language 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.
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.\footnote{The final provision contains only four minor revisions. First, it corrects two typographical errors by inserting the words “or” and “the” into the provision 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 or make a bona fide offer to negotiate, settle, or modify the terms of the customer’s debt.” (emphasis added).} 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.\footnote{Additionally, participants in the public forum voiced general support for the proposal. 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.} The vast majority of the comments that recommended changes to § 310.3(a)(2)(x) supported this rulemaking – those that predate, and were unaltered by, this rulemaking – would apply to inbound telemarketing of debt relief services.

2. Final Section 310.3(a)(2)(x)
a. Claims Other Than Savings Claims (§ 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.\footnote{Some commenters recommended that the Commission add additional examples of prohibited misrepresentations to § 310.3(a)(2)(x).} 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.

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.\footnote{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. 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. It is difficult to imagine information that is not misleading to a reasonable consumer.}
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 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.


568 See supra note 567; see also, e.g., NAAG (Oct. 20, 2009) at 2 (“The primary consumer protection problem areas that have given rise to the credit card providers’ 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 of 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.”); NFCSC at 3; SRLS at 2-5.

569 Id.

570 Supra Section III.C.2.a.(3).

571 Id.

572 See id.

564 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 or debt collectors 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.

565 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.

566 Data from the debt settlement industry supports this assertion. See supra Section III.C.2.a; see also FTC Case List, supra note 27.

567 Supra Section III.C.2.a.1.

568 This prohibition applies only to misrepresentations; thus, it does not prevent a bona fide nonprofit entity from claiming that it is a
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 customers577 and must

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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 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) (clauses based on advertising were deceptive because certain categories were systematically excluded and because the advertiser failed to ensure that individual who selected the savings were unbiased); FTC v. Linton Italian 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 “Lilton-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 whenever they claim to “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).575 In written comments and at the public forum, consumer groups, noting that debt settlement companies often fail to substantiate their 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 (“I 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 settlement 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 Milweitz, Gallup & Milweitz, P.A. v. US, 176 L. Ed. 2d 79 (2010) (restrictions on nonsoliciting commercial speech require a higher level of scrutiny under the First Amendment than restrictions on nonsoliciting speech); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (same); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Com’n, 447 U.S. 555 (1980). The Commission is confident that the parties involved in the Final Rules will be sufficient to address the problem of false or unsubstantiated savings claims without inadvertently stopping truthful claims that may be valuable to consumers.

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 and the general model, is, the issue of conclusion 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., 50% 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 437.3(a)(3)(ii).
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. 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. 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. 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.
- any material aspect of the nature or terms of the seller’s refund, cancellation, exchange, or repurchase policies.

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(b), the prohibition on the use of threats or intimidating or profane language (e.g., § 310.3(a)(2)(vii), and the recordkeeping requirements, § 310.5.

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 March 21, 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 exhorted 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)(1), 310.4(a)(6). The amended Rule applies these existing requirements to inbound debt relief telemarketing calls as well.

The TSR generally exempts inbound calls placed by consumers in response to legitimate industry compliance requests. In several FTC law enforcement actions, debt negotiation companies falsely represented that they were affiliated with consumers’ creditors, 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 Mgmt., Inc., No. 8:09-CV-05259 (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 Cnty., Minn. filed Sept. 1, 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-02209-SDM (M.D. Fla. filed Nov. 26, 2009) (alleging that defendants falsely represented that they were affiliated with the United States government); FTC v. Gantkier, 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).

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 CJW (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)).

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.\textsuperscript{588} The Final Rule in this proceeding, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption.\textsuperscript{589} As a result, virtually all debt relief telemarketing transactions are now subject to the TSR.\textsuperscript{590} Most commenters supported covering inbound calls made to debt relief providers.\textsuperscript{591} On the other hand, one debt relief provider opposed it, arguing that not all debt relief providers harm consumers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{594}

\textsuperscript{588} See § 310.6(b)(5) & (6).
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{591} See CFA at 20-21; Orion (Oct. 1, 2009) at 1.
\textsuperscript{592} Able (Oct. 21, 2009) at 29.
\textsuperscript{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.
\textsuperscript{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 Opportunity Rule ("BF 437" or "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.
\textsuperscript{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.
\textsuperscript{596} MD (Oct. 26, 2009) at 54.
\textsuperscript{597} Id.
\textsuperscript{598} 44 U.S.C. 3501-3521.
\textsuperscript{599} See 5 CFR 1320.3(c).

\subsection{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.\textsuperscript{595} Although the provisions of this section would likely be required 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.\textsuperscript{596} This commenter also questioned whether the requirement would reduce abuses and provide sufficiently useful data for law enforcement or regulatory purposes.\textsuperscript{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.

\subsection{IV. Paperwork Reduction Act}

In accordance with the Paperwork Reduction Act ("PRA"), as amended,\textsuperscript{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.\textsuperscript{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.

\subsubsection{A. Practical Utility}

According to OMB regulations, practical utility means the usefulness of information to or for an agency.\textsuperscript{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.\textsuperscript{601} The required disclosures are necessary to inform consumers of important information about the debt relief services being offered. Commenters overwhelmingly supported the disclosures.\textsuperscript{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...
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 record 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 companies606 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 disclosures and an additional six disclosures (if applicable), and it estimated that reading those disclosures 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.

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 12.

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 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 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”).

607 According to industry sources consulted by Commission staff, it is to be expected that 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 9 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 would 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.

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 thus far largely exempt from the

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 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 recordkeeping burdens for new respondents.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...
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.\textsuperscript{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\textsuperscript{627} and that 21.2% of direct marketing is done by direct mail.\textsuperscript{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.\textsuperscript{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.\textsuperscript{630}

As noted above, inbound calls responding to debt relief services advertised in general media are currently exempt from the Rule.\textsuperscript{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,\textsuperscript{632} labor costs would approximate $2,285,400 in the first year of compliance for new respondents.\textsuperscript{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...
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 the 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 $13.004 to the earlier estimated 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, comments 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...
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 as 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 With

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.

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 Technical Services (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/ide/groups/public/documents/sba_homepage/serv_sizedir/sizedir.pdf/].

654 See Able Workshop Comment at 6 (there are “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)(15).
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. In sum, the agency has worked to minimize any significant economic impact on small entities.

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

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<th>Short-name/Acronyms</th>
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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 FTC Law Enforcement Actions Against Debt Relief Companies


2. FTC v. Asia Pacific Telecom, Inc., No. 10 C 3168 (N.D. Ill. filed May 24, 2010) (debt negotiation)


8. FTC v. MCS Programs, LLC, No. 09-CV-5380 (W.D. Wash., final order July 19, 2010) (debt negotiation)


13. FTC v. Express Consolidation, No. 06-CV-61851-WJZ (S.D. Fla., final order May 5, 2007) (credit counseling)


15. United States v. Credit Found. of Am., No. CV06-3654 ABC (VBKx) (C.D. Cal., final order June 16, 2006) (credit counseling)


17. FTC v. Debt Solutions, Inc., No. CV06-0298 (W.D. Wash., final order June 18, 2007) (debt negotiation)


List of State Law Enforcement Actions Against Debt Relief Companies

Debt Settlement

**Attorney General Actions**


21. In re Grandview Credit, Inc., Notice of Active Public Consumer-Related Investigation, Florida Attorney General, available at (http://myfloridalegal.com/85256309005085AB/0/7FAE8CB0EA0BCE5F)


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


State Regulator Actions


32. In re Am. Liberty Fin., Inc. (S.C. Dep’t of Consumer Affairs 2007).
33. In re Debt Resolution Assocs., Inc. (S.C. Dep’t of Consumer Affairs 2008).
34. In re Debt Settlement USA, Inc. (S.C. Dep’t of Consumer Affairs 2008).
35. In re Endebt Solutions, LLC dba DebtOne Fin. Solutions (S.C. Dep’t of Consumer Affairs 2008).
37. In re NewPath Fin., Inc. (S.C. Dep’t of Consumer Affairs 2010).
38. In re Safeguard Credit Counseling Servs., Inc. (S.C. Dep’t of Consumer Affairs 2009).
42. In re Credit First Fin. Solutions, LLC (Utah Dep’t of Commerce 2009).

Publicly-Announced Investigations

New York Investigations


Florida Investigations


Debt Negotiation

Attorney General Actions


County 2009), Press Release, supra item 4.  
State Regulator Actions  
Credit Counseling  
Attorney General Actions  
State Regulator Actions  
Failure to Register  
Attorney General Actions  
Delawareans%20in%202008.pdf
9. In re Peoples First Fin. (Utah Dep’t of Commerce, 2009).
10. In re Consumer Law Ctr. (Utah Dep’t of Commerce, 2008).
11. In re Liberty Am., LLC (Utah Dep’t of Commerce, 2009).
12. In re Liberty Am., LLC (Utah Dep’t of Commerce, 2009).
13. In re Reliance Debt Relief, LLC (Utah Dep’t of Commerce, 2009).
State Regulator Actions
Order to Cease and Desist, available at (http://www.dbr.ri.gov/documents/decisions/BK-CRS-Order_Cease-Desist.pdf)
27. In re Debt Mgmt. Credit Counseling Corp. (R.I. Dep’t of Bus. Regulation 2007).
29. In re Credit Solutions of Am., Inc. (S.C. Dep’t of Consumer Affairs 2007).
30. South Carolina Dep’t of Consumer Affairs v. Rescue Debt, Inc., No. 06-ALJ-30-0645-JI (S.C. Admin. Law Ct. 2006). Administrative Law Court Decision, available at (http://www.scal.net/decisions.aspx?q=48516 Federal Register 38. 36. 34. 32. 30. 28. 29. 30. 32. 34. 36. 38)

VI. Final Amendments
List of Subjects in 16 CFR Part 310
Telemarking, 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.
310.1 Scope of regulations in this part.
310.2 Deceptive telemarketing acts or practices.
310.3 Abusive telemarketing acts or practices.
310.4 Exemptions.
310.5 Recordkeeping requirements.
310.6 Exemptions.
310.7 Actions by states and private persons.
310.8 Fee for access to the National Do Not Call Registry.
310.9 Severability.

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 may be required to pay for goods or services offered through telemarketing.

(n) Debt Relief Network Inc.

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, lease or use 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 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 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;

(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,
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 with 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 that account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;  


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.
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 any debt pursuant to a settlement agreement, debt management plan, or other 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 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 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.

(C) 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.
(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)(i)(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 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;

(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 nonprofit 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 by a person, 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 message 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 contractors assisting in its compliance, in the procedures established pursuant to §310.4(b)(3)(ii);

(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 placed666; 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.

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;\footnote{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.} 

(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 any instances of upselling included in such telephone calls;

(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.
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 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, 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.

[FR Doc. 2010–19412 Filed 8–9–10: 8:45 am]

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