

Congress of the United States
Washington, DC 20515

May 4, 2010

Mr. Jon Leibowitz, Chairman
Federal Trade Commission
Consumer Response Center
600 Pennsylvania Avenue, NW
Washington, DC 20580-0001

Dear Chairman Leibowitz:

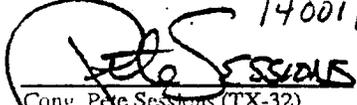
We are writing regarding the Federal Trade Commission's (FTC) proposed amendments to the Telemarketing Sales Rule (TSR), published in August 2009. The purpose of this letter is to pass along the concerns related to these amendments recently expressed to us and other Members of Congress by the United States Organizations for Bankruptcy Alternatives (USOBA).

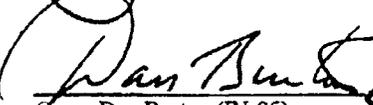
As detailed in the enclosed documents, USOBA's concerns deal primarily with the proposed amendments to Section 310.4 of the TSR regarding Advance Fees for Debt Relief Services as an Abusive Practice.

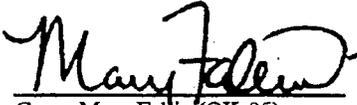
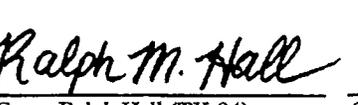
We respectfully request that you give full and fair consideration to the enclosed documents provided by USOBA, consistent with applicable law, rules, and regulations, as you proceed with your rulemaking effort.

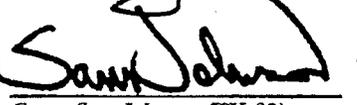
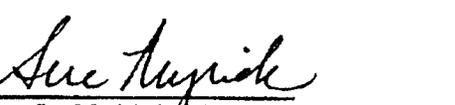
Sincerely,

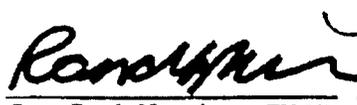
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 Cong. Pete Sessions (TX-32) Cong. Jeb Hensarling (TX-05) Cong. Marsha Blackburn (TN-07)

  
 Cong. Dan Burton (IN-05) Cong. John Carter (TX-31) Cong. Michael Conaway (TX-11)

  
 Cong. Mary Fallin (OK-05) Cong. Ralph Hall (TX-04) Cong. Ron Paul (TX-14)

  
 Cong. Sam Johnson (TX-03) Cong. Michael McCaul (TX-10) Cong. Sue Myrick (NC-09)

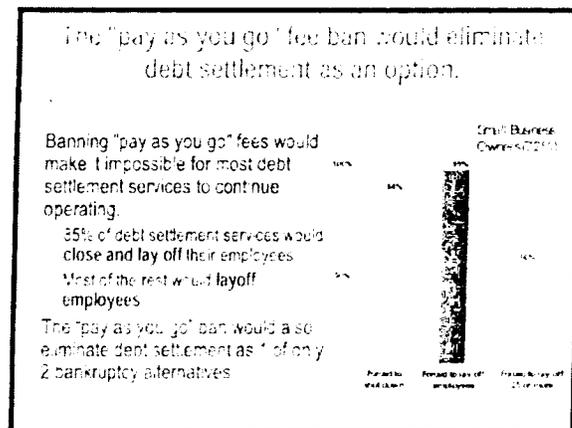
 
 Cong. Randy Neugebauer (TX-19) Cong. Pete Olson (TX-22)

The FTC's Proposed Amendments to the Telemarketing Sales Rule & The Devastating Impacts they will have on Distressed Consumers and Small Business Owners across the United States

April 2010

The United States Organization for Bankruptcy Alternatives (USOBA) has provided substantial information to the Federal Trade Commission (FTC) regarding the proposed Debt Relief Amendments to the Telemarketing Sales Rule (TSR). From the outset, USOBA has been clear that it shares the Commission's goal of strong consumer protection and has worked extensively to promote sound business practices among debt settlement companies and other debt resolution providers. USOBA has developed enforceable best practice standards and a "secret shopper" compliance and audit program. It has proposed and worked for the enactment of model state legislation and regulation, including extensive disclosure, licensing, insurance and civil and administrative remedy provisions. USOBA supports the vast majority of the proposed Rule amendments set forth in the August 2009 Notice of Proposed Rulemaking including the new disclosure requirements and the prohibitions against misrepresentations. However, USOBA strongly opposes the "advance fee ban" of proposed 16 C.F.R. § 310.4(a)(5), which provides that a debt settlement company may not request or receive a fee unless and until a particular debt has been renegotiated, settled, reduced, or otherwise altered.¹ This proposal is supported by competitors of debt settlement companies seeking to gain an unwarranted marketplace advantage at the expense of consumers in need.

To be clear, the industry and its trade associations **support** the vast majority of the proposed rule that the FTC has published. The primary concern is the use of the Telemarketing Sales Rule to regulate fees and to deny American small business owners the opportunity to collect reasonable pay-as-you-go fees as they and their employees provide services to consumers in need. It is the desire of USOBA and the industry to see to it that all consumers have access to all debt resolution options and that small businesses across the country are not regulated out of existence leaving those consumers 'high and dry.'



Clarifying the Facts: Before discussing the merits of the rulemaking, USOBA would like to take this opportunity to briefly address an April 8, 2010 posting by the agency of a summary of a meeting between the FTC including Chairman Liebowitz on the one hand, and four consumer groups including Consumers Union on the other. In this posted report, a number of allegations and/or assertions made by the consumer groups ("the advocates") were revealed, including the following:

- "Of particular importance, the advocates stated, is the proposed prohibition against advance fees, without which none of the other proposed rule provisions will effectively stop debt settlement companies from harming consumers. "
- "The advocates responded to the debt settlement industry's claim that because debt settlement companies provide consumers with valuable services other than settlement before settlement occurs, advance fees should be permitted. The advocates asserted that there is *minimal evidence* to support this claim and thus, the FTC should include an advance fee ban in the Final Rule."
- "The advocates expressed support for a performance-based fee model, arguing that this fee model is *the only way* to ensure that the industry has a real incentive to achieve settlements for consumers."
- "The advocates do not believe there are *any* alternatives to an advance fee ban that would curb abuses in the debt relief industry."

USOBA respectfully disagrees with these assertions and instead offers the following facts:

- USOBA members alone (comprising roughly 10%-15% of the entire industry) have settled more than \$1.4 billion in unsecured debt for American consumers *operating under the fee structure that the advocates want to eliminate*;
- One of USOBA's members alone has settled more than **32,450 individual unsecured credit accounts** for approximately **\$91,500,000** to the benefit of American consumers who settled their debts at **\$0.42 on the dollar**, again *operating under the fee structure that the advocates want to eliminate*;
- According to a survey of almost 700 American workers who service debt settlement consumers regularly *under the fee structure that the advocates want to eliminate*:
 - 65% reported providing value and/or services to consumers **other than the settlement of debts** in the form of **financial literacy and education**, information on **how to deal with creditor harassment or threats**, "**handholding**" and **emotional support, program coaching and budgeting support**;
 - Almost 30% reported being told by debtors that their debt settlement program "**saved their marriage**" or "**saved their health**;"

In his comments to the FTC, Bernard L. Weinstein Associate Director of the Maguire Energy Institute and an Adjunct Professor of Business Economics in the Cox School of Business at Southern Methodist University in Dallas provided the following points regarding these options:

- *The great advantage of debt settlement over the alternatives is consumers can satisfy outstanding obligations while paying less than the full amount of their unpaid balances.*
- *Credit counseling agencies receive payments from both consumer and credit card companies. This additional payment, or "kick-back," from creditors is a percentage of the payments creditors receive from consumers.*
- *Many credit card agencies have been hiking interest rates on outstanding balances, causing debtors to find themselves running faster and faster just to stay in place while the timeframe for paying off creditors is stretched out. For example, Citibank recently raised interest rates to an almost 30% on a large number of cardholders.*
- *Debt settlement can be viewed as part of the healing process to get distressed U.S. households back on a sound financial footing and thereby improve the odds for a sustainable economic recovery in the years ahead.*

In today's tumultuous economic environment, with many families on the brink of being overwhelmed by debt, fair and balanced debt management options are crucial. These include options for consumers of a variety of situations, including those who cannot satisfy overdue debt burdens while providing for their families in the midst of a hardship.

Working with the States: USOBA, as a leading trade association in the debt settlement industry has been working for years at the state level to establish effective balanced legislation.

State legislation is establishing strong
consumer protections

Debt settlement organizations have worked with the Uniform Law Commission to establish the model "Uniform Debt-Management Services Act."

The Uniform Debt-Management Services Act:

- Licenses debt settlement services
- Establishes insurance requirements
- Establishes bonding requirements
- Establishes maximum fees
- Sets out required consumer disclosures
- Specifies prohibited conduct
- Creates private and state causes of action with penalties and damages

Variations of this model act have been enacted in a number of states, including UT, TN, NV, CO & DE

Debt settlement trade organizations have established codes of conduct, certification programs and audit programs for their members.

Each of the states that have passed regulations on debt settlement have included fee caps, ranging between 15 to 20 percent. Many provide that debt settlement companies collect fees by spreading out the payment of those fees over half the life of the consumer's program, a period often of 18-24 months, in equal amounts. (Programs typically run around three years.) The result is a balanced approach whereby consumers are not overburdened with large upfront fees, but whereby the companies that serve them are also able to pay employees, lease obligations and develop technologies to further support those consumers.

Fee Ban Will Cost Thousands of Jobs: By contrast, the FTC has proposed a rule that would prohibit debt negotiation and settlement services from charging fees to customers until a debt is "settled, reduced, negotiated or otherwise altered." This would mean that debt negotiation and settlement service providers could not be compensated for the efforts they must undertake to obtain settlement offers, all the while still trying to meet their employee wage, insurance and other responsibilities.

The FTC refers to such payments as "advance fees." However this term is a misnomer. In reality, the ban would apply to "pay as you go fees," fees for services that are performed in advance of debt negotiation and settlement provided on an ongoing basis to consumers from the very first day those consumers enter their program.

Because the fees that would be banned are not "advance fees," the logic behind the proposed rule is flawed. More to the point, there appears to be a wrongful impression that debt negotiation and settlement organizations perform no substantial service in advance of settling accounts. This is a gross misunderstanding of the debt settlement process and the value to consumers of the entire scope of services provided. Debt negotiation and settlement service providers invest substantial time, expertise and energies into the entire process of coaching the consumer on budgeting, increasing savings, understanding their rights opposing unlawful collection efforts, and helping them stay on track over months and months until enough savings accrue to settle the enrolled debts. It requires considerable advance effort to obtain the eventual debt negotiation and settlements.

These preparatory services are an absolute prerequisite to a debt being "settled, reduced, negotiated or otherwise altered." In other words, the very purpose (settlement of debts) for which people engage debt negotiation and settlement services could *not* be achieved without these preparatory efforts. The revenues from "pay as you go" fees are necessary to pay for these services, without which debt negotiation and settlement offers could not be obtained. Moreover, it usually requires many months for people to save the money required to make or respond to credible settlement offers. To not be paid in a timely manner for services rendered is not a viable business model.

Texas Employers & Small Business Owners Will Suffer

USOBA alone represents roughly **twenty (20) Texas-based companies** who offer and/or provide debt settlement services

These companies employ more than **1100 Texans**

Counting companies that are not USOBA members, the group estimates that **30-50 Texas companies** and the more than **2000 Texans they employ** are in danger



Finally, non-profit credit counseling services are supporting the proposed “pay as you go” fee ban, despite the fact that they themselves charge “pay as you go” fees. Credit counseling services would not be covered by the proposed rule. However, the “pay as you go” fee ban would eliminate debt negotiation and settlement services, which are the principal competition to credit counseling services. From a business perspective, virtually outlawing competition would improve the revenues of credit counseling services. However, this would only be achieved by limiting the choice of some consumers to use the debt negotiation and settlement services that are more tailored to their needs. It would also force other consumers into bankruptcy. Neither of these outcomes is an acceptable goal of public policy.

SUMMARY

The FTC has proposed a "pay as you go" fee ban (erroneously called an "advance fee" ban) on debt settlement services.

This ban would drive most debt settlement services out of business, because fees could not be charged until long after services have been performed.

The ban would deny debt settlement as an option to people in need and result in more bankruptcies.

Debt settlement trade organizations have promoted strong reasonable fee regulation across the United States, and several states have adopted these fee schemes

The FTC has rejected these more reasonable consumer protection measures, and is now poised to impose on small business owners the most radical fee ban in the Country

Impacts of the FTC's Proposed "Pay as You Go" Fee Ban

Implementation of the "pay as you go" fee ban would have a disastrous impact on debt negotiation and settlement services and their employees and, in consequence, on people who require debt negotiation and settlement services.

Impact on Employment: The impact on jobs is indicated by a survey of USOBA members. Approximately 85% of debt negotiation and settlement organizations would be forced to cease offering debt negotiation and settlement services if "pay as you go" fees were banned. This would, of course, require virtually all employees to be laid off. At the same time, most of the services that would not close indicated that they would also have to lay off employees.¹

This would be a significant reversal. Debt negotiation and settlement services are unique in having added employment in the recent downturn as a result of the increasing demand from people in financial distress. Moreover, a large share of the debt negotiation and settlement services are small businesses, employing less than 25 people.²

Business Model Not Unique to Debt Settlement: "Pay as you go fees" are the norm for personal services that are spread out over a period of time. For example, attorneys routinely charge customers for services rendered, even before cases are settled or decided in court.

The "pay as you go" fee ban would drive most full service debt negotiation and settlement services out of business. Most of the companies are small businesses and do not have the capacity to provide compensable services for the 9 to 12 months that the FTC's proposal would

¹ USOBA, *USOBA Survey Confirms Worst Fears*, September 29, 2009.

² USOBA, *USOBA Survey Confirms Worst Fears*, September 29, 2009.

require they wait to collect fees. The “pay as you go” fee ban would deny debt negotiation and settlement as an option to hundreds of thousands of people in need and result in more personal bankruptcies.

Debt Negotiation and Settlement Services: Debt negotiation and settlement services negotiate reductions in the principal amounts of debt. They are a generally less costly to customers and thus represent a “middle ground” between bankruptcy and credit counseling.

Debt negotiation and settlement services enroll people in budgeting and savings programs. Once sufficient savings have been accumulated, the debt negotiation and settlement service attempts to negotiate down the principal amount of the customer’s debt.

People who enter the programs commit to establishing their own savings accounts to accumulate funding that can be used in settlements. Often, sufficient savings are accumulated within a year for settlement offers to be made and accepted. The customers remain in full control of the savings accounts and disbursement. Further, debt negotiation and settlement offers are made only as approved by the customers.

As in the case of credit counseling, credit card companies have the right to accept or reject proposed debt negotiation and settlement. The fact that they accept so many settlements is evidence of the value of debt negotiation and settlement services (see below).

Debt negotiation and settlement service providers earn all of their revenue from customers, by “pay as you go” fees. Unlike credit counseling services, debt negotiation and settlement services receive no funding from creditors.

One disadvantage for customers of debt negotiation and settlement services is that notwithstanding the Fair Debt Collection Practices Act (FDCPA), creditors are not otherwise limited in their ability to affect harassing collection efforts on debtors working these debt settlement programs. Further, it is always possible that creditors can file legal actions against creditors before a final settlement is reached. Harassing collection efforts from creditors and their collection agents are perennially a top complaint to the FTC from consumers.

Debt negotiation and settlement services have been criticized because of a perceived high customer cancellation rate. Debt negotiation and settlement service cancellation rates have been estimated at approximately 60%. While full data is not available, nearly 30% of customers cancelling either subsequently decided to settle debts on their own or filed bankruptcy. Many consumers leave debt settlement services because of the continued harassing phone calls from credit collection services. It is important, however, to note that the cancellation rate for credit counseling services is higher than for debt negotiation and settlement services.³

- The 2009 FTC Annual Complaint Report contains the following rankings of sources of consumer complaints: Third Party and Creditor Debt Collection, #2, Credit Cards, #7,

³ <http://www.consumercreditchoice.org/node/3>

Banks and Lenders, #10, and Debt Management and Credit Counseling, #19. *Consumer Sentinel Network Data Book, Jan.-Dec. 2009*; p. 6, available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2009.pdf>.

- The 2008 FTC Annual Complaint Report contains the following rankings of sources of consumer complaints: Third Party and Creditor Debt Collection, #2, Banks and Lenders, #9, Credit Cards, #18, and Debt Management and Credit Counseling, #24. *Consumer Sentinel Network Data Book, Jan.-Dec. 2008*, p. 6, available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf>.
- U.S. Better Business Bureau statistics show that in both 2008 and 2009, banks ranked 3rd, collection agencies 6th, and credit card companies 15th in overall consumer complaints. **Debt settlement companies ranked 117th in 2009 and were not on the list in 2008.** <http://www.bbb.org/us/Consumer-Complaints/Statistics/>
- The National Association of Attorneys General listed Debt Collection as the top consumer complaint, with Credit Cards tied for 4th place. See <http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php>.

A move by the FTC to unduly restrict the fees of debt settlement companies would result in an even greater shift of power to harassing creditors and debt collectors, the very operators who are the basis for the majority of consumer FTC complaints. Such a rule would handicap the ability of debt settlement companies to advocate for consumers and would prove to be highly anti-consumer.

Debt Settlement Is Working for Consumers: Debt negotiation and settlement services are involved in resolving large amounts of debt. A survey completed by approximately one-quarter of United States Organizations for Bankruptcy Alternatives (USOBA) members revealed that nearly \$7 billion of debt has been enrolled in debt settlement programs by roughly 277,000 customers. Nearly \$1.5 billion of unsecured debt has been settled.⁴ Much of the debt is comparatively new, having been enrolled during the recent and ongoing financial crisis. The same USOBA survey found that:

- The average debt reduction is 53% of the amount due upon entering debt negotiation and settlement.⁵
- Debt reductions range between 28% and 70%.
- Consumer payments were, on average, spread out over 31 months.

Economist Steven Breish has estimated that a consumer could save as much as 45% compared to paying off a credit card using minimum monthly payments (including debt negotiation and

⁴ USOBA, *Survey for FTC Requests – Data Summary*, January 19, 2010.

⁵ USOBA, *Survey for FTC Requests – Data Summary*, January 19, 2010.

settlement service fees). In the same example, Dr. Breish estimates that the customer would pay 60% less than under a typical credit counseling program.⁶

The very nature of debt negotiation and settlement services requires generally more intense activity than is required of credit counseling services. This is because debt negotiation and settlement cases cannot be resolved by simple and relatively rapid revisions to interest rates and payment schedules. Debt negotiation and settlement is a long, disciplined and complicated process.

Debt negotiation and settlement services begin performing the tasks that are prerequisite to settlement from the beginning of the engagement by the customers. Examples of such services include:

- Verifying eligibility for the program
- Verifying credit obligations and income
- Providing advice on establishing budgets and savings programs
- Providing advice on handling harassment by creditors
- Regular telephone calls to ensure progress is being made
- Performing a financial analysis for the consumer
- Quality control
- Critical coaching and emotional support
- Communication with creditors
- Referral to and coordination with local attorneys, when needed

None of these services would be compensable under the FTC's proposed fee ban, and virtually all would be unaffordable and eliminated if the companies providing them could not be compensated for those services.

Debt negotiation and settlement trade organizations have promoted appropriately strong consumer protection regulation to eliminate disreputable operators from debt negotiation and settlement services. By contrast, the proposed "pay as you go" fee ban represents regulatory over-reach, because it would drive reputable companies out of business.

The proposed "pay as you go" fee ban exceeds FTC's statutory authority and would pre-empt state regulation. The proposed "pay as you go" fee ban should be rejected by the FTC.

Evidence Begg for a Modified Final Rule: The evidence in the record before the Commission may in fact not support a fee a ban. Specifically, during the formal comment period more than two hundred (200) consumers submitted comments pertaining to the proposed rule. These customer testimonials ran roughly 40:1 in favor and in support of the debt settlement programs and services being offered and provided. This evidence seems to fly in the face of any alleged

⁶ <http://www.consumercreditchoice.org/node/3>

consumer “cry-out” for fee reform, and likely will not satisfy the Commission’s burden of demonstrating a legal basis for a final rule including a constitutionally suspect fee ban.

Conclusion: The debt negotiation and settlement services industry is an important business activity in the United States that is providing valuable services to hundreds of thousands of Americans who find themselves unable to pay their unsecured debt on time and in full. The FTC through the TSR has proposed a ban on ‘advance fees’ that translates to a ban on ‘pay as you go’ fees. If this section of the proposed rule is implemented, it will result in the loss of thousands of jobs in the United States as 85% of the debt negotiation and settlement services will likely be unable to survive without the capacity to be compensated in the ‘pay as you go’ fee model for the first year of compensable services. Further, a valuable option for consumers to settle their debts, avoid bankruptcy and establish good financial practices will be lost, likely resulting in a quarter million or more bankruptcies.

It is requested that the FTC in finalizing its proposed rule eliminate their proposed fee ban and defer to the judgment of the multitude of states who are already addressing this issue. It is also requested that consumers who enter debt negotiation and settlement services be afforded the same relief from creditors’ calls as those who enter into credit counseling services and bankruptcy.

For More Information, please contact:
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