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Legislative Update: The Rapidly-Shifting Legal Landscape Facing the Industry

**United States Organizations for Bankruptcy
Alternatives**

**June 7, 2010, 11:35 am – 12:45 pm
Four Seasons Resort, Palm Beach, Florida**

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Introduction

- **How did we get here?**
- **Consumer Financial Products and Services Oversight**
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- **State Debt Adjusting Law and Related Developments**
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- **Attorney Model – Risk or Opportunity**
- **Questions and Answers**



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How did we get here...Federal and State Authorities Interest in Debt Settlement Increases

- FTC Enforcement Actions and Nonpublic Investigations
- State Enforcement Actions and State Debt Adjusting Laws
- Congressional Moves to Enhance FTC Authority
- GAO Report on Debt Settlement



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- **FTC Enforcement Actions Against Debt Relief Companies** (19 lawsuits / 5 yrs)
- **FTC Nonpublic Investigation of Debt Relief Service Industry (December 2008 – Present)**
 - December 2008 – FTC Votes to Authorize Investigation of Industry Practices
 - Late Winter / Spring 2009 – Civil Investigative Demands Issued to Some Industry Participants
 - Ongoing and Open Investigations Continue (Lead Generators, Media Buyers and others contacted).



Congressional Move to Enhance FTC Oversight and Enforcement of Consumer Credit and Debt; Debt Settlement Services Targeted (Winter 2008 – Present)

VENABLE[®] LLP

Credit Counseling and Debt Settlement Alert
 May 11, 2009

Congressional Move to Enhance FTC Oversight and Enforcement of Consumer Credit and Debt; Debt Settlement Services Targeted

AUTHORS
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On May 7, 2009, the Consumer Credit and Debt Protection Act (H.R. 3200) was introduced in the U.S. House of Representatives to provide authority to the Federal Trade Commission ("FTC") or the "Commission" to conduct rulemaking on an expedited basis concerning consumer credit or debt, specifically directing the Commission to promulgate rules with regard to debt settlement (broadly defined). The bill also would expand the FTC's enforcement powers by allowing it to seek civil penalties in connection with unfair and deceptive acts or practices relating to consumer credit or debt.

A hearing on the bill by the House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection is scheduled for May 12, 2009. The bill is authored by Subcommittee Chairman Rep. Bobby Rush (D-IL), who previously held a hearing on this topic in March 2008. [1]

Over the last several months, the FTC and others have requested that Congress provide the Commission with expanded rulemaking authority and enforcement powers related to consumer credit and debt, as provided for in this bill. The bill does not, however, specifically direct the Commission to consider regulations for any specific consumer credit and debt-related products or services – other than debt settlement services and automobile sales.

In its present form, the bill would have a significant impact on the debt settlement industry and providers of other forms of consumer financial services, including credit counseling agencies that offer less-than-full balance repayment plans.

Moreover, the bill would enable the Commission to play a greater role in the oversight of consumer financial services related to consumer credit or debt. The Commission would be permitted to use this expedited rulemaking authority to issue rules covering the entire range of consumer financial products and services within its jurisdiction, either directed at consumer financial products/services in general or specific industry subsets (e.g., payday lending, mortgage servicing, credit counseling agencies, credit debt managers and advisors, and credit repair companies). In addition, the bill would enhance the Commission's ability to prosecute cases against such companies.

The Consumer Credit and Debt Protection Act contains several specific provisions of interest to providers of consumer financial products and services, including:

- Permitting the FTC to employ notice and comment procedures to establish rules pursuant to the Federal Trade Commission Act that set forth unfair or deceptive acts and practices relating to consumer credit or debt, rather than rulemaking processes that are more burdensome on the Commission;
- Directing the FTC to examine the practices of "debt settlement services" providers and to establish such rules as the Commission deems necessary to prevent unfair and deceptive acts or practices of such providers. The bill also requires the Commission to consider adopting rules that specifically:
 - "prohibit the charging of fees to consumers prior to any debt settlement service being fully reviewed and finalized fees that may be charged after a settlement with a creditor is reached"; and
 - "require disclosures before a contract is signed regarding the fee structure, weighted time frames for a successful settlement, success rate of debtors in settling their debts, information about creditor participation in settlement plans, and the potential impact on a consumer's credit score";
- Defining the term "debt settlement services (broadly)" as "a commercial service provided to assist consumers in managing and repaying consumer debt, including the offering of advice or acting as an intermediary between a debtor and one or more of the debtor's creditors, where the primary purpose of the advice or action is to obtain a settlement for less than the full amount of debt owed";
- Requiring that the specified require rulemaking be commenced within six months of the date of enactment of this bill.

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Credit Counseling and Debt Settlement Alert
 April 8, 2009

FTC Commissioner Rush Calls for More Responsibility and Reforms in the Debt Settlement Industry

AUTHORS
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Acknowledges "Debt Settlement Can Provide Some Real Benefits for Consumers"

Addressing a credit and collection industry conference in Carlsbad, California, on April 2, 2009, FTC Commissioner J. Thomas Rosch shared his views about debt settlement and discussed his thoughts on options available to the FTC and to the debt settlement industry to improve practices.

On the heels of FTC congressional testimony on consumer protection issues and the debt relief industry, Commissioner Rosch acknowledged that, in his view, debt settlement can provide some real benefits for consumers, but added that certain practices should be prohibited in the debt settlement industry.

In an address that was striking for its specificity, Commissioner Rosch directly addressed one of the most significant topics confronting debt relief providers and often asked by consumer advocacy groups – whether debt settlement can ever be in a consumer's best interests. Commissioner Rosch noted that in his view "debt settlement can provide some real benefits for consumers."

"For example, a debt settlement firm can advocate on the consumer's behalf, especially in cases where attorneys are retained, embarrassed, or even afraid to contact their creditors directly," Commissioner Rosch said to the conference attendees. "A debt settlement firm also may be able to provide individualized attention to consumers, taking a holistic approach to all of the consumer's unsecured debt owed to several creditors, rather than just the amount owed to a particular creditor."

Commissioner Rosch, one of four sitting commissioners on the FTC, laid out his views in vivid terms that echo, in many ways, but also expand upon, recent FTC testimony to congressional committees responsible for overseeing the consumer protection agency. Commissioner Rosch said that he was "torn between about certain practices we've witnessed among some industry players." To illustrate his concerns, Rosch described a number of the law enforcement actions brought by the FTC in recent years.

"Though its specific themes have been received by consumer advocates and the FTC advisors, Commissioner Rosch offered views on several industry practices that can be improved – as well as some that believe should be prohibited."

Recommendations for the Debt Settlement Industry

Among his recommendations, pulling suggestions from prior enforcement actions, Commissioner Rosch called on debt settlement firms to:

- "not that performance claims to those they can adequately substantiate";
- "not misrepresent the benefits of debt settlement";
- "disclose clearly and conspicuously the negative impact that participation in a program may have on a consumer's credit score, and how long that impact may linger. This disclosure should not be made only in the written contract, but in the ad itself"; and
- "if a debt settlement firm promises to refund debt settlement service fees to consumers if their debt settlement program fails to improve significantly, the firm must honor that promise."

Options for Improving the Debt Settlement Industry

Commissioner Rosch said that the audience there were debt settlement industry practices he believed should be prohibited. "Debt settlement firms should be allowed to charge any payment in advance of performing services for the consumer" he said in his speech. "This type of advance payment is already prohibited for credit repair services, and I think there should similarly be prohibited here."

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Credit Counseling and Debt Settlement Alert
 March 26, 2009

FTC Emphasizes Increased Enforcement against Debt Relief Companies at Congressional Consumer Protection Hearing

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Section 6 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices. The FTC also has the authority to promulgate rules to prohibit deceptive or unfair practices and enforce a number of other consumer protection statutes. In light of the economic crisis, the FTC is focused on law enforcement, consumer and business education to protect consumers of financial services. Despite the many regulations, newly opening companies that assist consumers to settle the FTC continues to focus its efforts on policing the marketplace.

On March 24, 2009, the U.S. House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on the subject of the role of the Federal Trade Commission ("FTC") in protecting the public, specifically in the area of consumer credit and debt. This hearing came in wake of the FTC testimony to the Senate Commerce Committee in February [1].

Newly appointed FTC Chairman Jon Leibowitz testified before the Subcommittee, elaborating virtually all of the same points that Commissioner Rosch made during his testimony to the FTC before the Senate Commerce Committee several weeks ago. Chairman Leibowitz highlighted the FTC's intent to be more aggressive in pursuing unfair and deceptive practices in the areas of mortgage loan modification and foreclosure rescue consultants, debt negotiation, payday loan lenders, credit repair companies, and debt collection – pointing to several recent enforcement actions targeting these industries [2].

Chairman Leibowitz also stated that the FTC is in the process of revamping Working Group, a task force consisting of the FTC, State Attorney General, and the U.S. Justice Department. The Working Group would allow for increased coordination and cooperation between these federal and state agencies.

The Chairman's testimony also highlighted the FTC's enforcement "wish list" – a list of expanded enforcement strategies that the FTC believes will help to make the Commission more effective in response to the currently existing unfair and deceptive practices in the area of consumer credit and debt. The list includes expanded rulemaking authority, the authority to obtain civil penalties, and increased resources.

In particular, the Chairman highlighted that the FTC has been given expanded rulemaking authority to initiate a rulemaking proceeding with respect to the entire fee structure of a mortgage loan. This authority was granted under the Credit Reform Act and Chairman Leibowitz indicated that the is an example of the type of rulemaking authority that the FTC would like generally.

Other references that surfaced at the hearing include a representative from the National Debt Attorney General Program, a law professor, a consumer advocate, and a representative from the American Financial Services Association ("AFSA"). The AFSA representative was the only witness who felt that the FTC had done an effective job in the past few years and questioned. The other representatives called for more aggressive, coordinated approach to the problem of unfair and deceptive consumer credit and debt practices.

The testimony makes clear that the FTC is committed to and focused on the goal of stopping or preventing in lieu of their modification, avoidance, rescission, debt negotiation, and other consumer credit and debt practices. The Subcommittee's chairman, Congressman Bobby Rush, also stated that he is currently working on legislation to address abusive credit practices.



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Proposed Consumer Credit and Debt Protection Act, H.R. 2309

111TH CONGRESS
1ST SESSION **H. R. 2309**

To provide authority to the Federal Trade Commission to expedite rulemakings concerning consumer credit or debt and to direct the Commission to examine and promulgate rules with regard to debt settlement and automobile sales, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 7, 2009

Mr. RUSH (for himself, Ms. SCHAROWSKY, and Ms. MATSUI) introduced the following bill, which was referred to the Committee on Energy and Commerce

A BILL

To provide authority to the Federal Trade Commission to expedite rulemakings concerning consumer credit or debt and to direct the Commission to examine and promulgate rules with regard to debt settlement and automobile sales, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.
4 This Act may be cited as the "Consumer Credit and
5 Debt Protection Act".

- Introduced - May 7, 2009
(Rep. Bobby Rush (D-IL))
- Referred to Subcommittee
on Commerce, Trade and
Consumer Protection
- Subcommittee Hearing -
May 12, 2009
- Markup - June 3, 2009
- Status - Dormant

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FTC Commissioner Rosch Speech on Consumer Protection and the Debt Settlement Industry (April 2, 2009)



Federal Trade Commission

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

Remarks by J. Thomas Rosch¹
Commissioner, Federal Trade Commission

before

The 4th Annual Credit and Collection News Conference
Carlsbad, California
April 2, 2009

I. INTRODUCTION

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

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

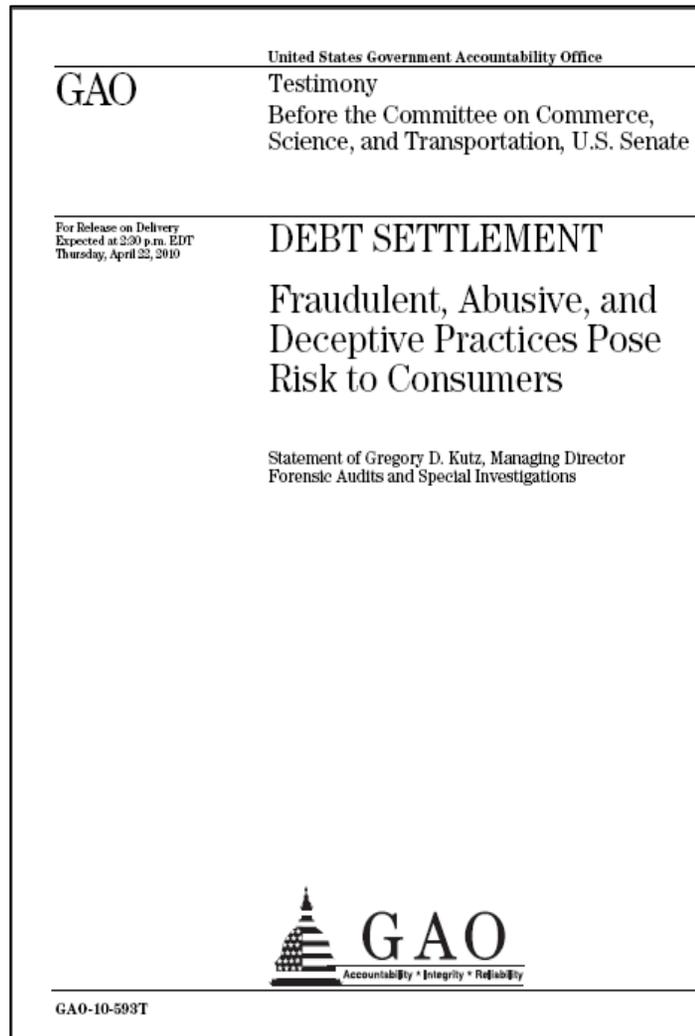
¹The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner. I would like to express my appreciation to Carolyn Hann, my attorney advisor, for her contributions to this speech.

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

- *FTC Commissioner J. Thomas Rosch Recommendations for the Debt Settlement Industry*
 - "limit their performance claims to those they can adequately substantiate";
 - not "misrepresent the benefits of debt settlement";
 - "disclose, clearly and conspicuously, the negative impact that participation in a program may have on a consumer's credit score, and how long that impact may linger. This disclosure should not be made only in the written contract, but in the ad itself"; and
 - "if a debt settlement firm promises to refund debt settlement service fees to consumers if their debt settlement negotiations are unsuccessful, the firm must honor that promise."
- Concerns about advance fees
- Prior Written Consent for Disbursements
- Supports Self-Regulation

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GAO Report on Debt Settlement



- GAO's investigation found that some debt settlement companies engage in fraudulent, deceptive, and abusive practices that pose a risk to consumers.
- 17 of 20 companies GAO called while posing as fictitious consumers say they collect fees before settling consumer debts--a practice FTC has labeled as harmful and proposed banning--while only 1 company said it collects most fees after it successfully settles consumer debt.
- GAO found some debt settlement companies provided fraudulent, deceptive, or questionable information to its fictitious consumers, such as claiming unusually high success rates for their programs--as high as 100 percent. FTC and state investigations have typically found that less than 10 percent of consumers successfully complete these programs.
- Other companies made claims linking their services to government programs.

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Consumer Financial Products and Services Oversight



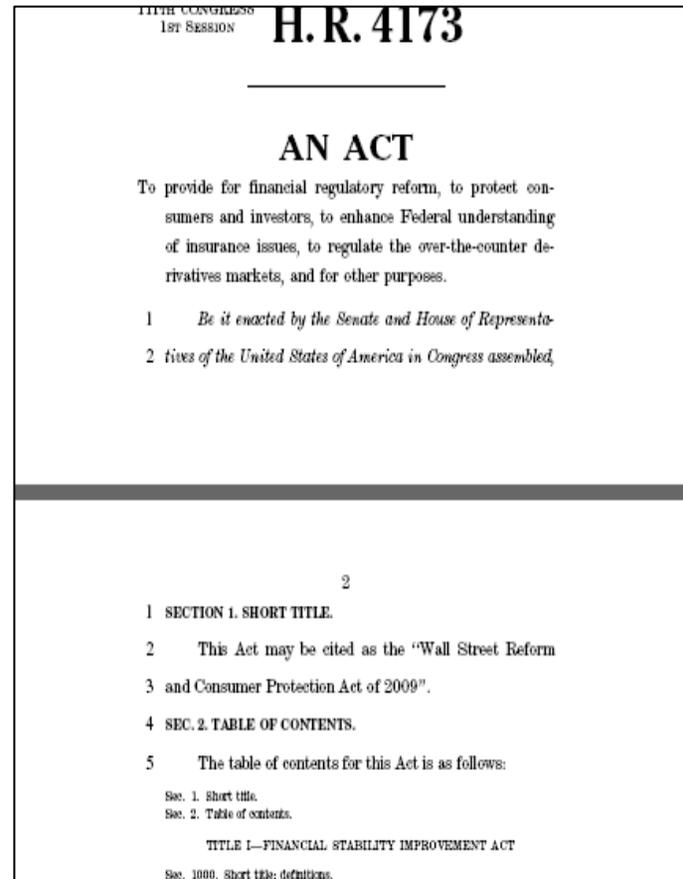
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Congress is poised to enact financial services regulatory reform legislation this year that would, among other things, provide greater federal oversight of financial services provided to consumers.



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House: Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173)



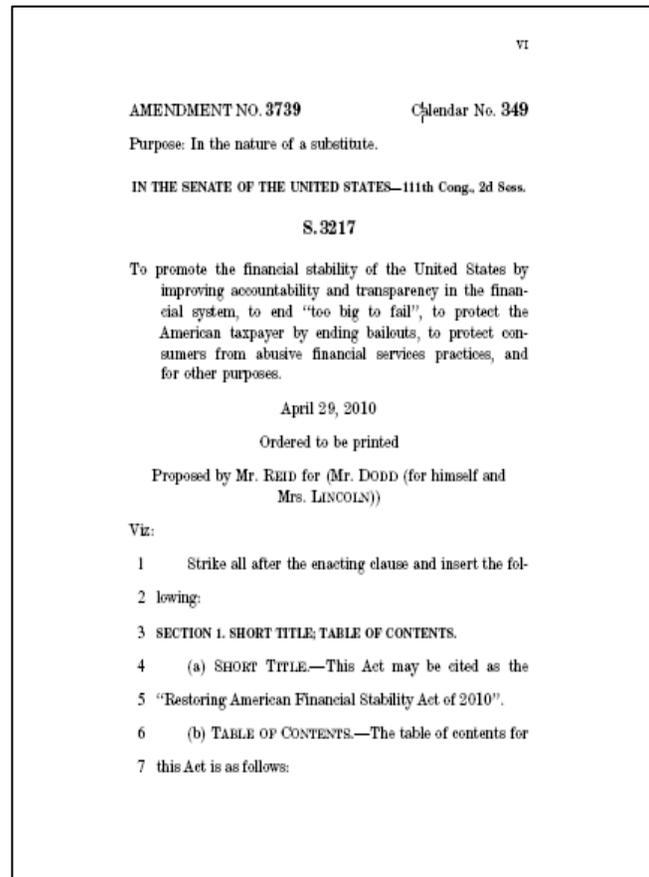
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Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173)

- The House-passed version of financial services regulatory reform (H.R. 4173, passed the House on Dec. 11, 2009) would establish a Consumer Financial Protection Agency (CFPA) that also would have regulatory oversight over credit debt settlement, credit counseling and other financial products and services.
- Broadly expands FTC authority.
 - Administrative Procedures Act rulemaking authority
 - Enforcement Authority for “Substantial Assistance” Violations.
 - Litigation Authority
 - Civil Penalty



Senate: Restoring American Financial Stability Act of 2010 (S. 3217)



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Restoring American Financial Stability Act of 2010 (S. 3217)

- The Senate passed S. 3217, Title X of which would establish a Bureau of Consumer Financial Protection.
- Section 1002(13)(A)(vii) defines "(I) providing credit counseling to any consumer; and (II) providing services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure" as a "financial product or service" over which the Bureau of Consumer Financial Protection would have regulatory jurisdiction.



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Debt Settlement Consumer Protection Act



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Debt Settlement Consumer Protection Act

- Senator Schumer (D-NY) and Senator McCaskill (D-MO) filed their debt settlement amendment (based on their recently introduced "Debt Settlement Consumer Protection Act," S. 3264) to the financial services regulatory reform bill (S. 3217).
- The amendment and bill include:
 - Specific rules and prohibitions for debt settlement service providers
 - Fee Restrictions
 - Right of Cancellation
 - Disclosures
 - Private Right of Action for Violations
 - Grants the FTC express rulemaking authority for debt settlement services and debt relief services (broader).
- Specifically, the amendment (and the bill) provides:
 - an exception from the definition of "debt settlement provider" for nonprofit tax-exempt credit counseling agencies, *i.e.*, "[a]n organization that is described in section 501(c)(3) and subject to section 501(q) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code" and
 - an exemption for the services provided by nonprofit tax-exempt credit counseling agencies from any rules prescribed by the Federal Trade Commission regarding any debt relief services that are not otherwise covered by the provisions of the Amendment.

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Debt Settlement Consumer Protection Act and Amendment Approach to Attorney Exemption

- ***The Debt Settlement Consumer Protection Act S. 3264:*** “The term 'debt settlement provider' does not include the following: (i) Attorneys when— (I) acting in the ordinary practice of their professions; (II) acting through any entity in the ordinary practice of their profession; (III) acting in the States where they are licensed to practice their profession; and (IV) not holding themselves out as debt settlement providers or providing debt settlement service.”
- ***Proposed Amendment to the S. 3217:*** Would have added: “(V) does not share any fee received for the provision of such service with a person who is not an attorney; and (VI) does not provide such service through a partnership, corporation, association, referral arrangement, or other entity or arrangement— ‘(aa) that is directed or controlled, in whole or in part, by an individual who is not an attorney; ‘(bb) in which an individual who is not an attorney holds any interest; ‘(cc) in which an individual who is not an attorney is a director or officer thereof or occupies a position of similar responsibility; ‘(dd) in which an individual who is not an attorney has the right to direct, control, or regulate the professional judgment of the attorney; or “(ee) in which an individual who is not an attorney and who is not under the supervision and control of the attorney delivers such service or exercises professional judgment with respect to the provision of such service.”

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What will the future bring?

- In order to ensure survival, the industry must continue to have ready answers to key questions early in the process.
- What the industry needs?
 - Empirical Data
 - Need for an FTC Rule
 - Scope of Covered Practices
 - Scope of Covered Entities



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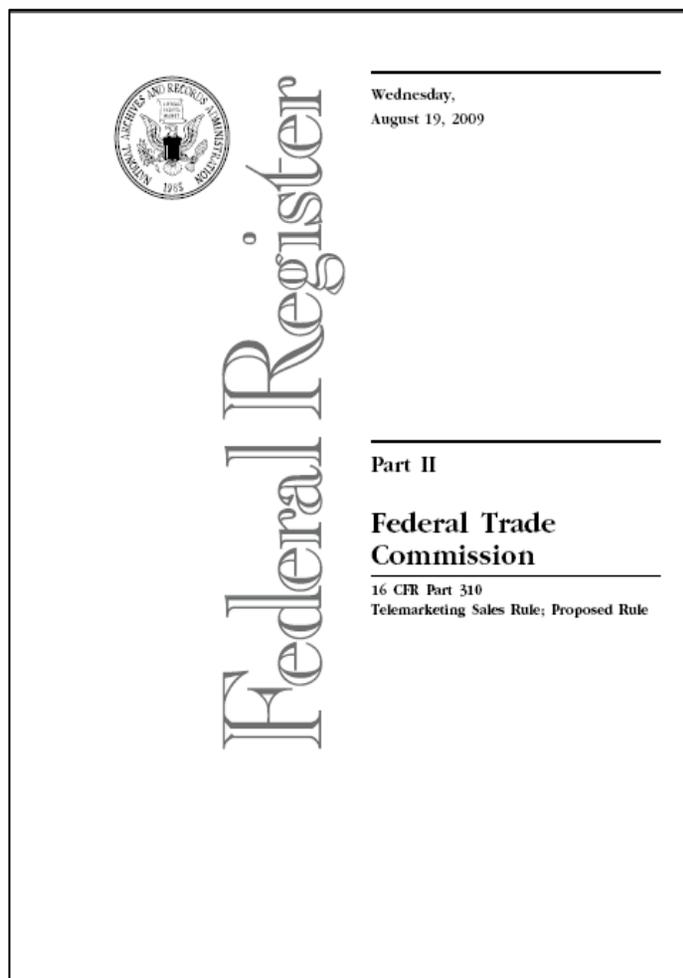
Federal Trade Commission Developments



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Notice of Proposed Rulemaking (NPRM) to Protect Consumers of Debt Relief Services (July 30, 2009)



- Prohibit companies from charging fees until they have provided the debt relief services;
- Require disclosures about the debt relief services being offered, including how long it will take to obtain promised debt relief and how much it will cost;
- Prohibit specific misrepresentations about material aspects of debt relief services, including success rates and whether a debt relief company is nonprofit;
- Extend the TSR to cover calls consumers make to debt relief services in response to their advertisements; and
- Define the term “debt relief service” to cover any service to renegotiate, settle, or in any way alter the payment terms or other terms of the debt between a consumer and one or more unsecured creditors or debt collectors, including a reduction in the balance, interest rate, or fees owed.
- Comment period closed October 26, 2009.

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A Possible FTC Approach to an Attorney Exemption

- *In a recent rulemaking on mortgage assistance relief services (“MARS”) the FTC made clear an intention to apply that rule to attorneys except in very limited circumstances.* The NPRM states, “[t]here is no general exemption for attorneys from the requirements of the proposed Rule. The Commission, however, proposes a limited exemption for licensed attorneys’ conduct in connection with a bankruptcy case or other court proceeding to prevent foreclosure, where that conduct complies with state law, including rules regulating the practice of law. Attorneys who meet these criteria would be exempt from Rule’s prohibitions against requesting or collecting advance fees. Additionally, attorneys would be exempt from the Rule’s prohibition against advising consumers to cease contact with their lenders or servicers. Note, however, that all attorneys would continue to be subject to the proposed Rule’s prohibition against misrepresentations, disclosure requirements, prohibition against knowing substantial assistance or support, and recordkeeping requirements.”

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When to Expect the FTC Rulemaking to be Finalized

- FTC Chairman Jon Leibowitz, May 20, 2010: “To curb ongoing abuses in the debt relief industry, in August 2009 the Commission proposed a rule to, among other things, prohibit debt relief service providers from charging consumers a fee until they have delivered the promised results. The FTC expects to complete this rulemaking proceeding within the next 60 days.”
- Section 553(d) of the APA – Publication in *Federal Register* no less than 30 days before the rule’s effective date.



FTC Targets Debt Relief Services and Mortgage Assistance Relief Services

- Ban on "upfront" fees.
- Disclosures
- Misrepresentations
- Written contract requirements
- Limited exemption for attorneys



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Other Federal Developments



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Credit CARD Act of 2009

- The Credit Card Act required the Federal Reserve Board ("Board") to adopt guidelines for card issuers to provide a toll-free telephone number for obtaining credit counseling information.
- The Credit Card Act requires that these guidelines ensure that consumers are referred "only [to] those nonprofit and credit counseling agencies approved by a United States bankruptcy trustee pursuant to [11 U.S.C. 111(a)]."
- The Board requires that card issuers update information regarding approved organizations at least annually for consistency with the information provided by the United States Trustee or a bankruptcy administrator.
- The Final Rule went into effect on February 22, 2010.

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Page 1 of 2

Summary of Account Activity		Payment Information	
Previous Balance	\$535.07	New Balance	\$1,764.53
Payments	-\$450.00	Minimum Payment Due	\$53.00
Other Credits	-\$13.45	Payment Due Date	4/20/12
Purchases	+\$520.57		
Balance Transfers	+\$785.00		
Cash Advances	+\$318.00		
Past Due Amount	+\$30.00		
Fees Charged	+\$69.00		
Interest Charged	+\$10.89		
New Balance	\$1,764.53		
Credit limit	\$2,000.00		
Available credit	\$215.47		
Statement closing date	3/22/2012		
Days in billing cycle	30		

QUESTIONS?
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

Payment Information

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a \$35 fee and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	\$3,284
\$62	3 years	\$2,232 (Savings=\$1,052)

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, any changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, any changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12

APR for Purchases 14.99%

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FTC Red Flags Rule

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FIGHTING FRAUD WITH THE RED FLAGS RULE

A How-To Guide for Business

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The Red Flags Rule

Create Your Program

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View Related Topics

Are you complying with the Red Flags Rule?

The Red Flags Rule requires many businesses and organizations to implement a written Identity Theft Prevention Program designed to detect the warning signs – or “red flags” – of identity theft in their day-to-day operations. Are you covered by the Red Flags Rule? Read [Fighting Fraud with the Red Flags Rule: A How-To Guide for Business](#) to:

- ✓ Find out if the rule applies to your business or organization;
- ✓ Get practical tips on spotting the red flags of identity theft, taking steps to prevent the crime, and mitigating the damage it inflicts; and
- ✓ Learn how to put in place your written Identity Theft Prevention Program.

By identifying red flags in advance, you’ll be better equipped to spot suspicious patterns when they arise and take steps to prevent a red flag from escalating into a costly episode of identity theft. Take advantage of other resources on this site to educate your employees and colleagues about complying with the Red Flags Rule.

Link to the Guide
Get Copies of the Guide

GET STARTED

- Guidance Available at: <http://www.ftc.gov/bcp/edu/microsites/redflagsrule/index.shtml>
- The FTC Red Flags Rule requires many businesses and organizations to implement a written Identity Theft Prevention Program designed to detect the warning signs – or “red flags” – of identity theft in their day-to-day operations.
- Are you covered by the Red Flags Rule?
- New Deadline for FTC regulated cover entities: TBD

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Revisions to the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

FTC GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

Sec. 255.0 Definitions.

255.1 General considerations.

255.2 Consumer endorsements.

255.3 Expert endorsements.

255.4 Endorsements by organizations.

255.5 Disclosure of material connections.

Authority: 38 Stat. 717, as amended; 15 U.S.C. 41 - 58.

§255.0 Definitions.

(a) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.

(c) For purposes of this part, the term product includes any product, service, company or industry.

(d) For purposes of this part, an expert is an individual, group or institution possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.



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Background on FTC Guides for Endorsements and Testimonials

- Informal but very important statements of policy by the FTC in the field of advertising.
- Significant proposed changes affect:
 - (1) The use of consumer and expert endorsements; and
 - (2) The ability of advertisers to use "new media" endorsements such as bloggers and online message boards.



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Special Rules for Consumer Endorsements

- Consumer Endorsements are interpreted as representing that the endorser's experience is representative of what consumers will generally achieve.
- If the advertiser cannot substantiate that the endorser's experience is typical, the advertisement must clearly and conspicuously either:
 - (a) disclose what the generally expected performance would be in the depicted circumstances; or
 - (b) clarify the limited applicability of the endorser's experience.



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Summary of Key Proposed Changes to FTC Testimonial Guides

- **Expanded Definition of Endorsements**
- **Expanded Liability**
 - Under the Commission's proposed changes, endorsers, as well as marketers, may be liable for statements made in the course of their endorsement.
- **The Death of the Disclaimer**
 - A statement by a consumer about his or her experience with the product is deemed to be a representation that other users of the product can expect the same experience.
 - Many marketers do not have the facts necessary to support such a claim so they merely state that the experience of the testimonial is unique and that "Your Experience Will Vary."
- **Disclosure of Connections: The New Frontier**
- **Social Media and Blogs**



State Debt Adjusting Laws and Related Developments



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State Debt Adjusting Law Trends

(Approx. Numbers Provided)

	December 2005	February 2007	July 2008	May 2010
States w/o Debt Adjusting Laws	3	3	2	2
States with Debt Adjusting Prohibitions w/limited or no Exceptions	2	2	1	1
States that Allow For-Profit and Non-Profit Entities to Engage in Debt Adjusting Activities	28	30	36	39
States with Licensing/Registration Requirements	29	31	34	37 (including effective dates of 2010)
States that Require Nonprofit Corporate Status (including (c)(3) status)	18	16	12	9
States that require 501(c)(3) Status	9	7	2	1

* For purposes of this chart, the term debt adjusting generally is defined to mean the entering into or making of a contract with a particular debtor where the debtor agrees to pay a certain amount of money periodically to the organization, and the organization, for consideration, agree to distribute, or distribute the same among specified creditors pursuant to an agreement or plan. It is further defined to mean the business or practice of any organization that holds itself out as acting or offering or attempting to act, for consideration as an intermediary between the debtor and his or her creditors for the purpose of settling, compounding or in anyway altering the terms of payment of any debt.

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State Debt Adjusting Law and Related Developments

- Tennessee (UDMSA)
- Nevada (UDMSA)
- Indiana SB 328
- Kentucky HB 166
- Delaware HB 232 (UDMSA Amendment)
- Mississippi SB 2447

States to watch: Illinois, Maryland, New York, California and others.

Types of statutes that are relevant grows: credit repair, mortgage consultants and more.

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Investigations, Law Enforcement Actions and Private Lawsuits (and Class Actions)

- FTC Act and Related Statutes (e.g., CROA)
- State Consumer Protection Laws
- State Credit Services Organization Acts
- State Debt Adjusting Laws
- State Mortgage Foreclosure Consultant Laws
- Other State Marketing and Security Breach Laws (e.g., email)
- Contract Actions (Arbitration Provisions)
- Private Lawsuits May Include CROA and RICO claims, among other federal statutes.



Private Lawsuits and Class Actions

Where do they come from?

- Federal Credit Repair Organization Act
- State Credit Services Organization Acts
- State Debt Adjusting Laws (e.g., GA, SC, UDMSA states, and others).
- State Mortgage Foreclosure Consultant Laws
- Other State Marketing and Security Breach Laws (e.g., email)
- Contract Actions (Arbitration Provisions)
- Tort Law (Creditor Lawsuits)
- Racketeer Influenced and Corrupt Organizations Act (RICO) (treble damages)



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What's next?

Your future success will depend on your ability to adapt to the changing legal and regulatory landscape. There are no “one size fits all” ways to overhaul your business.

The direction you take may depend on your current business model and practices.

No matter the approach you take – compliance with applicable law will be critical to avoid legal risk and exposure.

- Attorney Model – Liability or Opportunity
- Advertising and Marketing
- Products vs. Services will it make a difference?
- Data Transfer – Do you have permission?
- End of Life / Portfolio
- Compliance
- Other transition options

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Attorney Model: Risk or Opportunity?

- Navigating Challenges:
 - State Laws and Attorneys Rules Prohibiting Compensated Referrals
 - Prohibitions on Attorney Fee Splitting
 - A lawyer may not aid in the unauthorized practice of law
 - A lawyer may not intentionally or recklessly fail to perform legal services with competence
 - Special Rules of Attorney Advertising and Marketing
 - State Debt Adjusting Laws
 - State and Federal Advertising and Marketing Laws
- Avoiding Costly Mistakes:
 - Hess Kennedy
 - Richard Brennan
 - Howard Sinnott
 - Andrew Capoccia
 - Others...(censure, disbarment and other legal actions)
- Enforcement by:
 - State Attorneys General
 - Federal Trade Commission
 - Private Lawsuits
 - State Bar / Court System

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QUESTIONS AND DISCUSSION

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