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Hot Legal Topics in the Debt Settlement Industry: The Perfect Storm of Risk and Opportunity

United States Organizations for Bankruptcy Alternatives (USOBA) Summer Conference
June 8, 2009, 1 – 2:30 pm
Hyatt Regency Chicago, Chicago, IL

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IMPORTANT INFORMATION ABOUT THIS PRESENTATION

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.

Introduction

- FTC and Congress Target the Debt Settlement Industry – Risk and Opportunity
  - How We Got Here
  - Congressional move to Enhance FTC Enforcement and Oversight of Debt Settlement Industry
    - Consumer Credit and Debt Protection Act (H.R. 2309)
- Other Key Federal Developments
- Quick Review of State Debt Adjusting Law Developments
- Investigations, Law Enforcement Actions and Private Lawsuits
- Questions and Answers

The FTC and Congress Target the Debt Settlement Industry

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How We Got Here:

Federal Trade Commission Workshop on Debt Settlement

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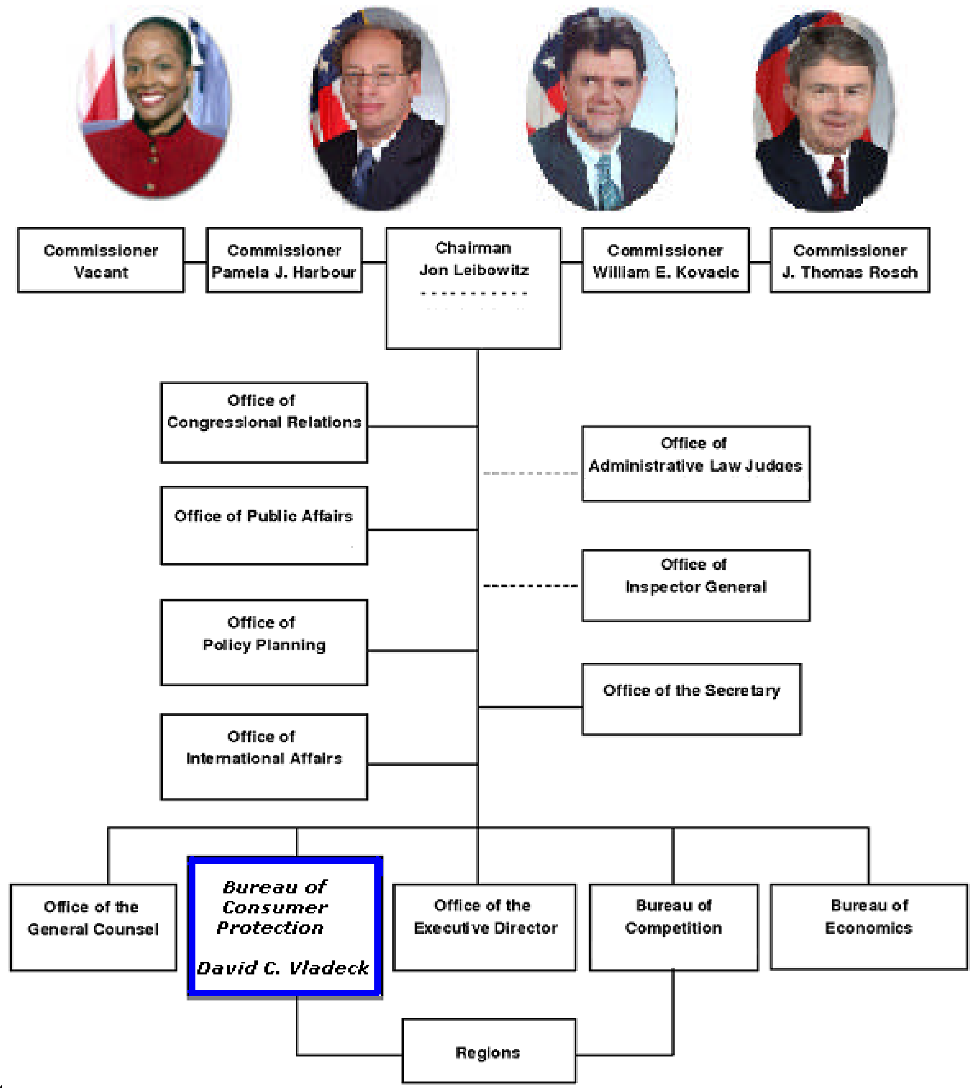
FTC Overview



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Federal Trade Commission Act

- **FTC pursues deceptive practices under Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45 *et seq.*:**
  - Section 5 gives the Commission broad authority to prohibit "unfair or deceptive acts or practices"
  - Section 13(b) authorizes FTC to file suit in United States District Court to enjoin any act or practice that is in violation of any provision of law enforced by the FTC
- **Enforcement against unfair or deceptive practices**
  - Not required to prove actual deception
  - Wide array of remedies: civil penalties, injunctions, restitution, corrective advertising
- **Issues Policy Statements and "Guides" for specific industries and advertising practices**
  - Not official regulations but represent FTC's views of certain practices
  - FTC has issued a Consumer Alert for debt settlement – "Knee Deep in Debt"

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Federal Trade Commission Act

Section 5 Prohibits:

"Unfair or deceptive acts or practices in or affecting commerce."

Deception Standard

- **A representation, omission, or practice is *deceptive* if it is likely to:**
  - Mislead consumers; and
  - Affect consumers' behavior or decisions about the product or service.
- **Ads must be truthful, not misleading, and substantiated.**

Unfairness Standard

An act or practice is unfair if the injury it causes, or is likely to cause, is:

– Substantial;

– Not outweighed by other benefits; and

– Not reasonably avoidable.

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Other FTC Related Statutes and Regulations

- Credit Repair Organizations Act (narrower than state credit repair statues, but more difficult to comply with).
- Telephone Consumer Protection Act
- Telemarketing Sales Rule
  - Disclosure
  - Credit Repair Prohibition on Fees
  - Debit Requirements
- Gramm-Leach-Bliley Act
  - Privacy Rule
  - Safeguards Rule
- CAN-SPAM Act
- Fax

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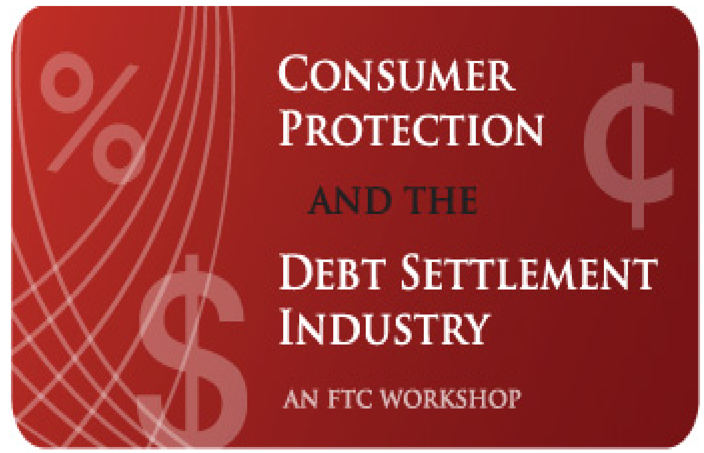
Federal Trade Commission Workshop: Sept. 25, 2008

- **Panel 1: Overview of the For-Profit Debt Settlement Industry: Understanding the Origins of the Industry**
- **Panel 2: The For-Profit Debt Settlement Industry Today: Perspectives on Current Industry Trends and Practices**
- **Panel 3: Protecting the Consumer: a Discussion of Consumer Protection Challenges Facing the For-Profit Debt Settlement Industry**
- **Panel 4: The Future of the For-Profit Debt Settlement Industry: Where Will the Industry Go from Here**



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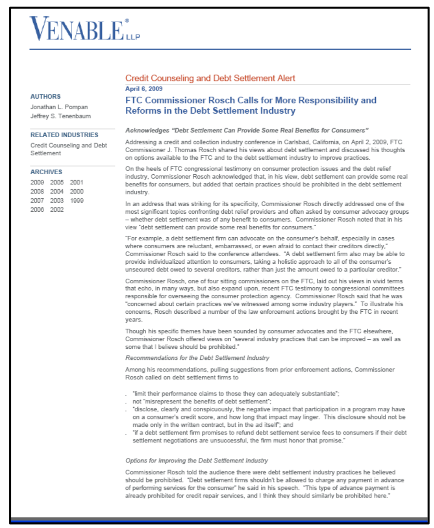
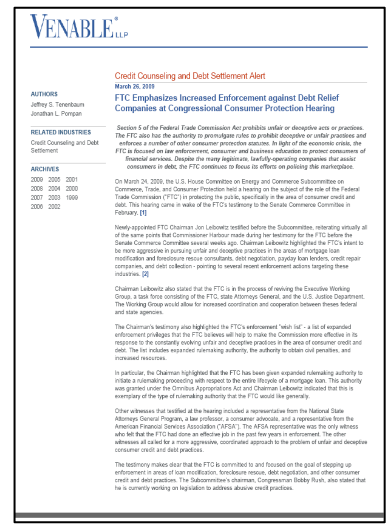
Congressional Move to Enhance FTC Oversight and Enforcement of Consumer Credit and Debt; Debt Settlement Services Targeted





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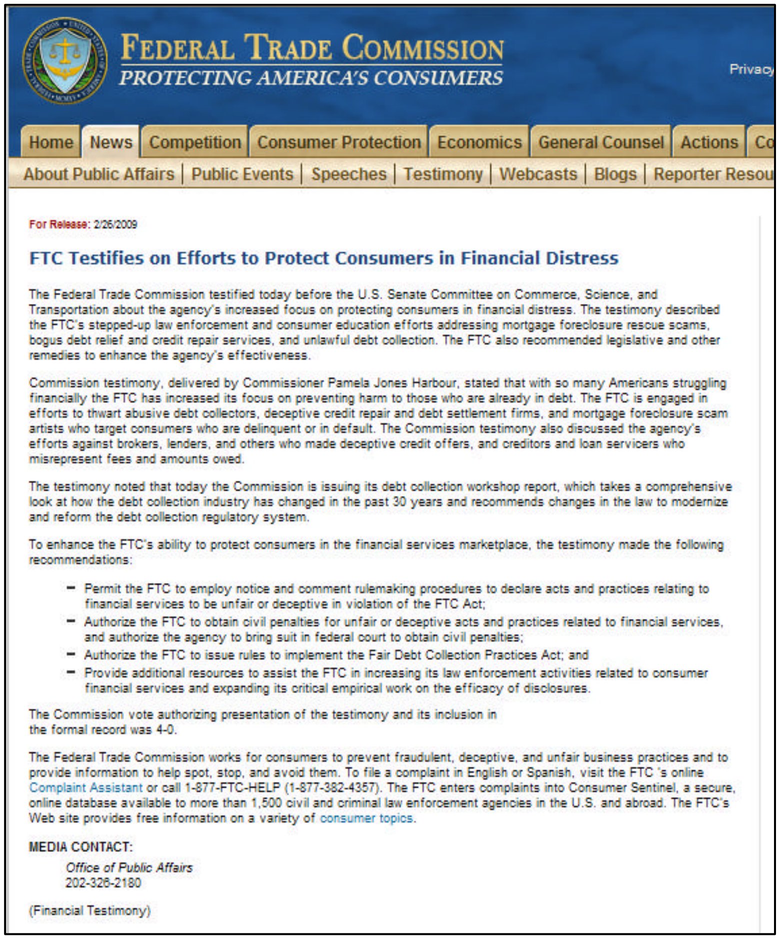
U.S. Senate Committee on Commerce, Science, and Transportation Hearing (Feb. 26, 2009)



For Release: 2/26/2009

FTC Testifies on Efforts to Protect Consumers in Financial Distress

The Federal Trade Commission testified today before the U.S. Senate Committee on Commerce, Science, and Transportation about the agency's increased focus on protecting consumers in financial distress. The testimony described the FTC's stepped-up law enforcement and consumer education efforts addressing mortgage foreclosure rescue scams, bogus debt relief and credit repair services, and unlawful debt collection. The FTC also recommended legislative and other remedies to enhance the agency's effectiveness.

Commission testimony, delivered by Commissioner Pamela Jones Harbour, stated that with so many Americans struggling financially the FTC has increased its focus on preventing harm to those who are already in debt. The FTC is engaged in efforts to thwart abusive debt collectors, deceptive credit repair and debt settlement firms, and mortgage foreclosure scam artists who target consumers who are delinquent or in default. The Commission testimony also discussed the agency's efforts against brokers, lenders, and others who made deceptive credit offers, and creditors and loan servicers who misrepresent fees and amounts owed.

The testimony noted that today the Commission is issuing its debt collection workshop report, which takes a comprehensive look at how the debt collection industry has changed in the past 30 years and recommends changes in the law to modernize and reform the debt collection regulatory system.

To enhance the FTC's ability to protect consumers in the financial services marketplace, the testimony made the following recommendations:

- Permit the FTC to employ notice and comment rulemaking procedures to declare acts and practices relating to financial services to be unfair or deceptive in violation of the FTC Act;
- Authorize the FTC to obtain civil penalties for unfair or deceptive acts and practices related to financial services, and authorize the agency to bring suit in federal court to obtain civil penalties;
- Authorize the FTC to issue rules to implement the Fair Debt Collection Practices Act; and
- Provide additional resources to assist the FTC in increasing its law enforcement activities related to consumer financial services and expanding its critical empirical work on the efficacy of disclosures.

The Commission vote authorizing presentation of the testimony and its inclusion in the formal record was 4-0.

The Federal Trade Commission works for consumers to prevent fraudulent, deceptive, and unfair business practices and to provide information to help spot, stop, and avoid them. To file a complaint in English or Spanish, visit the FTC 's online Complaint Assistant or call 1-877-FTC-HELP (1-877-382-4357). The FTC enters complaints into Consumer Sentinel, a secure, online database available to more than 1,500 civil and criminal law enforcement agencies in the U.S. and abroad. The FTC's Web site provides free information on a variety of consumer topics.

MEDIA CONTACT:

Office of Public Affairs
202-326-2180

(Financial Testimony)

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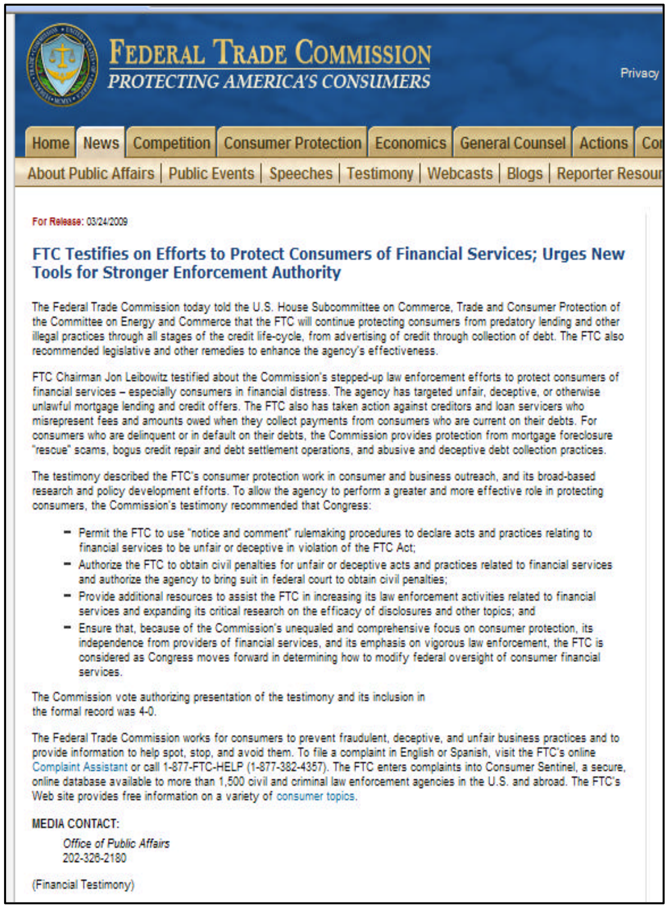
U.S. House Subcommittee on Commerce, Trade and Consumer Protection of the Committee on Energy and Commerce (March 24, 2009)



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For Release: 03/24/2009

FTC Testifies on Efforts to Protect Consumers of Financial Services; Urges New Tools for Stronger Enforcement Authority

The Federal Trade Commission today told the U.S. House Subcommittee on Commerce, Trade and Consumer Protection of the Committee on Energy and Commerce that the FTC will continue protecting consumers from predatory lending and other illegal practices through all stages of the credit life-cycle, from advertising of credit through collection of debt. The FTC also recommended legislative and other remedies to enhance the agency's effectiveness.

FTC Chairman Jon Leibowitz testified about the Commission's stepped-up law enforcement efforts to protect consumers of financial services – especially consumers in financial distress. The agency has targeted unfair, deceptive, or otherwise unlawful mortgage lending and credit offers. The FTC also has taken action against creditors and loan servicers who misrepresent fees and amounts owed when they collect payments from consumers who are current on their debts. For consumers who are delinquent or in default on their debts, the Commission provides protection from mortgage foreclosure "rescue" scams, bogus credit repair and debt settlement operations, and abusive and deceptive debt collection practices.

The testimony described the FTC's consumer protection work in consumer and business outreach, and its broad-based research and policy development efforts. To allow the agency to perform a greater and more effective role in protecting consumers, the Commission's testimony recommended that Congress:

- Permit the FTC to use "notice and comment" rulemaking procedures to declare acts and practices relating to financial services to be unfair or deceptive in violation of the FTC Act;
- Authorize the FTC to obtain civil penalties for unfair or deceptive acts and practices related to financial services and authorize the agency to bring suit in federal court to obtain civil penalties;
- Provide additional resources to assist the FTC in increasing its law enforcement activities related to financial services and expanding its critical research on the efficacy of disclosures and other topics; and
- Ensure that, because of the Commission's unequaled and comprehensive focus on consumer protection, its independence from providers of financial services, and its emphasis on vigorous law enforcement, the FTC is considered as Congress moves forward in determining how to modify federal oversight of consumer financial services.

The Commission vote authorizing presentation of the testimony and its inclusion in the formal record was 4-0.

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(Financial Testimony)

- FTC says: "The historic levels of consumer debt necessarily have affected the services CCAs can provide. The increased demand for debt relief options resulted in the recent growth of *for profit* debt settlement companies."
- 14 Enforcement Actions (About half against settlement companies)
- FTC Requests expanded and expedited rulemaking authority and civil penalties.
  - –Change from Magnuson-Moss Warranty Act
    - Consumer redress when the Commission is able to demonstrate that the respondent had engaged in dishonest or fraudulent conduct.
    - Civil penalties in the event that
      - –Violation of rules from special rulemaking procedures described in the Act or
      - –if the respondent committed a knowing violation of an outstanding decree against a third party (by engaging in the conduct proscribed in the decree.)

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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 Rosch[1]
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

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- *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

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

In my 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 consumers are reluctant, embarrassed, or even afraid, to contact their creditors directly. A debt

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- *FTC Commissioner J. Thomas Rosch Recommendations for the Debt Settlement Industry*

First, debt settlement firms should limit their performance claims to those they can adequately substantiate. For example, a debt settlement firm should not advertise that it can successfully negotiate a consumer's settlement down to only 50 percent of his or her unsecured debt, if the firm's average settlements are closer to 80 or 90 percent of its consumers' unsecured debt.

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

Federal Trade Commission

Second, debt settlement firms' ads should not misrepresent the benefits of debt settlement. For example, they should not claim that the program will protect consumers from debt collection calls or creditor law suits if that is not true.

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- *FTC Commissioner J. Thomas Rosch Recommendations for the Debt Settlement Industry*

Third, debt settlement ads should 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.

Fourth, 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. Moreover, if the refund is subject to certain terms and conditions, they should be clearly and conspicuously disclosed before the consumer signs up for the program.[20]

- Prior Written Consent for Disbursements
- Supports Self-Regulation

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

Federal Trade Commission

- *FTC Commissioner J. Thomas Rosch Recommendations for the Debt Settlement Industry*
  - "limit their performance claims to

Finally, I believe certain practices should be prohibited in the debt settlement industry. In particular, debt settlement firms shouldn't be allowed to charge any payment in advance of performing services for the consumer. This type of advance payment is already prohibited for credit repair services,[21] and I think they should similarly be prohibited here.

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

Federal Trade Commission

As many of you know, I have been a strong proponent of self-regulation in many areas of consumer protection law,[46] and I believe it can play an important role in debt settlement. Self-regulation can provide a critical complement to the FTC's law enforcement actions. It allows

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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. SCHAKOWSKY, 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consumer Credit and 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
- Next – Full Commerce Committee

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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.

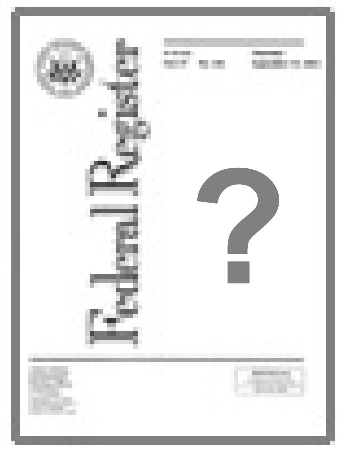
(B) DEFINITION.—For purposes of subparagraph (A), the term "debt settlement service" means any product or service represented directly or indirectly, to renegotiate, settle, or in any way alter the terms of payment or other terms of the unsecured debt between a consumer and one or more unsecured creditors or other entities, including a reduction in the balance, interest rate, or fees owed by a consumer to a creditor or other entity.

- 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
- Next – Full Commerce Committee

What to Expect if there is an FTC Rulemaking

- In order to ensure success, the industry must have ready answers to key questions early in the process.

- Based on the FTC's Current Rulemaking for Foreclosure Consultants Topics to Expect:
  - Empirical Data
  - Need for an FTC Rule
  - Scope of Covered Practices
  - Scope of Covered Entities



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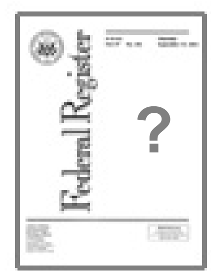
1. Empirical Data – Questions to Expect from the FTC

- What empirical data are available concerning the nature, extent, and impact of the debt settlement services industry?
- What business models are used to provide debt settlement services services? Please identify and describe any such business models and their impact on consumers and competition.
- What are the distinctions between different models of providing debt settlement services (e.g., free versus fee-for-service, full balance vs. less-than-full balance, etc.)?
- What are the costs and benefits of various debt settlement services and related services?



1. Empirical Data cont'd. - Questions to Expect from the FTC

- What roles do creditors and debt collectors play in the debt settlement services industry? What are the costs and benefits of their conduct in the context of debt settlement services services? Do the practices of creditors and debt collectors present consumer protection concerns? If so, how are these concerns the same as or different from those raised by third-party debt settlement services entities?

- What empirical data are available concerning the performance of debt settlement services entities in obtaining promised results? Please identify any such data (broken down by business model, if possible) used to provide debt settlement services, including but not limited to data addressing the following:

  1. The percentage or proportion of consumers enrolled in various debt settlement services who successfully complete the program.

  2. For the consumers who graduate, what is the percentage who, after successfully completing the program, remain current on their unsecured credit payments for a substantial period of time (e.g., six months, one year, or two years).

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2. *Need for FTC Rule - Questions to Expect from the FTC*

- Should the FTC promulgate a rule to address these services? Why or why not?
  - State Law Enforcement Actions and State Debt Adjusting Laws
  - FTC Law Enforcement Actions
- What should be in an FTC Rule?
  - Disclosures
  - Right to Rescind

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2. *Need for FTC Rule - Fees for Services - Questions to Expect from the FTC:*

- Should the Commission address in a proposed FTC rule any fee or refunds practices of providers of debt settlement services? If so, what practices should be addressed, how they should be addressed, and why?

- Should the Commission ban the payment of advance fees for debt settlement services in a proposed FTC rule? If so, why or why not? What effect, if any, would an advance fee ban have on the willingness or ability of debt settlement services providers to do business?

- Should the Commission impose fee restrictions in a proposed FTC rule other than a ban on the advance fees that providers of debt settlement services receive? If so, what restrictions should be imposed and why? Would these restrictions prevent or mitigate the potential harm caused by payment of these fees?
  - To what extent might the possible harm from advance fees be prevented or mitigated by requiring providers to make specific disclosures regarding the timing, amount, or allocation of fees?
  - To what extent might such harm be prevented or mitigated by requiring providers to make more general disclosures regarding the nature and material restrictions of their services (e.g., the disclosures regarding the likelihood of success, timing of services or negotiations with creditors and debt collectors, refund restrictions, or any potentially negative ramifications of using the service)?

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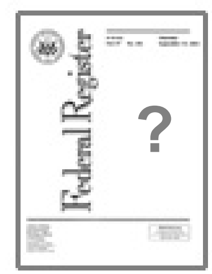
3. Scope of Covered Practices - Questions to Expect from the FTC:

Should conduct by debt settlement service providers or advertisers that the FTC has challenged as unfair or deceptive in violation of Section 5 of the FTC Act in its law enforcement actions be incorporated into a proposed FTC rule? If so, what conduct should be included, how should it be addressed, and why?



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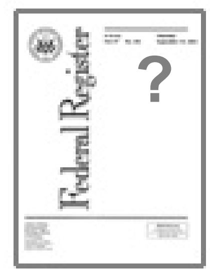
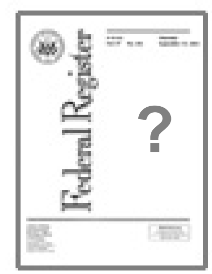
Scope of Covered Practices cont'd. - Questions to Expect from the FTC

- Some states have debt adjusting laws which, in whole or in part, only apply to monthly repayment plans where a company receives funds and distributes those funds to creditors. For what type of services should a proposed FTC rule protect consumers? Should it apply only to debt settlement services that don't touch or control consumer funds destined for creditors, for all debt relief services? Why?
- Please identify any other state restrictions or challenged conduct which should (or should not) be addressed in a proposed FTC rule, and explain why.



4. Scope of Covered Entities - Questions to Expect from the FTC

Generally, an FTC proposed rule would not cover banks, thrifts, federal credit unions, and non-profits. To what extent do these types of entities provide or advertise debt settlement services? To what extent do these entities compete with entities that an FTC proposed rule would cover and what effect would an FTC proposed rule have on such competition?



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Covered Entities cont'd. - Questions to Expect from the FTC

Many states have exempted attorneys from laws (e.g., state debt adjusting laws) which regulate the conduct of providers and advertisers of debt settlement services. What are the costs and benefits of exempting attorneys from these laws?

- What has been the effect of such exemptions on competition between attorneys and non-attorneys in providing or advertising debt settlement services?
- Should an FTC proposed rule include an exemption for attorneys or any other class of persons or entities? Why or why not?

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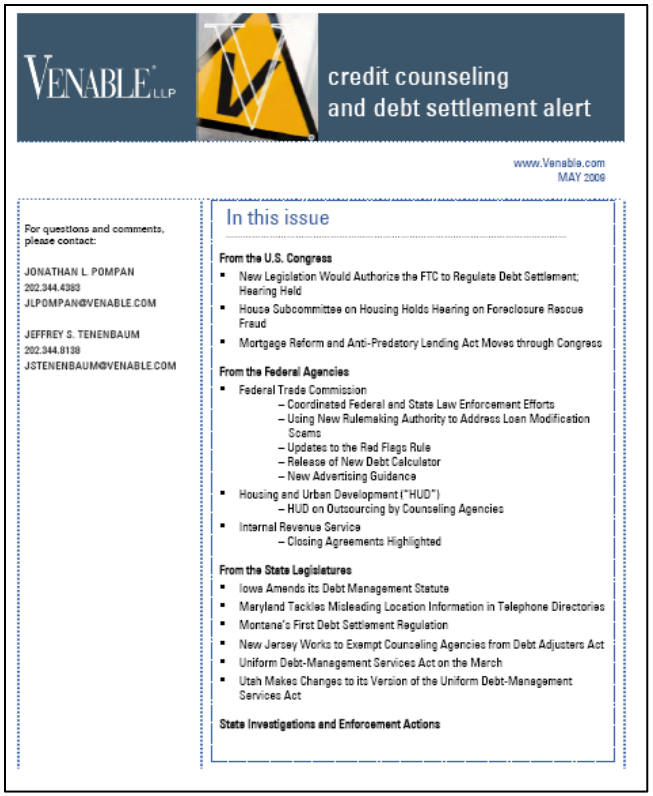
Other Federal Trade Commission Developments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credit counseling and debt settlement alert

www.Venable.com
MAY 2009

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In this issue

From the U.S. Congress
- New Legislation Would Authorize the FTC to Regulate Debt Settlement; Hearing Held
- House Subcommittee on Housing Holds Hearing on Foreclosure Rescue Fraud
- Mortgage Reform and Anti-Predatory Lending Act Moves through Congress

From the Federal Agencies
- Federal Trade Commission
  - Coordinated Federal and State Law Enforcement Efforts
  - Using New Rulemaking Authority to Address Loan Modification Scams
  - Updates to the Red Flags Rule
  - Release of New Debt Calculator
  - New Advertising Guidance
- Housing and Urban Development ("HUD")
  - HUD on Outsourcing by Counseling Agencies
- Internal Revenue Service
  - Closing Agreements Highlighted

From the State Legislatures
- Iowa Amends its Debt Management Statute
- Maryland Tackles Misleading Location Information in Telephone Directories
- Montana's First Debt Settlement Regulation
- New Jersey Works to Exempt Counseling Agencies from Debt Adjusters Act
- Uniform Debt-Management Services Act on the March
- Utah Makes Changes to its Version of the Uniform Debt-Management Services Act

State Investigations and Enforcement Actions

- Updates on the FTC Red Flags Rule
- Release of New FTC Debt Calculator
- New Advertising Guidance - Testimonials

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FTC Red Flags Rule

- 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: August 1, 2009.

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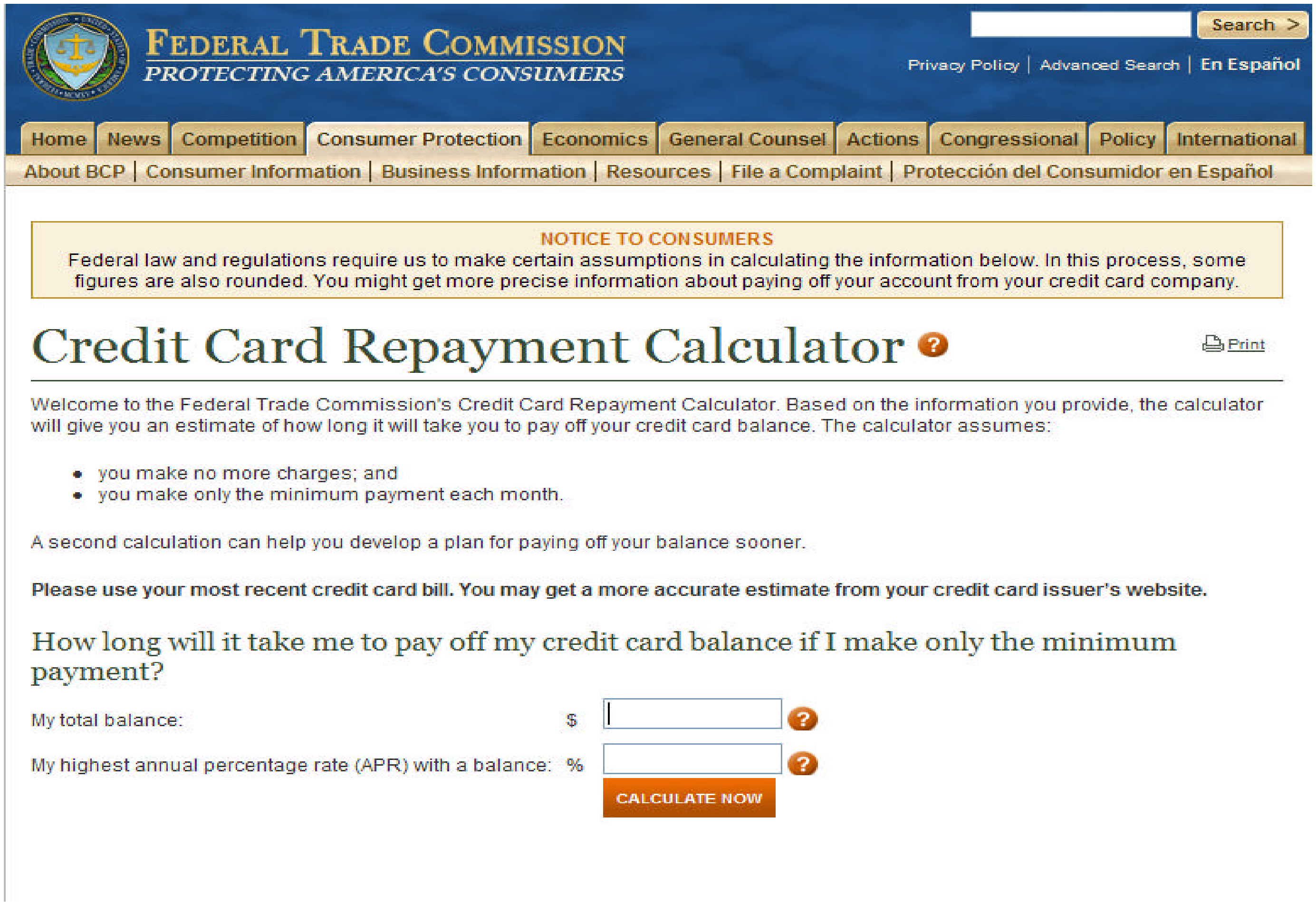
http://www.ftc.gov/creditcardcalculator



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

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NOTICE TO CONSUMERS
Federal law and regulations require us to make certain assumptions in calculating the information below. In this process, some figures are also rounded. You might get more precise information about paying off your account from your credit card company.

Credit Card Repayment Calculator

Print

Welcome to the Federal Trade Commission's Credit Card Repayment Calculator. Based on the information you provide, the calculator will give you an estimate of how long it will take you to pay off your credit card balance. The calculator assumes:

- you make no more charges; and
- you make only the minimum payment each month.

A second calculation can help you develop a plan for paying off your balance sooner.

Please use your most recent credit card bill. You may get a more accurate estimate from your credit card issuer's website.

How long will it take me to pay off my credit card balance if I make only the minimum payment?

My total balance: $

My highest annual percentage rate (APR) with a balance: %

CALCULATE NOW

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

FTC GUIDES CONCERNING USE OF
ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

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

- November 28, 2008: Notice and Request for Comment on Proposed Changes to the Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Guides").
- 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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The Existing FTC Guides

- Major "rules of the road" governing how and where testimonials/endorsements can be employed by advertisers.
- Must reflect the honest opinions, findings, beliefs or experience of the endorser.
- May *not* contain any representations that would be deceptive or could not be substantiated if made directly by the advertiser.

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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.

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**

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Testimonials (cont'd)

The most important questions are: (1) What is going to happen? and (2) When will it happen? At this point, no one knows.

The Commission is analyzing the comments and it would be surprising if anything came out before the Fall – and perhaps the beginning of next year. It may take even longer.

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Quick Update on State Debt Adjusting Law and other Developments

- Texas
- Maine
- Missouri (pending signature)
- California
- Nevada
- Montana
- Utah (amendments to UDMSA)
- Colorado (UDMSA enforcement)
- Iowa
- Tennessee
- New York

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Investigations, Law Enforcement Actions and Private Lawsuits

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
- 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).
- 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)

Practical Tips to Help Avoid Enforcement Actions and Lawsuits and on How to Fight Back When Investigated or Sued

Practical Tips to Help Avoid Law Enforcement Actions and Private Lawsuits

- Comply with Federal and State Consumer Protection Laws.
- Evaluate and comply with each state's debt adjusting laws (based on residence of consumer) and all other applicable laws (including tax requirements).
- Obtain all required authorizations, licenses and registrations (*e.g.,* debt adjusting, telemarketing, authority to do business, etc.).
- Train Management and Staff
- Appoint a Compliance Officer
- Private Lawsuits - Consider utilization of an arbitration provision that, among various points, (1) avoids a form contract and small, illegible print that is difficult to read," (2) ensures that consumer expressly agrees to the arbitration clause," (3) ensures that clause is not cost prohibitive.
- More…

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Get Informed and Get Help

- Training is the key
  - Become familiar with state and federal laws that could affect your business
  - Industry associations and private firms provide resources to help keep you informed
- Find someone who can help you make compliance with applicable rules part of your business
- Be Prepared

Develop a Compliance Plan

- Plans will vary based on the needs of your company
- Certain elements are universal
  - Classification of Services (what is your business model?)
  - System for Screening Customers
  - System for Assessing Red Flags
  - State Compliance Requirements
  - Advertising and Marketing Review
  - Systems Reviews
  - Training
  - Recordkeeping

Final Thoughts

- Be prepared for potential federal regulation
  - Support Efforts to Develop Empirical Data
  - Self Regulation
  - Individual Company Performance
  - Government Affairs
- Don't be Penny-Wise and Pound Foolish
- Customer satisfaction lessens, but does not eliminate, enforcement risk.
- Penalties for violating federal and state laws applicable to debt settlement can be severe, including:
  - Civil/Administrative penalties;
  - Criminal penalties, including fines and jail time;
  - Bans from industry and impediment to licensures.
  - Asset freezes and forfeitures.
- A compliant industry sets the stage for future legislative accomplishments…

QUESTIONS AND DISCUSSION

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To view Venable's index of articles and PowerPoint presentations on debt settlement industry legal topics, see www.Venable.com/ccds/publications

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