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VIA ELECTRONIC SUBMISSION ONLY

Office of the Secretary
Federal Trade Commission
Room H-135 (Annex K)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Debt Settlement Industry - Public Workshop

Dear Mr. Secretary:

The following comments are submitted on behalf of ACA International ("ACA") in response to the Federal Trade Commission's request for comments on the growth of the for-profit debt settlement industry and the effectiveness of the Commission's consumer protection mission to deter unfair or deceptive acts and practices within the industry.

ACA members do not work in the for-profit debt settlement industry. With increasing frequency, ACA members interact with representatives of for-profit debt settlement companies that purport to represent consumers seeking to settle outstanding payment obligations. As an association of business that regularly interact with credit-grantors, consumers, and credit reporting agencies in the accounts receivable management process, ACA members have a unique perspective to contribute to the Commission's evaluation of the debt settlement industry's practices.

ACA is concerned that some for-profit debt settlement companies disadvantage consumers by misstating their services and the impact of the Fair Debt Collection Practices

Act, the Fair Credit Reporting Act, and related State statutes. The consequences can be severe for consumers who rely upon for-profit debt settlement companies to represent their interests in compliance with Federal and State laws. The practices highlighted herein may not apply to all for-profit debt settlement companies, however, the pattern of overall conduct suggests that the Commission should closely scrutinize the marketing claims and other conduct of the industry and, where appropriate, utilize its enforcement authority under Section 5 of the Federal Trade Commission Act to deter further violations.

I. Background On ACA International.

ACA International is an international trade organization originally formed in 1939 and composed of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 6,000 members based in more than 55 countries and ranging from credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates. ACA has numerous divisions or sections accommodating the specific compliance and regulatory issues of its members' business practices.

The company-members of ACA are subject to applicable Federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activity of ACA members is regulated primarily by the Commission under the Federal Trade Commission Act, 15 U.S.C. § 45 et seq., the FDCPA, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., in addition to numerous other Federal and state laws. Indeed, the accounts receivable management industry is unique because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering payments. In so doing, Congress primarily committed the Federal enforcement of the recovery of debts to Commission.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

ACA serves members and represents the industry by developing timely information based on sound research and disseminating it through innovative education, training, and communications. The Association also promotes professional and ethical conduct in the global marketplace; acts as the members' voice in critical business, legislative, legal, regulatory and public arenas; and provides quality products and services to its members.

To help members stay current on regulatory and business developments, as well as industry practices, ACA provides more than 130 educational and training workshops to its members each year, with nearly 1,000 industry professionals completing ACA's collector credentialing program annually. As discussed in detailed herein, ACA is the industry leader in providing compliance information and education to its members, and education to consumers to encourage financial literacy. ACA provides consumers with valuable information about their rights under the FDCPA and the Fair Credit Reporting Act.

In addition, ACA has a Code of Ethics and Professional Responsibility (Ethics Code). Upon becoming a member of ACA and as a condition of membership renewal, each member agrees to abide by the Association's Ethics Code. In addition, ACA members must comply with all Federal and state laws and regulations governing the credit and collection industry. In fact, ACA's commitment to compliance is reflected in the fact that consumers are encouraged to file complaints with ACA. If a complaint is filed regarding an ACA member, ACA investigates the complaint and, if it finds that a member company has violated the Association's standards and ethics guidelines, it will impose sanctions ranging from a private letter of admonition to suspension to expulsion.

II. ACA Members Are A Critical Part Of The Economy.

The credit and collections industry in general, and ACA members in specific, play a crucial role in safeguarding the health of the economy. Uncollected consumer debt threatens a vulnerable economy. According to a 2006 economic impact study of the collections industry conducted by PricewaterhouseCoopers LLP, third party collection agencies returned $39.3 billion to creditors measured on a commission basis in 2005.[1] This represents a savings of

[1] *See* PricewaterhouseCoopers, LLP, *Value of Third-Party Debt Collection to the U.S. Economy: Survey and Analysis* (June 27, 2006). The $39.3 billion returned to creditors in 2005 amounts to a 22 percent reduction in non-public debt. *Id.* It equates to 11.4 percent of the before tax profits of all United States' domestic financial corporations. *Id.*

$351 per household each year, which equates to 155 gallons of gasoline or 129 days of electricity payments attributed to households.[2]

By itself, outstanding credit card debt has doubled in the past decade and now exceeds one trillion dollars. Total consumer debt, including home mortgages, exceeds $9 trillion.[3] Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of practically every community's businesses. For example, ACA members represent the local hardware store, the retailer down the street, and the local physician. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers.

Without an effective collection process, the economic viability of these businesses, as well as public debt recovery programs, is threatened. At the very least, Americans would be forced to pay higher prices to compensate for uncollected debt.

III. ACA's Comments.

The settlement of debts and credit counseling activities may be beneficial to consumers in defined situations as a way to gain control over consumers' finances and address outstanding debt obligations. ACA's comments are directed not toward the concept of debt settlement itself, but instead the specific practices of for-profit entities that are inconsistent with the requirements of the credit and collection laws. These practices are illustrated in the following examples:

A. False Statements of Authority in Violation of the FDCPA's Third-Party Disclosure Prohibitions.

ACA members report that debt settlement companies have engaged in conduct that violates or induces the violation of the third-party disclosure prohibitions of the FDCPA as well as State laws requiring a power of attorney ("POA") to disclose personal financial

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2 *Id.*

3 William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*, Wash. Post, Jan. 12, 2004.

information concerning a consumer. ACA members routinely receive letters from debt settlement companies or law firms claiming to represent consumers. Commonly the letters include POAs that purport to be signed by the consumer authorizing the attorney to act on behalf of the consumer. The attorney then directs the credit-grantor or collection agency to work with a debt settlement company to resolve the debt. In some instances, the POAs are deficient because they fail to comply with State laws for this type of document. This creates two problems – the POA is invalid and unenforceable, and there is no authority permitting an attorney to transfer a POA to a debt settlement company under agency rules. In either situation, the POA is inadequate to accomplish the purpose for which it is put to credit grantors and collection agencies.

Absent a valid POA, the debt settlement company has no authority to inquire with a credit-grantor or collector about a debt without violating the third-party communication prohibitions under the FDCPA. Section 805(b) of the FDCPA provides:

> Except as provided in section 1692b [§ 804] of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post-judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.[4]

This part of the statute prohibits collectors from speaking with a third party such as a debt settlement company unless the collector has the prior consent of the consumer, the express permission of a court, or as necessary to effectuate a post-judgment remedy. Therefore, without judicial involvement, a collector is prohibited from communicating with a debt settlement company unless the collector receives express permission or authorization from the consumer.

Various legal authorities have defined the scope of permissible third-party communications under section 805. Courts and the FTC have stated previously that a debt collector can communicate information about a debt to (a) the consumer's attorney,[5] (b) a

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4 15 U.S.C. § 1692c(b).

5 *See Phillips v. North Am. Cap. Corp.*, 1999 WL 299872 (N.D. Ill. Apr. 30, 1999).

consumer reporting agency,[6] (c) the creditor, (d) an attorney representing the creditor,[7] (e) the debtor's spouse,[8] (f) the parent of a minor debtor,[9] and (g) co-debtors.[10] The Commission has clarified in informal staff opinion letters under the FDCPA that an "attorney" for purposes of section 805 is someone who has graduated from law school and admitted to practice law in at least one jurisdiction.[11] At a minimum this implies that a debt settlement company does not have authority to engage a credit-grantor or collector in discussions about a consumer's debt simply because an attorney has attempted to transfer his or her POA to the settlement company.

To circumvent the lack of standing under the FDCPA, debt settlement companies encourage consumers to execute POAs governing the consumers' financial affairs. This presents problems. A person acting under a POA is bound by principles of agency law. POA requirements vary significantly from state to state. For instance, New York law requires the principal's signature to be notarized in order to be valid. Failure to follow State law procedures renders the POA a nullity.

If the holder of the POA is not an attorney or he or she has failed to follow State law requirements, communicating with the holder about a consumer's debt is not permitted under the FDCPA and state law analogs. Such a communication would be considered a third-party disclosure in violation of section 805(b) unless the consumer has provided her express consent to speak with the third party. At least one court has concluded that section 805(b) was violated when a collector discussed a debt with a third-party that claimed to hold a POA from a consumer.[12]

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6 *See Ditty v. CheckRite, Ltd.*, 973 F. Supp. 1320 (D. Utah 1997).

7 Bagwell, FTC Informal Staff Letter (Jan. 6, 1987).

8 *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983).

9 Atteberry, FTC Informal Staff Letter (July 18, 1978).

10 *Pearce v. Rapid Check Collection*, 738 F. Supp. 334 (D. S.D. 1990).

11 Edwards, FTC Informal Staff Letter (Feb. 7, 1991).

12 *Fava v. RRI, Inc.*, No. 96-CV-629 RSP/DNH, 1997 WL 205336 (N.D.N.Y. Apr. 24, 1997).

The increase in for-profit debt settlement companies has resulted in more of these companies seeking to interpose themselves between consumers and credit-grantors or collectors. The lack of authority issues noted above result in serious questions about the ability of these companies to act on the behalf of and bind consumers when dealing with credit-grantors and collection agencies. ACA respectfully requests that the Commission's workshop report address these problems to provide guidance to consumers and the collection industry to clearly reaffirm the requirements that for-profit debt settlement companies to comply with all applicable Federal and State laws, including laws relating to the creation and enforcement of POAs. By so doing, ACA hopes to avoid further situations where consumers' rights under the FDCPA are abrogated by the conduct of the debt settlement companies.

B. False Statements Concerning the Ability of Debt Settlement Companies to Prevent Litigation and the Effect on Credit Scores.

ACA members report a variety of false and misleading statements made by debt settlement companies. The Commission's workshop and other written submissions in the record have developed this point extensive. ACA therefore wishes to focus only on a few categories of misstatements which surface in dealings between collectors and for-profit debt settlement companies. For example, a common misconception is that debt settlement companies can forestall or prevent credit-grantors from commencing litigation to recover a debt. Debt settlement companies commonly make representations about their ability to ward off litigation as an inducement to consumers to sign up with their programs, but in reality credit-grantors are not required to settle debts and may refuse altogether to negotiate a resolution to an outstanding debt lower than the current amount due. Because debt settlement companies do not make monthly payments on the consumer's outstanding accounts, the account remains in default and the creditor or its assignee can at any time commence a lawsuit to recover the balance. Further to the detriment of consumers, it is reported that for-profit debt settlement companies make irregular payments on consumers' accounts which negatively affects credit scores.

Other less-than-robust disclosures about the effect of participating in a debt settlement program can result in severe problems for consumers' credit scores. In the experience of ACA members, some debt settlement companies fail to properly disclose the negative consequences of participating in a debt settlement program in terms of downward adjustments in credit scores. When consumers fail to make scheduled payments to credit-grantors as they are accumulating funds to settle the debt, the accounts that are unpaid fall further into arrears. Credit-grantors routinely report the number of days of missed payments. The scheduled

payments that are missed are factored into the consumer's credit rating and can result in charge-offs that may further damage the consumer's credit score. Indeed, the fact that a debt is settled results in a negative tradeline on a consumer's credit report that can lower a consumer's FICO score. All of these repercussions need to be fully disclosed and understood by consumers before electing to pay a for-profit debt settlement company. Indeed, in many instances, consumer self-help working directly with credit-grantors and collection agencies is equally successful and avoids the excessive fees charged by some for-profit debt settlement companies.

C. False Statements About the Ability to Cease Communications.

Debt settlement companies typically send letters to debt collectors which request that the collectors cease communications with the consumers and forward all communications to the debt settlement companies purportedly holding a POA. As noted above, section 805 of the FDCPA prohibits a collector from communicating with a consumer if the collector knows the consumer is represented by an attorney with respect to the debt.

Merely because a debt settlement company holds a POA does not authorize it to invoke a cease communications request under the FDCPA. The company is not an attorney. Moreover, a cease communication request is invalid if the settlement company has failed to follow State laws to create a valid POA. This can create a number of complicated legal issues under the FDCPA. For example, a debtor under the FDCPA can dispute a debt in a communication to a debt collector which triggers a requirement that the collector notate the account as disputed in credit reporting. In situations in which the dispute originates not with the debtor but with a for-profit debt settlement company purportedly acting pursuant to a POA, it is not clear whether the debt collector is required to report the account as disputed where the collector believes that the POA is invalid. The Commission should clarify this in order to make sure consumers' accounts are accurately updated.

The result is confusing to consumers. Consumers believe that the settlement company has invoked a cease communication request, yet collectors continue to communicate directly with the consumer because the POA relied upon by the settlement company is invalid. ACA respectfully submits that the seeds of this confusion are sown when the settlement companies fail to accurately inform consumers of their rights under the FDCPA or state laws. For example, a cease communication request is not absolute. As reflected in the statute and confirmed in the Commission's October 5, 2007, Advisory Opinion, section 805(c) includes an express exception to its prohibition on communication pursuant to which a collector can subsequently advise the consumer of the cessation of collection efforts.

It stands to reason that if a debt settlement company makes representations to current or future clients about its ability to stop all communications from collection agencies, the representations should be accurate and consistent with the FDCPA requirements.

IV. Conclusion.

ACA appreciates the opportunity to comment on problems observed by members of the credit and collections industry in their interactions with for-profit debt settlement companies. Consistent with the majority of participants at the workshop, ACA believes that these problems should be addressed by the Commission through the use of appropriate enforcement under section 5 in conjunction with state consumer protection statutes.

We welcome the opportunity to meet with you to discuss ACA's comments. If you have any questions, please contact Andrew Beato at 202-737-7777.

Sincerely yours,

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