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Committee on Banking and Insurance

REGULATION OF DEBT RELIEF SERVICES

Issue Description

Consumer credit is a critical component of the U.S. economy. Credit allows consumers to purchase goods and services for which they are unable or unwilling to pay the entire cost at the time of purchase. By extending credit, however, creditors take the risk that some consumers will not repay all or part of the amount that they owe. The latest federal survey indicates that 46 percent of families with credit cards carry a balance. The mean (average) balance of those persons carrying a balance is \$7,300.¹

In the last few years, an increasing number of disreputable companies have been capitalizing on the current economic turmoil and credit troubles of consumers. Some consumers are unable to pay their credit card obligations due to the loss of a job, overspending, divorce, or family illness and are often the subject of harassment and abuse by unethical debt collectors. These financial problems can take a toll on consumers, particularly vulnerable older consumers, resulting in consumers seeking a quick fix. Often, this pressure entices consumers to choose proffered solutions that are too good to be true. Unscrupulous entities target such consumers by engaging in deceptive and misleading marketing practices (e.g., promising the cancellation of debts for pennies on the dollar, avoiding bankruptcy, or erasing bad credit) or charging egregious fees for services that are never provided.

Florida laws provide consumer protection and regulation of debt relief services under part VI, ch. 559, parts III and IV, ch. 817, F.S., and part II of ch. 501, F.S. The purpose of this interim project is to determine whether these laws provide adequate consumer protections and enforcement tools for regulators.

Background

When too many consumers do not pay their credit card debt, creditors become less willing to lend money and may tighten underwriting requirements, resulting in an increased cost of borrowing, even for a creditworthy consumer. Creditors, including credit card companies, try to recover on these debts by using internal and third party debt collectors. The effectiveness of these collection efforts has implications for the pricing and availability of credit.

Generally, once a creditor determines that an account is overdue or delinquent, a creditor will attempt to contact the delinquent consumer via telephone or collection letters. Some creditors contract with external debt collection agencies companies to collect on accounts that are between 30 and 90 days past due, but not yet charged off as losses. If a creditor's collection efforts are not successful within a period of 6 months or so, the creditor will write off the debt. At this point, the creditor will place the account with a third-party collector. If the third-party collector is successful in recovering some of the debt, it will be paid a fee based on a percentage of the amount collected, which was an average fee of 28 percent in 2005.² Unsecured creditors and collection agencies can also file suit against a debtor and obtain a court judgment authorizing the garnishment of the debtor's wages. Instead of pursuing further collection costs, a creditor may opt to sell the debt. However, these collection efforts must operate within the parameters of law, which protect the rights of consumers.

¹ Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach, and Kevin B. Moore, *Federal Reserve Bulletin*, vol. 95 (February 2009), pp. A1-A55. www.federalreserve.gov/pubs/bulletin/default.htm.

² See Federal Trade Commission workshop, *Collecting Consumer Debts: The Challenges of Change* (October 10-11, 2007).

Federal Laws and Regulations Related to Consumer Debt and Credit

The debt relief industry is comprised of businesses providing products and services, including credit counseling, credit repair, debt management, debt settlement, and debt collection. Many federal laws have been enacted to protect consumers from deceptive and fraudulent practices related to debt relief services. The Federal Trade Commission (FTC) has jurisdiction to enforce certain federal consumer protection laws through the Federal Trade Commission Act,³ the Telemarketing and Consumer Fraud Act,⁴ the Credit Repair Organizations Act,⁵ and Fair Debt Collection Practices Act.⁶

Federal Trade Commission Act -- The FTC is empowered to (1) prevent unfair methods of competition, and unfair or deceptive acts or practices affecting commerce; (2) seek monetary redress for conduct injurious to consumers; (3) adopt trade regulation rules defining acts or practices that are unfair or deceptive; and (4) conduct investigations relating to the business practices.

Telemarketing and Consumer Fraud and Abuse Prevention Act -- The act requires the FTC to adopt regulations (1) defining and prohibiting deceptive telemarketing acts or practices; (2) prohibiting telemarketers from engaging in a pattern of unsolicited telephone calls that a reasonable consumer would consider coercive or an invasion of privacy; (3) restricting the hours of the day and night when unsolicited telephone calls may be made to consumers; and (4) requiring disclosure of the nature of the call at the start of an unsolicited call made to sell goods or services.⁷

Credit Repair Organizations Act -- This act prohibits untrue or misleading representations and requires certain affirmative disclosures in the offering or sale of credit repair services. The act bars credit repair companies from demanding advance payment, requires that "credit repair" contracts be in writing, and gives consumers certain contract cancellation rights.

Fair Debt Collection Practices Act -- The intent of the act is to protect consumers from harmful debt collection practices and to protect ethical collectors from an unfair competitive disadvantage. The act establishes standards of conduct for the collection industry by prohibiting abusive, deceptive, and unfair debt collection practices. The act applies to third-party collectors, which includes contingency agencies, collection law firms, and debt buyers. The act requires a collector to cease collection efforts until it has provided written verification of disputed debt.

Fair Credit Reporting Act -- The act⁸ promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies, such as credit bureaus. If a consumer identifies information in his or her credit report that is incomplete or inaccurate, and reports it to the consumer reporting agency, the agency must investigate unless the dispute is frivolous. Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information. Companies that provide information to consumer reporting agencies also have the duty to investigate disputed information.

Federal Bankruptcy Provisions -- In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act⁹ was enacted, which limits the ability of a consumer with adequate income to immediately discharge unsecured debt under a Chapter 7 bankruptcy filing. The act imposes a needs-based means test to determine if an individual may discharge unsecured debts under Chapter 7 or is required to pay a certain amount contingent on the debtor's income toward such debts under a Chapter 13 debt payment plan. Prior to these reforms, a consumer might have discharged or liquidated the entire amount of unsecured debt.

³ 15 U.S.C. ss. 41-58.

⁴ 15 U.S.C. ss. 6101-6108.

⁵ 15 U.S.C. s. 1679.

⁶ 15 U.S.C. s. 1692.

⁷ 16 C.F.R. Part 310.

⁸ 15 U.S.C. ss. 1681-1681(u).

⁹ Pub L. No. 109-8.

Regulation of Debt Relief Services in Florida

Florida law does not assign any specific state agency with the duty of enforcing the laws governing credit counseling agencies, debt management services, or credit service organizations. However, the Department of Legal Affairs and state attorneys do protect consumers from the entities that employ unfair methods of competition or unconscionable, deceptive, and unfair practices by using several enforcement tools. In regards to consumer collection agencies, Florida law designates the Office of Financial Regulation as the regulator. The OFR is under the Financial Services Commission, which is comprised of the Governor and Cabinet.¹⁰

Florida Deceptive and Unfair Trade Practices Act -- The Florida Deceptive and Unfair Trade Practices Act,¹¹ provides remedies and penalties for “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹² Violations of this part include any violation of this act and rules adopted pursuant to the FTC Act, which would include the standards of unfairness and deception set forth and interpreted by the FTC or the federal courts. Willful violations of the act occur when the person knew or should have known that the conduct was unfair, deceptive, or prohibited by rule. Remedies for practices prohibited by the act may include an action to enjoin a person from committing such acts,¹³ an action to recover actual damages caused by the violation, as well as the imposition of a civil penalty of generally not more than \$10,000 for each willful violation. Actions can be brought by a state attorney, the Department of Legal Affairs,¹⁴ or by a consumer.¹⁵

Credit Counseling Services and other Debt Management Services -- In Florida, credit counseling agencies are organizations providing credit counseling services or debt management services.¹⁶ The term “credit counseling services” means money management, debt reduction, and financial educational services. “Debt management services” generally means services provided for a fee to adjust or discharge the indebtedness of the debtor.¹⁷

Any person engaged in credit counseling *or* debt management services is prohibited from charging fees to any consumer or debtor *residing in Florida* in excess of amounts prescribed in s. 817.802, F.S. Section 817.802(1), F.S., prohibits a person, while engaging in debt management services or credit counseling services, from charging or accepting a fee greater than \$50 for the initial consultation. Subsequently, the person may not charge or accept a fee greater than \$120 per year for additional consultations or, alternatively, if debt management services are provided, the person may charge 7.5 percent of the amount paid monthly by the debtor or \$35 per month, whichever is greater. A violation of any provision of part IV of ch. 817, F.S., is an unfair or deceptive trade practice under the Florida Deceptive and Unfair Trade Practices Act.¹⁸ Accordingly, the Department of Legal Affairs can enforce Part II of ch. 501, F.S., against credit counseling agencies engaging in unfair and deceptive trade practices. A person who violates any provision of the act commits a third-degree felony. A consumer harmed by a violation of this act may bring an action for recovery of damages, costs, and attorney’s fees.

Credit Service Organizations -- Section 817.7001, F.S., defines a “credit service organization (CSO)” as an entity that represents that it can, for a payment, improve a buyer’s credit rating or obtain an extension of credit for a buyer. A CSO is prohibited from charging or collecting payment prior to the complete performance of the CSO’s services unless the CSO has posted a surety bond for \$10,000. The contract must provide a “cooling off” period of 5 days during which the buyer may cancel the contract, as well as disclose the services to be provided by the organization.

¹⁰ Section 20.121(3), F.S.

¹¹ Part II of ch. 501, F.S.

¹² Section 501.204, F.S.

¹³ Section 501.207(1)(b), F.S.

¹⁴ Section 501.203(2), F.S.

¹⁵ Section 501.211(1), F.S.

¹⁶ Part IV, ch.817, F.S.

¹⁷ Section 817.801, F.S.

¹⁸ Part II, ch. 501, F.S.

Consumer Debt Collection Agencies -- Part VI of ch. 559, F.S., regulates consumer collection agencies and protects consumers from certain debt collection practices that involve fraud, harassment, threats, and other unscrupulous activities. Section 559.725, F.S., designates the Department of Financial Services (DFS) as the registry for consumer complaints. Once the DFS receives a sworn complaint against an entity, the DFS refers the complaints to the appropriate regulatory authority or the Florida Bar, if appropriate. However, in January 2008, the OFR and the DFS mutually agreed to the DFS delegating this responsibility to the regulator, the OFR.

The OFR is responsible for the registration¹⁹ of consumer collection agencies and has limited investigative and enforcement powers and duties. Any out-of-state debt collector who collects or attempts to collect consumer debt prior to registration is subject to an administrative fine not to exceed \$1,000.²⁰ Section 559.72, F.S., outlines prohibited practices as they relate to the collection of consumer debts, which range from prohibitions against persons impersonating a law enforcement officer or governmental agency to using threats of force or violence. Section 559.725, F.S., authorizes the OFR to investigate by means of written communication with the accused collection agency. The OFR has no authority to examine the actual books and records of a consumer collection agency to determine the factual basis of a complaint. Before the OFR may take action, there must be at least five unresolved, sworn complaints filed by five different consumers within a 12-month period against a consumer collection agency.

The OFR is required to notify the appropriate state attorney, or the Attorney General in the case of an out-of-state consumer debt collector, of any determination by the OFR of a violation of the requirements of this part.²¹ State attorneys may apply to a court of competent jurisdiction upon the sworn affidavit of any person alleging a violation of any of the provision of this part.²²

Findings and/or Conclusions

Debt Relief Industry

In recent years, the number of consumer complaints and inquiries related to debt relief has increased significantly both at the federal and state levels. The recent increase in complaints may be attributable to a number of factors, such as the recent recession and the resulting increase in delinquent debt flowing to collection departments and collection agencies, and the increased ease with which consumers can file complaints or inquiries via the Internet.

In 2008, the FTC received 78,838 complaints regarding debt collections activities. By comparison, in 2007, the FTC received 71,004 debt collection complaints.²³ In Florida, the DFS received 1,051 filed complaints between January 1, 2007, and January 7, 2008. Of the 1,051 complaints, 847 were notarized, as required by law, and referred to the OFR for investigation. Subsequently, the OFR received 1,446 written complaints against consumer collection agencies from January 7, 2008, to October 26, 2009.²⁴ Of the 1,446 complaints, the OFR has closed over 80 percent or 1,158. During the period of January 1 to October 6, 2009, the Attorney General received approximately 1,833 consumer complaints regarding consumer debt collection, which were referred to the OFR. For fiscal year 2007-2008, the Division of Consumer Services of the Department of Agriculture received 422 consumer collection complaints and referred the consumers to the OFR.

From January 1 to October 6, 2009, the Attorney General received approximately 960 consumer complaints related to credit repair and debt management services. For fiscal year 2007-2008, Department of Agriculture and Consumer Services received 67 credit repair complaints and 191 debt consolidation complaints.

¹⁹ Section 559.555, F.S.

²⁰ Section 559.565, F.S.

²¹ Section 559.725, F.S.

²² Section 559.78, F.S.

²³ Federal Trade Commission, Annual Report 2009: Fair Debt Collection Practices Act.

²⁴ It is unclear whether the 1,446 complaints received by the OFR include the 847 referrals made by the DFS.

Credit Counseling Organizations -- Credit counseling organizations generally assist people with managing their personal debt and developing budgets. These organizations may attempt to help debtors avoid foreclosure or bankruptcy and reduce interest rates and monthly payments on unsecured loans. These services are provided through local offices, the Internet, or the telephone. A debt management plan (DMP) allows a debtor to reduce debt through monthly deposits to the credit counseling organization, which then distributes those funds to creditors. The CCO uses the money to pay unsecured loans and other debts in accordance with a payment schedule that has been agreed upon with the consumer and creditor. As a condition of the DMP, the consumer may have to agree not to apply for or use any additional credit while participating in the DMP. Depending on a consumer's debt and financial resources, a DMP may not be suitable for every consumer.

Under the federal bankruptcy provisions, an individual generally may not be a debtor in bankruptcy unless such individual has, within 180 days of filing a petition for bankruptcy, received from an approved nonprofit credit counseling agency, a briefing that outlines the opportunities for available credit counseling and assists the individual in performing a related budget analysis. Therefore, many CCOs are established as nonprofit, tax-exempt charitable, educational, or social welfare organizations under the Internal Revenue Code.²⁵ A non-profit CCO cannot refuse to provide counseling services due to a consumer's inability to pay or the ineligibility or unwillingness of a consumer to establish a debt management plan. Moreover, a non-profit agency must charge reasonable fees.²⁶

Nonprofit credit counseling organizations use various methods for producing income for the organization. Many creditors, particularly credit card issuers or financial institutions, make voluntary contributions or "fair share" payments to nonprofit credit counseling organizations for providing an alternative means of debt collection. Since credit card issuers limit their fair-share payments to non-profit agencies, the majority of these credit counseling agencies are organized as non-profits. Additionally, credit counseling organizations may request donations or fees from consumers for their services.

Debt Management and Settlement Providers -- Debt negotiation and settlement programs differ greatly from the debt management services provided by CCOs. In contrast to the traditional, nonprofit CCOs, debt negotiation or settlement companies generally operate as for-profit entities and negotiate with creditors to reduce the amount of the debt, including the principal, on behalf of the consumer. In return for a settlement, the consumer pays the provider a fee based on the savings on the principal plus monthly fees and consultation fees. Although a consumer may negotiate directly with a creditor to renegotiate the terms of the debt, a consumer with little financial educational background may feel intimidated by this process and seek assistance from a third party.

Advocates for the debt settlement industry state "there are essentially three options for Floridians in debt crisis—bankruptcy, consumer credit counseling, and debt settlement."²⁷ If a person is ineligible for a debt management plan offered by a CCO, other options are available, such as negotiating with the credit card company or filing for bankruptcy. According to industry representatives, debt settlement programs give consumers "the ability to avoid bankruptcy and pay off debt at a reduced rate."²⁸ However, industry representatives recognize "there are problems with the industry and fraudulent practices are more common than not."²⁹

Representatives of the banking and credit card industries disagree with the role or value of debt settlement companies. A representative of the American Bankers Association contended that a debt settlement company does not provide any real value to the debt negotiation process since the consumer can work directly with the bank and reach the same agreement. In fact, the representative said, "the notion that a consumer needs to go to debt

²⁵ Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code.

²⁶ Section 501(q) of the Internal Revenue Code.

²⁷ *Florida 2009 Debt Management Legislation/Regulation Memorandum*, September 9, 2009. Provided by Genie Hayes, representative of Credit Solutions of America.

²⁸ *Id.*

²⁹ Testimony by Jack Craven, President of Debt Settlement USA, at FTC Consumer Protection and Debt Settlement Industry Workshop, September 25, 2008, Washington, D.C.

settlement, that they can't possibly get the same kind of deal (directly) is just simply false."³⁰ A bank looks at the individual's financial hardship and works with the debtor to establish a negotiated agreement.³¹ A representative of American Express stated that its policy is not to work with debt settlement companies.³² The objective of American Express is to work with the cardholder. If necessary, the company refers the cardholder to a nonprofit credit counseling organization due to their emphasis on financial education.³³

Recently, a debt settlement, industry-sponsored organization, Americans for Consumer Credit Choice, released a white paper entitled, *Economic Factors and the Debt Management Industry*,³⁴ which evaluated the efficacy of one debt settlement company. The study concluded that reasonable upfront fees by debt settlement companies (prior to settlement) should be authorized because these companies provide value for consumers and the companies incur expenses associated with providing these services. The study noted that more than 57 percent of the clients had offers to settle at least 70 percent of their original debt. The paper cited a cancellation rate of 60 percent over two years for participants. However, the study noted, "accurate measures of consumer completion and cancellation cannot be calculated from the data, as almost 30 percent of the cancellations are due to the consumers either directly paying off the debt or being forced into bankruptcy." Since the study was limited to a review of the data of only one company, it is impossible for committee staff to determine whether the results of the study are representative of the industry. Consumers Union³⁵ provided the following comments and concerns regarding the industry paper:³⁶

- The study documents a high cancellation rate (60 percent) for a business that charges substantial upfront fees upon signing an agreement.
- No conclusions about the results for consumers can be supported by the study, because information about any settlements or even offers is missing for more than half the sample (the consumers that cancelled).
- The study shows that many consumers did not benefit from debt settlement. The reported percentages of debt settled appear to be calculated using only consumers for whom at least one debt was settled. The results do not indicate how many consumers had no debts settled at all.
- The comparison between debt settlement costs and credit counseling costs attributes some costs to credit counseling that are not paid by the individual in order to receive the service. This is not a valid cost comparison from the consumer's perspective. The study does not appear to consider that 60 percent of consumers who dropped out of the debt settlement still owe all of the fees they initially owed, have paid a set-up fee plus monthly fees, and because of late fees or penalty interest rates, may owe more debt at the end of the program than they did at the beginning if the debt had not been settled.
- The study's number suggest that, for the 4,500 consumers evaluated: an estimated 2,700 cancelled, owed a total of \$108 million in debt; paid an estimated \$2.2 million in set-up fees, if they were charged a 2 percent set-up fee, and lost \$1.3 million in those set-up fees when 60 percent of the consumers cancelled.

According to the FTC, some debt negotiation programs can be very risky and have long-term adverse impact on a consumer's credit report.³⁷ Some companies will direct their customers to cease making payments to their creditors, and instead send payments to the debt negotiation company or to a bank account established for the consumer. A debt relief company may require the consumer to provide the company with a power of attorney,

³⁰ Testimony by Ginny O'Neill, Senior Counsel, Center for Regulatory Compliance of the American Bankers Association, at FTC Consumer Protection and Debt Settlement Industry Workshop, September 25, 2008, Washington, D.C.

³¹ *Id.*

³² Testimony of Anna Flores, Vice President of Consumer Affairs for American Express, at FTC Consumer Protection and Debt Settlement Industry Workshop, September 25, 2008, Washington, D.C.

³³ *Id.*

³⁴ *Id.*

³⁴ Richard A. Briesch, Associate Professor, Cox School of Business, Southern Methodist University, *Economic Factors and the Debt Management Industry*, August 6, 2009.

³⁵ Consumers Union of United States is a nonprofit membership organization that provides consumers with information, education, and counsel about goods and services, health, and personal finance.

³⁶ Gail Hillebrand, Senior Attorney, Consumers Union of U.S., Inc., correspondence dated September 17, 2009, to Florida Senate Committee on Banking and Insurance Staff.

³⁷ *Knee Deep In Debt*, FTC Facts For Consumers, December 2005.

which authorizes the company to negotiate with debtors and initiate transfers from a bank account. According to the FTC, the goal of debt settlement is to save enough cash, while not paying creditors, so that the creditors will offer a fraction of the balance owed as settlement in lieu of the full debt.³⁸ However, if a consumer stops making monthly payments on a credit card, late fees and interest generally continue to accrue on the account. The credit card company is required to report nonpayments to the credit reporting agencies, resulting in adverse information on the consumer's credit report. There is no guarantee that a creditor will accept partial payment and settlement of the debt and the creditor may initiate litigation to recover the debt.

The FTC notes that most debt negotiation companies charge consumers substantial fees – a fee to establish an account, a monthly service fee, and a fee that is based on a percentage of the savings or debt reduction.³⁹ Therefore, even if a debt settlement company were to achieve a reduction or savings of up to 50 percent of the credit card debt, the maintenance and settlement fees imposed by the debt settlement company significantly offset or reduce these savings.

The results of a recent report on debt management, issued by the State of Colorado, are consistent with some of these concerns regarding the effectiveness of debt settlement and credit counseling companies.⁴⁰ The data, collected from 42 Colorado debt settlement and credit counseling companies, reveals that less than 9 percent of consumer contracting with these companies since 2006 completed their agreements by either paying off or settling all of their debts. Consumers paid an average fee of \$495 for credit counseling and \$1,666 for debt settlement; however, these amounts do not reflect total contract fees since generally they are paid the entire term for credit counseling and during the first half of the term for debt settlement. The results in Colorado are depicted below:

Debt Settlement Activity	2008	2007	2006
Total Number of Agreements	2,847	2,528	1,357
Percent of Completed Agreements	0.84%	4.31%	7.81%
Percent of Active Agreements	70.78%	43.91%	38.91%
Percent of Terminated Agreements	28.38%	51.78%	53.28%
Credit Counseling Activity			
Total Number of Agreements	7,342	8,005	8,459
Percent of Completed Agreements	1.92%	4.02%	8.35%
Percent of Active Agreements	73.20%	54.13%	43.87%
Percent of Terminated Agreements	24.88%	41.85%	47.78%

Consumer Debt Collection Agencies -- Currently, there are 1,313 consumer collection agencies registered with the OFR. Since January 2008, the OFR has not levied any fines, nor has it suspended or revoked any registrations because it has not documented five unresolved complaints by five different consumers against one specific consumer collection agency. The current statutory framework in Florida for regulating consumer collection agencies acts prevents the OFR from initiating disciplinary action against a debt collector until the OFR receives at least five, unresolved sworn complaints from five different consumers within a 12-month period, regardless of the type or severity of the alleged violation. If the OFR receives five complaints against an entity, the OFR does not have the statutory authority to examine or investigate the books or records of a debt collector to determine the legitimacy of the complaint.

If the OFR documents unresolved complaints and violations, the OFR's authority to discipline registrants is limited. For example, the OFR may not revoke or suspend a registration if the collection agency can show by a preponderance of the evidence that the violations were not intentional and resulted from a bona fide error.⁴¹ The OFR must also consider the registrant's volume of business when deciding whether to suspend or revoke a registration. The law allows the OFR to fine a registrant not to exceed \$1,000 for a violation of the prohibited

³⁸ Federal Trade Commission, *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public* (March 24, 2009) (prepared Statement of the Federal Trade Commission before the U.S. House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection).

³⁹ Federal Trade Commission, FTC Facts For Consumers, *Knee Deep in Debt* (Dec. 2005).

⁴⁰ Colorado Department of Law, *2008 Annual Report of Colorado Debt Management Services Providers* (October 15, 2009).

⁴¹ Section 559.730, F.S.

practices provisions. However, any action by the OFR to revoke, suspend or issue an administrative fine must be taken within two years of the date of the last violation upon which the action is founded. The OFR does not have the authority to impose administrative sanctions against a consumer collection agency that fails to register. Rather, the act provides it is a first-degree misdemeanor to operate a consumer collection agency without first registering with the office, unless the entity is exempt.⁴² Given the limited resources of the state and local governments, it is unlikely that the prosecution of first-degree misdemeanors would be pursued.

The federal version of Florida's Consumer Collection Agency Act is known as the Fair Debt Collection Practices Act (FDCPA). Many of the provisions of the federal act are similar to the Florida Consumer Collection Agency Act. However, there are key consumer and regulatory provisions in the FDCPA that are not included under Florida's law, such as: provisions pertaining to communications in connection with debt collection; acquisition of location information; false or misleading representations; unfair practices; validation of debts; and the furnishing of deceptive forms.

Recent Federal and State Enforcement Actions against Debt Relief Companies

Over the past three years, the FTC has brought cases alleging that certain debt settlement companies have made deceptive marketing claims, including the failure to disclose significant up-front fees and misrepresentations that credit or collection activities would cease during the duration of the debt settlement program.⁴³ In May 2008, the FTC announced that Randall L. Leshin, a Florida attorney, agreed to settle charges that he and his debt management services company, Express Consolidation, Inc., (Express), along with telemarketer Consumer Credit Consolidation, Inc., used abusive and deceptive telemarketing tactics to sell debt management services to consumers nationwide. Collectively, Leshin and the two corporations were ordered to pay \$2 million in damages. The FTC alleged that Leshin's debt management services company was marketed falsely as a nonprofit company because the proceeds actually benefitted Leshin personally. The FTC also further alleged that the defendants made false representations to potential clients pertaining to the fees and services offered by the company.

In late 2008, the FTC launched a nationwide crackdown with many state attorneys general, including Florida's Attorney General, on fraudulent debt service schemes, termed "Operation Clean Sweep." The FTC targeted 36 companies, which included a Florida company, Hargrave and Associates, that charged consumers an upfront fee of \$250 to \$450 prior to the performance of their debt relief services. Hargrave's website claimed that the company specialized in "erasing bad credit [by covering] all three major credit bureaus, slow pays, charge-offs" and that "repossessions can be erased for \$250." The company also guaranteed procuring a credit card for an additional fee. The FTC action was based on Hargrave collecting fees for services that the company was unable to provide.

In 2009, the FTC initiated a nationwide enforcement effort ("Operation Short Change"), coordinated with the Department of Justice and 14 states that resulted in more than 120 law enforcement actions against companies operating government grant scams, employment and work-at-home scams, advance-fee credit card scams, bogus debt relief services, and get-rich-quick schemes. As part of this sweep, the Florida Attorney General initiated actions against three debt relief organizations, Family Credit Counseling Corporation, New Leaf, and Financial Freedom Resources. In the case of New Leaf, over 2,000 victims paid almost \$4,000 each in upfront fees to "enroll" in nonexistent debt relief programs. The clients were lured by the promise that there was a secret "legal administrative process" to completely eliminate debt and improve credit scores. The lawsuit alleges that New Leaf and other defendants received more than \$8 million in fees over a two-year period. New Leaf was charged with violating Florida's Deceptive and Unfair Trade Practices Act.

Recent Enforcement Actions by the Attorneys General of Colorado, Florida, and New York

In February 2008, attorneys general for Florida and North Carolina sued a Florida attorney, Laura Hess and her companies, for defrauding approximately 37,000 credit card holders nationwide under the guise of providing

⁴² Section 559.785, F.S.

⁴³ Testimony by Sara Gottovi, FTC Consumer Protection and Debt Settlement Workshop, September 25, 2008, Washington, D.C.

legitimate debt relief services. Hess enrolled credit card holders in debt management programs that claimed to settle debts for pennies on the dollar. Clients were told that an “audit” had been performed on the clients’ accounts documenting violations under the federal Fair Credit Billing Act. The clients were advised that they no longer were responsible for paying these debts (exceeding over \$30 million) because notices were sent to the creditors disputing all charges. In exchange for these frivolous disputes of the debt, Hess would charge the clients exorbitant upfront fees without providing any services. These actions led to the creditors taking civil action against the debtors and Hess. Ultimately, Hess’s companies were liquidated and settlements were reached to help provide restitution to affected consumers and the credit card companies.

In March 2009, the Colorado Attorney General took enforcement actions against 11 debt management and credit counseling companies that have resulted in settlements, including \$923,370 in refunds. The most common violations were failing to register, charging illegal fees, and failing to allow consumers to cancel contracts. Three of the 11 companies were based in Florida (Financial Freedom Resources, Inc., National Foundation for Debt Management, and New Beginnings Debt Settlement).⁴⁴

In May 2009, the New York Attorney General announced a nationwide investigation into the debt settlement industry, subpoenaing the following 14 debt settlement companies and one law firm: American Debt Foundation, Inc.; American Financial Service; Consumer Debt Solutions; Credit Answers, LLC; Debt Remedy Solutions, LLC; Debt Settlement America; Debt Settlement USA; Debtamerica Relief; DMB Financial, LLC; Freedom Debt Relief; New Era Debt Solutions; New Horizons Debt Relief Inc.; Preferred Financial Services, Inc.; U.S. Financial Management, Inc., and the Allegro Law Firm. At that time, Nationwide Asset Services, Inc., and Credit Solutions of America, Inc., were also under investigation.

On October 19, 2009, the Florida Attorney General filed two lawsuits against five debt settlement-related companies. According to the complaints, the businesses promised consumers they could pay off their debts for a fraction of the amount owed, but instead collected large upfront fees and left customers little or no money to pay creditors, ruined credit, lawsuits, and bankruptcy in some cases. American Debt Arbitration (ADA) allegedly promised to help consumers pay off their debts at significant savings, but failed to disclose adequately the actual costs of their services. In addition, ADA allegedly did not disclose to consumers that the company collected at least the first three months of payments as fees, in violation of Florida law, before the consumer could start saving any funds for settlement and before any services were performed.

In the complaint against Credit Solutions of America (CSA), the Florida Attorney General alleged that CSA “systematically engages in numerous fraudulent, deceptive, and unfair business practices in its large-scale debt settlement operation, including but not limited to, unlawfully charging significant advance fees before completing or, in many instances, commencing performance of its services, falsely representing the success rates of its program, and deceptively advertising and promoting its debt settlement program through misrepresentations and material omissions.” The petition alleges that CSA charged fees in excess of the fee caps under the Florida Credit Counseling Services Act and received advance fees, which is prohibited under the federal Credit Repair Organization Act.

In addition to the legal actions in Florida, the Attorneys General of Texas,⁴⁵ New York,⁴⁶ Missouri, and Illinois have initiated actions against CSA for alleged deceptive and unfair practices employed in its debt settlement business. In regards to suitability of the program, the Texas petition states, “there does not appear to be a maximum amount of debt above which the consumer would not qualify for the program.” Furthermore, the petition alleges, “each consumer is presented with a program whereby the consumer will be debt free in 36

⁴⁴ Financial Freedom Resources, Inc., and New Beginnings Debt Settlement are debt settlement companies and National Foundation for Debt Management, Inc., is a credit counseling company.

⁴⁵ In March 2009, the Texas Attorney General charged CSA with conducting an unlawful scheme that defrauded Texans with financial problems.

⁴⁶ In May 2009, the New York Attorney General filed suit against CSA. According to the lawsuit, approximately 18,000 New Yorkers signed up as customers of CSA. CSA promised a 60 percent reduction in its consumers’ outstanding debt, but an average of one percent of consumers received that savings. CSA has collected approximately \$17 million in fees from New York residents.

months time, regardless of the size of the unsecured debt or the consumer's other financial circumstances, such as income, other debt obligations, and assets.”

Proposed FTC Regulations and Regulations in Other States

The FTC recently proposed rules to combat deceptive and abusive telemarketing of debt relief services—services that purportedly can reduce consumers' credit card and other unsecured debt. The proposed regulations would:

- Prohibit companies from charging fees until they 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 the services will cost;
- Prohibit specific misrepresentations about material aspects of debt relief services, including success rates and whether a debt relief company is nonprofit; and
- Define the term, “debt relief service,” to cover any service to renegotiate, settle, or in any manner 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.

Colorado, Delaware, Rhode Island, and Utah have adopted the Uniform Debt-Management Services Act, issued by the national Conference of Commissioners on Uniform State Laws.⁴⁷ The act requires registration only, rather than licensure, provides specified disclosures in agreements, and authorizes enforcement authority. Recently, the Attorney General of Colorado, John Suthers, expressed concerns regarding the high statutory debt settlement fees of 18 percent on the principal and the imposition of debt settlement fees prior to any settlements being achieved. He recommended amending the law to allow collection of minimal monthly fees but no settlement fees until settlements are paid in full.⁴⁸ The attorneys general of 40 states, including Florida and Colorado, recently submitted a letter in support of the proposed regulations of the FTC.⁴⁹

Two consumer advocacy groups, Consumers Union and Consumer Federation of America, provided comments to Senate Banking and Insurance Committee professional staff regarding debt settlement and current Florida laws.⁵⁰ Although they noted that other statutory protections might be useful for inclusion in the current laws, the current statutory fee cap protects consumers. “The existing Florida law, if fully complied with and strongly enforced, should protect Florida consumers from two of the difficult problems consumers face in debt settlement: the economic incentive for debt settlement companies to sign consumers up for debt settlement even when they are unlikely to be able to save enough to benefit, and the tendency of high early fees to drain the consumer's savings pool.”

Options and/or Recommendations

Debt Management and Debt Settlement Companies

Senate Professional staff recommends that the Legislature should consider creating additional consumer protections and enforcement tools to regulate companies providing debt management and debt settlement services. At a minimum, the Legislature should consider enacting the following provisions:

1. Prohibit any company from receiving a portion of the fees associated with the savings or reduction in debt negotiated by the company until the settlement is completed that releases the debt.
2. Allow consumers to have a right of cancellation or cooling off period of at least five days.

⁴⁷ Testimony of Michael Kerr, Legislative Director for the National Conference of Commissioners on Uniform State Laws at FTC Consumer Protection and Debt Settlement Industry Workshop, September 25, 2008, Washington, D.C.

⁴⁸ Colorado Department of Law, Attorney General Suthers' Press Release, October 15, 2009.

⁴⁹ Correspondence from the National Association of Attorney Generals to the FTC, October 23, 2009.

⁵⁰ Correspondence from Gail Hillebrand, Senior Attorney for Consumers Union of U.S., Inc., and Susan Grant, Director of Consumer Protection for the Consumer Federation of America, to Senate Banking and Insurance Committee professional staff, dated September 17, 2009.

3. Require detailed disclosures and documentation regarding any initial consultation fees, monthly fees, fees based on savings, payment schedule, and the financial suitability of the program.
4. Repeal the current provision in law that excludes the application of fee caps on transactions involving nonresidents of Florida.
5. Prohibit specific misrepresentations about material aspects of debt relief services, including success and completion rates.
6. Require cautionary written disclosures relating to the potential consequences of using a third party to settle or negotiate a credit card debt.

Consumer Debt Collection Agencies

Senate Professional staff recommends amending the current statutes relating to consumer collection agencies because the regulatory framework does not provide the necessary enforcement tools for the OFR to regulate the industry and adequately protect consumers. At a minimum, the Legislature should consider enacting the following provisions:

1. Clarify existing statutory authority for the regulation of consumer debt collection agencies by transferring statutory duties related to the registry and referral of complaints from the DFS to the OFR.
2. Codify the federal Fair Debt Collection Act, which would provide greater consumer protections and regulatory and enforcement tools than Florida's current laws.
3. Provide that a violation of the Consumer Collection Agency Act be deemed an unfair and deceptive trade practice within the meaning of part II of ch. 501, F.S.
4. Increase administrative fines, currently capped at \$1,000, which would allow the OFR to impose significant economic sanctions on unscrupulous consumer collection agencies.
5. Streamline the complaint process required under ch. 559, F.S., by eliminating the requirement of a sworn complaint because a sworn complaint imposes a chilling effect on persons seeking the resolution of a complaint.
6. Provide the OFR with broad, discretionary authority to investigate the books and records of a consumer collection agency promptly based on the nature and severity of an alleged violation rather than the accumulation of five unresolved complaints, as required currently.
7. Authorize the Attorney General to bring action against out-of-state consumer debt collectors in state court when appropriate.

Credit Service Organizations

Senate Professional staff recommends amending the current statutes relating to credit service or credit repair organizations to prohibit the acceptance or charging of a fee prior to the full and complete performance of the services by a credit service organization, which would codify the federal prohibition. Currently, a credit service organization may accept advance fees prior to the complete performance of the services if it maintains a \$10,000 surety bond. The federal Credit Repair Organizations Act prohibits credit repair organizations from charging or receiving any money for the performance of any service that the CSO has agreed to perform before such service is performed.