

Federal Oversight of the Debt Relief Industry: A More Effective Means of Deterring Illegal Debt Settlement Schemes

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I. INTRODUCTION

At the end of 2013, the Federal Reserve announced consumer revolving debt to have reached \$861.9 billion.¹ This high number has prompted the

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emergence of an industry promising to help relieve consumers of their enormous credit card debt.² These companies offer services that are incredibly attractive to financially destitute individuals suffering under the burden of built-up debt.³ Imagine owing over tens of thousands of dollars and hearing an advertisement promise that your debt could be “resolved” in as little as twenty-four to forty-eight months. For those who see no other way of paying off their debts, these promises can seem heaven-sent.

In 2007, fifty-eight-year-old Linda Robertson heard similar promises in a radio advertisement by Financial Freedom of America.⁴ Having lost her job, two homes, and drowning in over \$23,000 of credit card debt, Ms. Robertson enrolled in Financial Freedom’s debt settlement program.⁵ After making nine payments to Financial Freedom, she was served with court papers for a lawsuit filed by Capital One, one of her creditors, to collect roughly \$5,000.⁶ Despite having made about \$3,700 in payments, Financial Freedom told her it had no control over the lawsuit and that her account held only \$1,470—too little to settle the \$5,000 debt.⁷ Upon the closure of her account, she was able to collect the \$1,470 and only half the fees that she had paid to Financial Freedom.⁸ In addition to forfeiting \$1,120 to Financial Freedom for fees, her pending bankruptcy has cost her \$1,500 in legal fees.⁹

Each year, thousands are persuaded by the promises of debt settlement companies¹⁰ but unfortunately end up paying as much as 75% of the amount they owe into an account managed by the debt settlement company without ever settling any debt.¹¹ And while debt settlement can be a legitimate solution to a

¹ FED. RES., FEDERAL RESERVE STATISTICAL RELEASE: G.19 CONSUMER CREDIT, (Feb. 2014), available at <http://www.federalreserve.gov/releases/g19/20140207/g19.pdf>. Credit card debt comprises most of the revolving debt figure stated in the Report. *Consumer Credit G.19 About*, FED. RES., <http://www.federalreserve.gov/releases/g19/about.htm> (last updated May 16, 2014), archived at <http://perma.cc/Q3D-TTDX>.

² See Peter S. Goodman, *Peddling Relief, Firms Put Debtors in Deeper Hole*, N.Y. TIMES (June 18, 2010), <http://www.nytimes.com/2010/06/19/business/economy/19debt.html>, archived at <https://perma.cc/85VG-AV64>; Elizabeth Ody, *Debt Settlement Firms Outfox the Regulators*, BLOOMBERG BUSINESSWEEK MAG. (Nov. 3, 2011), <http://www.businessweek.com/magazine/debt-settlement-firms-outfox-the-regulators-11032011.html>, archived at <http://perma.cc/NVT8-R44A>.

³ See, e.g., Goodman, *supra* note 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Goodman, *supra* note 2.

¹⁰ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-593T, DEBT SETTLEMENT: FRAUDULENT, ABUSIVE, AND DECEPTIVE PRACTICES POSE RISK TO CONSUMERS, ii (2010), available at <http://www.gao.gov/assets/130/124498.pdf> [hereinafter GAO REPORT].

¹¹ Michelle Singletary, *Debt Settlement is Rarely a Done Deal*, WASH. POST (Oct. 20, 2012), http://articles.washingtonpost.com/2012-10-20/business/35501700_1_debt-settlement-consumer-bankruptcy-attorneys-florida-couple, archived at <http://perma.cc/Y5E5-FS2U>.

debtor's problems, enrolling in a debt settlement program always carries substantial risk.¹² The reality is that a relationship with a debt settlement company has very little upside for the consumer.¹³

Debt settlement involves negotiating with a consumer's creditors to accept a lump sum with an amount smaller than what is actually owed to "settle" the debt.¹⁴ When a consumer enrolls in a debt relief program, a monthly payment plan is usually established.¹⁵ The consumer is then told not to make any more payments to creditors.¹⁶ Consumers are told to stop paying their creditors in order to facilitate a future settlement of the debt for a lower sum.¹⁷ After some time of making payments, the debt settlement company is supposed to use that money to distribute to creditors who accept the lump sum in settlement of the debt.¹⁸

Unfortunately, debt settlement companies often charge exorbitant upfront and monthly maintenance fees without actually performing any debt settlement services at all. In 2010, the Government Accountability Office (GAO) reported on the Federal Trade Commission's (FTC) and state investigators' findings that less than 10% of enrollees successfully completed a debt settlement program.¹⁹ And even when debt is successfully settled, it is not uncommon for consumers to end up paying 75% or more of the debt in fees and payments into the trust fund only to see their credit scores thrashed because they were not paying their creditors.²⁰ In addition to these consequences, lawsuits and wage garnishments are also foreseeable if individuals stop paying their creditors.²¹

Consumer advocates who have scrutinized the debt settlement industry have pointed to debt settlement company insiders admitting that actually settling debt is counterproductive to making money.²² Much less money is available for

¹²STEPHANIE M. WILSHUSEN, MEETING THE DEMAND FOR DEBT RELIEF 8 (2011), available at <http://ssrn.com/abstract=1908334>.

¹³JOAN N. FEENEY & THEODORE W. CONNOLLY, THE ROAD OUT OF DEBT: BANKRUPTCY AND OTHER SOLUTIONS TO YOUR FINANCIAL PROBLEMS 98 (2010); see also GAO REPORT, *supra* note 10, at ii (explaining that state investigations found that typically less than 10% of consumers successfully settle all their debt when entering a debt settlement program).

¹⁴GAO REPORT, *supra* note 10, at 4.

¹⁵*Settling Credit Card Debt*, FED. TRADE COMMISSION, <http://www.consumer.ftc.gov/articles/0145-settling-credit-card-debt> (last visited Oct. 16, 2014), archived at <http://perma.cc/WLW7-TGZQ>.

¹⁶*Id.*

¹⁷GAO REPORT, *supra* note 10, at 6.

¹⁸*See id.* at 4.

¹⁹*Id.* at ii.

²⁰Singletary, *supra* note 11.

²¹Andrew T. Schwenk, *Debt Settlement: A Beast of Burden Without Any Reins*, 76 BROOK. L. REV. 1165, 1174 (2011) ("Compounding the problem, many clients are unaware that they are subject to traditional collection measures once enrolled in debt-settlement programs, and debt-settlement companies provide no assistance with the consequences.").

²²See Steve Rhode, *Former Bank VP of Recovery Operations Says TASC and Most Debt Settlement Companies, Suck!*, GET OUT OF DEBT GUY (Mar. 19, 2010),

companies that actually settle a customer's debt in a timely manner; so, perversely, it makes sense to get individuals on the hook paying advanced fees for services that never materialize.²³ And indeed, the debt settlement industry has found many ways to induce individuals to take the bait and enroll in programs that will likely only increase financial distress. This Note explores the debt settlement industry and analyzes the effectiveness of current laws designed to deter illegal debt settlement schemes. Ultimately, this Note posits that a federal legislative regime beyond what the FTC provides is needed to oversee the debt relief industry as a whole. Stiff civil and criminal penalties are needed to deter the illegal actions of companies and their corporate officers. Part II discusses the debt settlement industry and the American Fair Credit Council, a trade organization claiming to be made up of "consumer credit advocates."²⁴ Part III describes the inefficiencies of current federal and state legislation regulating debt settlement companies. Part IV explains the role of the newly created Consumer Finance Protection Bureau (CFPB) in enforcing state and federal laws to fight against illegal debt settlement schemes. This section also discusses the criminal case against Mission Settlement Agency and some of its corporate officers.²⁵ Finally, Part V proposes a new federal legislative regime that creates additional oversight and stricter penalties against the principals and officers of debt relief companies that do not comply with federal regulations.

II. THE DEBT SETTLEMENT INDUSTRY AND THE AMERICAN FAIR CREDIT COUNCIL

There are various debt relief services that should not be confused with debt settlement services. Credit counseling and debt management plans can be used to help consumers manage large amounts of debt but generally are not means used to settle debt.²⁶ Credit counselors generally do not advocate for consumers

<http://getoutofdebt.org/17645/former-vp-of-recovery-operations-says-tasc-and-most-debt-settlement-companies-suck>, archived at <http://perma.cc/M8PE-C35F>; see also Brian O'Connell, *Top Consumer Scam: Debt Settlement Firms*, THE STREET (Oct. 18, 2012, 3:32 PM), <http://www.the-street.com/story/11741743/1/top-consumer-scam-debt-settlement-firms.html>, archived at <http://perma.cc/Y92S-CYKY>.

²³ See Rhode, *supra* note 22.

²⁴ *Who We Are*, AM. FAIR CREDIT COUNCIL, <http://www.americanfaircreditcouncil.org/who-we-are> (last visited Jan. 6, 2015), archived at <http://perma.cc/VWJ2-NFBT>.

²⁵ See Press Release, U.S. Attorney's Office S. Dist. N.Y., Manhattan U.S. Attorney Charges Debt Settlement Company and Six Individuals for Multi-Million Dollar Scheme that Targeted Debt-Ridden Consumers (May 7, 2013), <http://www.justice.gov/usao/nys/pressreleases/May13/MissionIndictmentPR.php>, archived at <http://perma.cc/C3PS-W4AP>.

²⁶ See *Choosing a Credit Counselor*, FED. TRADE COMMISSION, <http://www.consumer.ftc.gov/articles/0153-choosing-credit-counselor> (last visited Oct. 24, 2014), archived at <http://perma.cc/N7NG-2VJ8>. Certainly credit counseling and other debt management services and the debt relief industry in general are not without scams and bad actors. See Anya Kamenetz, *Beware Debt Relief Scams*, CHI. TRIB. (Jan. 28, 2014, 6:30 PM),

to stop paying their debts so as to negotiate a settlement of the debt.²⁷ Such a plan would fall under the debt settlement category.²⁸ While debt-strapped consumers need options to help manage their debt, entities pushing debt settlement plans on consumers often use language and tactics reeking of deceit. These entities need to be weeded out.²⁹

A. *The Fraudulent, Abusive, and Deceptive Practices of Debt Settlement Companies*

Although debt is not a new concept in America, debt settlement companies present a relatively novel service.³⁰ Several business models exist under which a company will set up its debt settlement programs.³¹ Because there are many questionable practices, very little data has been put together regarding debt settlement companies.³² However, the GAO has identified multiple widespread practices used by debt settlement companies that are fraudulent, abusive, or deceptive.³³ They are as follows: charging advanced fees before any debt settlement occurs;³⁴ directing enrolled consumers to stop paying their creditors;³⁵ vaunting high success rates despite charging advanced fees and directing enrolled consumers to stop paying creditors;³⁶ and guaranteeing reductions in debt by forty to fifty cents on the dollar.³⁷

<http://www.chicagotribune.com/business/sns-201401281700--tms--savingsgctnzy-a20140128-20140128,0,2041422.story>, archived at <http://perma.cc/67ZT-ZK7A> (describing some of the risks associated with other debt relief services such as credit counseling).

²⁷ *What's the Difference Between a Credit Counselor and a Debt Settlement Company?*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/askcfpb/1449/whats-difference-between-credit-counselor-and-debt-settlement-company.html> (last visited Oct. 24, 2014), archived at <http://perma.cc/CCP7-CBMT>.

²⁸ See *Debt Settlement Can Hurt More than Help*, CBSNEWS (May 12, 2009, 9:18 AM), <http://www.cbsnews.com/news/debt-settlement-can-hurt-more-than-help>, archived at <http://perma.cc/SPR8-GLWR> (discussing the difference between a debt management plan and a debt settlement plan).

²⁹ Although debt settlement and other forms of debt relief management can be successful and beneficial alternatives to bankruptcy, this Note does not advocate for any one method in obtaining debt relief, but rather advocates for further action to deter illegal debt settlement schemes.

³⁰ *Are All Debt Settlement Services Legitimate?*, CONSUMER FIN. PROT. BUREAU (Oct. 11, 2013), <http://www.consumerfinance.gov/askcfpb/1461/are-all-debt-settlement-services-legitimate.html>, archived at <http://perma.cc/E9BK-9R9K>.

³¹ *Id.*

³² Loren G. Renner, Student Article, *Debt Settlement: New Illinois Law Provides Significant Consumer Relief*, 23 LOY. CONSUMER L. REV. 410, 416 (2011).

³³ See generally GAO REPORT, *supra* note 10.

³⁴ *Id.* at 7–8.

³⁵ *Id.* at 9–10.

³⁶ See *id.* at 10–13.

³⁷ *Id.* at 13. In addition to the previously discussed abusive practices, there are others that debt settlement companies have been known to use in order to enroll consumers in debt

While some criticize recent the proposed regulations on the debt settlement industry as stifling one of the only methods by which American consumers can find relief from massive debt,³⁸ these critiques either fail to recognize or completely disbelieve the objective findings of the GAO that clearly show the widespread nature of abusive, deceptive, and even fraudulent practices harming consumers that unknowingly turn to debt settlement companies for relief.³⁹

B. *The American Fair Credit Council—Purported Consumer Advocate Lobbying for the Interests of the Debt Settlement Industry*

Feeding off the public's hunger for debt relief solutions, the American Fair Credit Council (AFCC), which claims to be a consumer advocacy group protecting consumer interests, is successfully lobbying to loosen restrictions on the debt settlement industry.⁴⁰ The American Fair Credit Council's "very powerful principles" are meant "to promote and enforce industry 'best practices'" and "advocate for consumer-centric legislation."⁴¹ Whether one can classify the AFCC's actions as "consumer-centric" is certainly debatable. Its stated consumer interests seem to conflict with its role as an organization that collects dues from member debt settlement companies which want the AFCC's stamp of accreditation.⁴² Thus, AFCC "accredited" companies should be treated cautiously as the AFCC may not be as consumer-centric as it claims.⁴³

settlement programs. See Elizabeth Ody, *Debt Firms Play 'Whack-a-Mole' Using Lawyers to Skirt Fee Ban*, BLOOMBERG (Sep. 30, 2011, 12:01 AM), <http://www.bloomberg.com/news/2011-09-30/debt-firms-play-whack-a-mole-to-skirt-fee-ban.html>, archived at <http://perma.cc/FYM8-E2DM> (discussing the various ways in which debt settlement companies use deceptive means to sidestep the laws and regulations with which it would otherwise have to comply).

³⁸ See generally Derek S. Witte, *The Bear Hug that Is Crushing Debt-Burdened Americans: Why Overzealous Regulation of the Debt-Settlement Industry Ultimately Harms the Consumers It Means to Protect*, 14 TEX. REV. L. & POL. 277 (2010).

³⁹ See generally GAO REPORT, *supra* note 10.

⁴⁰ Sheryl Harris, *Big Data Just One of the Big Consumer Issues Looming in 2014: Plain Dealing*, PLAIN DEALER (Dec. 27, 2013, 4:30 PM), http://www.cleveland.com/consumeraffairs/index.ssf/2013/12/hot_consumer_issues_in_2014_pl.html, archived at <http://perma.cc/FYL3-WMCD> (discussing the recent passage of AFCC-championed HB 173 in the Ohio House of Representatives that eliminates the 8.5% fee cap debt settlement companies can charge); see also H.B. 173, 130th Gen. Assemb., Reg. Sess. (Ohio 2013) (proposing to regulate "providers of debt settlement services").

⁴¹ *Who We Are*, AM. FAIR CREDIT COUNCIL, <http://www.americanfaircreditcouncil.org/who-we-are/> (last visited Oct. 16, 2014), archived at <http://perma.cc/L39D-596R> (stating that its principles are, "To support consumers dealing with overwhelming credit and debt problems; [t]o promote and enforce industry 'best practices'; and [t]o advocate for consumer-centric legislation at the state and federal level that protects consumers through strong regulation and preservation of choice of debt relief").

⁴² See *Become a Member*, AM. FAIR CREDIT COUNCIL, <http://www.americanfaircreditcouncil.org/become-a-member/> (last visited Oct. 24, 2014), archived at <http://perma.cc/F45X-RHMU> (providing the process by which debt settlement

Freedom Debt Relief provides a fitting example of a debt settlement company that, despite being an AFCC accredited member, is mired in disputes with consumers suing the company over abusive and deceptive practices. Freedom Debt Relief settled a class action lawsuit filed by Washington's Attorney General by paying over \$800,000 to about 570 Washington consumers who used Freedom's services.⁴⁴ Freedom settled a similar case in New York for about \$1.1 million.⁴⁵ Freedom Debt Relief has also settled lawsuits in Colorado, Rhode Island, California, and Delaware.⁴⁶ Additionally, Freedom Debt Relief makes it even harder for consumers to know who they are actually dealing with because it has multiple registered names under which it does business.⁴⁷

Despite Freedom Debt Relief's questionable past, it continues to bear the "AFCC Accredited" stamp on its website.⁴⁸ Of course, Freedom Debt Relief may be currently offering legitimate and honest debt relief services, but the many lawsuits filed against Freedom and other similarly situated AFCC

companies can become "Accredited Members"); *see also* Sheryl Harris, *Ohio Shouldn't Let Debt Settlement Industry Write Its Own Rules*, PLAIN DEALER (Oct. 24, 2013, 1:03 PM), http://www.cleveland.com/consumeraffairs/index.ssf/2013/10/ohio_shouldnt_let_debt_settle.html, *archived at* <http://perma.cc/AJC4-7JR3> (arguing that the AFCC incorrectly explains away the scandals within the industry it lobbies for).

⁴³ *See* Harris, *supra* note 42.

⁴⁴ Rita R. Robison, *Freedom Debt Relief Agrees to Pay Back Consumers After Accusations*, DAILYFINANCE (Mar. 8, 2011, 11:00 AM), <http://www.dailyfinance.com/2011/03/08/freedom-debt-relief-agrees-to-pay-back-consumers-after-accusatio/>, *archived at* <http://perma.cc/ZWZ7-93CT>; *see also* Consent Decree & Judgment, *State of Washington v. Freedom Debt Relief, LLC* (2011), *available at* http://atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2011/FDRConsentDecree.pdf.

⁴⁵ Robison, *supra* note 44.

⁴⁶ *Id.*; *see also* Press Release, Colo. St. Att'y Gen., *Eleven Companies Settle with the State Under New Debt-Management and Credit Counseling Regulations* (Mar. 12, 2009), http://www.coloradoattorneygeneral.gov/press/news/2009/03/12/eleven_companies_settle_state_under_new_debt_management_and_credit_counseling, *archived at* <http://perma.cc/Q2LQ-WVKW>; News Release, Del. Att'y Gen., *Consumer Protection Unit Acts to Safeguard Delawareans in Debt* (Sep. 28, 2009), <http://news.delaware.gov/2009/09/28/consumer-protection-unit-acts-to-safeguard-delawareans-in-debt>, *archived at* <http://perma.cc/PZ2Z-6D3V>; Consent Order, *In re Freedom Financial Network, LLC* (Dep't of Bus. Regulation July 16, 2009), *available at* http://www.dbr.state.ri.us/documents/decisions/BK-Freedom_Financial-Consent_Order.pdf; Consent Judgment, *California v. Freedom Debt Relief, LLC*, No. CIV 477991 (Dec. 22, 2009), *available at* <http://www.dbo.ca.gov/ENF/pdf/f/FDR.pdf>.

⁴⁷ *See* COLO. ST. ATT'Y GEN., *DEBT MANAGEMENT SERVICES ACT REGISTERED PROVIDERS AND DISCIPLINARY ACTION* (Oct. 2013), *available at* http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/DMReport_27.pdf. Freedom has had registered names that include *DebtHelpAmerica.com*, *Freedom Financial Network*, *Freedomplus.com*, *Freedom Debt*, *Freedom Debt Help*, *Freedom Debt Relief USA*, *Freedom Debt Reduction*, *Debt Resolution Partners*, *Debt OK*, *New Debt Relief*, and *Pacific Debt Relief*. *Id.*

⁴⁸ FREEDOM DEBT RELIEF, <http://www.freedomdebtrelief.com> (last visited Aug. 11, 2014), *archived at* <http://perma.cc/W7FN-35SF>.

accredited members warrants at least some skepticism of the AFCC's accreditation process.⁴⁹

Debt settlement companies do not act alone, however, and other parties have been found complicit in the deception and abuse of debt-ridden consumers. Debt settlement companies use third party payment processors to manage the bank accounts of debt settlement enrollees in an attempt to avoid touching the money and potential liability for charging fees.⁵⁰ Despite these steps, debt settlement companies, third party payment processors, and other involved entities have been found liable in at least one state for charging illegal fees under the state law governing debt relief agencies.⁵¹ However, in *Carlsen v. Global Client Solutions, LLC*, notwithstanding the ruling and the Washington state law under which liability was found, Judge Chambers' concurrence expressed skepticism that the current state and federal regulatory regimes go far enough to deter these and other similar bad actors.⁵²

Legislation has been passed on both the state and federal level to reign in the harmful practices of debt settlement companies,⁵³ but this body of law continues to change and fluctuate with the varied state law governing the industry.

⁴⁹ See *supra* notes 44–46 and accompanying text.

⁵⁰ N.Y.C. BAR, PROFITEERING FROM FINANCIAL DISTRESS: AN EXAMINATION OF THE DEBT SETTLEMENT INDUSTRY 39 n.198 (2012), available at <http://www2.nycbar.org/pdf/report/uploads/DebtSettlementWhitePaperCivilCtConsumerAffairsReportFINAL5.11.12.pdf>.

⁵¹ *Carlsen v. Global Client Solutions, LLC*, 256 P.3d 321, 327 (Wash. 2011) (finding that entities Global Client Solutions and Rocky Mountain Bank Trust are liable under the state's debt adjusting statute for charging illegal fees in the management of debt settlement accounts). The Washington Supreme Court explained third party entity involvement as follows:

The plaintiffs could access their special purpose accounts on line and terminate them at any time by sending written notice. But on a practical level, the plaintiffs did not need to access their accounts because they had signed blanket authorizations upon entering the debt relief program that established automatic (1) monthly transfers from the plaintiffs' primary bank accounts to their special purpose accounts, (2) monthly payments from the special purpose accounts to the debt settlement company, (3) monthly and one-time payments from the special purpose accounts to [Global Client Solutions] for banking services, and (4) disbursements from the special purpose accounts to creditors when the debt settlement company negotiated a settlement. In its role as 'processor' for the special purpose accounts, [Global Client Solutions] initiated all these automatic transfers.

Id. at 323.

⁵² *Id.* at 328 (Chambers, J., concurring) (“As cats are drawn to cream, many for-profit [debt settlement companies] will be attracted to the most unsophisticated of consumers. Despite the recent federal rule, I fear that until the Washington legislature prohibits debt adjusting for profit, consumers in Washington will continue to suffer. In my view, the chronic and systemic abuses in the Washington debt adjusting industry deserve the attention of the Washington State Legislature.”).

⁵³ See *infra* Part III.

III. LEGISLATIVE SCHEMES ON STATE AND FEDERAL LEVELS

State and federal governments have not been blind to the detrimental effect of debt settlement companies on American consumers. But unfortunately, current legislative regimes have done little to stop debt settlement companies from innovating to meet, or at least appearing to meet, these new legal standards while still taking advantage of consumers.⁵⁴

A. *The FTC Telemarketing Sales Rule*

In 2010, the FTC specifically outlawed the common practice of debt settlement companies charging enrolled consumers upfront fees for debt relief services in amendments made to the Telemarketing Sales Rule (TSR).⁵⁵ The TSR amendments not only bar charging advanced fees, but also require debt relief companies to make specific disclosures to consumers and prohibit misrepresentations. The rule also extends to both companies reaching out to people and to calls consumers make to these firms in response to debt relief advertising.⁵⁶

In response to the new federal regime, debt settlement companies have found ways around the new FTC rules.⁵⁷ One of the most common tactics used to avoid the TSR is enlisting attorneys to offer debt settlement services as legal services and charging legal fees to retain the attorney.⁵⁸ With allegations that only twenty to thirty debt settlement companies changed their practices to comply with the TSR, it became apparent that companies risked very little to continue operating as they did before the TSR was amended.⁵⁹ Certainly there was a risk of civil lawsuits for choosing to disregard the TSR, but that risk was low, especially considering the vulnerable and, unfortunately, unknowing clientele that debt settlement companies often prey upon. These individual debt settlement enrollees could not afford their own bills, let alone entertain the thought of hiring an attorney to pursue litigation.⁶⁰

⁵⁴ See Ody, *supra* note 37.

⁵⁵ FTC Telemarketing Sales Rule, 16 C.F.R. §§ 310.1–9 (2010) [hereinafter TSR].

⁵⁶ TSR, 16 C.F.R. § 310.6; Press Release, Fed. Trade Comm'n, FTC Issues Final Rule to Protect Consumers in Credit Card Debt (July 29, 2010), <http://www.ftc.gov/news-events/press-releases/2010/07/ftc-issues-final-rule-protect-consumers-credit-card-debt>, archived at <http://perma.cc/GP8W-4ADL>. If a consumer responds to a debt settlement company's advertisement by calling the company, the TSR's provisions will cover that communication. Press Release, Fed. Trade Comm'n, *supra*.

⁵⁷ Charles Wallace, *How Debt-Settlement Companies Skirt the New FTC Rules*, DAILYFINANCE (Dec. 26, 2010, 8:00 AM), <http://www.dailyfinance.com/2010/12/26/consumer-warning-how-debt-settlement-companies-skirt-the-new-ft>, archived at <http://perma.cc/37CR-ULYV>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See N.Y.C. BAR, *supra* note 50, at 72.

In addition to the TSR, the federal government passed the Consumer Financial Protection Act of 2010, which created the Consumer Financial Protection Bureau (CFPB) and new laws that directly regulate debt settlement companies.⁶¹ The CFPB has used both state and federal laws to pursue debt settlement companies engaging in illegal practices.⁶² Although this effort is ongoing, unless stricter civil and criminal penalties are imposed on noncompliant debt settlement companies and their principals and officers, the industry will continue to evolve and companies preying upon debt-ridden consumers will proliferate. States have stepped in to protect their citizens and deter these bad actors, but this effort has also had little effect.⁶³

B. State Implemented Legislative Regimes

Many states have recognized the loopholes in the TSR and Consumer Financial Protection Act and have stepped up to the plate to protect their citizens from the harmful practices of debt settlement companies by creating legislation to further regulate the industry.⁶⁴ State laws and action by state attorneys general have helped the CFPB better pursue enforcement against illegal debt settlement schemes.⁶⁵ However, the debt settlement industry continues to ensnare consumers in unmanageable and harmful programs.

Most states have enacted some form of legislation to protect consumers from illegal debt settlement schemes.⁶⁶ Legislation in Indiana,⁶⁷ Nevada,⁶⁸ Tennessee,⁶⁹ Illinois,⁷⁰ California,⁷¹ Mississippi,⁷² and Ohio⁷³ all have differing

⁶¹ See Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5491, 5531(a), 5536(a), 5564(a) & 5581 (2012).

⁶² See Al Krulick, *Feds Continue Cracking Down on Dishonest Debt-Relief Companies*, DEBT.ORG (June 13, 2013), <http://www.debt.org/2013/06/13/dishonest-debt-relief-companies>, archived at <http://perma.cc/3E4Z-77JG>.

⁶³ See, e.g., N.Y.C. BAR, *supra* note 50, at 35–36 n.178.

⁶⁴ See *infra* notes 65–93 and accompanying text.

⁶⁵ Rachel Witkowski, *CFPB and State AGs Win First Case Against Debt Settlement Firm*, AM. BANKER (Dec. 21, 2012, 1:28 PM), http://www.americanbanker.com/issues/177_245/cfpb-and-state-ags-win-first-case-against-debt-settlement-firm.html, archived at <https://perma.cc/V97T-5S4Q>.

⁶⁶ The National Conference of State Legislatures tracks state legislation regarding the debt relief industry which includes the debt settlement industry and lists the legislation by state on its website. Heather Morton, *Credit Counseling, Debt Management and Debt Settlement State Statues* [sic], NAT'L CONF. ST. LEGS., <http://www.ncsl.org/research/financial-services-and-commerce/credit-counseling-debt-managem983and-settlem983.aspx> (last visited Mar. 23, 2014), archived at <http://perma.cc/2WX9-VSWA>.

⁶⁷ IND. CODE § 24-5-15-2 (2010).

⁶⁸ NEV. REV. STAT. § 676A.010–.780 (2009).

⁶⁹ TENN. CODE ANN. § 47-18-5501 to 47-18-5541 (2010).

⁷⁰ H.B. 4781, 96th Gen. Assemb. (Ill. 2010).

⁷¹ A.B. 350, 2009–10 Reg. Sess. (Ca. 2009).

⁷² MISS. CODE ANN. § 81-22 (West 2014).

⁷³ OHIO REV. CODE ANN. § 4710 (LexisNexis 2013).

versions of regulations designed to help reduce fraudulent debt settlement schemes. Most of these cap the fees that debt settlement companies can charge.⁷⁴

Some states have just recently begun contemplating regulatory regimes to regulate the debt settlement industry. Massachusetts⁷⁵ and Washington⁷⁶ are two states that have proposed bills that would supplement the TSR and Consumer Financial Protection Act and tighten the reins on debt settlement companies.

Other states such as Ohio and Pennsylvania are considering proposed legislation that would loosen restrictions on debt settlement companies.⁷⁷ Bolstered by studies produced by the AFCC and testimony from some of the industry's biggest lobbyists, some legislators in Ohio are being swayed to exempt debt settlement companies from legislation intended to protect consumers against harmful debt relief industry practices.⁷⁸ The Ohio House of Representative has already passed a bill to amend the laws established under its Debt Adjusters Act that would exempt debt settlement companies from the definition of debt adjusters.⁷⁹ This would, in effect, get rid of fee caps on what debt settlement companies can collect.⁸⁰ If the AFCC was truly acting as a consumer advocate, why would it push for greater leniency on debt settlement companies which already take advantage of consumers under the current laws in Ohio?

Debt settlement companies continue to disregard current state and federal regulations because wronged consumers do not file very many lawsuits against these companies.⁸¹ Unfortunately, these companies are especially good at settling their own debt to society for pennies on the dollar—successfully keeping money they effectively stole from the consumers who need it the

⁷⁴ See, e.g., OHIO REV. CODE ANN. § 4710.02(B) (LexisNexis 2013) (capping the charge for an initial consultation or set up of a debt management plan or similar plan at \$75 and capping the charge for consultation fees at \$100 per calendar year).

⁷⁵ Deirdre Fernandes, *State Bill Would Regulate Debt Settlement Firms*, BOS. GLOBE, (Aug. 23, 2013), available at <http://www.bostonglobe.com/business/2013/08/22/state-bill-would-require-licensing-debt-settlement-companies/uq.html>, archived at <http://perma.cc/W7FQ-RSG5>.

⁷⁶ H.B. 1491, 63d Leg., Reg. Sess. (Wash. 2013); Connie Thompson, *Bill Would Tighten Regulations for Debt Settlement Companies*, KOMONEWS.COM, (Feb. 5, 2013, 8:08 PM), available at <http://www.komonews.com/news/consumer/Bill-would-tighten-regulations-for-debt-settlement-companies-189943591.html>, archived at <http://perma.cc/8S98-JG7N>.

⁷⁷ Charles A. Menke, *Ohio, Pennsylvania Debt Settlement Legislation Prompts Industry Concern*, BANKING & FIN. L. DAILY (June 28, 2013), http://www.dailyreporting.suite.com/banking-finance/news/ohio_pennsylvania_debt_settlement_legislation_prompts_industry_concern, archived at <http://perma.cc/7VVT-3E4E>.

⁷⁸ See Harris, *supra* note 42.

⁷⁹ See Harris, *supra* note 40.

⁸⁰ See *id.*

⁸¹ See N.Y.C. BAR, *supra* note 50, at 72 n.397.

most.⁸² Civil liability in other contexts has not been enough to deter opportunistic actors from essentially stealing from consumers.⁸³ Unfortunately, states that can impose criminal liability on noncompliant debt settlement companies rarely choose to prosecute which makes civil liability the only potential deterrent to debt settlement companies engaging in illegal behavior.⁸⁴ Company conduct that would be labeled criminal if committed by an individual is treated only with civil sanctions.⁸⁵ Debt settlement companies and their principals should face criminal liability for their illegal acts and should be under greater scrutiny from the federal government. Thousands of financially destitute people have been fleeced of money they could not afford to lose.⁸⁶

Legislative reform on the state level will only continue to motivate the evolution of illegal debt settlement company actions rather than halting it.⁸⁷ Some scholars have proposed that all states aggressively adopt and enforce the Uniform Debt-Management Services Act that was created by the National Conference of Commissioners on Uniform State Laws.⁸⁸ Although it may be

⁸² See, e.g., *Estrella v. Freedom Fin. Network, LLC*, N.D. Cal No. CV 09-03156, 2012 WL 4645012 (Oct. 2, 2012) (approving a settlement that provided approximately \$185 to the average qualifying class member).

⁸³ See generally Creola Johnson, *Fakers, Breachers, Slackers, and Deceivers: Opportunistic Actors During the Foreclosure Crisis Deserve Criminal Sanctions*, 40 CAP. U. L. REV. 853 (2012). Johnson refers to “deceivers” specifically as companies that promise to rescue homeowners from foreclosure, but rather defraud homeowners using spurious foreclosure relief services. *Id.* at 855. Johnson states, “[M]any Deceivers are not being criminally prosecuted at all, and imposition of civil liability by the FTC and state attorneys general do not appear to deter some of them from continuing to defraud homeowners.” *Id.* at 887. Johnson argues that these opportunistic actors taking advantage of consumers “suffer little or no consequences” and that this behavior should be criminalized by passing new laws. *Id.* This example is analogous of debt settlement companies defrauding enrolled consumers out of money through deception and outright illegal behavior and receiving “little or no consequences.” See *id.*

⁸⁴ Jane Birnbaum, *Debt Relief Can Cause Headaches of Its Own*, N.Y. TIMES (Feb. 9, 2008), <http://www.nytimes.com/2008/02/09/business/yourmoney/09credit.html>, archived at <http://perma.cc/3ZHU-Y42H> (explaining that “[d]ebt settlement companies are regulated by state attorneys general and the Federal Trade Commission, but they are rarely prosecuted”).

⁸⁵ See Johnson, *supra* note 85, at 886. Johnson’s example of con-artist foreclosure relief companies illustrates this point:

If someone claimed to have many years of experience as a doctor, but lacked any training or license to practice medicine, that individual would still be guilty of a crime designed specifically to cover this kind of wrongdoing. However, a tailor-made criminal statute for foreclosure relief con artists does not exist

Id. Likewise, strict criminal statutes for debt settlement con-artists do not exist.

⁸⁶ See GAO Report, *supra* note 10, at 24–25.

⁸⁷ See generally Schwenk, *supra* note 21. The author’s proposed solution does not go far enough to keep debt settlement companies from finding new ways to charge fees. Loopholes are often possible to find, and with the punitive risks of lawsuits being so low, there is little motivation to simply comply.

⁸⁸ See *id.* at 1185.

wise for all states to adopt similar laws so as to make enforcement easier, the Uniform Debt-Management Services Act is outdated and contains language that does not reflect the current business models of the debt settlement industry.⁸⁹ Some states have followed this model in creating their own legislation, but it has not kept debt settlement companies from acting illegally within those states.⁹⁰

Although the CFPB and many state attorneys general from around the country have been successfully pursuing legal action against noncompliant debt settlement company schemes, the infractions continue with many repeat offenders.⁹¹ Criminal liability for noncompliance coupled with focused scrutiny from the federal government would likely quell the repeat offenders and force compliance.⁹² Without additional measures on the federal level, debt settlement companies will continue to be drawn to vulnerable debt-ridden consumers “as cats are drawn to cream.”⁹³

IV. THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE DEBT SETTLEMENT INDUSTRY’S INTRODUCTION TO FEDERAL CRIMINAL LIABILITY

The CFPB has filed multiple lawsuits and enforcement actions against debt settlement companies for breaking state and federal laws like the FTC Telemarketing Sales Rule.⁹⁴ The Dodd-Frank Act required the CFPB to refer evidence of criminal activity to the Department of Justice.⁹⁵ And when, in the CFPB’s investigation of Mission Settlement Agency, evidence of criminal fraudulent activity was uncovered, the CFPB referred the matter to the United States Attorney for the Southern District of New York.⁹⁶ The U.S. Attorney’s

⁸⁹ See Uniform Debt-Management Services Act (2005 draft), <http://www.udmsa.org/pdf/2005Final.pdf>.

⁹⁰ See, e.g., COLO. CODE REGS. §§ 12-14.5-201 to 12-14.5-242 (2009), available at <http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/5%20-%20Debt-Management%20Services%20Act%20%208-7-13.pdf>.

⁹¹ See Robison, *supra* note 44.

⁹² See *infra* Part V.

⁹³ Carlsen v. Global Client Solutions, LLC, 256 P.3d 321, 328 (Wash. 2011) (Chambers, J., concurring).

⁹⁴ See, e.g., Complaint for Permanent Injunction and Other Relief, Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc., No. SACV13-01267 JST (C.D. Cal. Aug. 20, 2013).

⁹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1356, 124 Stat. 1375, 2031 (2010) (codified at 12 U.S.C. § 5566 (2012)).

⁹⁶ Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Two Companies for Charging Illegal Debt-Relief Fees (May 7, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-two-companies-for-charging-illegal-debt-relief-fees>, archived at <http://perma.cc/GDV4-33EF>.

Office accepted the case and filed criminal charges against Mission Settlement Agency as well as against some of its corporate officers individually.⁹⁷

Michael Levitis, the principal in charge of Mission Settlement Agency and the Law Office of Michael Levitis (also charged in the lawsuit), is one of the individuals facing criminal liability for fraudulent acts.⁹⁸ Due to his control over two of the corporate entities charged in the lawsuit, the Department of Justice filed criminal charges against him for wire fraud, mail fraud, and conspiracy to commit mail and wire fraud.⁹⁹

The criminal charges against Levitis, his law office, Mission Settlement Agency, and other principals broke new ground for both the CFPB and the debt settlement industry. This case is the first criminal referral made by the CFPB to the Department of Justice and represents a unique circumstance where both the company and some of its principals are criminally charged.¹⁰⁰ Additionally, debt settlement companies were forced to face the prospect of the CFPB referring other potential criminal cases to the Department of Justice based on the deceptive, fraudulent, or otherwise illegal actions.¹⁰¹

Levitis, Mission Settlement, and the other entities listed in the indictment were charged with lying about and/or concealing Mission's fees as well as deceiving customers by fraudulently promising Mission could slash their debts by 45% and then doing little or no work to reduce the debt. The entities were also charged for deceptively suggesting that Mission had affiliations with the federal government¹⁰² and for taking fees of nearly \$2.2 million from over 1200

⁹⁷ Sealed Indictment, *United States v. Mission Settlement Agency*, No. 1:13CR00327 (S.D.N.Y. May 1, 2013) 2013 WL 1880839, available at <http://www.justice.gov/usao/nys/pressreleases/May13/MissionSettlementAgencyetalChargingDocuments.php>; see also Prepared Remarks for U.S. Attorney Preet Bharara on *United States v. Mission Settlement Agency, et al.* (May 7, 2013), available at <http://www.justice.gov/usao/nys/pressconference/mission/remarks.pdf>.

⁹⁸ Sealed Indictment, *supra* note 97.

⁹⁹ *Id.*

¹⁰⁰ Press Release, U.S. Attorney's Office S. Dist. N.Y., *supra* note 25.

¹⁰¹ See U.S. Attorney's Office S. Dist. N.Y., *Debt Settlement Company & 6 Individuals Charged for Multi-Million Dollar Scheme*, YOUTUBE (May 30, 2013), <http://www.youtube.com/watch?v=tUZj9BfbO9E>.

¹⁰² Sealed Indictment, *supra* note 99, at 3–4. The indictment specifically charges:

(1) the defendants commonly lied about and/or concealed M[ission]'s fees, falsely indicating M[ission] would charge a mere \$49 per month, when in truth and in fact M[ission] took thousands of dollars in fees from funds that its customers had set aside because they believed the funds would be used to pay creditors; (2) the defendants deceived prospective customers by fraudulently promising that M[ission] could help slash their debts[—]typically by 45%[—]when, for the majority of customers, M[ission] actually did little or no work and failed to achieve any reduction in debt whatsoever; and (3) the defendants deceptively created an air of legitimacy for M[ission]'s business by, among other things, falsely suggesting that M[ission] had affiliations with the federal government and a major credit bureau.

Id.

of its customers and paying nothing to these customers' creditors.¹⁰³ Evidence of Levitis' personal gain from this scheme showed his alleged use of the money to pay for the operating expenses of his nightclub, lease payments for two Mercedes cars, and credit card bills he paid for his mother.¹⁰⁴

What may be most disturbing in the criminal case is the alleged manner by which Mission and the other charged entities misrepresented Mission's relationships with the federal government to make Mission seem more credible and trustworthy. To attract more enrollees, Mission sent solicitation letters suggesting that Mission was acting on behalf of a federal government program.¹⁰⁵ In the return address area of the mailer was the name "Reduction Plan Administrator" of the "Office of Disbursement" along with the Great Seal of the United States.¹⁰⁶

While this presents what seems to be a slam-dunk case given the facts, unfortunately the deception and illegal acts of other debt settlement companies is not so self-evident so as to fall under the fraud statutes contained in Title 18 of the United States Code.¹⁰⁷ It can often be difficult for the federal government to prove—in any alleged corporate crime—the intent element.¹⁰⁸

Thus, regardless of the outcome of the case against Mission Settlement Agency, consumers need a form of regulation that unifies the law surrounding the debt settlement industry. New criminal sanctions associated with companies not in compliance with the new regulations will help the federal government deter bad acts by pursuing criminal sanctions with greater ease. Only then will noncompliant debt settlement companies and their principals be deterred from the illegal schemes that continue to run rampant throughout the industry.

V. A PROPOSAL FOR SECURING CONSISTENT AND SWIFT SANCTIONS FOR ILLEGAL DEBT SETTLEMENT SCHEMES

When the 2010 amendment to the TSR became effective, it begged the question, why would debt settlement companies adhere to a new regulation when they could easily bear the risk of civil lawsuits and settle class action lawsuits (ironically) for pennies on the dollar? Settlement deals by debt settlement companies have historically given former consumer enrollees very little for recovery. Some may wonder after all the recent activity by the CFPB if there are still bad actors out there pushing illegal debt settlement schemes that

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.* at 4–5.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.*

¹⁰⁷ See 18 U.S.C. §§ 1341–1351 (2012).

¹⁰⁸ See Peter J. Henning, *The Difficulty of Proving Financial Crimes*, N.Y. TIMES (Dec. 13, 2010, 2:01 PM), http://dealbook.nytimes.com/2010/12/13/the-difficulty-of-proving-financial-crimes/?_php=true&_type=blogs&_r=0, archived at <http://perma.cc/DS8P-4VCY> (noting that the lack of criminal prosecution of corporate principals and officers may be due to the difficulty of proving intent).

their companies offer. The recent lawsuits by multiple attorneys general and actions by the CFPB prove that the bad actors are still alive and well.¹⁰⁹

Currently, the FTC recommends that if individuals are struggling with credit card debt and considering debt settlement, they should check out the company with the state Attorney General and local consumer protection agency.¹¹⁰ The FTC's website on "coping with debt" even states, "Don't rely on verbal promises."¹¹¹ If the FTC knows that the promises made by companies are too good to be true, the federal government should be doing more to enable trust between the debt settlement industry and consumers looking into the products the industry provides.

Although several proposals of legislative reform have been suggested and many regulations passed over the last decade, none will be as effective at deterring illegal debt settlement schemes as a federal criminal liability reform measure. This country protects companies from individuals engaging in theft, fraud, and other forms of cheating or swindling companies out of their hard-earned money through criminal statutes.¹¹² However, similar protection is not offered to individuals who are taken advantage of by companies engaging in theft, fraud, and other forms of cheating or swindling.

While the principals and officers directing illegal debt settlement schemes may not be historically known as white collar criminals, their harmful actions justify white collar criminal conviction. It is time that the federal government starts holding principals and officers responsible for the criminal acts of their debt settlement companies. In order to do that, the federal government needs to implement a better system for monitoring these companies.

A. *Creation of a Federal Registry of Debt Relief Service Providers*

Like with any other business cost, if the expected cost of committing a wrong goes up by raising the expected penalty, committing the wrong eventually becomes unprofitable. Under the current law enforcement model, deterrence is not being achieved. However, if the companies and their principals and officers actually faced a real possibility of serving time in prison or even merely having a criminal record, the cost of pursuing illegal debt settlement schemes would outweigh the benefits received. Likewise, being completely

¹⁰⁹ See, e.g., Press Release, Consumer Fin. Prot. Bureau, CFPB Files Suit Against Morgan Drexen for Charging Illegal Fees and Deceiving Consumers (Aug. 20, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-morgan-drexen-inc-for-charging-illegal-fees-and-deceiving-consumers>, archived at <http://perma.cc/5DYG-JX24>.

¹¹⁰ *Coping with Debt*, FED. TRADE COMMISSION (Nov. 2012), available at <http://www.consumer.ftc.gov/articles/pdf-0037-coping-with-debt.pdf>, archived at <http://perma.cc/C2PH-8BYP>.

¹¹¹ *Id.*

¹¹² See generally 18 U.S.C. §§ 641–665 (2012) (containing the criminal code sections regarding embezzlement, theft, bribery, receiving stolen property, etc.).

transparent to federal government oversight would more likely deter blatant disregard of the law.

In order to achieve this, the federal government must create a means to monitor the industry more effectively. The CFPB has certainly picked up on this important aspect and is trying to enforce compliance through civil actions against noncompliant debt settlement companies. Unfortunately, for both consumers and compliant debt settlement companies, there is no streamlined method for separating the good actors from the bad. The CFPB can only discover bad actors when reported by consumers. However, this is inefficient because consumers seeking relief through a debt settlement company often do not know if the service being sold to them is legitimate until they have already been cheated out of their money.

Providing a centralized federal registry of debt relief service providers will help counter the chaos that exists in state and federal government enforcement efforts. It will also reduce the burden placed on those states that are actively attempting to monitor these companies but find it nearly impossible. The CFPB will be able to monitor companies providing debt settlement services as well as businesses which offer debt counseling, debt consolidation, debt pooling, and other forms of debt management services. More than anything, this registry will give the public a list of trustworthy companies monitored by the CFPB.

This federal registry and oversight may seem overly burdensome on those businesses simply trying to run an honest business helping people settle their debts, but similar regulatory regimes have helped protect America's health and well-being. The Food and Drug Administration (FDA) requires all domestic and foreign facilities that manufacture, process, pack, or hold food or dietary supplements in the United States to register with the FDA.¹¹³ Indeed, there is a very large regulatory regime in place to protect the public from physically harmful products and misleading or otherwise false claims made by companies about their products.¹¹⁴ This regime provides swift corrective measures like recalls when harmful products are sold to consumers.¹¹⁵

¹¹³ SMALL BUSINESS GUIDE TO FDA 5 (2011), available at <http://www.fda.gov/downloads/ForIndustry/SmallBusinessAssistance/SmallBusinessGuidetoFDA/UCM081030.pdf>, archived at <http://perma.cc/Y6WK-8VUT>. The FDA produced this guide “as a blueprint that firms can follow to achieve their business aims while helping FDA accomplish its public health mission.” *Id.* at 2.

¹¹⁴ *What Does FDA Regulate?*, FDA <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194879.htm> (last updated June 12, 2014), archived at <http://perma.cc/Z6AD-M2MH>.

¹¹⁵ FDA REGULATORY PROCEDURES MANUAL, CHAPTER 7 RECALL PROCEDURES 1 (Oct. 2013), available at <http://www.fda.gov/downloads/iceci/compliancemanuals/regulatoryProceduresManual/UCM074312.pdf>. Recalls provide “an appropriate alternative method for removing or correcting marketed consumer products . . . that violate the laws administered by the [FDA]. Recalls afford equal consumer protection but generally are more efficient and timely than formal administrative or civil actions, especially when the product has been widely distributed.” *Id.*

Similar to a recall procedure in the FDA, the CFPB or otherwise assigned agency could provide swift corrective measures when a noncompliant debt relief service is discovered. Litigation is certainly not something that can be avoided entirely, but a more efficient resolution for those consumers suffering under an illegal debt settlement scheme is needed. A registry would provide the motivation for businesses to remain compliant so as to remain on the registry. As soon as a company is found selling illegal debt relief services, the CFPB could remove the business from the registry and essentially bar them from continuing to do business until the company regained compliance in its actions.

Just as the federal government requires businesses selling certain goods to report and register through the FDA, it also requires companies to register their securities in an effort to protect American investors from deceit, misrepresentations, and other fraud.¹¹⁶ When registering, companies must provide “a description of the company’s properties and business; a description of the security to be offered for sale; information about the management of the company; and financial statements certified by independent accountants.”¹¹⁷ Such disclosure with the SEC “enables investors . . . to make informed judgments about whether to purchase a company’s securities.”¹¹⁸ Requiring debt settlement companies and other companies selling debt relief services to register with the federal government would have a similar effect of helping consumers make an informed decision about choosing with whom they do business.

While the SEC and the FDA are not without their critics,¹¹⁹ both provide a service to help protect consumers from harmful practices and products. The debt relief industry, especially debt settlement companies, need the same type of regulation on the federal level to root out bad actors and help consumers know who they should and should not trust.

A centralized registry could also help improve the image of those debt settlement companies honestly seeking to provide a legitimate and compliant service to consumers. Registering with the federal government could be viewed as an act of good faith by those companies truly desiring to be compliant and provide a legitimate service. It would likely help a company cast off the negative stigma associated with the industry by registering with the federal government. And who better than the CFPB to provide a standard of ethics that registered entities must follow in order to avoid civil and criminal sanctions. The TSR is a good start, but a full regulatory scheme should be dedicated to the debt relief industry because its businesses are so prone to fraudulent misrepresentation.

¹¹⁶ *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION (Oct. 1, 2013), <http://www.sec.gov/about/laws.shtml>, archived at <http://perma.cc/76PJ-ZN4J>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 903 (2008).

Currently, the only group that provides an opportunity for debt settlement companies to register and publicly accept a standardized set of ethics and values is the AFCC.¹²⁰ This accreditation standard presents an inherent conflict of interest due to the fact that the AFCC essentially lobbies to loosen the restrictions placed on debt settlement companies by advocating for companies instead of consumers.¹²¹ Thus, creating a standardized set of federal rules and ethics as well as a registry monitored by the CFPB—an agency whose mission is to protect consumers—is the first step in achieving ultimate deterrence of illegal debt settlement schemes.

This would not require a huge undertaking. The CFPB already serves as a consumer watchdog to enforce compliance among companies engaged in commerce with consumers. A registry would help the CFPB and the federal government to create uniform policies and procedures that prevent these companies from misrepresenting their products and from charging illegal fees. It would also assist the states fighting against industry abuses and provide at least one layer of protection for those consumers seeking debt settlement services in states that have not regulated the industry.

What might the registration of debt relief services look like? On the state level, obtaining surety bonds of varying amounts is currently required in Colorado, Connecticut, Kentucky, Maryland, Utah, and many other states.¹²² Requiring a surety bond on the federal level may not be appropriate or necessary given the vast amount of states already requiring it. But registering with the federal government would include a formal acceptance of ethical rules as previously discussed. These rules would make it clear that to maintain CFPB approval, a debt settlement company must comply with all state laws including, and especially, those rules and regulations regarding the debt relief industry.

Modeled after what the SEC requires of companies selling securities, the FTC should require that, upon registration, companies engaged in debt relief servicing make the following disclosures to the CFPB and FTC:

- A description of the company's property and business;
- A description of the services the company sells;
- Information and financial data regarding the company's success rates in settling or otherwise providing debt relief certified by independent accountants.

These disclosures would be required upon registration and updated yearly. This information will help the CFPB and FTC quickly recognize misrepresentation and illegal charges as soon as they arise. It would also likely facilitate swift enforcement action. The data would need to be verifiable, and verifying the data is already a possibility because these companies are already

¹²⁰ See *Become a Member*, *supra* note 42.

¹²¹ See Harris, *supra* note 42.

¹²² See Morton, *supra* note 66.

subject to CFPB investigations.¹²³ Certainly being subject to audits of financial data and CFPB investigations would not be new for these companies. Additionally, these disclosures would not be more burdensome than what is already required in most states for these companies to do business—a small price to pay to get an official CFPB stamp of approval. And with some publicity, no longer would the public trust debt relief service providers that were not “CFPB approved.” The risk of purchasing debt relief services not baring CFPB approval would be similar to the risk of purchasing medications not baring the approval of the FDA.

Indeed, this approval means nothing if the CFPB is all bark and no bite when it comes to enforcement, which is why swift criminal sanctions are required to deter illegal schemes. Indeed, criminal sanctions should not only be imposed upon those companies providing noncompliant debt settlement services but also those that have not registered with the federal government.

B. Federal Criminal Sanctions for Noncompliant Debt Settlement Companies

Although many states have already implemented legislation allowing for criminal prosecution of debt settlement agencies through broader fraud statutes,¹²⁴ principals and officers are not facing real criminal sanctions for their involvement in illegal debt settlement schemes. Levitis and the other principals and officers criminally charged in the *Mission* case serve as anomalies to the standard that if a company is not compliant, the principal has no criminal liability despite the fraudulent actions the principal may have known about—or worse—implemented. By creating a federal registry of debt relief service providers who have to make certain disclosures, a stricter criminal liability standard can be devised.

Looking back to the FDA analogy, if a drug manufacturer is not compliant with the FDA’s “current Good Manufacturing Practices” (cGMPs), the FDA can bring both seizure and injunctive actions against these manufactures.¹²⁵ For more serious violations, the FDA also has the power to bring criminal cases

¹²³Section 1052 of the Dodd-Frank Act set forth the parameters of the CFPB’s investigative powers specifically allowing the CFPB to ascertain whether one had engaged in conduct would constitute a violation of any provision of Federal consumer financial law. 12 U.S.C. § 5562

¹²⁴For a list of states that have criminalized debt relief service providers who are not complying with state law, a list of the codified laws, and a brief summary of the severity of the crime committed, see Complaint at 3–7, *Baxter v. Legal Helpers Debt Resolution, LLC*, No. 11-CV-1050-KHV-JPO (D. Kan. Feb. 18, 2011).

¹²⁵*Facts About Current Good Manufacturing Practices (cGMPs)*, FDA (May 2, 2013), <http://www.fda.gov/drugs/developmentapprovalprocess/manufacturing/ucm169105.htm>, archived at <http://perma.cc/3RW9-VDKX>.

seeking fines and jail time.¹²⁶ Of course, the FDA does not initiate these proceedings without any warning. The FDA sends warning letters to companies that are not following the cGMPs or other rules and regulations.¹²⁷ The CFPB should have similar power to initiate civil and criminal actions against debt settlement companies not following the prescribed “good debt management practices” set forth by the agency or the state in which companies sell noncompliant debt relief services.

Because the debt relief industry has been in existence now for some time, it may be worrisome for industry veterans that new regulations may be implemented without their knowledge. The FDA faces similar concerns and sometimes uses warning letters to help correct the noncompliance before initiating a civil or criminal proceeding against the bad actor. The CFPB would be under similar direction to warn those individual bad actors of the potential civil and criminal actions it will file if no corrective action is taken. With the threat of jail time, corrective action by these individuals will likely go up. Without a broader federal legislative regime, the debt relief industry will continue evolving to find loopholes in current state laws and do business in states where little or no regulation exists. Consumers in this country deserve strict and effective protection from fraud and theft by businesses no matter where they live. With a broader federal regulatory regime dedicated to overseeing the debt relief industry, consumers will be able to establish greater trust in those companies offering alternative debt relief solutions.

VI. CONCLUSION

The debt settlement industry can be a legitimate service used to accelerate relief to those mired in debt. However, the consequences of using this service include negative effects on credit scores, the possibility of lawsuits by creditors or debt collectors, and the very real possibility that no settlement will be achieved by the debt settlement service provider. Debt settlement companies today are using deceptive, unfair, and illegal means of enrolling consumers without fear of criminal prosecution. Civil penalties imposed on noncompliant debt settlement companies are too small and insignificant to truly deter noncompliance.

Unfortunately, due to the wide variance of state laws relating to debt settlement and the debt relief industry as a whole, debt settlement companies continue to mislead consumers and dupe them into believing that debt settlement is a much better alternative than bankruptcy. In reality, the debt settlement plan may only be delaying bankruptcy after incurring massive fees, lawsuits by creditors, and a slashed credit rating. Additionally, advanced fees

¹²⁶ *Id.* The FDA is not required to produce evidence that the drugs manufactured by a company not following current good manufacturing practices be compromised in terms of safety for an action to be successful. *See id.*

¹²⁷ *Id.*

are often illegally charged. The only organization that claims to be solely dedicated to protecting consumers against these actions, the AFCC, is simply a masked industry trade organization advocating for looser restrictions on the debt relief industry. While the CFPB has successfully pursued actions against noncompliant debt settlement companies, the federal regulations it can rely on to impose civil and criminal penalties are sparse.

While some states are taking up the issue and imposing stricter standards, other states are seeing the AFCC successfully tear down regulations that once protected consumers from deceptive and unfair business practices. The fraudulent, deceptive, and abusive practices of noncompliant debt relief businesses need to stop. The federal government can deter these practices by establishing a more comprehensive regulatory regime that makes monitoring and applying civil and criminal sanctions faster and more consistent.

A federal regulatory regime dedicated solely to overseeing the debt relief industry would greatly reduce noncompliance. By creating the opportunity for debt settlement companies and other businesses selling debt relief services to become “CFPB approved,” fewer consumers will fall prey to the illegal schemes implemented by the principals and officers of debt settlement companies which blatantly disregard state and federal law. Additionally, compliant companies will no longer have to combat a negative stigma surrounding the services they sell simply because of the bad acts of others in the industry. The FDA and SEC serve as examples of agencies that the federal government has given regulatory power over specific consumer products. Like the FDA, the CFPB or other assigned agency should have prosecutorial powers and a federal statutory scheme to hold principals and officers of noncompliant debt relief companies criminally liable. Without the threat of actual jail time or at least a criminal record, principals and officers of these noncompliant businesses will continue to look for ways to exploit vulnerable individuals and rob them of what little money they have left.