Center for Responsible Lending
Comments to the Consumer Financial Protection Bureau
on Request for Information Regarding Senior Financial Exploitation
Docket CFPB-2012-0018
20 August 2012

Introduction

The Center for Responsible Lending is pleased to submit these comments to the Consumer Financial Protection Bureau (CFPB or "Bureau") in response to its request for information on abusive financial practices that affect older Americans. Our comments relate to Question Seven from the RFI: *"What types of fraudulent, unfair, abusive or deceptive practices target Americans age 62 and over?"*

We are very encouraged that CFPB is tackling this issue. In a recent survey of experts who deal with financial fraud of elders (financial planners, medical professionals, and social workers), 96 percent said financial exploitation/fraud of seniors is a serious problem, and three out of four respondents reported that they encountered investment fraud or financial exploitation of seniors "quite often" or "somewhat often."[1] Research by insurance provider MetLife found that Americans over 60 lost at least $2.9 billion to financial abuse in 2010—up 12 percent from 2008.[2] It is likely that these numbers will only get worse in the future. Projections show that nearly one in every six Americans will be age 65 or older by the year 2020, and almost 20 percent of the U.S. population will be so by 2030.[3]

Financial abuses are often targeted at financially-vulnerable seniors. For example, one subprime mortgage salesman described the "perfect customer" several years ago as: *"an uneducated widow who is on a fixed income, hopefully from her deceased husband's pension and Social Security, who has her house paid off, is living off of credit cards, but having a difficult time keeping up with her payments and who must make a car payment in addition to her credit card payments."*[4]

Still, sophisticated scams can lure even educated, financially-savvy seniors into poor decisions. A major AARP survey identified fraud victims as relatively affluent and well-educated, with extensive networks of family and friends.[5] The good news is that today's seniors have accumulated substantial assets, either through inheritance, home equity, or a lifetime of saving for retirement: in 2009 they had 42 percent higher net worth than similarly-aged counterparts in 1984.[6] The bad news is this makes them prime targets for wannabe Willie Suttons who "Go where the money is … and go there often."[7]

<u>The Worsening Financial State of Seniors</u>

Although seniors as a group may hold a significant share of financial assets, they have not been immune to the impact of the Great Recession. From 2005 to 2010, the median net worth for households headed by someone 65 or older decreased 13 percent to $170,128.[8] If home equity is excluded, the median net worth for a senior-citizen headed household was just $28,518 in 2010, down from $31,575 in 2005.

Coupled with declines in the value of their largest assets—homes and retirement assets—many older Americans struggle with limited incomes. More than 13 million older adults are considered economically insecure, living on $21,800 a year or less.[9] Senior women in particular face diminished incomes because of lower lifetime earnings and therefore lower Social Security and pension benefits.

Faced with insufficient incomes, many older Americans take on debt to cover medical and living expenses. The average credit card debt for older households in the US is now slightly more than $9,000, the highest average balance of any age group.[10] Other seniors turn to checking account fee-based overdraft loans, payday (cash advance) loans and car title loans. All of these carry very high costs and create debt traps, as detailed below.

The result is not just more debt, but also <u>unaffordable debt</u>. Some 20 percent of older households with annual incomes below $50,000 report spending more than 40 percent of their income on debt payments.[11] The results are predictable: People over age 55 make up the fastest-growing segment of people seeking bankruptcy protection,[12] and a limited study of Chapter 7 bankruptcy filers found that the older debtors' major distinguishing characteristics were large credit card debt—more than double their annual income.[13]

The picture is even grimmer for African-American and Latino seniors. Even *before* the Great Recession, The Institute on Assets and Social Policy (IASP) at Brandeis University estimated that nine of ten African-American and Latino seniors did not have sufficient economic security to sustain themselves through their projected lives.[14] As explained by IASP: *"A typical adult approaching retirement in 2010 was born around 1945 and may have entered the workforce in the mid-1960s at a time of racial segregation in schools and communities, little access to college for people of color, and employment opportunities with no pension or retirement savings benefits, or even Social Security for African-American and Latino workers."*

Although there are many issues related to financial abuse of seniors, we focus these comments on the issues where CRL has done or is doing most of its work. We have separated these into three general categories:

- Financial Products that Take Advantage of Income Insufficiency (payday loans, overdraft loans)
- Financial Products that Contribute to Asset Depletion (reverse mortgages)
- Financial Practices that Perpetuate Economic Insecurity (debt buying and debt settlement)

Financial Practices that Take Advantage of Income Insufficiency

Seniors living on fixed incomes are particularly vulnerable to abuses in short-term loans, in particular payday and high-cost overdraft loans. The structure of these loans—high fees combined with a short-term balloon payment requirement—ensures that most borrowers cannot both repay the principal and interest AND meet their day-to-day living expenses until their next payday. As a result, they are forced to take out another loan and then another, creating a cycle of debt that leaves borrowers worse off than they were before getting the first loan.

<u>Payday Loans</u>

Payday lenders and banks are increasingly persuading seniors living on fixed incomes who have trouble meeting their day-to-day living expenses to take out payday loans. Whether through storefronts, banks, or online, these loans are structured to create long-term debt traps. Borrowers take out a loan, usually for a few hundred dollars, and write a post-dated check or provide electronic checking account access for the principal borrowed plus a fee (typically 10-20 percent of the principal). The payment is due when the next payday or benefits check is deposited, typically two weeks for paychecks and one month for benefits checks. These loans generally carry triple-digit annual percentage rates (APRs) and create a debt trap as recipients are unable to repay the loan and still cover their living expenses until their next payday, necessitating subsequent loans. Oftentimes borrowers default on their loans after months of payments, at which point they may face the possibility of automatic closure of their bank accounts and/or filing for bankruptcy.

Data from two CRL reports highlight the debt trap of payday loans. *Payday Loans, Inc.*[15] found that borrowers were in debt an average of 212 days, or 58 percent of the first year after taking out a payday loans, and over 50 percent of the second year. Despite how these loans are marketed, they are not in reality short-term loans. *Phantom Demand*[16] found that more than three-quarters (76 percent) of payday loan volume is due to loan churn—when lenders make additional loans to the same borrower because he or she does not have enough disposable income to pay back the original loan and pay regularly-occurring expenses, at a cost of $3.5 billion in fees each year. It is telling that payday lenders often offer the first payday loan for "free," knowing that the vast majority of borrowers will not be able to repay even only the principal in such a short period of time and will be forced to take out additional payday loans—and pay the high fees that go along with them.

There is anecdotal evidence that payday lenders and banks target seniors. A *Wall Street Journal* analysis of data from the U.S. Department of Housing and Urban Development (HUD) found that payday lenders were clustered around government-subsidized housing for seniors and the disabled.[17] The article cited one former payday store manager who said management encouraged him to target the elderly by eating lunch near such a development and striking up conversations with potential borrowers. And an internet search of "payday loan + Social Security" generates a plethora of online ads touting "Get Fast Cash," "Easy Social Security Loans," etc.

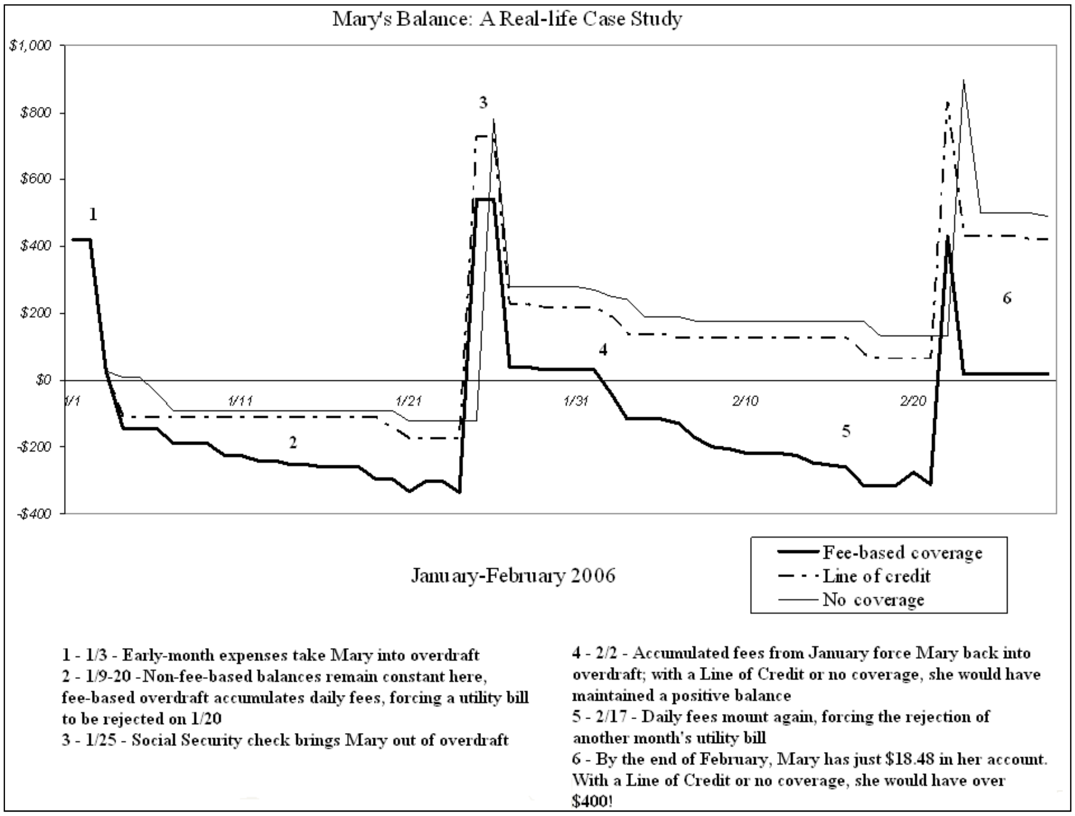
Although not many data on the incidence of payday lending among the older population are available, CRL's research report, *Big Bank Payday Loans,*[18] found that nearly one-quarter of all bank payday loan borrowers were Social Security recipients, who were 1.6 times more likely to have used a bank payday loan as bank customers as a whole. In addition to the higher incidence of payday loans among the elderly population, there is often a greater impact of payday loans on this group. Seniors with payday loans are likely to pay a large proportion of their Social Security benefits to abusive payday loan fees. They are dragged further into debt and face even greater income insufficiency than they did when they first considered using a payday loan since the fees multiply.

For example, a *Wall Street Journal* article[19] provides the example of Melvin Bevels, an 80-year-old man who in November 2002 fell short of money for groceries and took out a relatively small payday loan for approximately $200. A clerk helped him fill out his paperwork to send his $565 monthly Social Security benefits to an out-of-state bank, which then transferred money back to the payday lender. His bank account statements confirm that every time he received his directly deposited Social Security benefits, the bank then transferred the money to the payday lender. He would then go to the payday lender to pick up what he considered his "allowance," sometimes as little as $180/month. He eventually had his utilities shut off and faced eviction when his trailer burned down, ultimately leaving him homeless. The payday lender ultimately sued Mr. Bevels in small claims court, but the case was thrown out.

Overdraft Loans

Overdraft fees are charged when an institution chooses to pay a customer's debit card, check, ATM, or other electronic transaction, even though the customer's account lacks sufficient funds to cover the charges. Like payday loans, overdraft loans often create a debt trap for seniors.

To demonstrate the impact of overdraft fees on seniors living on fixed Social Security income, we tracked two months of actual checking account activity of one senior citizen, whom we call Mary, from a database of checking account transactions.[20] Mary is entirely dependent on Social Security for her income. We compared the actual activity with what her account activity would have been with an overdraft line of credit and with no overdraft coverage at all. The results are graphically demonstrated below.



During January and February of 2006, Mary overdrew her account several times and was charged $448 in overdraft fees. At the end of February, she had $18.48 in her account. She was trapped in a destructive cycle of debt, using the bulk of her monthly income to repay costly overdraft fees. Notably, even with high-cost overdraft coverage, Mary's utility bills were denied in both January and February because overdraft fees had driven her so far into the red that the bank eventually stopped approving her transactions.

With an 18 percent APR overdraft line of credit, Mary would have paid about $1 in total fees over the two months and would have had $420 in the bank. Moreover, even if Mary had had no overdraft coverage at all, she would have been better off than she was with high-cost overdraft loans. Five of her transactions, totaling $242, would have been denied—two point-of-sale transactions and three electronic transactions. She would have been charged no fee for the two point-of-sale transactions. She might have been charged a non-sufficient funds (NSF) fee for each of the three denied electronic transactions and may have been charged late fees if any of the electronic transactions were bills. Assuming, conservatively, that she was charged an NSF fee *and* a late fee for each of the three transactions, her ending balance still would have been $489—more than enough to cover the value of the utility bills that were denied.

Mary's situation illustrates a problem common among the chronic overdrafters who pay the vast majority of the fees: Overdraft fees beget more overdraft fees. Ultimately, high-cost overdraft coverage prevents account holders from being able to meet obligations they otherwise would have been able to meet. Said another way, high-cost overdraft coverage can lead to denial of transactions that would not have been denied *but for* the debt created by high-cost overdraft fees.

Mary is not alone. Many other seniors dependent on Social Security benefits are caught in a cycle whereby the first overdraft fee causes subsequent ones, driving them further into debt and ultimately making them less likely to be able to meet essential expenses. The National Consumer Law Center's 2010 report, *Runaway Wagon,* estimated that at least $700 million in Social Security benefits went to repay overdraft loan fees each year.[21] In addition, CRL's report *Shredded Security* found that older Americans aged 55 and over paid $6.2 billion in overdraft fees in 2008[22]—$2.5 billion for debit card/ATM transactions alone[23]—and those heavily dependent on Social Security paid $1.4 billion.[24] Moreover, debit card transactions were the most frequent trigger of unauthorized overdrafts for older adults, even though seniors were less likely to use debit cards than their younger counterparts.[25] Account holders who overdrafted using a debit card paid back far more in fees than they received in credit.

Since the publication of these reports, the Federal Reserve Board (FRB) has put in place an opt-in rule for electronic overdraft coverage, yet this has not alleviated consumer problems for two reasons. First, too many banks, large and small, aggressively marketed overdraft "opt-in," targeting customers who generate the most fees and steering them to the highest-cost credit the bank offered.[26] Marketing materials often created the false impression that emergency action was needed on the account, or implied that opting in would protect customers from bounced check fees. For example:[27]

> *We Need to Hear From You . . . To keep your account operating smoothly . . . To avoid any interruptions in how we service your account; we need to hear from you.*
>
> *Your Debit Card May Not Work the Same Way Anymore Even If You Just Made a Deposit.*
>
> *Relax and protect yourself from the inconvenience of an overdrawn account and retailer fees*
>
> *The Bounce Overdraft Program was designed to protect you from the cost and embarrassment of having your transactions denied.*

Second, the FRB rule did not address the substantive reforms necessary to address the abusive nature of overdraft fees. For example, banks still routinely reorder transactions to maximize fee income, and fees are not proportional to the transactions triggering them, with high fees standard even when borrowers overdraft by pennies. Further, there is no limit to the number of overdraft fees consumers may be charged.

It is imperative to go beyond improving disclosures or addressing deceptive marketing to address the substantive problems with overdraft loans that result in a cycle of high-cost debt for vulnerable seniors and others: charging overdraft fees on debit card and ATM transactions that could be declined at no cost; extending this high-cost credit without an ability to repay; and reordering transactions to maximize overdraft fees.

Seizure of Exempt Benefits to Repay Payday and Overdraft Loans

Federal law aims to protect exempt benefits like Social Security payments from garnishment by debt collectors. But banks routinely subvert the letter and spirit of the law through collection of payday and overdraft loans.

Unfortunately, federal regulators have perpetuated these practices by affirmatively defending in the courts banks' ability to seize federal benefits through overdraft programs. In *Miller v. Bank of America*, a case involving more than one million elderly customers challenging bank seizure of exempt funds from Social Security, the Department of Justice asserted to the California Supreme Court on behalf of the

Office of the Comptroller of the Currency (OCC), Treasury, and the Social Security Administration, that overdraft programs do not involve "collect[ing] a debt" and that, as a result, the OCC's regulations under the National Banking Act allow the seizure of funds through overdraft.[28] This position was intellectually inconsistent then, since the regulators had already explicitly stated in 2005 that overdrafts were extensions of credit,[29] and it is even more clearly so now in the wake of the OCC's repeated acknowledgement that overdrafts are credit in last year's proposed guidance to address overdraft programs, entitled "Guidance on Deposit-Related Consumer *Credit* Products" (emphasis added).[30]

Fortunately, more recently, the Treasury Department has taken significant steps toward ensuring Social Security and other federal benefits are appropriately protected when debt collectors attempt to garnish bank accounts.[31] Similarly, when Treasury recently authorized direct deposit of Social Security and other federal payments to prepaid cards, it banned deposits to prepaid cards that have a line of credit or loan agreement that triggers automatic repayment upon the next deposit, out of concern that high-cost credit products would siphon off exempt benefits.[32]

But banks' ability to repay themselves payday and overdraft loans and related fees from customers' checking accounts has not been made subject to either of these new rules. Treasury's garnishment rule did not address this practice of "setoff" by financial institutions,[1] and its direct deposit rule protects only deposits to prepaid cards, not to traditional checking accounts. The federal government should ensure that federal benefits are protected from debt collection even when the creditor is the customer's bank, and it should protect direct deposits of federal benefits from high-cost loans made through traditional checking accounts, as it has protected these funds on prepaid cards.

Financial Practices and Products that Contribute to Asset Depletion

While payday and overdraft loans take advantage of income insufficiency, reverse mortgages contribute to asset depletion of seniors who are "house rich, but cash poor."

Reverse Mortgages

As the recent CFPB report to Congress on reverse mortgages found, Home Equity Conversion Mortgages (HECMs)—reverse mortgages insured by the Federal Housing Administration (FHA)—can have benefits but also be dangerous and confusing. HECMs allow seniors 62 and over to tap into the equity in their home without having to make monthly payments. Instead, seniors *receive* payments from the bank. The loan—including principal borrowed, interest, and a substantial mortgage insurance premium—are all due when the borrower dies or leaves the home "permanently" (i.e. for at least a year)—to enter a long-term care facility, for example.

Sometimes, a reverse mortgage can be helpful; for example, a reverse mortgage is certainly a better way to pay for day-to-day necessities than payday or overdraft loans. Nevertheless, reverse mortgages can be harmful and even abusive in some cases. These include instances when borrowers are pressured use the proceeds to buy deferred annuities or to take out the entire principal up-front (paying high interest and fees over the life of the loan) even when they do not need the money right away. Today, more reverse mortgage borrowers are facing foreclosure because they have run out of equity and cannot afford to pay taxes and insurance and continue upkeep on the home—all requirements of staying current on the mortgage.

For most seniors, their home is their greatest asset, and tapping into the equity of that asset should not

[1] 76 Fed. Reg. 9947.

be done without careful consideration. As a result, CRL believes the reverse mortgage application process should occur in this order:

- Seniors who are considering a reverse mortgage should have access to information from an unbiased source, such as AARP, the National Council on Aging, or even the CFPB. This information should advise seniors to also consider other options, such as cutting back on expenses, selling their house and downsizing, applying for public benefits that may be available to them, or taking out a home equity line of credit.
- After reviewing this information, borrowers who believe that reverse mortgages may meet their needs should receive counseling, ideally in person, to evaluate their needs and options.
- Only after counseling should borrowers contact lenders and move forward with the loan origination process.

Unfortunately, often the process is very different, with seniors often learning about reverse mortgages from late-night television ads that urge them to call lenders directly. In addition, there is a heavy rotation of advertising on urban Christian radio networks, and we have heard anecdotal stories that seniors are targeted through affiliations with churches and civil organizations. As a result of this marketing, seniors often start with the lenders—who obviously have an interest in the outcome of the loan—rather than gathering independent information first. After they've decided to take out a loan, seniors then go to counseling and possibly see it as a formality rather than a source of valuable information on alternatives to reverse mortgages and ways to choose the best type of reverse mortgage for them.

Among the issues that raise concern for CRL are the following:

Counseling

Although counseling is required for HECM borrowers, counseling does not ensure that borrowers are well-informed and understand the implications of the decisions they make. One key problem is that, as discussed above, some borrowers see the counseling as a formality and not a real chance to evaluate their options. Indeed, the recent CFPB report on reverse mortgages states: "Counselors interviewed for this study reported that many prospective borrowers did not take the sessions seriously. According to counselors, these prospective borrowers viewed counseling not as an opportunity to learn about the product and make a better decision, but as a hurdle between them and their goals. Counselors stressed that prospective borrowers needed to allow themselves the time to learn about the product and the options without rushing toward a desired conclusion."[33]

In addition, counselors are prohibited by HUD from offering their own assessment of what options may make sense given a particular borrower's situation, which can make it more difficult for borrowers who do want counseling to evaluate their choices. The lack of funding for counseling—down 50 percent this year[34]—may also contribute to shorter or less comprehensive counseling sessions, and we have heard anecdotally of "counseling mills" where sessions last as little as 20-30 minutes. Given the importance of high-quality counseling to the program, more must be done to ensure that the sessions are timely, comprehensive and high-quality, so that borrowers who receive counseling can make the best decisions for themselves.

Product Choice

CRL is also concerned with the large proportion—70 percent—of borrowers who are choosing fixed-rate rather than adjustable-rate HECMs. Unlike "regular" mortgages, fixed-rate HECMs have a dangerous difference versus their adjustable-rate peers: they require borrowers to draw all their available principal up-front, rather than over time. Unless a borrower needs all the loan principal up-front (say, to pay off a "forward" mortgage in order to avoid foreclosure), he or she would do better to choose an adjustable-rate loan, which provides the flexibility to borrow money over time in a line of credit and/or with fixed term/tenure payments each month. In the latter case, a borrower would save many years of accumulated interest and mortgage insurance premium (currently, 1.25 APR of the loan balance) and would have a lower loan balance over the life of the loan, all else being equal. In addition, borrowers with the sudden infusion of cash from a fixed-rate HECM are prime targets for unscrupulous salespeople who want to sell them inappropriate financial and insurance products. Although the Housing and Economic Recovery Act of 2008 bars cross-selling of products, borrowers can still be targeted by salespeople who are not employed by the originator.

Foreclosure Risk for Failure to Pay Taxes and Insurance

Although a HECM does not come due until the borrower dies or permanently moves out of the home, borrowers who fail to pay their property taxes or insurance are in default and may be foreclosed upon. Servicers may make these payments directly from loan proceeds for borrowers who fail to pay them on their own, but with 70 percent of the borrowers taking a full draw up-front through the fixed-rate HECM, many borrowers do not have any available principal to pay their taxes or insurance every year. As a result, more and more borrowers are facing the threat of foreclosure. This is particularly concerning because HECMs are sometimes marketed as "safe" loans without risk of foreclosure because the bank makes payments to the borrowers. The reality is that when HECM proceeds run out, many borrowers are at risk of foreclosure because they cannot afford taxes and insurance. More emphasis should be placed on this in counseling, and CFPB and HUD should consider if there is a way to require an escrow account for taxes and insurance, especially for fixed-rate borrowers who are at higher risk of running out of funds, all else being equal.

Taking a Homeowner Off the Deed

The amount of money a borrower receives from a HECM is dependent in part on the age of the borrowers; younger borrowers are likely to live longer and therefore are allowed to tap into a smaller proportion of their home value because the loan balance has the potential to grow over a longer period of time. When two borrowers are present, as in the case of spouses, the age of the younger borrower is used, meaning that less principal is available than if the older borrower took out the loan on his or her own. The reason is that the loan will not come due until both borrowers die or permanently leave the home.

Some borrowers, in an effort to borrow as much money as possible, take the younger borrower off the deed. (If the younger spouse is under 62, this must happen in order to receive a HECM.) This can cause many problems, in particular if the older spouse dies or permanently leaves the home and the reverse mortgage is due. This leaves spouses and other borrowers who are not on the deed and, therefore, the reverse mortgage at risk of losing their homes unless they have the proceeds to pay off the reverse mortgage. The CFPB report highlights this problem: "Several borrowers reported to the CFPB that they did not understand the consequences of not having a spouse on the deed and the reverse mortgage. Borrowers reported that brokers promised lower rates, additional funds, or a more favorable deal if spouse's [sic] names were not on the deed or reverse mortgage."[35] More protections are needed to ensure that spouses and other family members on the deed are not inappropriately removed.

Financial Practices that Perpetuate Economic Insecurity

There are many components to family economic security, including adequate and stable income, a government safety net for households facing severe hardship, and ways for families to build and protect savings and assets. Abusive debt collection practices are a direct threat to the latter. In addition, many of the dangers posed by debt collection cannot be avoided by consumers – while they may have some choice in creditors, they have no choice in who attempts to collect debt from them.

The prevalence of debt collection abuses is well-known. The FTC receives more complaints about the debt collection industry than any other industry.[36] Some of these complaints include misrepresentation about the amount or legal status of the debt, excessive contact, obscene or abusive language, and threats to sue. In addition to the seizure of exempt benefits by financial institutions to repay overdraft and payday debt, discussed above, CRL is particularly concerned about additional elements of debt collection, outlined below.

Debt Buying

Debt buying is the practice of banks and creditors selling charged-off or defaulted debt to companies specializing in debt collection. The most prevalent type of debt sold is credit card debt, making seniors (who as a group hold the highest levels of credit card debt)[37] vulnerable to debt buying abuses. In addition, more types of debts are being packaged and sold, including student loans, medical (including hospital) bills, utility and phone bills, tax liens, car loans, and mortgage deficiencies.[38] Seniors can carry large balances of these debts as well.

After a loan becomes delinquent and internal collection attempts have failed, creditors will charge-off and sell the debt, typically once it is more than 180 days past due. Debt buyers purchase the charged-off debt for pennies on the dollar and attempt to collect the debts themselves using techniques that range from phone calls to lawsuits. When debt buyers are unable to collect on the debt, they usually repackage and resell the debt to other debt buyers.

The FTC considers debt buying to be one of the most significant changes in debt collection in recent years, noting the substantial increase in debt buying between 1997 and 2007.[39] Debt sales have increased from $6.8 billion in face value of debt sold in 1993 to more than $110 billion sold in 2005.[40]

Many state legislatures and courts are establishing needed reforms that protect consumers from unfair and improper debt collection practices by debt buyers, including strengthening minimum evidentiary standards and barring the collection of time-barred debts. However, debt buyers are fighting against these measures and are even seeking to weaken laws and rules regulating their activities and practices. The CFPB can play an important role in establishing and maintaining strong—and badly-needed—reforms.

Below are some of the most egregious debt buying abuses CRL has learned about from legal services and counseling organizations and local advocates:

Inaccurate and "Zombie" Debt

When debt buyers purchase debt portfolios, they rarely obtain documentation of the debt. Instead, they typically receive an electronic file that contains a person's name, the amount allegedly owed, the charge off date, the date and amount of the last payment, and sometimes other information used to identify the consumer. The portfolios are typically sold "as is," without representation that the information is accurate, and often account information in fact is not accurate or goes missing, particularly if the debt is resold. The result of the sale and resale of undocumented and often inaccurate debt is that debt buyers often collect on debt that is beyond the statute of limitations or debt has been paid, settled, or discharged in bankruptcy. This phenomenon is called "zombie debt," as it is debt that never seems to die. In a 2009 report, the FTC concluded that the information received by debt buyers is frequently "inadequate and results in attempts to collect from the wrong consumer or to collect the wrong amount."[41]

Courtrooms as Collection Agencies

Debt buyers are increasingly turning to lawsuits to collect debts instead of pursuing traditional debt collection methods. Flooding small claims courts around the country, the majority of debt collection suits result in default judgments in favor of the debt buyers because the person sued did not appear in court. A recent study of 365 lawsuits filed in New York City revealed that debt buyers prevailed in more than nine out of ten lawsuits, usually by obtaining default judgments.[42] With a default judgment in hand, debt buyers are then able to collect on the debt by garnishing wages or seizing bank accounts even though they lack proof of the debt, the debt has already been paid, or the debt is time-barred by the statute of limitations.

Numerous reports have documented that state courts have become overwhelmed by debt collection lawsuits in recent years. According to a 2009 report from the FTC, the majority of cases on state court dockets on any given day are debt collection cases.[43] The *Chicago Tribune* reported in 2008 that one judge in Cook County had 12,000 debt collection lawsuits on his docket, more than double from the year before.[44]

"Sewer Service" and Robo-Signing

Because of the often incomplete or outdated information that debt buyers obtain when purchasing the debt, many consumers do not actually receive notice of the suit because the notice is often sent to an out-of-date address associated with the underlying credit card account.[45] Debt buyers and their law firms typically hire process serving agencies to serve collection lawsuit papers on the consumers in the cases. Significantly, these independent contractors are not paid for unsuccessful service. Numerous reports document the prevalence of "sewer service"—the practice of failing to serve notice of the suit (and instead throwing court papers in the "sewer") and filing false affidavits of service with courts.[46]

News reports and court cases also suggest that, much like mortgage foreclosure problems, "robo-signing" of affidavits in support of debt buyer lawsuits is a problem. A 2010 study of cases in New York City found that one individual signed all affidavits filed by three debt buyers that, if extrapolated to every case filed by those companies in one year, would have meant that the individual would have signed more than 47,500 affidavits during that year.[47] An employee of Asta Funding, a large debt buying company, testified that she signed about 2,000 affidavits per day.[48]

<u>Debt Settlement</u>

"Be debt free in 36 months!!" "We can reduce your debt load by up to 50%!!" With false promises like these, debt settlement companies entice debt-burdened families desperate to relieve their financial distress. As with debt buying abuses, seniors holding large amounts of credit card or other unsecured debt like medical bills may be particularly vulnerable to these often unfulfilled marketing promises.

Typically, enrolling in a debt settlement program worsens a family's financial situation almost immediately. This is because debt settlement requires consumers to stop paying their debts, and instead make payments directly to the debt settlement company or into a separate bank account. This puts clients in default on their credit obligations, increases their debt burden through late fees and penalty interest rates, and harms their credit scores. And the very low success rate for debt settlement programs means that most clients will not achieve any financial benefit, and many will be left significantly worse off. It is not surprising that the OCC has concluded that debt settlement "is not a legitimate method of satisfying debts."[49]

The debt settlement industry has exploited the growing financial distress of the last decade. An industry spokesperson estimates that more than 500,000 Americans with approximately $15 billion of debt are currently enrolled in debt settlement programs.[50] Virtually all of these individuals would be better off pursuing other, legitimate, options for debt relief, such as speaking with their creditors directly or working with a nonprofit credit counseling agency.

Increased consumer debt burden

Debt settlers advise clients to ignore creditor calls and letters, even though this causes the amount of debt to grow through late fees and penalty interest rates. The growth in debt load ("accretion") is a serious problem where any debts are left unsettled. Unfortunately, accretion is the outcome in the vast majority of cases.

Penalty interest rates and late fees charged on typical credit cards are significant. A study by the Pew Charitable Trusts analyzed the terms of over 450 consumer credit card products issued by the top issuers who together control more than 90 percent of outstanding credit card debt.[51] As of March 2010 (following the CARD Act), the median disclosed default interest rate was 29.99 percent.[52] In a 2011 update, Pew noted that monthly late fees had dropped from a median of $39 per month to a range of $25 to $35 for banks and $25 for credit unions, but continued to be charged on more than 95 percent of the card products reviewed.[53]

The debt settlement industry trade association is the American Fair Credit Council (AFCC).[54] AFCC has claimed an accretion rate of 21.9 percent but acknowledges this rate does not include the growth of debts that the company does not settle.[55] Since the majority of debts enrolled in debt settlement programs are not settled, industry's asserted 21.9 percent accretion rate is artificially low. Given that the median default interest rate reported by Pew itself was 29.99 percent, it seems evident that annual accretion rates of defaulted debt are likely to be higher than 21.9 percent, especially when late and other fees are also added.

In discussions with lawmakers, AFCC spokesmen have repeatedly claimed that creditors do not charge interest or impose fees after they "charge off" the account, typically after 90 to180 days' delinquency. This is not accurate. To comply with accounting standards, creditors "write off" defaulted accounts after 90 to 180 days. At that point, the creditor typically sells the debt to a third party debt buyer or sends it out to a debt collector. This does not mean that interest and fees stop accruing; third party debt-collectors and debt buyers are entitled to charge interest and fees to the extent permitted in the credit card agreement. While not all creditors do so, it is clear that many creditors do indeed charge interest after charge-off and are legally entitled to do so. This has been confirmed by Novadebt, a consumer counseling agency with offices in 9 states, which reviewed its client files and confirmed that creditors continue to charge interest after charge-off.[56]

Stopping payments to creditors causes problems for consumers beyond debt accretion and creditor law suits. Defaulting on credit card debts can reduce a consumer's credit score anywhere between 65 and 125 points, with higher impacts on consumers who were current on their payments prior to enrolling in the program.[57] Missed payments can remain on a consumer's credit report for seven years even after a debt is settled.[58]

Even worse, many consumers who enroll in debt settlement programs, whether because of it or in spite of it, end up having to file for bankruptcy, with estimates ranging from between 13.5 percent and almost 25 percent of enrollees.

Poor success rate

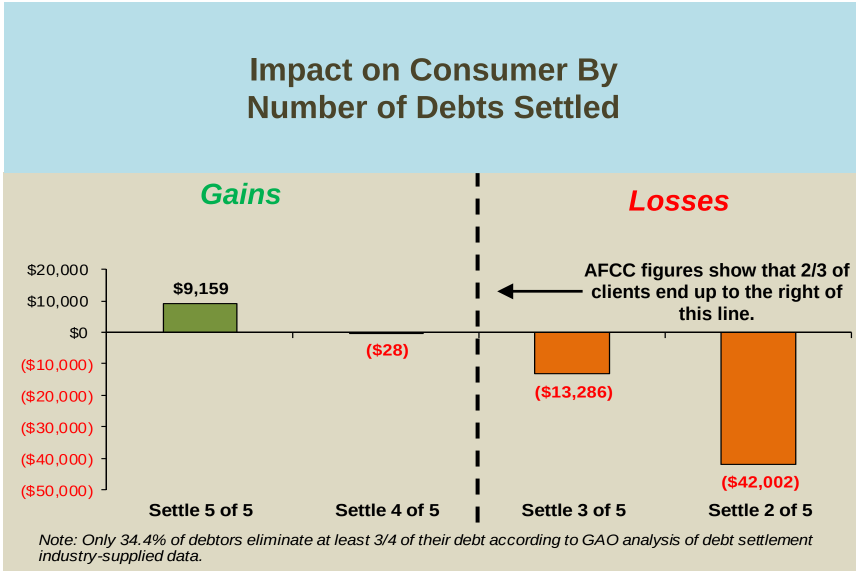
The AFCC released performance figures from self-selected member companies, which show that roughly two-thirds of all debt settlement clients do not get close to the anticipated (and promised) results.[59] And AFCC survey data showed that 43 percent of clients had no debt settled at all. Even these abysmal figures seem overly optimistic according to data obtained by state law enforcement agencies.[60] Debt settlement companies resist transparent reporting of their success rates, so comprehensive national data are hard to come by. Nevertheless, state Attorneys General have uncovered considerable data involving numerous companies, and the data are remarkably consistent in showing uniformly low success rates.[61]

Debt settlement companies openly acknowledge that the business model contemplates that most clients will not achieve the results called for in their debt settlement plan. After the Better Business Bureau (BBB) designated debt settlement an "inherently problematic" business, the BBB offered to remove this designation for any company that could show that more than 50 percent of their clients completed the program and achieved a significant reduction in savings that exceeded fees paid to the debt settler. Spokesmen for the two industry trade associations rejected this offer saying it was "unrealistic" to expect debt settlement companies to achieve this result for even half of their clients. [62]

CRL researchers gathered data showing the costs associated with debt settlement in an effort to determine debt settlement's impact on consumers and the conditions necessary to enable consumers to derive some benefit from a debt settlement plan. The graph below demonstrates the impact of debt settlement on consumers depending upon the number of debt accounts that are settled, calculating conservatively in a way that likely understates the accretion through debt settlement.

The graph assumes that the debt settlement company's fee is limited to 15 percent of the savings achieved. It calculates debt accretion by applying a 29.99 percent interest rate to the outstanding balance. In order to be conservative, it does not include late fees in the debt accretion. It assumes the consumer has five debts of $5,000 each, and that the debt settlement company achieves savings of 45 percent on the debts it settles (calculated as 45 percent of the difference between the amount of debt at enrollment and the amount paid to settle). It assumes a relatively large monthly payment of $600. Using a lower monthly payment would have resulted in even greater losses with debt settlement.

As the figure on the next page reveals, even when fees are capped at 15 percent of savings, a consumer achieves a true financial benefit <u>only if all five out of five debts are settled</u>. If only four out of five debts are settled, the consumer roughly breaks even. However if fewer than three of five debts are settled, the consumer incurs a loss that exceeds the gains she could achieve even in the best case scenario. Because even AFCC acknowledges that most consumers will not achieve the settlement of all debts, the model shows that most clients will not achieve *any* financial benefit from debt settlement, and many will be left significantly worse off.



Turns a delinquent loan into a lawsuit

Debt settlement firms advise clients to stop paying their debts, with the goal of giving the settlement firm leverage to negotiate with the creditor. However, many creditors refuse to work with debt settlement companies. InsideARM.com, a publication of the accounts receivable management industry, published the results of a survey of creditors and collectors that asked about their experiences with debt settlement.[63] Fully 41 percent of the respondents stated that they do not work with debt settlement companies to settle consumer debt.[64] The top reasons given for not working with debt settlers were the economics of settlement and "security, compliance and legal concerns."[65]

When a creditor will not work with a debt settlement company, and the consumer stops paying on their debt because they are enrolled in a debt settlement plan, the creditor often files a lawsuit to collect the debt. This is supported by the insideARM.com survey, describing what respondents do when they discover that a debtor is working with a debt settlement company. Fourteen percent have developed a legal recovery strategy specifically for such accounts, while others appear to step up their collection efforts, with 42 percent employing specialized in-house collections and eight percent using repeated demand letters.

Avoids better debt relief solutions

There are a range of better debt relief options for struggling families, typically at a fraction of the cost of debt settlement and without many of the attendant harms. For example, credit counseling agencies offer debt management plans (DMPs).[66] A DMP generally requires consumers to pay unsecured debts to their creditors in full, but with modified terms, including significantly reduced interest rates and minimum payments, and the elimination of late and other penalty fees. Under a DMP, the credit counseling agency creates a repayment schedule that typically lasts three to five years. The consumer sends one monthly payment to the agency, and the agency distributes funds to each of the consumer's creditors. Because a DMP is not dependent upon a consumer being in default and is arranged with creditor knowledge and consent, it is not accompanied by the penalty interest rates and fees that make debt settlement so dangerous.

Consumers may also be able to work directly with their creditors to obtain relief from late fees and finance charges, receive a reduced "hardship" interest rate, or extend their time to repay. By working directly with their creditors, consumers can avoid some negative consequences of debt settlement, which might include significant credit impairment, the threat of litigation from creditors, and possibly forced bankruptcy.

For consumers seeking to reduce the principal balances of their debts, the traditional, legally sanctioned way is through the bankruptcy courts. This mechanism is overseen by a judge to ensure fairness to all creditors, and provides protections for the debtor to ensure that her financial position is not worsened in the process. For example, while under the protection of the bankruptcy court, the debtor cannot be sued by creditors, does not incur new late fees and penalty charges, and does not end up with a tax bill for any debts reduced in the process.

Gaps in & Evasion of FTC rules

In July 2010, the FTC issued final amendments to the Telemarketing Sales Rule (TSR), promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, to prevent abusive telemarketing practices. These amendments relate specifically to debt settlement companies and are an important step toward reining in debt settlement abuses. Significantly, the rule bans covered companies from requiring clients to pay a fee in advance of any debts being settled.

Nevertheless, there are significant gaps in the FTC rule, which debt settlers have found ways to exploit. For this reason, regulatory and enforcement action remains necessary to protect consumers.

For example, although the rule instituted an advance fee ban in connection with debt relief services, it does not limit the amount allowable fees or require that these be tied to the size of the benefit provided (the amount saved from a settlement). The rule also allows a provider to collect its full fee relating to a particular debt as soon as the consumer pays the first installment payment towards a debt, and before the debt is fully settled. Lengthy "settlement" terms are likely to reduce success for consumers, while allowing providers to evade the advance fee ban. Panelists at an April 2012 debt settlement industry conference reported on a dramatic shift from lump sum settlements to term settlements, with one reporting an increase of term settlements from 20-30 percent of settlements to 70-80 percent post-FTC, and another reporting a fivefold increase in term settlements with some terms as long as 48 months.[67]

In addition, some firms in the debt settlement industry are seeking to exploit other gaps in the FTC rule in states where debt settlement is not prohibited.[68] For example, because the rule does not explicitly prohibit the sale of ancillary (and often illusory) products or services, to the detriment of consumers, some may seek to profit through such sales.[69] At the Evolution 2011 Debt Relief Conference[70] speakers and vendors were touting various add-on products and services for debt settlement companies to add revenues, such as credit repair services, outsourcing of financial education (e.g., Debt Free Academy), and bundled services with a monthly fee like the "Fight Back Plan" (includes identity theft protection, perks card, expense tracker, etc.).

We have also seen a rise in various attorney debt settlement models, presumably in an effort to evade both the FTC rule's advance fee ban through the face-to-face contact exception,[71] as well as state laws that often exempt attorneys from their debt settlement regulations. As reported by Bloomberg News, "Debt-settlement companies that offer to negotiate with creditors on behalf of consumers are switching tactics to skirt rules banning up-front fees by working with lawyers and charging retainers."[72] Similarly, creditcards.com reports: "Despite a 2010 federal rule that banned charging upfront fees for helping consumers to negotiate their way out of debt, law firms have now teamed up with debt settlement operators to get around restrictions—and to keep on charging hefty upfront fees."[73]

Finally, we are concerned that debt settlement companies will embrace other ways to evade the FTC rule. For example, there historical precedent for debt relief companies falsely obtaining non-profit status and abusing consumers.[74] The exclusion of non-profit entities from the scope of the rule may encourage new, similar abuses among debt settlement companies. Additionally, debt settlement companies may seek to skirt the Rule by utilizing solely web-based communications, rather than telephone communications, or by utilizing solely intrastate phone calls, rather than interstate.[75]

Conclusion

Although this comment discusses only some of the financial abuses aimed at seniors, there are important actions that the Bureau can take to address these. For example, the Bureau should:

- Promulgate a rule and take appropriate supervisory action toward ending the debt trap of payday lending.
- Promulgate an overdraft rule and take appropriate supervisory action that moves beyond improving disclosures or addressing deceptive marketing to address the substantive problems with overdraft loans that create a cycle of high-cost debt for vulnerable households. Problem practices include charging overdraft fees on debit card and ATM transactions that could be declined at no cost; extending this high-cost credit without an ability to repay, resulting in more than six such loans per year; and reordering transactions to maximize overdraft fees. Improving disclosures and deceptive marketing is not sufficient to protect older Americans.
- Promulgate a rule (in coordination with HUD) on reverse mortgages to address the many areas of concern highlighted in CFPB's recent reverse mortgage report.
- Expand its work administering the Fair Debt Collection Practices Act to include debt buying and debt settlement firms; in addition, CFPB's "larger participants" rulemaking should capture major debt-buying firms.
- Continue outreach and education efforts toward vulnerable populations, such as seniors.
- Collect data on the impact of various financial products and practices on older Americans, and make such data publicly available.

Thank you for the opportunity to comment on senior financial exploitation. We look forward to working with you on the issues we raised in this comment letter. If you have any questions, please do not hesitate to contact Susanna Montezemolo in CRL's Washington Office at (202) 349-1850.

Notes

[1] Investor Protection Trust, *Survey: More than 4 Out of 5 Experts Say Financial Abuse of Elderly is Getting Worse* (June 13, 2012), available at http://www.investorprotection.org/downloads/pdf/learn/press/IPT_Elder_Fraud_Survey_News_Release_06-13-12.pdf

[2] *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* (June 2011), available at http://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf

[3] U. S. Census Bureau, *Projections of the Population and Components of Change for the United States: 2010 to 2050* (2008), available at http://www.census.gov/population/www/projections/summarytables.html

[4] Comments by "Jim Dough," former finance company employee, Senate Special Committee on Aging hearing March 16, 1998, available at http://aging.senate.gov/minority/public/index.cfm/files/serve?File_id=41c46f8f-c3c4-1629-cb3e-046b129c135b

[5] AARP Foundation, *National Fraud Victim Study* (March 2011), available at http://assets.aarp.org/rgcenter/general/fraud-victims-11.pdf

[6] Pew Research Center, *The Rising Age Gap in Economic Well-Being* (November 7, 2011), available at http://www.pewsocialtrends.org/2011/11/07/the-rising-age-gap-in-economic-well-being/?src=prc-headline.

[7] Willie Sutton and Edward Linn, *Where the Money Was: The Memoirs of a Bank Robber* (1976).

[8] US Census Bureau, *Net Worth and Asset Ownership of Households (2005 and 2010),* available at https://www.census.gov/hhes/www/wealth/wealth.html

9 National Council on Aging, *A Blueprint for Increasing the Economic Security of Older Adults: Recommendations for the Older Americans Act* (March 2011), available at http://www.ncoa.org/assets/files/pdf/Blueprint-White-Paper-web.pdf

[10] Amy Traub and Catherine Ruetschlin, *The Plastic Safety Net: Findings from the 2012 National Survey on Credit Card Debt of Low- and Middle-Income Households,* Demos (May 2012), available at http://www.demos.org/sites/default/files/publications/PlasticSafetyNet-Demos.pdf

[11] National Council on Aging, *Op. Cit.*

[12] "More Seniors Declaring Bankruptcy in Retirement," *US News and World Report,* (Nov. 17, 2010), available at http://money.usnews.com/money/blogs/planning-to-retire/2010/11/17/more-seniors-declaring-bankruptcy-in-retirement

[13] John A. E. Pottow, "The Rise in Elder Bankruptcy Filings and Failure of U.S. Bankruptcy Law" (August 2010), *University of Michigan Program in Law and Economics.* Working Paper 17. Available at http://law.bepress.com/umichlwps-empirical/art17

[14] Tatjana Meschede et. al., *Severe Financial Insecurity among African-American and Latino Senior,* Institute on Assets & Social Policy and Demos (2010), available at http://iasp.brandeis.edu/pdfs/SFSI.pdf

[15] Uriah King and Leslie Parrish, *Payday Loans, Inc.: Short on Credit, Long on Debt,* Center for Responsible Lending (March 2011), available at http://www.responsiblelending.org/payday-lending/research-analysis/payday-loans-inc.html

[16] Leslie Parrish and Uriah King, *Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume,* Center for Responsible Lending (July 2009), available at http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-short-term-due-date-generates-need-for-repeat-payday-loans-accounting-for-76-of-total-volume.html

[17] Ellen E. Schultz and Theo Francis, "High Interest Lenders Trap Elderly, Disabled," *The Wall Street Journal* (Feb. 12 2008), available at http://online.wsj.com/article/SB120277630957260703.html.

[18] Rebecca Borné, Joshua Frank, Peter Smith, and Ellen Schloemer, *Big Bank Payday Loans: High-interest loans through checking accounts keep customers in long-term debt,* Center for Responsible Lending (July 2011), available at http://www.responsiblelending.org/payday-lending/research-analysis/big-bank-payday-loans.html

[19] *Ibid.*

[20] For this analysis, CRL used data from a consumer panel tracked by Lightspeed Research Inc. Our analysis included data for 5,681 households whose transaction-level online and offline banking account activity was electronically captured. The dataset contained 18 months of data on 3,279,522 transactions of these households with accounts at the 15 largest banks in the U.S.

[21] National Consumer Law Center, *Runaway Bandwagon: How the Government's Push for Direct Deposit of Social Security Exposes Seniors to Predatory Bank Loans* (July 2010), available at: www.nclc.org/images/pdf/pr-reports/runaway-bandwagon.pdf.

[22] Leslie Parrish and Peter Smith, Center for Responsible Lending, *Shredded Security: Overdraft practices drain fees from older Americans* (June 18, 2008), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.pdf. The figures in this report have been updated in the text above to reflect the increase in total overdraft fees paid by all Americans from $17.5 billion in 2006 to $23.7 billion in 2008 as reported in *Overdraft Explosion*, available at http://www.responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf.

[23] *Ibid.* The report found that debit card POS and ATM transactions account for 37.4 percent and 2.5 percent, respectively, which, when calculated as a percentage of $6.2 billion, together equal $2.5 billion.

[24] *Ibid.* "Heavily dependent" was defined as recipients who depended on Social Security for at least 50 percent of their total income.

[25] *Ibid.*

[26] Center for Responsible Lending , "*Banks Collect Opt-Ins Through Misleading Marketing*" (April 2011), available at http://www.responsiblelending.org/overdraft-loans/policylegislation/regulators/banks-misleading-marketing.html

[27] These quotes are from the marketing materials of a representative sample of banks on file with CRL.

[28] *Amicus Curiae* brief on behalf of the United States in Support of Appellants/Cross-Respondents Bank of America and DOES 1-50, On appeal from the California Court of Appeal, First Appellate District, Division Three, Case No. A110137; OCC

Interpretive Letter #1082, Overdraft Practices, June 2007: "When the Bank processes an overdraft item and recovers a fee for doing so, it is not exercising its right to collect a debt."

[29] Department of the Treasury—Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, NCUA, Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127, 9129 (Feb. 24, 2005): "When overdrafts are paid, credit is extended."

[30] Department of the Treasury, Office of the Comptroller of the Currency, Proposed Guidance on Deposit-Related Consumer Credit Products, Docket ID OCC-2011-0012, June 8, 2011, 76 Fed. Reg. 33409.

[31] 31 C.F.R. § 212.1.

[32] Interim Final Rule, Department of the Treasury, Federal Government Participation in the Automated Clearing House, 75 Fed. Reg. 80335, 80338 (Dec. 22, 2010).

[33] Consumer Financial Protection Bureau, *Reverse Mortgages: Report to Congress* (June 28, 2012), available at http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf.

[34] Elizabeth Ecker, "Reverse Mortgage Counseling Sees Backlog, Funding Not Sufficient?" *Reverse Mortgage Daily* (June 10, 2012), available at http://reversemortgagedaily.com/2012/06/10/reverse-mortgage-counseling-sees-backlog-funding-not-sufficient/

[35] *Ibid.*

[36]Federal Trade Commission, *FTC Releases Top Complaint Categories for 2011* (February 28, 2012), available at http://ftc.gov/opa/2012/02/2011complaints.shtm. The top consumer complaint is for identity theft (not a specific industry); debt collection is ranked #2 with 10 percent of all complaints received.

[37] Traub and Ruetschlin, *Op. Cit.*

[38] Katie Hebeisen, *Breaking Into New Debt Buying Markets*, Collector (Feb. 2012), available at http://www.digital-collector.com/collectormagazine/201202#pg20

[39] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* (Feb. 2009), available at http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

[40] The Legal Aid Society, et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (May 2010), available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf.

[41] Federal Trade Commission, *Op. Cit.*

[42] Comment of ACA International to the FTC Regarding the Debt Collection Workshop, (June 6, 2007) p. 40, available at http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00016.pdf;

[43] Ameet Sachdev, "Debt Collectors Pushing to get Their Day in Court." *Chicago Tribune* (June 8, 2008), available at http://articles.chicagotribune.com/2008-06-08/news/0806080066_1_debt-collectors-court-papers-pushing.

[44] Ibid.

[45] *Debt Deception*, p. 6; Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), pp. 8-12, available at http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf; Appleseed Network, *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases* (2010), p. 12, available at http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf

[46] *Ibid.;* The Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* (Oct. 2007), available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf.

[47] *Ibid.*

[48] David Segal, "Debt Collectors Face a Hazard: Writer's Cramp", *New York Times* (October 31, 2010), available at http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=all

[49] Office of the Comptroller of the Currency, U.S. Department of the Treasury, "Answers about Debt Elimination and Fraudulent Schemes" available at http://helpwithmybank.gov/get-answers/credit/debt-elimination-and-fraudulent-schemes/faq-credit-debt-elim-fraud-schemes-02.html (last visited February 23, 2011).

[50] Shirley Gao, "Borrower Nightmares: Small town teacher seeks help for big debt, ends up in bankruptcy" I Watch News (The Center for Public Integrity July 20, 2011) (citing Andrew Housser, executive board member of the American Fair Credit

Council (formerly TASC), a debt settlement trade group), available at http://www.iwatchnews.org/2011/07/20/5276/borrower-nightmares-small-town-teacher-seeks-help-big-debt-ends-bankruptcy.

[51] Pew Health Group, *Two Steps Forward: After the Credit CARD Act, Credit Cards Are Safer and More Transparent — But Challenges Remain*, Appendix C (July 2010), available at: http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/PEW-CreditCard%20FINAL.PDF.

[52] *Ibid.*

[53] The Pew Health Group, *A New Equilibrium: After Passage of Landmark Credit Card Reform, Interest Rates and Fees Have Stabilized* (May 2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/Report_Equilibrium_web.pdf.

[54] The industry trade group The Association of Settlement Companies (TASC) has rebranded itself as the American Fair Credit Council (AFCC). We will refer to them with their current name AFCC throughout.

[55] Letter from The Association of Settlement Companies to the Federal Trade Commission at 1 (Mar. 8, 2010) (referring to accretion data based on the last 46,000 settlements by one company, Freedom Debt Relief), available at http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00334.pdf. Because this figure applies only to debts that have settled and does not measure growth for debts that have not settled, this figure underestimates total debt growth across all debt.

[56] Novadebt randomly called some of its clients' creditors to find out whether debts on which interest continued to accrue had been charged off. This investigation confirmed that creditors were indeed continuing to charge interest on charged off debts. (Jan. 6, 2012 letter from Susan Neimic, Novadebt Compliance Manager, to N.J. Law Revision Commission). *See also* Jeremy M. Simon, "Beware of Interest Charged on Closed Accounts in Collection," *Credit Score Report*, available at www.creditcards.com/credit-card-news/jeremy-simon-interest-charge-closed-account-debt-collection-1508.php. For a broader discussion of debt collection practices see Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* at 28-29 (Feb. 2009) (discussing practices of third party debt collectors), available at http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

[57] U.S. Government Accountability Office Rep. No. GAO-10-593T, *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers* at 12-13 (Apr. 22, 2010), available at http://www.gao.gov/new.items/d10593t.pdf.

[58] *Ibid.*

[59] Letter from the Association of Settlement Companies (TASC) to the Federal Trade Commission, commenting on the FTC's proposed amendments to the Telemarketing Sales Rule on the marketing of debt relief services at 9-11 (Oct. 26, 2009), available at http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00202.pdf.

[60] GAO Report (see Note 57) "[F]ederal and state agencies have raised concerns with the methodology behind TASC's data." "When these agencies have obtained documentation on debt settlement success rates, the figures have often been in the single digits."

[61] Some representative examples:

- Colorado: For 2009, only 11.35 percent of consumers who had enrolled more than 3 years earlier (in 2006) and 9.53 percent of those who enrolled in 2007 had completed the program. *2009 Annual Report – Colorado Debt Management Service Providers*, available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/uccc/2009%20Annual%20Report.pdf.
- Vermont: In 2012 a court found only 15 percent of Vermont consumers enrolled in one company's program received an offer to settle all of their enrolled debts. *Vermont v. CSA-Credit Solutions of America, LLC*, Docket No. 484-7-10 Wncv (VT Sup. Ct., Wash. Unit) (Decision and Order: Motion for Summary Judgment Mar. 5, 2012) (Hon. Michael S. Kupersmith)
- New York: A 2011 court found of Freedom Debt Relief (FDR), that "FDR's debt relief program rarely provides the claimed results."[61] (Significantly, FDR is held up by the AFCC trade association as an example of one of the "better" debt settlement companies.) *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of Freedom Debt Relief, LLC and Freedom Financial Network, LLC*, AOD No. 10-167 ¶ 7 (Assurance of Discontinuance Mar. 7, 2011). Two seats on the American Fair Credit Council executive committee are occupied by executives of FDR.

[62] GAO Report (see Note 57). Representatives from both industry trade groups, TASC (now AFCC) and United States Organization for Bankruptcy Alternatives (USOBA) rejected the standard as "unrealistic".

[63] InsideARM.com, *InsideARM Debt Settlement Survey: How Creditors Utilize the Debt Settlement Industry to Increase Collections* (Oct. 2011), available at http://www.insidearm.com/freemiums/debt-settlement-industry-collections/. The survey compiled and

analyzed responses from 649 respondents, including credit card issuers, legal recovery firms, collection agencies and debt buyers, with collection agencies being the most heavily represented group.

64 *Ibid.* The break-down of respondents who answered that they did not work with debt settlement companies is as follows:

Industry	**Responses**	**Percent**
Collection Agency	142	53%
Credit Card Issuer	17	7%
Legal Recovery Firm	15	6%
Debt Buyer	14	5%
Other	78	29%

65 *Ibid.*

66 According to the National Association of Attorneys General, "In the recent past, a number of for-profit debt management companies engaged in deceptive practices in the marketing and collection of fees for their programs. However, due to action by the States, the FTC, and the Internal Revenue Service, debt management abuses have been greatly reduced." Letter from National Association of Attorneys General to Federal Trade Commission re Telemarketing Sales Rule – Debt Relief Amendments, Matter No. R4110011 (Oct. 23, 2009), available at http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00192.pdf.

67 On a related note, at the Evolution 2011 Debt Relief Conference in Henderson, NV (8/22-8/23), industry participants expressed significant displeasure to Michael Kerr, who was then the Legislative Director and Legal Counsel to the Uniform Law Commission, with the revisions to the Uniform Debt Management Services Act that provided that debt settlement providers would get paid proportionately with each payment in an installment settlement, stating that, under this approach, they would have no incentive to enter into installment plans, ***even if such plans would be beneficial for the consumer.***

68 For a more detailed discussion of potential loopholes, see Michael Mallow & Michael A. Thurman, *In Search of Exceptions to the FTC's Amended Telemarketing Sales Rule – Don't Put Your Neck in a Loophole!* (Aug. 2010), available at http://www.loeb.com/exceptionstoftcsamendedtelemarketingsalesrule/. See also *Credit Counseling Group Makes Presentation to FTC About Cracking Down on Bad Actor Debt Settlement Companies* (Dec. 22, 2010), available at http://getoutofdebt.org/24571/credit-counseling-group-makes-presentation-to-ftc-about-cracking-down-on-bad-actor-debt-settlement-companies; Steve Rhode, *Debt Settlement FTC TSR Ruling and Legal Model Informational Webinar by Tami Brown*, available at http://getoutofdebt.org/22021/debt-settlement-ftc-tsr-ruling-and-legal-model-informational-webinar-by-tami-brown.

69 *See, e.g.*, Connie Prater, "States, Feds Target Debt Settlement Legal Firms Over Upfront Fees," *CreditCards.com* (Apr. 12, 2012) ("'We've seen outfits trying to sell other products that they could charge for that aren't covered in the law, things like bankruptcy services, bankruptcy form preparation and bankruptcy counseling,' says [West Virginia Assistant Attorney General Doug] Davis. 'Before October 2010, they had nothing to do with bankruptcy, but in November 2010, they all became bankruptcy experts.' ¶'Yet, they still go about the debt settlement activity and try to secure debt settlement for consumers.'"), available at http://www.creditcards.com/credit-card-news/debt_settlement-upfront-fees-banned-law-firms-1282.php; Steve Rhode, "Life After Debt System. A Way for Debt Settlement Companies to Make Extra $$$," available at http://getoutofdebt.org/22085/life-after-debt-system-a-way-for-debt-settlement-companies-to-make-extra.

70 Conference held in Henderson, NV on August 22-23, 2011.

71 The FTC has made clear that attorneys are not exempted from the Rule as a matter of course. *See, e.g.*, TSR at 48468 ("Based on the record in this proceeding, the Commission has concluded that an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services is not warranted.").

72 Elizabeth Ody, "Debt Firms Play 'Whack-a-Mole to Skirt Fee Ban." *Bloomberg News* (Sept. 29, 2011), available at http://www.bloomberg.com/news/2011-09-30/debt-firms-play-whack-a-mole-to-skirt-fee-ban.html.

73 *See, e.g.*, Connie Prater, *Op. Cit.*

74 *See, e.g.*, TSR at 48460-61 (citing and discussing enforcement actions against credit counseling agencies by the FTC and actions by the IRS challenging tax-exempt status).

75 Prater, *Op. Cit.*