



August 19, 2021

Clerk of the Commission  
State Corporation Commission  
c/o Document Control Center  
PO Box 2118  
Richmond, VA 23218

**RE: CASE NO. BFI-2021-00010**

Dear Sir or Madam:

On behalf of the American Fair Credit Council (“AFCC”), the leading trade association representing the debt settlement industry, we would like to thank the staff of the State Corporation Commission (“Commission”) for the opportunity to submit comments with respect to the above-referenced matter, specifically the proposal by the Commission to adopt regulations governing debt settlement providers under Chapter 20.1 of Title 6.2 of the Code of Virginia. While the AFCC supports a strong regulatory framework that provides for robust consumer protections, we are concerned that the proposal, as drafted, would result in negative consumer impacts.

Please accept this comment letter (with accompanying attachment) as a summary of our suggestions and concerns with respect to the proposed regulations. While we have endeavored to be both concise and explicit in setting forth our views, we believe a more fulsome explanation of the environment in which the debt settlement industry operates, particularly following the July 2010 enactment of the Federal Trade Commission’s (“FTC”) Amended Telemarketing Sales Rules (“TSR”), would provide additional, and needed, context to our observations.

### **The Debt Settlement Industry: Consumer Need**

There are few options available to consumers in financial distress. For those who have suffered a loss of income, incurred significant, unforeseen medical expenses or who simply can no longer afford to pay their unsecured debt, personal bankruptcy is all too often the only path available. As many Virginians can personally attest, the long-term financial consequences of filing personal bankruptcy are significant: bankruptcy stays on one’s credit report for up to a decade and can substantially limit not only one’s ability to obtain credit but, in some cases, disqualify you from certain jobs and housing opportunities. And this assumes that the consumer can meet the “means test” of the bankruptcy code, a test designed by creditors to prevent the discharge of credit card debt. Those who cannot meet the bankruptcy means test or who cannot keep up with the ruinous cycle of minimum monthly payments face an all but guaranteed future of collections lawsuits, wage garnishments and judgments.

AFCC member companies work with financially challenged consumers to achieve reductions in the amount that they owe to their unsecured creditors. This service provides debt settlement clients with much-needed relief from the threat of bankruptcy or litigation, allowing them to remain productive, contributing members of their communities. Debt settlement is an opportunity for consumers in financial crisis to restructure their debt obligations in a dignified and efficient manner, in all cases with the participation and consent of their creditors. Indeed, in 2019 (the last year for which we have independently gathered and verified statistics), our members achieved approximately \$120 million in settlements for tens of thousands of Virginians.<sup>1</sup>

### **The Debt Settlement Industry: Current Regulation**

As mentioned above, the debt settlement industry is federally regulated by the FTC under the 2010 amendments to the TSR, amendments to which the AFCC actively contributed and supported. Under the TSR, debt settlement companies are prohibited from charging fees of any sort until: (1) a settlement on an account has been reached; (2) the consumer has accepted the settlement; and (3) the consumer has made a payment towards the settlement to the creditor. Unlike debt management companies, the TSR absolutely prohibits debt settlement companies from touching or controlling consumer funds at any time and requires that a consumer be permitted to withdraw from a debt settlement program at any time for any reason with no cost or penalty.<sup>2</sup>

### **The Proposed Regulations: Observations and Concerns**

There are some elements of the Commission's proposed regulatory framework that we believe would result in limiting consumer access to debt settlement services without any corresponding benefit to consumer protection. We note several areas of such concern in this letter, while providing a few additional concerns in our attached mark-up of the proposed regulations.

**10VAC5-230-10:** The definition of "affiliate" is so broad as to be unworkable. For example, under the proposed definition, the ownership by an "owner" (as defined by the proposed regulations) of even one share of voting stock in any publicly-traded company would constitute that company as an "affiliate." We recommend an ownership threshold of 25% of the voting interests in an entity be used to determine affiliate status, as the Commission has utilized in other instances.

**10VAC5-230-20(C):** The requirement of a fidelity bond is unnecessary given the TSR proscription on touching or controlling consumer funds. In a debt settlement program, the consumer is, at all times, the sole and exclusive owner of his/her funds. We recommend that this requirement be deleted.

**10VAC5-230-50(B):** This provision would limit consumer access to debt settlement services by limiting participation in the enrollment process to credit counselors (as defined) of the licensee.

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<sup>1</sup> John Dunham and Associates. (2020, October). *2020 Economic Impact of the Debt Settlement Industry*. <https://americanfaircreditcouncil.org/wp-content/uploads/Economic-Impact-Report-2020.pdf>.

<sup>2</sup> 16 CFR 310.4

We respectfully submit that narrowing consumer access by prohibiting the use of marketing partners to assist in the client enrollment process is contrary to the apparent purpose of the statute and the proposed regulations, specifically to ensure that every person involved in the enrollment and servicing of consumers is licensed under this Chapter and subject to supervision by the Commission. Accordingly, we suggest that 10VAC5-230-50(B) be amended to read, "A licensee shall not provide or offer to provide debt settlement services in connection with a debt settlement services agreement that has been set up or established by any other person except for: (i) another person licensed under this chapter; or (ii) an agent or a credit counselor of the licensee." This would ensure that only licensed persons could be involved in the enrollment and servicing process while enhancing consumer access to debt settlement services.

**10VAC5-230-50(D):** This provision would prohibit a referral of a debt settlement service client to an affiliate, without regard for what product or service for which the referral was made or even without regard for whether the affiliate was separately registered and regulated to do business in Virginia. For example, this prohibition would preclude recommending referring a client to an affiliated loan broker, even though both of those entities are required to be separately licensed to do business in Virginia (and are separately regulated). We recommend the prohibition be re-phrased to except from this prohibition any affiliate that is separately licensed by, and separately regulated in, the Commonwealth or is otherwise exempt from such licensure and regulation.

We have provided as an attachment to this letter a marked-up draft of the Commission's proposed regulations with our proposed amendments highlighted, and with a footnote or margin note explaining our rationale for each. In the absence of changes to the Commission's proposal that align with those we have outlined in the enclosure, we are concerned that the tens of thousands of Virginians who currently depend on debt settlement to address their unmanageable debt burdens could lose access to a critically important service.

We look forward to meeting with Commission staff, either virtually or in person, to discuss our comments at your earliest convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Linderman", with a stylized flourish at the end.

Robert Linderman  
Vice President of the Executive Board & Legislative Director

Enclosure

# STATE CORPORATION COMMISSION

## Chapter 230

### Debt Settlement Services Providers

#### 10VAC5-230-10. Definitions.

A. The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Advertisement" for purposes of Chapter 20.1 and this chapter means a commercial message in any medium that **promotes** *solicits*,<sup>1</sup> directly or indirectly, the offering of debt settlement services to any consumer. The term includes a communication sent to a consumer as part of a solicitation of business, but excludes messages on promotional items such as pens, pencils, notepads, hats, calendars, etc., as well as other information distributed or made available solely to other businesses.

"Affiliate" means an entity of which ~~any~~ **25% or more**<sup>2</sup> of the voting shares or ownership interest is held, directly or indirectly, by a person that also owns, directly or indirectly, any of the voting shares or ownership interest of a licensee.

"Chapter 20.1" means Chapter 20.1 (§ 6.2-2026 et seq.) of Title 6.2 of the Code of Virginia.

"Owner" means a person who holds, directly or indirectly, **25% or more**<sup>3</sup> any of the voting shares **or ownership interest**<sup>4</sup> of a licensee.

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<sup>1</sup> "promotes" could be interpreted to include a wide range of materials, including, for example, articles pertaining to how debt settlement works generally. We believe the term "solicits" is more appropriate.

<sup>2</sup> Read literally, an affiliate under the Commission's proposal would be any company in which a person with a voting share or ownership interest of a licensee also holds an interest. This could include a publicly traded company for which an owner or a person with a voting share in a licensee holds a single share of stock. We propose using the 25% threshold that the Commission has set forth for debt management plans and has proposed under 10VAC5-230-50 (J).

<sup>3</sup> Similarly, this proposed definition would make any individual with even one voting share an owner of a licensee. We propose using the 25% threshold that the Commission has set forth for debt management plans and has proposed under 10VAC5-230-50 (J).

<sup>4</sup> The inclusion of the term "ownership interest" in this definition would include any entity that holds a licensee's corporate debt to the extent the credit agreement allows the lender to foreclose.

"Subsidiary" means an entity of which any of the voting shares or ownership interest is held, directly or indirectly, by a licensee.

B. Other terms used in this chapter shall have the meanings set forth in § 6.2-100 or 6.2-2026 of the Code of Virginia.

**10VAC5-230-20. Bond coverage.**

A. Pursuant to § 6.2-2029 of the Code of Virginia, a surety bond shall be filed with the commissioner and continuously maintained thereafter in full force by each licensee. The form of the bond shall be prescribed and provided by the commissioner. The bond amount required for initial licensure shall be at least \$25,000. After initial licensure, the bond amount required may be adjusted annually based on the volume of debt settlement services agreements maintained by a licensee during the preceding calendar year and any other factors deemed pertinent by the commissioner.

B. If a person has filed a surety bond with the commissioner, the bond shall be retained by the commissioner notwithstanding the occurrence of any of the following events:

1. The person's application for a license is withdrawn or denied:
2. The person's license is surrendered, suspended, or revoked: or
3. The person ceases engaging in the business of providing or offering to provide debt settlement services.

C. A licensee shall continuously maintain at least \$250,000 in fidelity bond coverage.<sup>5</sup>

**10VAC5-230-30. Reporting requirements.**

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<sup>5</sup> Fidelity bonds are generally required to prevent the mishandling of consumer funds; however, because debt settlement companies are prohibited from doing so (and we propose that this requirement be restated in the Commission's regulations), we do not believe a fidelity bond is necessary in the debt settlement context.

A. Within 15 days following the occurrence of any of the following events, a licensee shall file a written report with the commissioner describing the event and its expected impact upon the business of the licensee:

1. Bankruptcy, reorganization, or receivership proceedings are filed by or against the licensee.

2. Any local, state, or federal governmental authority institutes revocation, suspension, or other formal administrative, regulatory, or enforcement proceedings **relating to its debt settlement services business or similar business** against the licensee.<sup>6</sup>

3. Any local, state, or federal governmental authority (i) revokes or suspends the licensee's debt settlement services license or other license for **a similar business**<sup>7</sup>; (ii) takes formal administrative, regulatory, or enforcement action against the licensee relating to its debt settlement services business or similar business; or (iii) takes any other action against the licensee relating to its debt settlement services business or similar business where the total amount of restitution or other payment from the licensee exceeds \$5,000. A licensee shall not be required to provide the commissioner with information about such event to the extent that such disclosure is prohibited by the laws of another state.

4. Based on allegations by any local, state, or federal governmental authority that the licensee violated any law or regulation applicable to the conduct of its licensed debt

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<sup>6</sup> As proposed, the language would require reporting of *any* local, state, or federal administrative or regulatory action, including for issues wholly unrelated to the provision of debt settlement services. We propose to add to this section the Commission's language used in subparagraph 3, which would trigger reporting for any administrative, regulatory, or enforcement proceeding related to a licensee's provision of debt settlement services.

<sup>7</sup> For purposes of compliance with this requirement, a definition of "similar business" would be helpful.

settlement services business or similar business,<sup>8</sup> the licensee enters into, or otherwise agrees to the entry of, a settlement or consent order, decree, or agreement with or by such governmental authority.

5. In lieu of threatened or pending license revocation, license suspension, or other administrative, regulatory, or enforcement action, the licensee surrenders its license to engage in (i) the business of providing or offering to provide debt settlement services in another state or (ii) any similar business<sup>9</sup> in another state.

6. The licensee is denied a license to engage in (i) the business of providing or offering to provide debt settlement services in another state or (ii) any similar business in another state.

7. The licensee or any of its members, partners, directors, officers, principals, or employees<sup>10</sup> is indicted for or convicted of a felony.

8. The Attorney General or any other Virginia governmental authority institutes an action against the licensee under the Virginia Consumer Protection Act (§ 59.1-196 et seq. of the Code of Virginia).

9. Such other events as may be prescribed by the commissioner.

B. Pursuant to § 6.2-2035 of the Code of Virginia, each licensee shall file an annual report with the commissioner on or before March 25. The annual report shall contain the following data

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> A licensee may not have any ability to know if an employee that is neither a partner, director, officer, or principal has been indicted or convicted of a felony. We believe this requirement should be limited only to those individuals in a senior role within a debt settlement company.

regarding a licensee's business in the Commonwealth<sup>11</sup> under Chapter 20.1 during the preceding calendar year:

1. The total number of active agreements to provide debt settlement services maintained by the licensee.<sup>12</sup>
2. The total number of agreements to provide debt settlement services entered into;
3. The total principal amount of debt enrolled by consumers into the licensee's debt settlement services;
4. The total number of settled debts;
5. The total principal amount to be paid by consumers to satisfy settled debts;
6. The total amount of fees charged pursuant to § 6.2-2041 of the Code of Virginia;
7. The total amount of fees received pursuant to § 6.2-2041 of the Code of Virginia;
8. The total number of debt settlement services agreements terminated by consumers;  
and
9. Any additional information required by the commissioner.

**10VAC5-230-40. Schedule of annual fees for the examination, supervision, and regulation of debt settlement services providers.**

Pursuant to § 6.2-2038 of the Code of Virginia, the commission sets the following schedule of annual fees to be paid by persons licensed under Chapter 20.1. The fees are to defray the costs of examination, supervision, and regulation of licensees by the bureau.

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<sup>11</sup> We propose to clarify that these reporting requirements would apply to a licensee's activity within the Commonwealth as opposed to nationally.

<sup>12</sup> Our intention with this proposed amendment is merely to clarify the original language.



The annual fee shall be \$1,000 per licensee plus **an additional**<sup>13</sup> \$3.44 per **active** debt settlement services **client agreement maintained in the Commonwealth**<sup>14</sup> by the licensee during the calendar year preceding the year of assessment. In cases where a licensee was not licensed under Chapter 20.1 as of December 31 of the calendar year preceding the year of the assessment, the annual fee shall be \$0.

The fee assessed using the above schedule shall be rounded down to the nearest whole dollar.

Fees shall be assessed on or before June 1 for the current calendar year. The fee shall be paid on or before July 1.

The information supplied in the annual report. due March 25 each year. of each licensee provides the basis for its assessment.

Fees prescribed and assessed by this schedule are apart from, and do not include, the reimbursement for expenses permitted by subsection B of § 6.2-2038 of the Code of Virginia.

**10VAC5-230-50. Additional business requirements and restrictions; acquisitions.**

A. A licensee shall continuously maintain the requirements and standards for licensure prescribed in § 6.2-2031 of the Code of Virginia.

B. A licensee shall not provide or offer to provide debt settlement services in connection with a debt settlement services agreement that has been set up or established by any other person except for: **i) another person licensed under this chapter; or ii) an agent** or a credit counselor of the licensee.<sup>15</sup>

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<sup>13</sup> We propose to make clear that the proposed annual fee of \$1,000 is per licensee only, and not per each debt settlement services agreement maintained, which we believe to be the intent of the proposal.

<sup>14</sup> Similar to our proposed amendment in footnote 14, we propose to clarify that the fees required under the regulations pertain only to a licensee's active clients in the Commonwealth.

<sup>15</sup> This proposed amendment ensures that any entity that offers debt settlement services to consumers in Virginia is regulated and licensed by the Commission.

C. A licensee shall not sell or otherwise assign a debt settlement services agreement to another person unless the purchaser or assignee is licensed or exempt from licensure under Chapter 20.1.

D. A licensee shall not refer or direct a consumer for whom the licensee is providing debt settlement services to any creditor that is an affiliate, owner, or subsidiary of the licensee; provided that this provision shall not apply to a creditor that is separately licensed and regulated in the Commonwealth or is otherwise exempt from licensure and regulation in the Commonwealth.<sup>16</sup>

E. A licensee shall comply with all state and federal laws and regulations applicable to the conduct of its business, including the Standards for Safeguarding Customer Information (16 CFR Part 314).

F. A licensee or person required to be licensed under Chapter 20.1 shall not provide any information to the bureau that is false, misleading, or deceptive.

G. A licensee or person required to be licensed under Chapter 20.1 shall not provide any information to a consumer that is false, misleading, or deceptive.

H. A licensee or person required to be licensed under Chapter 20.1 shall not engage in any activity that directly or indirectly results in an evasion of the provisions of Chapter 20.1 or this chapter.

I. A person shall remain subject to the provisions of Chapter 20.1 and this chapter applicable to licensees in connection with all debt settlement services provided or offered to be provided while licensed under Chapter 20.1 notwithstanding the occurrence of any of the following events:

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<sup>16</sup> We propose to make clear that this limitation does not apply to entities separately registered and regulated to do business in Virginia. We recommend the limitation be re-phrased to except any affiliate that is separately licensed by, and separately regulated in, the Commonwealth or by a federal regulator.

1. The person's license is surrendered, suspended, or revoked: or

2. The person ceases providing debt settlement services.

J. Any person submitting an application to acquire, directly or indirectly, 25% or more of the voting shares of a corporation or 25% or more of the ownership of any other person licensed to conduct business under Chapter 20.1 shall pay a nonrefundable application fee of \$500.

**10VAC5-230-60. Advertising.**

A. A licensee shall disclose the following information in its advertisements:

1. The name of the licensee as set forth in the license issued by the commission.

2. A statement that the licensee is "licensed by the Virginia State Corporation Commission."

3. The license number assigned by the commission to the licensee (i.e., DSP-XXX).

B. A licensee shall not deliver or cause to be delivered to a consumer any envelope or other written material that gives the false impression that the mailing or written material is an official communication from a governmental entity.

C. Every licensee shall retain for at least three years after it is last published. Delivered, transmitted, or made available, a copy of every version of an<sup>17</sup> advertisement used. including solicitation letters, print media proofs, commercial scripts, recordings of all radio and television broadcasts, and Internet web pages. A licensee may retain copies of its advertisements in electronic form.

**10VAC5-230-70. Enforcement: civil penalties.**

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<sup>17</sup> A literal reading of this language would require every online advertisement that appears on any computer to be retained for three years. We propose to make clear that only a version of each advertisement used must be retained.

A. A Failure to comply with any provision of Chapter 20.1 or this chapter may result in civil penalties. license suspension. license revocation, the entry of a cease and desist order. or other appropriate enforcement action.

B. Pursuant to § 6.2-2046 of the Code of Virginia. a person shall be subject to a civil penalty of up to \$1,000 for every violation of Chapter 20.1 or this chapter. Furthermore. if a person violates any provision of Chapter 20.1 or this chapter in connection with multiple debt settlement services agreements, the person shall be subject to a separate civil penalty for each debt settlement services agreement. For example, if a licensee enters into five debt settlement services agreements and the licensee violates two provisions of this chapter in connection with each of the five debt settlement services agreements. there would be a total of 10 violations and the licensee would be subject to a maximum civil penalty of \$10,000.

**10VAC5-230-80. Commission authority.**

The commission may, at its discretion, waive or grant exceptions to any provision of this chapter for good cause shown.