

January 31, 2020

The Honorable Rodney Willett
Virginia House of Delegates
Pocahontas Building
900 E. Main St,
Richmond, Virginia 23219

Dear Mr. Willett:

My name is Joel Winston and I am a partner emeritus with the law firm of Hudson Cook, LLP. I have, for a number of years, represented the American Fair Credit Council (“AFCC”), the trade association representing the debt settlement industry. From 1976-2011 I served with the Federal Trade Commission (“FTC”) in a variety of staff and managerial positions. The opinions expressed in this letter are exclusively my own and do not reflect the views or positions of the FTC.

During the period from 2009-2011 I was the Associate Director of the Division of Financial Practices in the FTC’s Bureau of Consumer Protection and, in that capacity, directed the agency’s efforts with respect to the 2010 amendments to the FTC’s Telemarketing Sales Rules (“TSR”) (16 CFR 310). Those amendments regulated the practices of for-profit debt relief providers, including debt settlement companies, credit counselors, and debt management firms. The amendments were preceded by more than two years of intensive study of the industry, including the state of regulation at the state level, as well as a public comment period and public workshops to solicit input from stakeholders.

On Thursday, January 27, 2020, the AFCC advised me that legislation has been proposed in the Virginia House of Delegates that would establish a cap on fees that debt settlement companies would be legally permitted to charge their clients. The AFCC requested that I review the legislation in the context of the TSR, including the policy positions taken by the FTC in connection with the consideration and adoption of the amendments, and offer my thoughts to you.

In establishing the advance-fee ban in the TSR, the FTC explicitly rejected any provision imposing fee caps on the amount of compensation that could be charged. The FTC has addressed the anticompetitive effects of fee caps, stating that, “... fee-setting is best done by a competitive market ...” (75 Federal Register 48488, August 10, 2010). While it recognized that the decision to

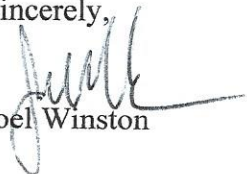
regulate fees is one reserved to the states, the FTC expressed concern that imposing a fee cap could, in fact, harm consumers by eliminating the downward pressures normally found in a competitive marketplace:

“... any federally established maximum advance fee might well become the de facto actual fee for debt relief service Further, fee caps can quickly become obsolete, as changes in market conditions and technologies render the maximum fee too low ... or too high” (75 Federal Register 48488, n. 424)

The FTC concluded that the advance-fee prohibition coupled with a competitive marketplace would be far more effective than any other available mechanism in addressing the potential for consumer harm. Indeed, I believe that the prohibition on advance fees effected the very kind of “change in market conditions” that the FTC identified, one that warrants revisiting existing legislatively enacted fee caps as well as giving pause when considering enacting a fee cap de novo. To impose fee caps along with a prohibition on advance fees risks seriously distorting the market, making it difficult for legitimate providers to stay in business to the detriment of those consumers who could benefit from their services. With the ban on advance fees in place it is the consumer, not the provider, that controls both the timing and the amount of any given settlement and where the consumer may reject an offered settlement for any reason or no reason at all, fee caps offer no additional protection; in fact, by suppressing the development of a competitive marketplace, fee caps may well work to the detriment of consumers. I am aware of no evidence since the TSR amendments were promulgated to suggest that the FTC’s analysis was flawed. On the contrary, it is my understanding that data collected since the TSR amendments supports the Commission's conclusion that the absence of fee caps in a market in which advance fees are prohibited fosters a competitive pricing landscape for consumers.

Thank you for the opportunity to comment on this important matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Joel Winston