



July 17, 2023

Marc Shovers
Administrative Rules Coordinator
Department of Financial Institutions
Box 8861
Madison, WI 53708-8861
(DFIComments@dfi.wisconsin.gov)

Re: Comments re: Statement of Scope SS 037-23

Dear Mr. Shovers:

This comment letter is submitted on behalf of the American Fair Credit Council (“AFCC”), the trade association representing the majority of the nation’s debt resolution service providers. We have carefully reviewed the Department of Financial Institution’s (“DFI”) Statement of Scope to revise DFI-Bkg 73, as well as the statutory and case law references cited therein, and appreciate the opportunity to share with you our thoughts regarding DFI’s proposed rulemaking. We strongly support DFI’s regulatory initiative to enact strong consumer protections in the debt resolution industry to ensure that consumers in Wisconsin may access debt resolution services as an option to assist them through financial hardships.

Who We Are & Our Impact

While it is all too easy for consumers to get into debt, there are very few options available to get them out of it. For consumers who have, for example, suffered a loss of income or incurred significant, unforeseen medical expenses and can no longer afford their unsecured debt burden, personal bankruptcy is too often the only path available. The long-term financial and social consequences of filing bankruptcy are significant and can substantially limit a consumer’s ability to access credit for up to a decade. And this assumes success: in reality, more than half of Chapter 13 bankruptcy filers across the country are unsuccessful, leaving the filer worse off than when they started the bankruptcy process.

For some consumers, non-profit credit counseling may be a viable alternative. But credit counseling does not reduce the amount owed by the consumer – it simply provides them with a reduced rate of interest, a fixed timeframe in which to pay their entire debt and slightly lower aggregate monthly payments than they would otherwise pay to their unsecured creditors. Credit counseling programs are appropriate only for consumers whose financial hardship is less severe than those who are served by the debt resolution industry. Moreover, it is worth noting that, unlike debt resolution programs, which prohibit fees paid in advance of a consumer receiving the benefit of the service, credit counseling services require fees to be paid with every payment made to the credit counselor.



In contrast to credit counseling programs, AFCC member companies provide debt resolution services through which they negotiate with creditors on behalf of financially challenged consumers to achieve substantial reductions in the amount of unsecured debt that they owe. AFCC members provide this important service in a highly regulated environment and in compliance with stringent industry standards and best practices, against which they are regularly audited by an independent third party. Debt resolution should therefore be seen as the opportunity for consumers who do not have sufficient resources to succeed in a credit counseling program to restructure their personal balance sheets, thereby avoiding bankruptcy and allowing for the repayment of at least a portion of their debt obligations in a dignified and efficient manner, in all cases with the full participation and consent of their creditors and in a compliance-focused ecosystem.

Discussion of the Proposed Amendment of DFI-Bkg 73

As we noted above, we strongly support DFI’s regulatory initiative and look forward to working closely with DFI on the drafting of appropriate regulations. In this context, we commend to DFI’s staff the text of the Federal Trade Commission’s (“FTC”) Amended Telemarketing Sales Rule (16. CFR §310.1 *et seq.*, herein “TSR”), as well as the industry-drafted Model Legislation (copy enclosed with this comment letter). The Model Legislation was crafted by the debt resolution industry with the objective of codifying both the TSR’s stringent regulatory requirements, prohibitions, and obligations as well as industry “best practices.” The enclosed version represents the most recent iteration of the Model Legislation, which the industry has periodically amended over the last several years to respond to market and regulatory developments.

The industry’s Model Legislation calls for a strong state licensing regime, clear and conspicuous consumer disclosures, enactment at the state level of the advance fee ban promulgated by the FTC in 2010, and a slate of other requirements designed to ensure that consumers who choose to enroll in debt resolution programs are well protected. We believe the industry model bill represents a robust, consumer-protective structure for delivering debt resolution services, making debt resolution the most consumer-centric service available in the financial services marketplace, and encourage DFI to consider the Model Legislation as a basis upon which to craft its forthcoming regulations.

Fee Caps Disadvantage Consumers

Notably, the one area of difference between the regulatory framework of the Model Legislation and the TSR as compared to DFI’s expressions of intent in its Statement of Scope is with respect to the possible implementation of a fee cap on the delivery of debt resolution services. While we are mindful of DFI’s regulatory responsibility under Wis. Stat. §218.07(d), which statute imposes upon DFI the “...duty ...[t]o determine and fix by general order the maximum fees or charges that ... [adjustment] companies may make....”, we believe the adoption of a fee cap, particularly one



set at or close to the threshold of enterprise profitability, would be detrimental to the interests of Wisconsin consumers for the following reasons:

- As both the AFCC and state regulators in other jurisdictions have observed, a fee cap effectively becomes the default fee for everyone, thereby eliminating marketplace competition.
- By limiting the fees that debt resolution providers may assess for their programs, access to debt resolution programs will likely be sharply limited to those Wisconsin consumers with higher overall unsecured debt burdens, leaving consumers with lower debt loads who still would benefit from debt resolution programs without access to this important service.
- A fee cap is likely to drive reputable providers out of Wisconsin. This predictable outcome is borne out by data demonstrating the unavailability of debt resolution services in most if not all of those states cited by DFI in Section 7 of the Statement of Scope.
- The TSR requires that debt resolution companies provide the benefit of their service before they may assess any fee. This construct, along with a consumer's absolute right to (i) approve each and every offer of debt resolution and (ii) exit his or her debt resolution program at any time, for any reason and without any penalty of any sort, provides significant consumer protection. Nationally, consumer complaints about debt resolution providers accounted for less than 0.2 percent of all consumer complaints received by the Consumer Financial Protection Bureau in 2022.¹

Accordingly, we respectfully request that, when considering the imposition of a fee cap on the delivery of debt resolution services in Wisconsin, DFI takes into consideration the facts and concerns we have set forth in this comment letter.

The FTC Considered and Rejected A Fee Cap on Debt Resolution Services

The FTC, in 2010, finalized amendments to the TSR that established a regulatory framework for the debt resolution industry. Among other things, the TSR prohibits a debt resolution service provider from charging or collecting fees of any sort before actually settling the consumer's debts (the "advance fee" ban).²

¹ https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf.

² The TSR covers only those providers who offer their services by means of an instrumentality of interstate commerce, meaning a face-to-face exchange between a consumer and a provider is not covered. This is one reason why the AFCC looks forward to working with DFI to craft rules that extend the "advance fee" prohibitions and disclosure obligations found in the TSR and the Model Legislation to debt resolution providers in Wisconsin that may not be required currently to comply with the TSR.



The issue of fee caps was widely debated during the TSR rulemaking process, and after exhaustive study and copious public testimony, the agency concluded that a fee cap, when considered on top of the “advance fee” ban, was unnecessary and, even worse, likely to be counterproductive by eliminating marketplace competition and restricting consumer choice. The FTC’s supplemental analysis³ explicitly rejected fee caps for two reasons: first, the FTC concluded that because the provider does not get paid unless and until the consumer approves the settlement offer and acknowledges having received the benefit of the service, the advance fee ban, along with the robust and extensive disclosure provisions set forth in the TSR, was sufficient to protect consumers while allowing reputable debt resolution service providers to continue normal business operations. Second, the FTC concluded that fee caps would very likely be anti-competitive, to the detriment of consumers, and that “... fee setting is best done by a competitive market”⁴ The FTC expressed concern that, while states have the authority to regulate fees, the imposition of a fee cap would likely eliminate the downward pressures on prices normally found in a competitive marketplace:

“... any ... maximum 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”⁵

We agree with the FTC’s conclusions: to impose fee caps on top of the advance fee ban would almost certainly distort the market, making it difficult for legitimate providers to stay in business to the detriment of financially challenged Wisconsin consumers who need and benefit from their services. With the ban on advance fees, it is the consumer, not the provider, that controls both the timing and the amount of any given settlement. Given that, we submit that fee caps offer no additional protection that is not already provided by the TSR.

Most States Do Not Impose Fee Caps And Those That Do See a Sharply Restricted Marketplace

Since the October 2010 effective date of the TSR amendments, only one state – Virginia – has imposed a fee cap on the provision of debt resolution services. Conversely, several states that had fee caps prior to the passage of the TSR amendments have since repealed those limits⁶, and one state – California – has enacted a regulatory framework for debt resolution without any limitation on service fees other than a competitive marketplace. Today, there are 27 states, including California, Florida, New York, and Texas - plus the District of Columbia - in which debt resolution is offered to consumers without fee caps of any sort.

³ 75 Fed. Reg. 48458, August 10, 2010.

⁴ Ibid.

⁵ Ibid.

⁶ Fee caps have been repealed in Colorado, Nevada, Tennessee and Utah.



It is worth noting that, of the 15 states itemized by DFI in Section 7 of the Statement of Scope as having approved the offering of debt resolution services subject to a fee cap, every single one of them (other than Virginia) both enacted its fee cap previous to the implementation of the TSR amendments and currently has an extremely limited marketplace with very few providers and no fee competition of any sort. In some states – Illinois, Connecticut, Oregon, Rhode Island, Maine and North Dakota, to name but a few – there are no providers who are willing to offer debt resolution services at any scale, an obviously poor outcome and one detrimental to the interests of consumers. Indeed, in states lacking a competitive marketplace for debt resolution services, consumers must choose between engaging an attorney – with legal fees much greater than those charged by reputable debt resolution service providers and that must be paid up-front – or bankruptcy.

Overall, but for our concerns around restrictive fee caps, we strongly support DFI’s initiative to regulate the debt resolution industry in Wisconsin. The AFCC has a long track record of working closely with the regulatory community, both at the federal and the state level, in crafting appropriate and consumer-centric regulation that recognizes both the vulnerability of those in financial distress and the business realities of serving financially challenged consumers.

We look forward to working with DFI to ensure that consumers continue to have access to professional and transparent debt resolution services that enable them to settle their debts in a financially responsible and dignified manner.

Please feel free to contact the undersigned should you have any questions, comments or concerns. We would be delighted to supply any additional information you might request.

Sincerely,

A handwritten signature in cursive script that reads "Denise A. Dunckel".

Denise Dunckel
Chief Executive Officer

cc: Matthew Lynch, Esq.
Nathan Halbach

ATTACHMENT (MODEL LEGISLATION)