UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

March 20, 1998

The Honorable Albert Gore, Jr.
President of the Senate
United States Senate
Washington, D.C. 20510

RE: Twentieth Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act

Dear Mr. President:

The Federal Trade Commission ("Commission") is required by Section 815(a) of the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §§ 1692-1695o, to submit a report to Congress each year summarizing the administrative and enforcement actions taken under the Act over the preceding twelve months. These actions are part of the Commission's ongoing effort to curtail abusive, deceptive, and unfair debt collection practices in the marketplace. Such practices have been known to cause various forms of consumer injury, including emotional distress and invasions of privacy, and can severely hamper consumers' ability to function effectively at work. Although the Commission is vested with primary enforcement responsibility under the Act, overall enforcement responsibility is shared by other federal agencies. In addition, consumers who believe they have been victims of statutory violations may seek relief in state or federal court.

As the Commission has stated in the past, this report continues to make a number of recommendations for changes in the FDCPA that the Commission believes will improve its clarity. It also presents an overview of the types of consumer complaints received by the Commission over the past year as well as a summary of the Commission's formal and informal enforcement initiatives. Finally, it outlines the activities and recommendations of the other federal agencies responsible for administering and enforcing the Act with regard to entities under their respective jurisdictions.

INTRODUCTION

Although the Fair Debt Collection Practices Act prohibits abusive, deceptive, and otherwise improper collection practices, it permits reasonable collection efforts that promote repayment of legitimate debts. Thus, the Commission's enforcement goal is to ensure compliance with the Act without unreasonably impeding the collection process. The Commission recognizes that the timely payment of debts is important to creditors and that the debt collection industry offers useful assistance toward that end. The Commission also appreciates the need to protect consumers from those debt collectors who engage in abusive and unfair collection practices.

Congress enacted the FDCPA in an effort to balance the debt collector's right to recover just obligations with the consumer's right to protection from harassment, deceit, invasions of privacy, interference with the employment relationship, and other abusive collection tactics. Many members of the debt collection industry supported this legislation when it was proposed, and most debt collectors now conform their practices to the standards the Act imposes. The Commission staff continues to work with industry groups to clarify ambiguities in the law and to educate the industry and the public regarding the Act's requirements.

CONSUMER COMPLAINTS

Debt collection continues to be a principal subject of many of the complaints received by the Commission. Debt collectors also occasionally contact us to express concern about allegedly violative practices of competitors, because they fear that such practices may cause them to lose business to collectors who violate the law.

Most of the Commission's information about how debt collectors are complying with the Act, however, comes from consumers. Some of the complaints we receive allege violations involving substantial consumer injury and, therefore, are a source of immediate concern. We continue to believe that the number of consumers who contact the Commission represents a relatively small percentage of the total number of consumers who actually encounter problems with debt collectors.[1] Experience indicates that some consumers may not even be aware that the Commission enforces the Act.

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[1] We cannot determine the extent to which abusive debt collection practices in general are represented by the complaints the Commission receives. Based on our enforcement experience, we know that many consumers never complain while others complain to the underlying creditor or to other enforcement agencies.

Not all consumers who complain to the Commission about collection problems have experienced law violations. In some cases, for example, consumers complain that a debt collector will not accept partial payments on the same installment terms that the original lender provided when the account was current. Although a collector's demand for accelerated payment or larger installments may, in these circumstances, be frustrating to the consumer, such a demand is not a violation of the Act. In other cases, it is unclear whether the conduct at issue violates the law. In these cases, we must review the evidence, which often includes copies of dunning notices, consumer and collector correspondence, contracts, warranties, or sales agreements. However, many consumers complain of conduct that, if accurately described, clearly violates the Act.

In the past year, some debt collectors apparently continued to abuse consumers over the telephone in the course of their collection efforts. Profane or obscene language, as well as racial and ethnic slurs, were employed. Consumers complained that collectors called them at work even when the collectors knew that employers prohibited such calls or otherwise had reason to know that employers objected to their workers receiving such calls on the job. Consumers alleged that some collectors made repeated telephone calls within a brief period, hung up abruptly and then called back immediately; some collectors also called in the early morning or late evening. All of these practices clearly violate the Act.

Another source of complaints involves the use of false or misleading threats of what might happen if a debt is not paid. These include threats to institute civil suit or criminal prosecution, garnish salaries, seize property, cause job loss, have a consumer jailed, or damage or ruin a consumer's credit rating. Some of these practices, such as those involving false threats of the consequences of nonpayment, are specifically prohibited by the Act. Other practices, such as the threat to cause a consumer's arrest, violate the Act only if the collector does not have the legal authority or intent to accomplish the promised result.

We continue to receive complaints about unauthorized third party contacts. Some collectors persist in telephoning uninvolved third parties without the consumer's consent. Consumers' employers, relatives, children, neighbors, and friends have been contacted and informed about consumers' debts. Such contacts typically embarrass or intimidate the consumer and are a continuing aggravation to third parties. Contacts with consumers' employers and co-workers about their alleged debts jeopardize continued employment and prospects for promotion. Relationships between consumers and their families, friends, or neighbors may also suffer from improper third party contacts. In some cases, collectors reportedly have used misrepresentations as well as harassing and abusive tactics in their communications with third parties. Unless authorized by the consumer or unless they fall within one of the Act's exceptions, third party contacts for any purpose other than obtaining information about the consumer's location violate the Act.

Some debt collectors continue to violate the act by sending consumers collection letters falsely representing the active involvement of an attorney in the collection effort. Attorneys who

are employees of debt collectors may not permissibly use "attorney-at-law" stationery without disclosing the identity of their debt collector-employer. Failure to disclose the nature of their employment in these circumstances may falsely imply to the consumer that the debt collector has retained a private attorney to pursue legal action. Additionally, some debt collectors send letters to consumers under an attorney letterhead, signed by an attorney, when the attorney (1) has little or no involvement with either the letters or the consumers to whom the letters are sent and/or (2) has no intent to take legal or other action if the consumers' debts are not paid. These letters often falsely represent or imply that the attorney signing them has studied a given consumer's file and concluded that the consumer is a candidate for legal action. Thus, they violate Sections 807(5) and (10) of the Act.

Consumers who dispute the amounts of their debts or who believe they do not owe the debts in question complain that debt collectors fail to respond to their dispute letters, fail to provide proper verification of their debts, and fail to cease collection upon receipt of a written dispute letter as required by the Act. These failures frustrate some of the Act's primary self-help provisions, which are designed to prevent debt collectors from continuing to dun the wrong person, collecting amounts in excess of what is owed, or attempting to collect debts that they are unable to verify.

The Commission continues to receive complaints against creditors collecting their own debts. Some consumers allege that creditors often mention that they are not generally covered by the FDCPA. In particular, complaints concerning medical and hospital debts are becoming more evident. Some consumers allege that they never receive a final statement from the medical service provider and their accounts are forwarded, without further notice, to collection agencies which attempt to charge exorbitant interest, late fees and other collection costs in addition to the original debt. Some of these charges can exceed the debt itself. Insurance providers, in some cases, may never have informed consumers that the consumer had not paid the whole amount due.

Communication of erroneous credit information to credit bureaus is a continuing area of concern, especially in light of recent amendments to the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. Section 807(8) of the FDCPA has always prohibited communication of credit information that is known or should be known to be false. This can include information about which a dispute has been received. Consumers are understandably sensitive about the content of their credit reports. Many believe that their credit reports are inaccurate because of erroneous entries submitted by debt collectors. Commission staff will continue to monitor developments in this area in conjunction both with the administration and enforcement of the Fair Credit Reporting Act and the FDCPA.

Finally, consumers are complaining in increasing numbers that debt collectors are debiting their bank accounts without their knowledge or permission and that banks are permitting the practice on the erroneous assumption that consumers have authorized the transfers. Collectors may be obtaining consumers' account numbers from checks consumers have written in the past, current checks written on accounts with insufficient funds, or from consumers themselves on false

pretenses. While it is true that some transfers are supported by proper authorization and are, in fact, more convenient for both consumer and debt collector alike, the potential for abuse of the practice exists. The Commission staff is aware of the trend in this area and will closely monitor these kinds of debt collection activities over the next year.

THE ENFORCEMENT PROGRAM

The Commission's FDCPA enforcement program is diverse and consists of a number of initiatives. Industry and consumer education efforts are an integral part of this program. The Commission staff's continuing colloquy with industry members, attorneys, and other interested parties has the effect of informing debt collectors of their responsibilities under the Act. These informal education efforts alert debt collectors to potential violations and encourage their voluntary compliance. In circumstances where debt collectors choose not to remedy FDCPA violations on their own and the violations are too serious or sweeping to handle informally, the Commission may choose to take formal enforcement action. Formal enforcement action, depending upon the particular facts, may result in litigation to compel compliance with the Act.

EDUCATION AND INFORMAL ENFORCEMENT

Industry and consumer education, information-sharing, and informal enforcement activities are important aspects of the Commission's enforcement program. Commission resources are more efficiently used by promoting voluntary compliance, when possible, and reserving formal legal procedures, such as litigation, for more severe and injurious violations of the Act.

Staff's ongoing participation in industry conferences and workshops has aided industry members in gaining increased familiarity with the Act's requirements and the way in which the Commission staff has interpreted them. We continue to maintain an informal communications network with major trade associations, which provides a mechanism for the exchange of information and ideas and a forum for discussions of potential problems that arise in the course of the Commission's enforcement efforts. These contacts have proven a useful resource for both the Commission staff and the industry. Difficulties that debt collectors have in complying with the Act are a frequent topic in these discussions.

When staff becomes aware of problematic collection activities that do not appear to be pervasive or serious violations of the Act, the debt collector under scrutiny may be notified and requested to conform the activities in question to the requirements of the Act. On occasion, staff refers complaints to debt collectors for individual resolution and asks that they report to the Commission on the disposition of the complaints. The Commission believes that obtaining compliance with the Act in this manner saves time and resources.

The Commission staff’s education efforts have focused in many cases on advising consumers and industry of the extent to which attorneys’ activities are covered by the FDCPA. As we have stated in previous reports, Congress amended the Act in 1986 to remove the

exemption for attorneys. Previously, attorneys collecting debts on behalf of clients were specifically exempted from the definition of "debt collector" in the Act.[2] By amending the Act to remove the exemption (Public Law 99-361), Congress brought within the scope of the Act attorneys who regularly collect debts for third parties.[3]

Since the exemption was eliminated, however, courts differed on exactly how the Act should address the various forms of debt collection in which attorneys engage. Some courts held that attorneys engaged solely in collection litigation, i.e., the filing and prosecuting of lawsuits, as opposed to more traditional debt collection activities, such as sending dunning letters and making telephone calls, are not covered by the Act.[4] These courts based their conclusions on the Act's

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[2] Public Law 95-109, former Section 803(6)(F).

[3] H.R. Rep. No. 405, 99th Cong. 2d Sess. 3-6, reprinted in 1986 U.S. Code Cong. & Ad. News 1752, 1753-57. "The purpose of the amendment was . . . to close a significant loophole, whereby attorneys engaging in traditional debt collection activities were able to avoid the FDCPA's precepts merely by virtue of the fact that they had, at some point, obtained a law degree." Firemen's Ins. Co. v. Keating, 753 F. Supp. 1137, 1142 (S.D.N.Y. 1990).

[4] Green v. Hocking, 9 F.3d 18 (6th Cir. 1993); Fireman's Ins. Co. v. Keating, 753 F. Supp. 1137, 1142-43 (S.D.N.Y. 1990) (because a law firm initiating a legal proceeding to recover a debt cannot be deemed a "debt collector" as defined by the FDCPA, the venue provisions of the FDCPA are inapplicable); National Union Fire Ins. Co. v. Hartel, 741 F. Supp. 1139, 1141 (S.D.N.Y. 1990) (law firm representing a plaintiff guarantor of notes executed by defendant investor in limited partnership is not a "debt collector" within the meaning of the FDCPA because it has engaged in activities only of a purely legal nature in seeking reimbursement for plaintiff).

legislative history and related statements,[5] the Commission's Staff Commentary on the Act[6] and the seemingly anomalous results produced by requiring litigating attorneys to comply with some of the Act's requirements.[7] Others held that, no matter what sort of collection activity attorneys conduct, the Act applies if they engage in it regularly, based upon the literal language of the definition of "debt collector" in Section 803(6).[8]

In 1995, the United States Supreme Court resolved this dispute, affirming the Seventh Circuit, which held that the Act covers attorneys and law firms engaged in litigation to collect debts.[9] The Court held that lawyers who regularly collect debts through legal proceedings meet the Act's definition of debt collector in Section 803(6) and that, when Congress repealed the attorney exemption, it did not carve out an exception for litigation-related collection efforts. Additionally, it held that the plain language of the Act overrides contrary postenactment statements by one of the repeal's sponsors, the Commission's Staff Commentary on the Act and

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[5] See H.R. Rep. No. 99-405, 99th Cong. 1st Sess., 1-7, reprinted in 1986 U.S. Code Cong. & Ad. News 1752, 1753-57 (reflects purpose of amending the FDCPA to delete provision exempting "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client," designed to bring under the FDCPA's coverage attorneys engaging in activities traditionally carried on by debt collectors); 131 Cong. Rec. H 10534 (1985) (Rep. Annunzio, sponsor of Amendment, stated that "[t]he removal of the attorney exemption will not interfere with the practice of law by the Nation's attorneys. It will not prevent them from representing the interests of their clients."). In addition, three months after enactment of the amendment, in 132 Cong. Rec. H 10031 (1986), Rep. Annunzio stated that "[o]nly collection activities, not legal activities, are covered by the Act . . .. The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature . . .. The Act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.").

[6] The Staff Commentary on the FDCPA states that an attorney whose activities are restricted to "legal" activities (e.g., the filing and prosecution of lawsuits) is not a "debt collector" under Section 803(6) of the FDCPA. Staff Commentary on the Fair Debt Collection Practices Act, comments 803(6)-1 and 2 (53 Fed. Reg. 50097, 50102, Dec. 13, 1988).

[7] Green v. Hocking, 9 F.3d 18, 21 (6th Cir. 1993).

[8] "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Scott v. Jones, 964 F.2d 314 (4th Cir. 1992); Fox v. Citicorp Credit Services, 15 F.3d 1507, 1512-13 (9th Cir. 1994).

[9] Heintz v. Jenkins, 115 S. Ct. 1489 (1995).

whatever anomalous results that could occur.[10]

The Commission staff continues to field questions about the impact of this decision on the collection activities of attorneys in various stages of collection litigation. In its interpretations, staff is attempting to clarify the FDCPA's application to these attorneys in specific situations and routinely provides guidance as needed. It will continue to disseminate pertinent information in this and other areas to the entire collection industry as widely and as effectively as possible.

The Commission staff also frequently provides guidance concerning when and how often debt collectors must make disclosures under Section 807(11) of the FDCPA. In 1996, the Congress amended Section 807(11) of the Act to clarify its meaning in light of two conflicting appellate court decisions on the Section and in response to Commission recommendations of the past several years. Before the amendment, Section 807(11) required a debt collector to "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." We previously reported that two appellate courts had disagreed on when and how often the disclosure must be made -- one holding that it need only be made in the first debt collection communication[11] and another holding that it must be made in all such communications.[12]

The amendment resolved the conflict. Section 807(11) now requires the above-noted disclosure to be given only in the initial written communication with the consumer and, if the initial communication is oral, in that initial oral communication. Subsequent communications must disclose only that they are from a debt collector. The Congress also excepted "formal pleadings made in connection with a legal action" from any disclosure requirement. This clarification will benefit both consumers and debt collectors alike. The Commission staff will continue to provide guidance to the industry on Section 807(11) as needed.

In addition, in 1997 the Commission staff launched a massive education campaign to inform information providers, including debt collectors, about their responsibilities under the amended Fair Credit Reporting Act ("FCRA"). During the past year, Congress amended the FCRA in response to, among other things, complaints about the accuracy of credit information in credit reports. Some of the amendments are applicable to debt collectors. Section 623 of the amended FCRA imposes additional duties upon "furnishers" of credit information, including all debt collectors who report to consumer reporting agencies. For example, "furnishers" may not report information that they know is inaccurate; in addition, they have a duty to correct

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[10] Id. The Seventh Circuit in Jenkins v. Heintz, 25 F.3d 536, 539 (7th Cir. 1994), stated that "[t]here may be abundant reasons why Congress should not regulate litigation aimed at collecting debts. But in drafting a broad statute, Congress entered all areas inhabited by debt collectors, even litigation."

[11] Pressley v. Capital Credit and Collection Services, 760 F.2d 922 (9th Cir. 1985).

[12] Pipiles v. Credit Bureau of Lockport, 886 F.2d 22 (2d Cir. 1989).

information previously reported if it is subsequently found to be wrong. If a furnisher receives notice of a dispute from a consumer reporting agency about information reported by the furnisher, the furnisher must conduct an investigation to determine whether the information reported was correct and report the results of the investigation to the consumer reporting agency within thirty days. Various remedies are available to consumers, states, and the Commission for failure to comply.

Finally, consumers who file complaints with the Commission regarding debt collection practices are always advised of the FDCPA's self-help remedies as well as the numerous other protections afforded to them by the Act. For example, consumers are advised of their rights under Section 809 of the Act to obtain verification of the debt from the debt collector upon request and to have all collection activities stopped until verification is obtained. Additionally, consumers are regularly told about Section 805 of the Act, which provides that consumers may require the collector to stop communicating with them about the debt if they request it in writing. Finally, Commission staff advises consumers of their private right of action, which enables them to bring legal action against debt collectors who violate the Act. If successful, consumers may recover actual damages plus additional damages of up to one thousand dollars as well as court costs and attorneys' fees.

An informed public that enforces its rights under the FDCPA operates as a powerful, informal enforcement mechanism. Consumers who are victims of unlawful debt collection activities can provide significant policing of the industry. By using the FDCPA's self-help remedies, these consumers often further the goals of the Act in the process. Accordingly, consumer education remains an integral part of the Commission's informal enforcement effort.

STATE EXEMPTIONS FROM THE FDCPA

Section 817 of the FDCPA permits states to petition the Commission for an exemption from the provisions of the Act.[13] Pursuant to Section 817, the Commission promulgated regulations shortly after the statute's enactment that provide criteria and establish procedures whereby the Commission may exempt from the Act any debt collection practice within a state.[14] To seek an exemption under the Act, a state must petition the Commission for a determination that under the laws of that state, any class of debt collection practices within that state is subject

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[13] Section 817 provides:

> The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement. 15 U.S.C. § 1692o.

[14] These regulations are codified at 16 C.F.R. Part 901 et seq.

to requirements that are substantially similar to, or provide greater protection for consumers than, the requirements of the FDCPA. To obtain an exemption under the Act, the petitioning state must provide documentation demonstrating that the state law provides protections substantially similar to those of the FDCPA, and that the state has sufficient resources to enforce its law.

No petitions for exemption were received by the Commission during 1997.

FORMAL ENFORCEMENT

Commission staff selects firms for further investigation when complaints from consumers, state and local agencies, or from other industry members suggest a pattern of law violations not amenable to voluntary compliance efforts. Case selection is based primarily, although not exclusively, on the extent of possible consumer injury.

If the investigation reveals evidence of continuing FDCPA violations, staff contacts the debt collector and attempts to negotiate a settlement before recommending that the Commission issue a complaint. If a settlement is reached and the Commission accepts the staff's recommendation to approve a proposed consent order, the Commission delivers the proposed order and accompanying complaint to the Department of Justice, which files them in the appropriate federal district court.[15] If the debt collector will not agree to an appropriate settlement that remedies the violations involved, the Commission requests that the Department of Justice file suit in federal court on behalf of the Commission, usually seeking a civil penalty and injunctive relief that prohibits the collector from continuing to violate the Act. On occasion, debt collectors agree to an appropriate settlement only after suit has been brought.

The Commission staff is currently conducting several non-public investigations of debt collection agencies to determine whether they are or have engaged in serious violations of the Act. In addition, there have been significant developments in five pending Commission enforcement actions.

During 1997, the Commission, through the Department of Justice, attempted to collect its judgment against National Financial Services (NFS), a Maryland debt collection agency, its owner, and an attorney who helped devise and mail the collector's dunning notices. In 1994, the Commission had moved for the imposition of a substantial civil penalty against the defendants based on their serious, persistent violations of the FDCPA involving a large volume of deceptive attorney letters and false threats of suit. In July 1995, the court assessed a civil penalty of $500,000 against the corporate defendant and its owner and $50,000 against the attorney. Although defendants appealed the decision to the Fourth Circuit Court of Appeals, the Fourth Circuit in 1996 affirmed the judgment of the district court.[16] Last year, the United States, representing the Commission, in an attempt to collect the penalty, filed for a temporary restraining order, and ultimately obtained a preliminary injunction, freezing the owner's bank account which contained sufficient funds to satisfy the judgment. On March 3, 1998, the parties entered into a stipulated judgment and consent order providing for a total payment of $625,810.81, which includes interest up to the date of payment and a ten percent late surcharge,

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[15] Consent orders are for settlement purposes only and do not constitute an admission by the debt collector that it violated the law.

[16] United States v. National Financial Services, 98 F.3d 131 (4th Cir. 1996).

in final resolution of the matter.

In another matter, the Department of Justice, on behalf of the Commission, had filed complaints in 1995 in the United States District Court for the Northern District of California against Trans-Continental Affiliates (TCA), a medium-sized debt collector headquartered in California, and two of its principals, for a number of egregious violations of the Act.[17] In 1996, the Department of Justice followed its complaints with a motion for partial summary judgment against the corporation and the two principals seeking to enjoin them from committing the violations alleged in the complaints and seeking liability for civil penalties. While the court granted the injunctive relief against all parties, including the principals, and granted the motion for penalties with respect to TCA, it held that a determination of civil penalty liability with respect to the individuals would require a trial because there was a disputed issue of fact concerning the role they played in the law violations alleged. In May of 1997, the individuals settled the penalty action for $25,000. In the meantime, TCA had filed for bankruptcy protection. In August, the court finally resolved the overall penalty issue and the case by also assessing a $25,000 penalty against TCA for a total of $50,000.

The Commission is continuing its ongoing investigation of Lundgren and Associates, a law firm which the Commission staff believes may have engaged in FDCPA violations in connection with the collection of checks written on accounts without sufficient funds. Lundgren had resisted our investigation on grounds that his debt collection activities were not covered by the FDCPA because dishonored checks allegedly are not "debts" as defined in Section 803(5).[18] In 1996, the Commission issued a CID against Lundgren for further information and documents related to the violations charged. Lundgren filed a motion to quash the CID, which the Commission denied. Despite the denial, the firm failed to respond to the CID and the

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[17] United States v. Trans-Continental Affiliates, Civil No. C95-1627 MMC (C.D. Cal. filed May 15, 1995).

[18] The United States District Court for the District of Arizona agreed with Lundgren in a private class action suit brought by Sharolyn Charles against Lundgren and Check Rite, Ltd. and dismissed the complaint. Plaintiff appealed to the Ninth Circuit which, following the decision of the Seventh Circuit (Bass v. Stolper, 111 F.3d 1322 (7th Cir. 1997)) held that the FDCPA does apply to the collection of dishonored checks and remanded the case to the district court for further proceedings. In 1996, the Commission filed amicus curiae briefs with both the Seventh and Ninth Circuits arguing, among other things, that the plain language of the Act covers efforts by third parties to collect debts arising from dishonored checks given by consumers in payment for goods and services. In December, 1997, the Supreme Court denied defendant Check Rite's petition for certiorari [Check Rite, Ltd. v. Charles, No. 97-658 (S.Ct., cert. denied 12/15/97)]. This issue has also been presented in two other cases now before the courts of appeals, in which the Commission has also filed amicus briefs. The Eighth Circuit found in our favor in Duffy v. Landberg, No. 97-1560, (8th Cir. 1/20 /98), although a rehearing is now being sought. No decision has been rendered in Snow v. Riddle, No. 97-4045, in the Tenth Circuit.

Commission filed an enforcement action in federal district court in the Eastern District of California in late 1996. A hearing on the matter was held in February 1997 and Lundgren was ordered to comply. Last year, the Commission staff finally received the information and documents sought and continued the investigation.

Finally, the Commission settled a precedent-setting case in 1997 against a Cincinnati debt collector, United Compucred Collections (UCC), and its president on charges that they violated the terms of two previous orders issued against the company in 1976 and 1980 for deceptive threats of legal action and misleading references to attorneys in its "attorney" dunning letters sent to consumers. Among other things, the 1997 complaint alleged that UCC's dunning letters continued to misrepresent the degree of attorney involvement in UCC's debt collection process and the likelihood of suit. The settlement permanently bans the corporation from using "attorney" letters in its collection process -- the first time a ban has ever been used as a remedy in a debt collection context. It also prohibits the company and its president from violating the two previous orders and the FDCPA and assesses a civil penalty of $55,000 against UCC and $5,000 against its president.[19]

LEGISLATIVE RECOMMENDATIONS

The Commission continues to recommend four amendments to, or clarifications of, the FDCPA as permitted by Section 815 of the Act.

A. Section 809(a) -- Clarity of Notice

The Commission continues to recommend that Congress amend Section 809 to make explicit the standard for clarity to be applied to the notice required by that Section. Section 809(a) of the Act requires debt collectors to send a written notice to each consumer within five days after the consumer is first contacted, stating that if the consumer disputes the debt in writing within thirty days after receipt of the notice, the collector will obtain and mail verification of the debt to the consumer.

Some debt collectors print the notice required by Section 809(a) in a type size considerably smaller than the other language in the dunning letter, or obscure the notice by printing it on a non-contrasting background in a non-contrasting color. Significantly, two courts of appeal have held that collection letters that use small or otherwise obscured print in the notice required by Section 809(a) and at the same time use much larger, prominent or bold-faced type in the text of the letter violate the Act. Miller v. Payco-General American Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Swanson v. Southern Oregon Credit Services, Inc., 869 F.2d 1222 (9th Cir. 1989). The courts reasoned that the payment demand in the text both contradicts and

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[19] United States v. United Compucred Collections, Civil No. C-1-97-0369 (S.D. Ohio entered April 16, 1997).

overshadows the required notice.[20] Neither of the courts attempted to specify what elements of presentation (e.g., the color and size of type, location in the document) would constitute a clear disclosure to consumers of their dispute rights under Section 809(a) of the Act.

The Commission recommends that Congress eliminate this problem by amending Section 809 explicitly to require a more conspicuous format for the notice by mandating that it be "clear and conspicuous." That standard could be defined as "readily noticeable, readable and comprehensible to the ordinary consumer." The definition could also reference various factors such as size, shade, contrast, prominence and location that would be considered in determining whether the notice meets the definition. As presently drafted, the provision does not explicitly specify any standard for the 809(a) notice. There are a number of Commission decisions and orders that define the "clear and conspicuous" standard in a variety of contexts. See, e.g., California Suncare, Inc., File No. 942-3218 (1997) (consent); Figgie International, Inc., 107 F.T.C. 313, 401 (1986). [21] Proper application of such a standard in Section 809(a) would help ensure that the information in the required notice is effectively conveyed and eliminate dunning letters artfully designed to confuse their readers and frustrate the purposes of this provision of the FDCPA.

B. Section 809(b) -- Effect of Thirty-day Period

Section 809(b) of the FDCPA provides that if the consumer, within the thirty-day period specified in Section 809(a), disputes the debt in writing, the collector must cease all collection efforts until verification of the debt is obtained and mailed to the consumer. Until recently, this provision has been consistently interpreted to mean that the thirty-day period was simply a time within which the consumer must act to take advantage of his or her right to require the collector to verify the debt before making further collection efforts.[22] Furthermore, it was generally understood that the intent of the Section was simply to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer had

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[20] Miller, 943 F.2d at 484; Swanson, 869 F.2d at 1225-26. Both the format and the substance of the letter were held to "overshadow" the notice required by Section 809(a) in each case.

[21] See also European Body Concepts, Inc., Docket No. C-3590 (June 23, 1995); Eggland's Best, Inc., Docket No. C-3520 (Aug. 15, 1994); and Nutri/System, Inc., Docket No. C-3474 (Dec. 22, 1993).

[22] "If the consumer disputes the validity of the debt within 30 days, the debt collector must cease collection until he sends the consumer verification." S. Rep. No. 382, 95th Cong., 1st Sess. 4, reprinted in 1977 U.S. Code Cong. & Ad. News 1695, 1699. A similar statement appears at page 8 of the Senate Report (1977 U.S. Code Cong. & Ad. News at 1702).

already paid."[23]

Two federal courts of appeal have strongly implied that the thirty-day period is a firm grace period, making a demand for payment within the first thirty days impermissible. Graziano v. Harrison, 950 F.2d 107, 111-13 (3d Cir. 1991); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1226 (9th Cir. 1988).[24] The Commission considers this interpretation erroneous.

As reflected in opinion letters issued by the staff of the Commission and in the Staff Commentary on the FDCPA,[25] a debt collector may (unless or until the consumer disputes the debt) continue to make demands for payment or take legal action within the thirty-day period, so long as the debt collector's activities do not function to nullify, disparage or overshadow the disclosure of the consumer's dispute rights under Section 809(a) or otherwise lead the consumer to believe that the disclosure is meaningless. Nothing within the language of the statute indicates that Congress intended an absolute bar to any appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt. To the contrary, Section 809(b) simply provides a time frame within which the consumer may insist, by disputing the debt in writing, that the collector verify the debt with the creditor before continuing collection activity.

These decisions have interjected an element of uncertainty in the law by effectively treating the thirty-day time frame set forth in Section 809 as a grace period within which collection efforts are prohibited, rather than a dispute period within which the consumer may insist that the collector verify the debt. The Commission therefore recommends that Congress clarify the law by adding a provision expressly permitting appropriate collection activity within the thirty-day period if the debt collector has not received a letter from the consumer disputing the debt. The clarification should include a caveat that the collection activity should not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt specified by Section 809(a).[26]

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[23] Id.

[24] The Graziano court also held that a threat to take any action within ten days would violate Section 807(5), as well as Section 809, because it would be a threat to take an "action that cannot legally be taken." 950 F.2d at 113.

[25] 53 Fed. Reg. 50097, 50109; comment 809(b)-1 (Dec. 13, 1988).

[26] In the Senate, a current bill (S 1405) proposes specifically to allow continuation of collection activities during the thirty-day period. The concept of "overshadowing" is not addressed.

C. Section 803(6) -- Litigation Attorney as "Debt Collector"

As previously stated, the Supreme Court has resolved the conflict in the federal courts concerning whether attorneys in litigation to collect a debt are covered by the Act. The Court has said that they are, in fact, covered like any other debt collector because they fall within the plain language of the statute. The difficulties in applying the Act's requirements to attorneys in litigation, however, and the anomalies that result, still remain. For example, pretrial depositions can violate Section 805(b) because they involve communicating with third parties about a debt. Pleadings will still trigger the Section 809 disclosure, which will not make sense in a litigation context.[27] If the consumer disputes the debt, the attorney/debt collector could be required to "stop" the suit because Section 809(b) requires that collection activity cease until after verification.

Because it still seems impractical and unnecessary to apply the FDCPA to the legal activities of litigation attorneys, and because ample due process protections exist in that context, the Commission continues to believe that Congress should intervene and make its intent in this area clear. The Commission, therefore, recommends that Congress re-examine the definition of "debt collector" and state that an attorney who pursues alleged debtors solely through litigation (or similar "legal" practices) -- as opposed to one who collects debts through the sending of dunning letters or making calls directly to the consumer (or similar "collection" practices) -- is not covered by the statute.[28]

D. Section 803(6)(F)(iii)

Section 803(6) of the FDCPA sets forth a number of specific exemptions from the law, one of which is collection activity by a party that "concerns a debt which was not in default at the time it was obtained by such person."[29] The exemption was designed to avoid application of the FDCPA to mortgage servicing companies, whose business is accepting and recording payments on current debts.[30] The theory behind the exemption was that the Act should not apply to a business whose focus was the routine processing of remittances (as opposed to the collection of delinquent accounts) simply because such business continued to work an account after the account went into default.

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[27] Formal pleadings are specifically excepted from any disclosure requirements by the recently amended Section 807(11).

[28] S 1405 also proposes to exclude from the coverage of the FDCPA communications made pursuant to the Federal Rules of Civil Procedure and applicable rules of procedure in a state or in a nonjudicial foreclosure proceeding.

[29] 15 U.S.C. § 1692a(6)(F)(iii).

[30] The principal Senate Report on the final version of the FDCPA states that the intent was to exempt "persons who service debts for others" from its coverage. S. Rep. No. 382, 95th Cong., 1st Sess. 7, reprinted in 1977 U.S. Code Cong. & Ad. News 1695, 1701.

The Commission staff has become aware, however, of a number of industry members that acquire all of the accounts of their clients (hospitals or other service providers) at an early stage when the accounts are current (sometimes called an "early out" program) and then claim exemption from the FDCPA because each account constitutes a "debt that was not in default when it was obtained" from the creditor. In fact, collection of delinquent debts is the major focus of these businesses. Apart from the fact that they acquire accounts prior to default, these businesses function in all respects like typical debt collectors. Nevertheless, they can argue that they are exempt from the FDCPA.

The Commission believes that Section 803(6)(F)(iii) was designed to exempt only businesses whose collection of delinquent debts is secondary to their function of servicing current accounts. However, the existing formulation of the exemption, which focuses on the status of the individual debts at the time they are obtained by the third party, allows collectors that obtain current debts that routinely go into default to escape the coverage of the FDCPA. Therefore, the Commission recommends that Congress amend this exemption so that its applicability will depend upon the nature of the overall business conducted by the party to be exempted rather than the status of individual obligations when the party obtained them. For example, the provision could be redrafted to exempt an activity that "is incidental to a business whose principal purpose is the servicing of current debts for others" or words to that effect. In this manner, the mortgage servicer (who acts more like a creditor than a debt collector) would not be covered even though it might continue to collect the small fraction of its accounts that become delinquent. By contrast, the debt collector that primarily collects delinquent accounts (regardless of whether they were current when obtained) would be unmistakably within the scope of the FDCPA.

ADMINISTRATION, ENFORCEMENT AND LEGISLATIVE RECOMMENDATIONS BY OTHER AGENCIES

Section 814 of the FDCPA places enforcement obligations upon seven other federal agencies for those organizations whose activities lie within their jurisdiction. These agencies are the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Department of Transportation, and the Department of Agriculture. These agencies have provided the Commission with a description of their activities during the past year. Almost all of the organizations regulated by these agencies are creditors and, as such, fall outside the coverage of the Act. When these agencies receive complaints about debt collection firms that are not under their jurisdiction, they generally forward them to the Commission.

The Office of the Comptroller of the Currency ("OCC") enforces compliance with the FDCPA's provisions with respect to national banks. The OCC reports that its examination of all

national banks on a regular basis shows that there is a high level of compliance with the Act.[31] No violations of the Act were discovered as a result of the OCC examinations of national banks in 1997. The OCC also resolves complaints against national banks. It received 19,770 complaints, of which 1,117 involved debt collection practices or tactics. No violations of the Act were identified. It should be noted that very few national banks engage in activities covered by the Act.

In the past year, the OCC continued to make available to all national banks copies of The Comptroller's Handbook for Compliance, which explains the Act's provisions and details instructions for determining compliance with the Act. The OCC also continued to provide guidance to bankers through its examiners during the examination process. The OCC's Community and Consumer Policy Division also has a program of education and outreach to promote compliance with the Act. During 1997, the Division's staff gave presentations at numerous seminars and training sessions sponsored by national and state trade associations and responded to questions and concerns regarding compliance with the FDCPA.

The Federal Reserve Board ("FRB") enforces compliance with the FDCPA's provisions with respect to member banks of the Federal Reserve System other than national banks. The FRB continues to enforce the Act, as it applies to state member banks, through regular compliance examinations. The FRB encountered no significant problems enforcing the Act in 1997 and considers compliance with the Act by state member banks to be satisfactory. A review of the 1997 Consumer Affairs examination reports submitted to the FRB by December 31, 1997, revealed no violations of the Act. In 1997, the FRB received thirty-one complaints alleging violations of the Act. Twelve of the complaints were against state banks. None of the twelve complaints were subject to the Act because state member banks collected only their own debts.

The FRB continues to distribute to interested parties the pamphlet entitled The Fair Debt Collection Practices Act and to provide training regarding compliance with the Act in consumer compliance schools. During 1997, the FRB did not issue any policy statements or comments about the Act.

The Federal Deposit Insurance Corporation ("FDIC") enforces compliance with the FDCPA's provisions with respect to banks (other than members of the Federal Reserve System) whose deposits or accounts are insured by the FDIC. During 1997, the FDIC issued revised FDCPA examination procedures in conjunction with the other agencies comprising the Federal Financial Institutions Examination Council. These revised procedures were developed as a result of statutory amendments to the FDCPA. The FDIC encountered no significant problems with enforcement of the FDCPA in 1997. Examiners checked for compliance with the Act during the course of regular compliance examinations of approximately 6,114 insured nonmember institutions that are supervised by the FDIC. Individual institutions are examined generally once every two or three years with an interim evaluation at 12 or 18 months.

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[31] The OCC's compliance program includes examinations of all national banking companies every 24 or 36 months depending on the size and complexity of the bank.

Based upon a review of 1,720 compliance examination reports completed in 1997, the FDIC found that only one cited any violations of the Act.[32] During 1997, the FDIC made no changes to its FDCPA enforcement methods and did not issue any new or revised policy statements. The FDIC encountered no significant problems with enforcement of the FDCPA this year. The FDIC's Division of Compliance and Consumer Affairs received 60 complaints in 1997 concerning the debt collection practices of 26 different insured state-chartered nonmember banks. In 50 of the complaints, the banks involved were engaged in collecting their own debts or had sold their loans to another entity and were not acting as debt collectors under the Act. Ten of the complaints dealt with institutions that used debt collectors subject to the FDCPA and contained allegations of harassment, including calls to the debtors' place of employment, contacts at unusual times, and communication with third parties.

The Office of Thrift Supervision ("OTS") enforces compliance with the FDCPA with respect to institutions subject to certain provisions of the Home Owners Loan Act of 1933, the National Housing Act, and the Federal Home Loan Bank Act. The OTS employs highly trained examiners who conducted 544 compliance examinations in 1997. No FDCPA violations were cited. During 1997, the volume of complaints received regarding the Act was less than one percent of all complaints received for the year.

The OTS's Compliance Activities Handbook, and its 1997 update, provides examiners with information and specific guidance to conduct thorough compliance examinations covering the FDCPA as well as other statutes. The OTS provides its publication, Compliance: A Self-Assessment Guide, to savings associations to help the associations assess their compliance programs and develop or improve internal policies to ensure compliance with consumer protection laws and regulations. This publication was revised in the 1997 update to address, among other things, the reforms enacted in the Economic Growth and Regulatory Paperwork Reduction Act of 1996. Further, the OTS's two-week Compliance I school includes discussion of the FDCPA's requirements and instruction on how to examine for compliance with the Act.

The National Credit Union Administration ("NCUA") enforces compliance with the FDCPA's provisions with respect to federal credit unions. The NCUA has delegated the enforcement of the Act to six regional directors who supervise field examiners in conducting on-site examinations of credit unions under its jurisdiction. The NCUA's publication, Compliance: A Self-Assessment Guide, provides credit union officials with information about the requirements of the Act and is in the process of being updated. The NCUA found no FDCPA violations in 1997 and received no complaints of federal credit unions violating provisions of the Act. In general, federal credit unions do not perform debt collection services for other credit unions or lenders.

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[32] Only 17 insured state-chartered nonmember banks supervised by the FDIC were identified as debt collectors subject to the Act.

The Department of Transportation ("DOT") enforces compliance with the FDCPA's provisions with respect to air carriers subject to the Federal Aviation Act of 1958. DOT states that it has not received any complaints or initiated any enforcement proceedings concerning the conduct of collection agencies or other persons whose principal business is to collect debts owed or due to any air carriers. Air carriers collect their own debts and are thus outside the scope of the provisions of the Act.

The United States Department of Agriculture ("USDA") enforces compliance with the FDCPA's provisions with respect to any activities subject to the Packers and Stockyards Act. The USDA reports that it has encountered no fact situations that fall within the statutory provisions of the Act. Therefore, the USDA makes no specific observation, suggestion, or recommendation regarding enforcement of or compliance with the Act.

CONCLUSION

The Commission believes that its efforts to monitor compliance and maintain a balanced program of formal and informal enforcement of the FDCPA will continue to do much to reduce consumer injury due to debt collection abuses as well as to encourage debt collectors covered by the Act to use lawful debt collection methods.

By direction of the Commission.

Robert Pitofsky
Chairman