ANNUAL REPORT: FAIR DEBT COLLECTION PRACTICES ACT

FEDERAL TRADE COMMISSION
MARCH 2001

INTRODUCTION

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. §§ 1692-1692o, 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, invasions of privacy, and the payment of amounts that are not owed, and can severely hamper consumers' ability to function effectively at work. Although the Commission is vested with primary enforcement responsibility under the FDCPA, overall enforcement responsibility is shared by other federal agencies.[1] In addition, consumers who believe they have been victims of statutory violations may seek relief in state or federal court.

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The FDCPA prohibits abusive, deceptive, and otherwise improper collection practices by third-party collectors. For the most part, creditors are exempt when they are collecting their own debts. The FDCPA permits reasonable collection efforts that promote repayment of legitimate debts, and the Commission's 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. Many members of the debt collection industry supported the legislation that became the FDCPA, 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.

As in past years, the Commission took significant steps to curtail abusive, deceptive, and unfair debt collection practices in 2000. This report presents an overview of the types of consumer complaints received by the Commission in 2000, a summary of the Commission's consumer and industry education initiatives last year, and a summary

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[1] Section 814 of the FDCPA, 15 U.S.C. § 1692*l*, 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. Almost all of the organizations regulated by these agencies are creditors and, as such, largely 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.

of the Commission's debt collection enforcement cases that became public in 2000. The report also contains five recommendations for changes to the FDCPA that the Commission believes will improve the statute's clarity and its effectiveness as a law enforcement tool.

CONSUMER COMPLAINTS RECEIVED BY THE COMMISSION

Most of the Commission's information about how debt collectors are complying with the Act comes directly from consumers.[2] The Commission received more complaints[3] in 2000 about third-party collectors -- nearly 14,000 -- than about any other specific industry.[4] The Commission continues to believe that the number of consumers who complain to the agency represents a relatively small percentage of the total number of consumers who actually encounter problems with debt collectors.[5]

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[2] The Commission also receives consumer complaints that are referred by state attorneys general. Occasionally, debt collectors 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.

[3] When this report refers to "complaints" received by the Commission, the term means consumer complaints about the practices of specific companies. It does not include requests for information about companies and other non-complaint consumer contacts.

[4] In late 1999, the Commission instituted a toll-free telephone number, 1-877-ID-THEFT, that consumers can call to report the theft of their identities and any impediments they may have faced in clearing up the related problems. The number of consumers contacting the Commission directly in 2000 to report such identity theft problems (26,424) nearly doubled the number complaining about third-party collectors (13,962), but such identity theft contacts include complaints about merchants, debt collectors, credit bureaus, and individual identity thieves, rather than about one particular industry. We note that, while the number of complaints received by the Commission about third-party collectors increased from 11,820 in 1999 to 13,962 in 2000, the number of complaints received by the Commission about all industries also increased significantly in 2000. Thus, we do not believe that the increase in complaints about third-party collectors necessarily indicates a larger number of FDCPA violations.

[5] 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. Some consumers may not even be aware that the Commission

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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. Many consumers, however, complain of conduct that, if accurately described, clearly violates the Act. Some of the allegations that we hear most frequently are the following:

Harassing the alleged debtor or others: As in 1999, this was the complaint we heard most frequently last year. Approximately 6,608 consumers alleged that a third-party collector harassed them. Many of these consumers complained that a debt collector was harassing them by calling periodically. Infrequent contacts, such as once a week or once a month, certainly might induce stress in a consumer but would not be "harassment" under the FDCPA. Other consumers, however, described collection tactics that do appear to constitute "harassment." Such apparent violations ranged from collectors calling several times within a very short period to collectors screaming obscenities and racial slurs, or even threatening violence to the consumers or their family members.

Failing to send required consumer notice: The FDCPA requires that debt collectors send consumers a written notice that includes, among other things, the amount of the debt, the name of the creditor to whom the debt is owed, and a statement that, if within thirty days of receiving the notice the consumer disputes the debt in writing, the collector will obtain verification of the debt and mail it to the consumer.[6] In 2000, more than 700 consumers complained to the Commission that collectors who called them did not provide such a notice. Many consumers who do not receive the notice are unaware that they must send their dispute in writing if they wish to obtain verification of the debt.

Some collectors call consumers demanding that they make payments directly to the collector's client, the alleged creditor. According to consumer complaints the

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[5](...continued)
enforces the Act or that the conduct they have experienced violates the Act.

[6] Section 809(a), 15 U.S.C. § 1692g(a). The collector need not send such a written notice if the collector's initial communication with the consumer was oral and the consumer received this information in the initial communication.

Commission has received, some of these collectors send consumers nothing in writing while at the same time refusing to reveal the name of their collection agency or collection firm. Consumers subjected to this practice are prevented from even complaining about the collector to law enforcement agencies or Better Business Bureaus.

Failing to verify disputed debt: The FDCPA also provides that, if a consumer does submit a dispute in writing, the collector must cease collection efforts until it has provided written verification of the debt. Nearly 700 consumers complained that collectors failed to verify debts that the consumers allegedly owed. Many of these consumers told us that collectors ignored their written disputes, sent no verification, and continued their collection efforts. Other consumers told us that some collectors who did provide them with verification continued to contact them about the debts between the date the consumers submitted their dispute and the date the collectors provided the verification, a practice that also violates the FDCPA.

Calling consumer's place of employment: A debt collector may not contact a consumer at work if the collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such contacts.[7] Many of the 819 consumers who complained about such illegal contacts told us that debt collectors continued to call them at work after they or their colleagues specifically told the collectors that such calls were prohibited by the consumer's employer. By continuing to contact consumers at work in these circumstances, debt collectors may put the consumers in jeopardy of losing their jobs.

Revealing alleged debt to third parties: Third-party contacts for any purpose other than obtaining information about the consumer's location violate the Act, unless authorized by the consumer or unless they fall within one of the Act's exceptions. We received 514 complaints about unauthorized third-party contacts in 2000. 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 or 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.

[7] Section 805(a)(3), 15 U.S.C. § 1692c(a)(3).

Continuing to contact consumer after receiving "cease communication" notice: The FDCPA requires debt collectors to cease all communications with a consumer about an alleged debt if the consumer communicates in writing that he wants all such communications to stop or that he refuses to pay the alleged debt.[8] This "cease communication" notice does not prevent collectors or creditors from filing suit against the consumer, but it does stop collectors from calling the consumer or sending dunning notices. More than 500 consumers complained that collectors ignored their "cease communication" notices and continued their aggressive collection attempts.

Threatening dire consequences if consumer fails to pay: 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. Such threats violate the Act unless the collector has the legal authority and the intent to take the threatened action.[9] The Commission received 661 complaints in 2000 alleging that third-party collectors falsely threatened a lawsuit or some other action that they could not or did not intend to take, and 287 complaints alleging that such collectors falsely threatened arrest or seizure of property.

Demanding a larger payment than is permitted by law: The FDCPA prohibits debt collectors from (1) misrepresenting the amount that a consumer owes on a debt[10] and (2) collecting any amount unless it is "expressly authorized by the agreement creating the debt or permitted by law."[11] In 2000, the Commission received 2,246 complaints about third-party collectors falsely representing the character, amount or status of a debt, and 811 complaints about such collectors collecting unauthorized interest, fees or expenses.

Complaints about creditors' in-house collectors: The Commission also received 7,881 complaints in 2000 about creditors collecting their own debts. Because creditors are not generally covered by the FDCPA, some in-house

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[8] Section 805(c), 15 U.S.C. § 1692c(c).

[9] Sections 807(4)-(5), 15 U.S.C. §§ 1692e(4)-(5).

[10] Section 807(2)(A), 15 U.S.C. § 1692e(2)(A).

[11] Section 808(1), 15 U.S.C. § 1692f(1).

collectors use no-holds-barred collection tactics in their dealings with consumers. While the Commission cannot pursue such creditors under the FDCPA, it can do so under the Federal Trade Commission Act. The Commission included such charges in a case filed this month against the large subprime lender, The Associates, and its successors,[12] and will continue to do so as appropriate cases present themselves in the future.

CONSUMER AND INDUSTRY EDUCATION: THE FIRST PRONG OF THE FDCPA PROGRAM

The Commission's consumer education initiative and business education initiative combine to form the first prong of the Commission's FDCPA program. The other prong is the Commission's enforcement initiative, discussed below. The consumer education initiative informs consumers throughout the nation of their rights under the FDCPA and the requirements that the Act places on debt collectors. With this knowledge, consumers can identify when collectors are violating the FDCPA and exercise their rights under the statute. An informed public that enforces its rights under the FDCPA operates as a powerful, informal enforcement mechanism. The industry education initiative informs collectors of the Commission staff's positions on various FDCPA issues. With this knowledge, industry members can then take all necessary steps to comply with the Act.

Tools for both consumers and industry: Two of the Commission's educational tools are useful in both the consumer education initiative and the industry education initiative. The Commission staff's Commentary on the Fair Debt Collection Practices Act ("Commentary")[13] was issued in 1988 and provides the staff's detailed analysis of every section of the Act. The comments serve as valuable guidance for consumers, their attorneys, courts, and members of the collection industry.[14] The Commentary superseded staff opinions issued prior to its publication, but staff members have issued many additional opinion letters since that date. Like the Commentary, these letters provide consumers, attorneys, courts and the collection industry with the Commission staff's views on knotty statutory interpretations. Both of these educational tools -- the Commentary and the staff opinion letters -- are on the Commission's FDCPA

[12] *FTC v. Citigroup Inc.*, No. 010 CV-0606 (N.D. Ga. Mar. 6, 2001).

[13] 53 Fed. Reg. 50,097 (1988).

[14] A small number of the staff's Commentary positions are now inaccurate because of a minor amendment to the statute and several recent court decisions.

web page, located at *www.ftc.gov/os/statutes/fdcpajump.htm*. Nearly 29,000 online users viewed the web page in the last six months of 2000.

Tools specifically for consumers: The Commission's "Facts for Consumers" brochure explains the FDCPA in the language of a layperson. In Fiscal Year 2000, the Commission dispersed 116,065 of these brochures to consumers through non-profit consumer groups, state consumer protection agencies, Better Business Bureaus, and other sources of consumer assistance. Like the Commentary and the staff opinions, the brochure is available from the Commission's web site. The brochure was viewed by online users 25,680 times during the last six months of 2000. Another extremely valuable component of the Commission's consumer education initiative is the Consumer Response Center ("CRC"), whose highly trained contact representatives respond to telephone calls and correspondence (in both paper and electronic form) each day from consumers concerning a wide array of issues. Now that a toll-free number, 1-877-FTC-HELP, went into service in mid-1999, it is even easier for consumers to contact the CRC. As noted above, a large percentage of consumer contacts with the Commission relate to debt collection. For those consumers who contact the CRC seeking only information about the FDCPA, the contact representatives answer any urgent questions and then mail out the Facts for Consumers or refer the consumer to the web page to find it there. As also indicated above, however, many consumers who contact the CRC complain about specific debt collectors, both third-party collectors and creditor collectors. For those consumers who complain about the actions of third-party collectors, the CRC contact representatives provide essential information about the FDCPA's self-help remedies, such as the right to demand that the collector cease all communications about the debt and the right to obtain written verification of the debt. The contact representatives also record information about debt collectors who are the subjects of complaints, enabling the Commission to track patterns of complaints for use in its enforcement initiative described below. A third component of the consumer education initiative stems from the public speaking that Commission staff members do to groups of consumers across the country. From local talk shows, to military bases, to county fairs, staff members inform consumers of their rights under a number of consumer-finance statutes. Almost invariably, these presentations include a discussion of the FDCPA.

Tools specifically for the collection industry: Commission staff also delivers speeches and participate in panel discussions at industry conferences throughout the year. In 2000, staff members from the Division of Financial Practices, the office that coordinates and carries out much of the Commission's FDCPA education and enforcement program, addressed several national associations of collection agencies and collection attorneys. Staff from several of the Commission's regional offices also discussed the FDCPA in presentations to groups of debt collectors and creditors.

In addition to the presentations at industry conferences, Commission staff maintains an informal communications network with the leading debt collection trade associations, which permits staff members to exchange information and ideas and discuss problems as they arise. Recent topics of discussion between Commission staff members and trade association representatives have included proposed self-regulation programs and proposed amendments to the FDCPA. Commission staff members also provide interviews to trade publications. These interviews provide yet another vehicle for staff to make its positions known to the nation's debt collectors.

ENFORCEMENT: THE SECOND PRONG OF THE FDCPA PROGRAM

Every consumer who learns which debt collection tactics are illegal and asserts their FDCPA self-help rights assists the Commission in policing the collection industry. Every debt collector who hears or reads about FDCPA compliance issues is that much more likely to comply with the Act without the need for a Commission investigation. Thus, both consumer education and industry education encourage voluntary compliance by debt collectors and conserve the Commission's enforcement resources.

There are times, however, when it appears to Commission staff, based often on complaints from consumers, state or local agencies, or other industry members, that a debt collector is not complying with the statute voluntarily. Accordingly, the Commission's FDCPA program includes investigations of certain debt collectors. If an investigation reveals evidence of significant 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 the documents in the appropriate federal district court.[15] If the debt collector will not agree to an appropriate settlement that remedies the alleged violations, 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 would prohibit the collector from continuing to violate the Act. On occasion, these debt collectors agree to an appropriate settlement after suit has been brought.

The Commission staff is currently conducting a number of non-public investigations of debt collectors to determine whether they are or have engaged in serious

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

violations of the Act. In addition, there have been significant developments in several Commission public enforcement actions.

In July 2000, ***North American Capital Corporation*** ("NACC") agreed to pay a $250,000 civil penalty as part of a settlement to resolve Commission allegations that NACC violated the FDCPA by, among other things, discussing consumers' debts with third parties such as the consumers' employers and co-workers; harassing consumers with obscene or profane language; and making false and misleading representations, such as that the consumers' wages would be garnished and their property seized if they failed to pay. In addition to the civil penalty, the consent decree settling the Commission charges includes broad prohibitions on future FDCPA violations, and requires NACC to inform consumers it contacts in writing that they may stop the company from contacting them about the debt.

In a January 1998 complaint, the Commission alleged that ***Capital City Mortgage Corporation*** and its owner, Thomas K. Nash, among other things, violated the FDCPA by falsely representing that letters from the company's in-house attorney were from a third-party collector, making false and misleading representations when collecting loan payments, and engaging in unfair or unconscionable debt collection practices. In March 1999, the court permitted the Commission to add the in-house attorney, Eric J. Sanne, as a defendant based on the Commission's discovery during litigation of hundreds of additional letters sent by the attorney. In October 2000, the court denied Capital City and Nash's motion for summary judgment on the Commission's FDCPA claims holding that the Commission had submitted "significant and substantial" support for its claims that defendants misrepresented amounts owed by borrowers. The Commission is seeking a combination of civil penalties and injunctive and equitable monetary relief and is awaiting a trial date.

LEGISLATIVE RECOMMENDATIONS

As permitted by Section 815 of the FDCPA, the Commission recommends five amendments to, or clarifications of, the Act. These recommendations have been proposed in annual reports in prior years.

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.

As presently drafted, the FDCPA does not specify any standard for how the 809(a) notice must be presented to consumers, such as the color and size of the typeface and the location on the collection notice. Attempting to take advantage of this lack of clarity, some debt collectors print the notice 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.[16] The courts reasoned that the payment demand in the text both contradicts and overshadows the required notice.[17] Neither of the courts attempted to specify which elements of presentation would constitute a clear disclosure to consumers of their dispute rights under Section 809(a).

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. A number of Commission decisions and orders define the "clear and conspicuous" standard in a variety of contexts.[18] 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.

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[16] *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). *See also United States v. National Financial Services, Inc.*, 98 F.3d 131, 139 (4th Cir. 1996) ("bold commanding type of the dunning text overshadowed the smaller, less visible, validation notice printed on the back in small type and light grey ink"); *Macarz v. Transworld Sys.*, 26 F. Supp. 2d 368, 373 (D. Conn. 1998) (collection letter violated Section 809, in part, because validation notice was "relegated to the very bottom of the page in a difficult to read and nondistinctive print, where it appear[ed] to look purposefully insignificant").

[17] *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.

[18] *See, e.g., Geocities*, Docket No. 3849, 1999 FTC Lexis 17, *14 (Feb. 5, 1999) (consent) (website privacy disclosure); *California Suncare, Inc.*, 123 F.T.C. 332, 383 (1997) (consent) (skin-tanning product warnings).

Section 809(b)--Effect of Thirty-day Period: Section 809(b) of the FDCPA provides that if a consumer, within the thirty-day period specified in Section 809(a), disputes a debt in writing or requests verification of the debt, the collector must cease all collection efforts until verification is obtained and mailed to the consumer. The Commission and its staff have consistently read Section 809(b) to permit a debt collector to continue to make demands for payment or take legal action within the thirty-day period unless the consumer disputes the debt or requests verification during that time. Nothing within the language of the statute indicates that Congress intended an absolute bar to appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt or requested verification. The Commission articulated this position in an April 2000 advisory opinion. Commission staff has taken the same position in staff opinion letters and the Staff Commentary on the FDCPA.[19]

Federal circuit courts that have addressed this issue recently have arrived at the same conclusion. In a 1997 opinion, the Seventh Circuit stated that "[t]he debt collector is perfectly free to sue within the thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor."[20] In the most recent federal appellate court pronouncement on the subject, the Sixth Circuit stated that "[a] debt collector does not have to stop its collection efforts [during the thirty-day period] to comply with the Act. Instead, it must ensure that its efforts do not threaten a consumer's right to dispute the validity of his debt."[21]

Although these courts have been consistent with the position taken by the Commission and its staff, some continue to argue that the thirty-day time frame set forth in Section 809 is 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 or requesting verification. 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).

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[19] 53 Fed. Reg. at 50,109, comment 809(b)-1. The Commentary, the Commission's advisory opinion, and staff opinion letters are available at *www.ftc.gov/os/statutes/fdcpajump.htm*.

[20] *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997) (Posner, J.).

[21] *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999).

Section 803(6)--Litigation Attorney as "Debt Collector": 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. In *Heintz v. Jenkins*, 514 U.S. 291 (1995), the Court held that they are, in fact, covered like any other debt collector because they fall within the plain language of the statute.[22] The difficulties in applying the Act's requirements to attorneys in litigation, however, and the anomalies that result, still remain. For example, pretrial depositions could violate Section 805(b) because they involve communicating with third parties about a debt.[23] In addition, if a complaint represents an attorney's initial contact with a consumer, it appears that the attorney must include the Section 809 validation notice in a complaint itself or in some other written communication within five days after serving the complaint on the consumer. Such a notice does not make sense in a litigation context. It would state that, if the consumer sends a written request for verification within thirty days, the attorney will provide the verification. If the consumer does make such a request, it appears that Section 809(b) requires the attorney to put the lawsuit on hold until he or she provides the verification.[24]

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 recommend 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. Alternatively, Congress could amend the definition of "communication" to state that the term "does not include actions taken pursuant to the Federal Rules of Civil Procedure or, in the case of a proceeding in a State court, the rules of civil procedure available under the laws of such State."

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[22] *Heintz*, 514 U.S. at 299 ("[T]he Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation.").

[23] Section 805(b) permits collectors to reveal a debt to third-parties under certain circumstances, including with "the express permission of a court of competent jurisdiction." Thus, an attorney could obtain "express permission" from the court before taking each third-party deposition, but this seems an inefficient method of proceeding.

[24] Because of a 1996 amendment to Section 807(11), attorneys do not have to state in their pleadings that they are attempting to collect a debt and that any information obtained will be used for that purpose -- the so-called "mini-Miranda" notice.

Section 803(6)(F)(iii)--"Early Out" Programs: 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."[25] The exemption was designed to avoid application of the FDCPA to mortgage servicing companies and other entities whose business is accepting and recording payments on *current* debts.[26] 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.

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

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[25] Section 803(6)(F)(iii), 15 U.S.C. § 1692a(6)(F)(iii).

[26] The principal Senate Report on the final version of the FDCPA states that the Senate committee that drafted the Act did not intend the definition of "debt collector" to cover "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." S. Rep. No. 382, 95th Cong., 1st Sess. 7, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1695, 1698.

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.

Model Collection Letters: The Commission's fifth recommendation for an amendment to the FDCPA, which was first offered in last year's annual report, grew out of discussions between Commission staff and representatives of the debt collection industry. These collectors often complain that, no matter how hard they try to make their collection letters comply with the FDCPA notice requirements, there is always an attorney who will allege that their letters violate the statute in some way -- and a judge who may agree. These collectors have suggested that the FDCPA be amended to contain model collection letters that, if adhered to precisely, would insulate them from liability for the form of their letters. The Commission believes that model letters would benefit both collectors and consumers. Collectors would benefit from having specific guidance regarding the form of their collection letters. Because the creation of such model letters would reduce the number of illegal collection letters sent by debt collectors, consumers would benefit in that they would be less likely to receive an illegal letter and, therefore, less likely to be deceived or intimidated by a debt collector.

While we agree that model collection letters would be highly beneficial, we do not think such models should be included in the FDCPA itself. Model letters might have to be altered, or a new model added to or deleted from the existing set, from time to time. We believe that specifically giving the Commission the limited authority to issue model letters or forms would provide the best solution. Model forms in Regulation Z, which implements the Truth in Lending Act, and Regulation B, which implements the Equal Credit Opportunity Act, provide valuable guidance for the nation's creditors. As the Federal Reserve System's Board of Governors does with the Regulation Z and Regulation B models, the Commission could alter existing models, add new ones, or delete models that are no longer appropriate.

The Commission recommends a slight amendment to the FDCPA. Section 814(d) currently provides, in pertinent part, that the Commission may not promulgate "trade regulation rules or other regulations with respect to the collection of debts by debt collectors."[27] The following language could be added to the end of Section 814(d): ". . . except that the Commission shall be authorized to promulgate by regulation, under Section 553 of Title 5, United States Code, model collection letters or forms for those debt collectors who choose to use them. If a debt collector adheres precisely to one of

[27] 15 U.S.C. § 1692*l*(d).

these models in creating a collection letter, the collection letter shall be deemed to be in compliance with [the FDCPA]."[28]

[28] Section 553, 5 U.S.C. § 553, is the section of the Administrative Procedures Act that prescribes procedures for notice and comment rulemaking.

CONCLUSION

Many debt collectors covered by the FDCPA already comply with the statute. Through its balanced FDCPA program of education and enforcement, the Commission encourages those collectors to continue to comply and provides strong incentives for those who are not complying to do so in the future.