

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



Federal Trade Commission

March 13, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1801 L Street, NW
Washington, DC 20036

Dear Mr. Cordray:

We are writing to apprise the Consumer Financial Protection Bureau (CFPB) of the debt collection activities of the Federal Trade Commission (Commission or FTC) during the past year. As you are aware, as a result of the Dodd-Frank Act,¹ the CFPB is responsible for providing annual reports to Congress concerning the federal government's efforts to implement the Fair Debt Collection Practices Act (FDCPA).² During the past year, the Commission has engaged in aggressive law enforcement activities to address new and troubling issues in the debt collection area (such as time-barred debt and collection on decedents' accounts), and has obtained tough and effective remedies to promote compliance with the law. The FTC has also educated consumers about various concerns relating to the conduct of debt collectors. In addition, the Commission has engaged in research and policy development activities related to debt collection litigation and arbitration, debt buyers, and debt collection technologies. We hope that the information in this letter describing the FTC's debt collection program will assist the CFPB in preparing its annual FDCPA report.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 11-203, § 1089, 124 Stat. 1376, 2092-93 (2010) (amending the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p).

² Prior to the enactment of the Dodd-Frank Act, Section 815(a) of the FDCPA, 15 U.S.C. § 1692m, required the FTC to submit reports to Congress on the federal government's implementation and administration of the FDCPA. The Commission submitted such annual reports from 1977 to 2011. For the most recent annual report, see FEDERAL TRADE COMMISSION ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT, *available at* www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf.

I. FTC Authority

The Commission has the authority to investigate and take law enforcement action against debt collectors who engage in unfair, deceptive, abusive, or other practices that violate the FDCPA.³ The FTC also has the power to investigate and take law enforcement action against entities that, in connection with collecting on debts, engage in unfair or deceptive acts and practices in violation of Section 5 of the FTC Act.⁴ In addition, the FTC issues statements as to how it intends to exercise this law enforcement authority in the debt collection context, and educates consumers about their rights and businesses about their responsibilities under the FDCPA and the FTC Act. Finally, the Commission engages in research and policy development activities to identify, adopt, and advocate debt collection policies, practices, and priorities that advance the agency's consumer protection mission. As described below, the FTC engaged in all of these types of activities in the debt collection context during the past year.

II. Law Enforcement Activities

The Commission is primarily a law enforcement agency, and law enforcement investigations and litigation are at the heart of the FTC's recent debt collection work. The FTC has the authority under Section 13(b) of the FTC Act to file actions in federal district court to obtain injunctive relief against those who violate any of the laws the Commission enforces, including the FDCPA and FTC Act. The Commission generally files actions under Section 13(b) of the FTC Act where the unlawful conduct of collectors is so egregious that a court order is needed to immediately halt the conduct or where consumer redress and disgorgement are more appropriate forms of monetary relief than civil penalties. The Commission also refers cases alleging violations of the FDCPA to the Department of Justice in cases where preliminary injunctive relief to halt unlawful conduct is not needed and where civil penalties are appropriate monetary relief. The FTC supplements its filing and referring of law enforcement actions by issuing policy statements, filing amicus briefs, and undertaking other law enforcement related activities.

A. Law Enforcement Actions

To improve deterrence in recent years, the Commission has focused on bringing a greater number of cases and obtaining stronger monetary and injunctive remedies against debt collectors that violate the law. Over the past year, the FTC has brought or resolved seven debt collection cases, the highest number of debt collection cases that it has brought or resolved in any single year. In its two civil penalty cases, *United States v. West Asset Management, Inc.* and *United*

³ Section 814 of the FDCPA, 15 U.S.C. § 1692l.

⁴ Section 5 of the FTC Act, 15 U.S.C. § 45.

States v. Asset Acceptance, LLC, the Commission obtained \$2.8 million⁵ and \$2.5 million,⁶ respectively, the two largest civil penalty amounts the agency has ever obtained in cases alleging violations of the FDCPA. And in each of its five Section 13(b) cases involving debt collection, as discussed below, the FTC has obtained preliminary or permanent injunctive relief, with the preliminary relief in many of these cases including ex parte temporary restraining orders with asset freezes, immediate access to business premises, and appointment of receivers to run the debt collection business.

As discussed below, these cases represent an extensive and concerted effort by the FTC to target debt collection practices that pose substantial risks to consumers. These practices include conduct related to the quantity and quality of information used in collecting debts, disclosure of information in the collection of time-barred debts, tactics used to collect on actual or purported payday loans, and other egregious debt collection practices.

1. Information Used in the Collection Process

One of the Commission's major consumer protection concerns is the quantity and quality of information that debt collectors have, use, or convey to others in their collection activities. The FTC recently addressed some of these issues in a case against one of the largest debt buyers in the United States. In January 2012, the Commission announced a settlement with Asset Acceptance, LLC (Asset), a debt collector that purchases and collects on portfolios of charged-off consumer debt.⁷ Among other things, the Commission's complaint alleged that Asset violated the FTC Act by continuing collection attempts on disputed debts without a reasonable basis, and violated the FDCPA by failing to obtain and provide verification of debts in response to written requests from consumers made within thirty days of receiving a validation notice.⁸ In addition, the complaint alleged that Asset violated the Fair Credit Reporting Act (FCRA) by

⁵ *United States v. West Asset Mgmt., Inc.*, No. 1-11-CV-0746 (N.D. Ga. Mar. 14, 2011); *see also* Press Release, Leading Debt Collector Agrees to Pay Record \$2.8 Million to Settle FTC Charges (Mar. 16, 2011), www.ftc.gov/opa/2011/03/wam.shtm. The largest civil penalty obtained by the Commission in a previous debt collection case was \$2.25 million. *See United States v. Acad. Collection Serv., Inc.*, No. 2:08-CV-1576 (D. Nev. Nov. 19, 2008).

⁶ *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 31, 2012) (court entered order); *see also* Press Release, Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception (Jan. 30, 2012), www.ftc.gov/opa/2012/01/asset.shtm. The Commission vote authorizing the staff to refer the complaint and consent decree to the Department of Justice was 3-1, with Commissioner J. Thomas Rosch voting no.

⁷ *Id.*

⁸ Complaint, *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 30, 2012) (complaint filed).

furnishing inaccurate information to credit reporting agencies, failing to provide consumers with written notice within thirty days of furnishing negative information to credit reporting agencies, and failing to reasonably investigate notices of consumer disputes received from credit reporting agencies. To resolve these allegations, the settlement agreement requires Asset to pay a \$2.5 million civil penalty, enjoins Asset from violating the FDCPA and FCRA, and prohibits Asset from engaging in information practices that are the same as or similar to those alleged to be unlawful in the complaint.

2. Time-Barred Debt

The Commission's case against Asset also addressed the challenging issue of what debt collectors should tell consumers in connection with collecting on debts that are beyond the relevant statute of limitations, also known as time-barred debts. The FTC alleged that in connection with collecting on debts that it knew or should have known were time-barred, Asset violated Section 5 of the FTC Act. The FTC's complaint alleged that Asset's demands that consumers pay these debts created the misleading impression that Asset could legally sue them if they did not pay, and that Asset's failure to disclose to consumers that in fact they could not legally be sued if they did not pay was a deceptive practice in violation of Section 5 of the FTC Act.

To remedy these alleged violations, the settlement agreement requires Asset to provide a disclosure when collecting on debt that it knows or should know is barred by the statute of limitations. In its initial communication with consumers regarding such debts, Asset must disclose to the consumer that because of the age of the debt, Asset will not sue to collect on it. The order also provides that Asset must repeat this disclosure if consumers are likely to have forgotten the disclosure and its import, which generally will be considered to have occurred six months after the prior disclosure. For any debt where Asset has disclosed that it will not sue to collect, it is prohibited from commencing any arbitration or legal action to collect on that debt, including initiating an action where the consumer has made a partial payment that otherwise would revive the debt. Additionally, the settlement provides that if Asset sells the right to collect on debts, Asset must withhold from the sale any rights it may have to initiate any arbitration or legal action to recover on the debts.

3. Collection on Payday Loans

Some of the FTC's recent law enforcement efforts have focused on defendants who collect debts (or purport to collect debts) related to payday loans. In February 2012, in *FTC v. American Credit Crunchers, LLC*, the Commission filed such an action in federal district court in Illinois against defendants who allegedly contacted consumers from call centers in India and made misrepresentations and threats to convince them to make payments on debts arising from

payday loans.⁹ The consumers, however, either had not taken out a payday loan at all or had taken out a payday loan that the defendants were not authorized to collect. The Commission's complaint alleged that the defendants violated the FDCPA and Section 5 of the FTC Act. The FTC obtained an ex parte temporary restraining order with an asset freeze, immediate access to the premises, and the appointment of a receiver.¹⁰ The FTC continues to litigate this matter.

The Commission also litigated two other Section 13(b) actions against debt collectors seeking to recover on payday loans. In the first case, *FTC v. LoanPointe, LLC*, the FTC challenged the wage garnishment practices, among other things, of a payday loan operation.¹¹ The FTC alleged that the operation attempted to garnish wages to collect on payday loans, without first obtaining a state court order. Although federal law allows federal agencies to require employers to garnish employees' wages without a state court order if the employees owe money to the federal government, private parties, such as the payday lenders in this case, must obtain a court order to garnish wages. Nevertheless, the defendants allegedly sent documents to the employers of consumers that mimicked the documents that the federal government sends in collecting on its own debts, thereby falsely representing that the defendants (like the federal government) were entitled to garnish wages without obtaining a state court order. The Commission alleged that this conduct violated the FDCPA and the FTC Act, and a federal court ordered temporary and preliminary injunctive relief against the defendants. After the Commission settled against an individual defendant who was an owner of the operation,¹² in July 2011 the court granted summary judgment against the remaining defendants, entered a permanent injunction against them, and ordered that they pay \$294,436 in monetary relief.¹³

⁹ Complaint, *FTC v. American Credit Crunchers, LLC*, No.12cv1028 (N.D. Ill. Feb. 13, 2012); *see also* Press Release, Court Halts Alleged Fake Debt Collector Calls from India, Grants FTC Request to Stop Defendants Who Often Posed as Law Enforcement (Feb. 21, 2012), www.ftc.gov/opa/2012/02/acc.shtm.

¹⁰ *FTC v. American Credit Crunchers, LLC*, No.12cv1028 (N.D. Ill. Feb. 14, 2012) (temporary restraining order).

¹¹ Complaint, *FTC v. LoanPointe, LLC*, No. 2:10 CV 00225 DAK (D. Utah, Mar. 15, 2010); *see also* Press Release, FTC Charges Payday Lender with Deceiving Employers in Scheme to Collect Debts (April 7, 2010), www.ftc.gov/opa/2010/04/getecash.shtm.

¹² In August 2010, the FTC settled with Mark S. Lofgren, one of the owners of the payday loan and debt collection scheme. *See FTC v. LoanPointe, LLC*, No. 2:10 CV 00225 DAK (D. Utah, Aug. 26, 2010) (final order as to defendant Mark Lofgren); Press Release, Payday Loan Defendant Settles FTC Charges; Illegally Tried to Garnish Borrowers' Wages (Sept. 2, 2010), www.ftc.gov/opa/2010/09/getecash.shtm.

¹³ *FTC v. LoanPointe, LLC*, No: 2:10 CV 00225 DAK (D. Utah Dec. 9, 2011) (final order); *see also* Press Release, Court Rules in Favor of FTC; Orders Defendants in Payday

In the second case, *FTC v. Payday Financial, LLC*, the Commission again challenged the wage garnishment practices, among other things, of an operation that purportedly has an association with a Native American tribe and that collects on payday loans.¹⁴ Like the defendants in *LoanPointe*, the defendants allegedly sent documents to consumers' employers that mimicked the documents that the federal government sends in collecting on its own debts, falsely representing that under tribal laws they (like the federal government) were entitled to garnish wages without obtaining a state court order. The Commission alleged that this conduct violated the FTC Act. After the FTC filed its complaint, the parties stipulated to and subsequently entered into a preliminary injunction to immediately halt the alleged unlawful conduct.¹⁵ The FTC continues to litigate this matter.¹⁶

4. Other Egregious Collection Practices

In addition to bringing actions in federal court to address law violations that arose in the context of collecting in the payday lending context, the Commission brought two additional actions under Section 13(b) of the FTC Act in response to egregious debt collection practices. In the first case, *FTC v. Forensic Case Management Services, Inc.*,¹⁷ the FTC's complaint alleged that the defendant debt collector charged its small business clients a contingent fee for collecting on their debts, yet failed to forward to these clients the amounts due when they received payments from consumers. The Commission's complaint also alleged that the defendants, among other things: threatened to physically harm consumers and to desecrate the bodies of their dead relatives; threatened to kill consumers' pets; used obscene and profane language in collection calls; revealed consumers' debts to third parties; and falsely threatened consumers

Lending Case to Pay More Than \$294,000 for Illegal Garnishment of Consumers' Paychecks (Dec. 19, 2011), www.ftc.gov/opa/2011/12/getecash.shtm.

¹⁴ Complaint, *FTC v. Payday Fin., LLC*, No. 3:11-cv-03017-RAL (D.S.D. Sept. 6, 2011); *see also* Press Release, FTC Action Halts Allegedly Illegal Tactics of Payday Lending Operation That Attempted to Garnish Consumers' Paychecks (Sept. 12, 2011), www.ftc.gov/opa/2011/09/payday.shtm.

¹⁵ *FTC v. Payday Fin., LLC*, No. 3:11-cv-03017-RAL (D.S.D. Sept. 7, 2011) (stipulated preliminary injunction).

¹⁶ In March 2012, the Commission amended its complaint to add counts and to seek civil penalties from the defendants for violating the FTC's Credit Practices Rule. Amended Complaint, *FTC v. Payday Fin., LLC*, No. 3:11-cv-03017-RAL (D.S.D. March 1, 2012); *see also* Press Release, FTC Charges That Payday Lender Illegally Sued Debt-Burdened Consumers in South Dakota Tribal Court Without Jurisdiction (Mar. 7, 2012), <http://www.ftc.gov/opa/2012/03/payday.shtm>.

¹⁷ Complaint, *FTC v. Forensic Case Mgmt. Servs., Inc.*, No. LACV11-7484 (C.D. Cal. Sept. 12, 2011).

with lawsuits, arrest, seizure of assets, and wage garnishment. The FTC alleged that the conduct of the defendants violated the FDCPA and the FTC Act. The court granted the Commission's motion for an ex parte temporary restraining order with an asset freeze, appointment of a receiver, and immediate access to business premises.¹⁸ The court subsequently granted the FTC's motion for a preliminary injunction.¹⁹ The Commission continues to litigate this matter.

The other Section 13(b) action the Commission filed to challenge egregious law violations of a debt collector was *FTC v. Rincon Management Services, LLC*.²⁰ The FTC's complaint charged that the defendants, among other things, made Spanish-language and English-language calls to consumers and their employers, family, friends, and neighbors, falsely representing that they were process servers seeking to deliver legal papers that purportedly related to a debt collection lawsuit. In many instances, the defendants also allegedly issued false threats that consumers would be arrested if they did not respond to the calls. In addition, in many instances the defendants allegedly made false claims that they were attorneys or employees of a law office, and demanded that consumers pay "court costs" and "legal fees." The Commission's complaint alleged that this conduct violated the FDCPA and the FTC Act. The court granted the FTC's ex parte motion for a temporary restraining order, including an asset freeze and the appointment of a receiver,²¹ and the court subsequently entered a preliminary injunction.²² The Commission continues to litigate this matter.

¹⁸ *FTC v. Forensic Case Mgmt. Servs., Inc.*, No. LACV11-7484 (C.D. Cal. Sept. 13, 2011) (ex parte temporary restraining order).

¹⁹ *FTC v. Forensic Case Mgmt. Servs., Inc.*, No. LACV11-7484 (C.D. Cal. Sept. 27, 2011) (preliminary injunction); see also Press Release, At FTC's Request, Court Orders Debt Collector to Stop Deceiving Clients and Abusing Consumers (Sept. 30, 2011), www.ftc.gov/opa/2011/09/rumson.shtm.

²⁰ Complaint, *FTC v. Rincon Mgmt. Servs., LLC*, No. ED CV 11-01623 (C.D. Cal. Oct. 11, 2011).

²¹ *FTC v. Rincon Mgmt. Servs., LLC*, No. ED CV 11-01623 (C.D. Cal. Oct. 11, 2011) (ex parte temporary restraining order); see also Press Release, At FTC's Request, Court Orders Debt Collection Operation to Stop Deceiving and Abusing Consumers (Oct. 26, 2011), <http://www.ftc.gov/opa/2011/10/rincon.shtm>.

²² *FTC v. Rincon Mgmt. Servs., LLC*, No. ED CV 11-01623 (C.D. Cal. Nov. 10, 2011) (order granting preliminary injunction).

B. Other Law Enforcement Related Activities

1. Policy Statement Regarding Decedent's Debts

In July 2011, the Commission issued a policy statement regarding communications made in connection with collecting on deceased consumers' accounts.²³ The statement clarifies that the FTC will not take enforcement action under the FDCPA or the FTC Act against companies that are attempting to collect the debts of deceased consumers, if the companies communicate only with someone who has the authority to pay debts from the estate of the deceased. The policy statement also emphasizes that debt collectors may not mislead relatives to believe that they are personally liable for a deceased consumer's debts, or use other deceptive or abusive tactics.

The policy statement reconciles Section 805(b) of the FDCPA's requirements concerning with whom collectors may communicate in collecting on a deceased consumer's debts and current trends in state probate law. When a debtor has died, under the FDCPA debt collectors may only contact the decedent's spouse, as well as the executor or administrator of the deceased person's estate. Since the FDCPA was enacted in 1977, however, state probate law has changed so that in many instances there is no executor or administrator of the decedent's estate. If debt collectors are not permitted to contact those who state law now authorizes to pay the debts of the decedent out of the decedent's assets, collectors' recourse is to commence probate proceedings, thereby imposing costs and delays on the resolution of estates.

To avoid harm to consumers from these costs and delays, the policy statement provides that the Commission will not take law enforcement action under the FDCPA if a debt collector communicates about a decedent's estate with anyone who is authorized to pay the decedent's debts from assets in his or her estate. The policy statement also provides guidance to collectors concerning how they may locate a person with such authority.²⁴ In addition, the policy statement underscores that in communicating with a person who is authorized to pay the decedent's debts from assets in the decedent's estate, collectors must comply with the FDCPA's prohibition on unfair, deceptive, or abusive collection practices. Specifically, collectors must not contact the decedent's spouse, executor, administrator, or a person with the authority to pay the decedent's debt out of the decedent's estate at unusual or inconvenient times or places. Collectors also must

²³ Statement of Policy Regarding Communications in Connection With the Collection of Decedents' Debts, 76 Fed. Reg. 44,915 (July 27, 2011); *see also* Press Release, FTC Issues Final Policy Statement on Collecting Debts of the Deceased (July 20, 2011), www.ftc.gov/opa/2011/07/fdcpa.shtm.

²⁴ Section 804 of the FDCPA expressly permits debt collectors in certain circumstances to communicate with persons other than the consumer for the purpose of acquiring location information (i.e., home address and telephone number, or place of employment) about the consumer. 15 U.S.C. § 1692b; *see also* 15 U.S.C. § 1692a(7) (definition of "location information").

not create the misleading impression that the individual is personally liable or could be required to pay using his or her own assets, or assets he or she held jointly with the deceased person.

2. Abusive Debt Collection Litigation: Midland Amicus Brief

In June 2011, the Commission filed an amicus brief in federal court opposing a class action settlement that would require consumers to surrender protections provided by the FDCPA and state laws in exchange for a minimal payment.²⁵ The proposed settlement in *Vassalle v. Midland Funding, LLC*, would resolve multiple private class action lawsuits consumers filed against Midland Funding, LLC, and related entities Encore Capital Group, Inc. and Midland Credit Management, Inc. (collectively “Midland”). The class actions alleged violations of federal and state law arising out of Midland’s practice of “robo-signing” affidavits that were used in debt collection lawsuits.²⁶ Allegedly, Midland employees would sign hundreds of affidavits a day that falsely claimed that the employee had personal knowledge concerning the underlying debt and related debt collection lawsuit.

Consistent with concerns expressed about the proposed settlement by state attorneys general and consumer protection advocates, the FTC’s amicus brief argued that if the court accepted the settlement, class members would have to give up too much in exchange for too little. Class members would receive only a small payment, capped at \$10. In return, they would surrender their rights under the FDCPA and state laws to challenge Midland’s actions related to the company’s use of affidavits in debt collection lawsuits. This would include, the FTC argued, perhaps even the right to challenge improper default judgments obtained by Midland. The amicus brief also noted that nothing in the settlement limited Midland’s uses of personal information that consumers provide in connection with the proposed settlement. In keeping with its long-standing position that information collected for one purpose should not be used for other, undisclosed purposes, the FTC asserted that consumer information obtained in connection with a class action settlement should be used solely to process settlement payments.²⁷ Although the court ultimately approved the settlement agreement in *Midland*, the FTC’s amicus brief

²⁵ Brief for the FTC as Amicus Curiae, *Vassalle v. Midland Funding, LLC*, No: 3:11-CV-00096 (N.D. Ohio June 21, 2011), available at www.ftc.gov/os/2011/06/110621midlandfunding.pdf.

²⁶ See Complaint at pp. 3-8, *Vassalle v. Midland Funding, LLC*, No. 3:11-cv-00096 (N.D. Ohio Jan. 17, 2011); see also *Midland Funding, LLC v. Brent*, 644 F.Supp.2d 961, 966-69 (N.D. Ohio 2009) (describing the challenged affidavit production practice).

²⁷ Following the FTC’s amicus brief, Midland stipulated that none of the information collected through the settlement claims process will be used for the purpose of collecting debts of the class members. *Vassalle v. Midland Funding, LLC*, No. 3:11-CV-00096, at 17 (N.D. Ohio Aug. 12, 2011) (opinion and judgment).

served to highlight - for the court and for the public - some of the abuses in debt collection litigation that raise major consumer protection concerns.²⁸

3. Collector Communication with Represented Consumers: Fein Amicus Brief

In December 2011, the Commission filed a joint brief with the United States and the CFPB, urging the Supreme Court to deny certiorari in *Fein, Such, Kahn & Shepard, PC v. Allen*.²⁹ In *Fein*, a consumer filed a class action against several entities involved in a mortgage foreclosure action.³⁰ The consumer alleged that the law firm that brought the foreclosure action violated the FDCPA by sending a letter, to her attorney, that demanded payment for fees that were much higher than the amounts allowed under state law. Section 808(1) of the FDCPA prohibits “[t]he collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law.”³¹ The law firm moved to dismiss the FDCPA claims, arguing that communications to a consumer’s attorney are categorically excluded from the FDCPA. This argument, however, was rejected by both a federal district court and the Third Circuit.³²

Among other things, the joint brief advocated that the Supreme Court not grant certiorari in this case because the decision of the Third Circuit is consistent with the plain language of the FDCPA, the structure of the FDCPA, and the underlying purposes of the FDCPA, which are to protect consumers and prevent abusive debt collectors from gaining an unfair competitive advantage. In January 2012, the Supreme Court denied the petition for certiorari.³³

²⁸ *Id.* The court found that the release was not overly broad, in part because consumers are still free to raise legal challenges based on evidentiary deficiencies in the proof offered by Midland, as long as the deficiencies do not relate to the affidavit. *Id.* at 21-23. The court also found the \$10 amount offered to class members who file a timely claim to be adequate, partly due to the difficulty that consumers would have bringing individual litigation and the ability for consumers to opt-out of the settlement agreement. *Id.* at 27-28.

²⁹ Brief for the United States as Amicus Curiae, *Fein, Such, Kahn & Shepard, PC v. Allen*, No. 10-1417 (U.S. Dec. 23, 2011), available at www.justice.gov/osg/briefs/2011/2pet/6invt/2010-1417.pet.ami.inv.pdf. The Commission vote to authorize the filing of the brief was 3-1, with Commissioner J. Thomas Rosch dissenting.

³⁰ *Allen ex rel. Martin v. LaSalle Bank*, 629 F.3d 364 (3rd Cir. 2011).

³¹ 15 U.S.C. § 1692f(1).

³² *See LaSalle Bank*, 629 F.3d at 367-68.

³³ *Fein, Such, Kahn & Shepard, PC v. Allen*, No. 10-1417, 2012 WL 171347 (U.S. Jan. 23, 2012) (mem.) (order denying cert.).

4. Risk to Effective Law Enforcement: Gag Clauses

The FTC extensively uses consumer complaints in its law enforcement work to identify targets for investigation, identify consumer witnesses, and for other purposes. Commission staff, however, recently have become aware that many collectors appear to be routinely including provisions in settlement agreements with consumers that prohibit the consumers from cooperating with or sharing information with the FTC and other law enforcement agencies.

Courts generally have determined that gag clauses in settlement agreements that prevent or limit the ability of consumers to complain to law enforcement agencies are not enforceable because they are against public policy.³⁴ Nevertheless, the mere presence of these clauses in private FDCPA settlement agreements may deter injured consumers from providing critical information to the FTC and other law enforcement officials about possible unlawful debt collector conduct. The Commission thus believes that gag clauses should not be included in private FDCPA settlements.

III. Consumer and Business Education Materials

The second prong of the FTC's FDCPA program is consumer and industry education. Consumer education informs consumers of their rights under the FDCPA and what the law requires of debt collectors. The Commission provides this information through English and Spanish written materials, one-to-one guidance, and speeches and presentations. The three main forms of consumer education in the area of debt collection are: brochures that are distributed in paper and online; an online informative video;³⁵ and discussions between consumers and the FTC's Consumer Response Center staff.³⁶

³⁴ See, e.g., *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir.1996) (observing that in light of the EEOC's duty to prevent employment discrimination, "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest"); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?* 25 WM. MITCHELL L. REV. 627, 655-62 (1999) (collecting cases and observing that a "common thread" running through decisions reviewing the enforceability of non-disclosure agreements involving a federal statute "is that it is contrary to public policy to block communication needed to carry out the purpose of a federal act"); see also *Gen. Steel Domestic Sales, LLC v. Steelwise, LLC*, No. 07cv01145, 2009 WL 185614 (D. Colo. Jan. 23, 2009) (concluding that covenants preventing consumers and investigators from truthfully testifying about facts related to a pre-fabricated building manufacturer's alleged violations of consumer protection laws were void as against public policy).

³⁵ The FTC offers an animated video that explains consumer rights regarding debt collection. The video can be found at www.ftc.gov/debtcollection.

³⁶ The highly trained contact representatives in the FTC's Consumer Response Center respond to thousands of telephone calls and written communications (in both paper and

In addition, the FTC engages in business education efforts to inform debt collectors what they must do to comply with the law. The Commission develops and distributes brochures and similar materials to provide industry guidance. The FTC delivers speeches, participates in panel discussions at industry conferences, and provides interviews to general media and trade publications.

A complete list of the FTC's consumer and business education materials relating to debt collection and information on the extent of their distribution is set forth in Appendix A to this letter. In the last year, the Commission issued the following new or updated consumer and business educational materials to supplement its existing materials:

- In February 2012, the Commission issued a consumer alert warning consumers of scam artists posing as debt collectors.³⁷ The alert provides advice for consumers regarding how to spot a fake debt collector, what to do if they receive a call from someone who may be a fake debt collector, and the dangers associated with fake debt collectors.
- In January 2012, in connection with announcing the settlement with Asset Acceptance discussed above, the Commission issued a consumer alert to assist consumers in understanding their rights when debt collectors are seeking to recover on time-barred debts.³⁸
- In July 2011, in conjunction with the final policy statement regarding the collection of deceased consumers' debts, the Commission issued a consumer alert explaining the rights and responsibilities related to the debts of a deceased relative.³⁹

IV. Research and Policy Development Activities

The third prong of the FTC's FDCPA program is research and policy initiatives. In the past year, the FTC has continued to monitor and evaluate the debt collection industry and its practices. As described below, important policy topics examined by the FTC in the past year

electronic form) from consumers each weekday.

³⁷ FTC, Consumer Alert, *Who's Calling? That Debt Collector Could Be a Fake* (Feb. 2012), www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt076.shtm.

³⁸ FTC, Consumer Alert, *Time-Barred Debts: Understanding Your Rights When It Comes to Old Debts* (Jan. 2012), www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt144.shtm.

³⁹ FTC, Consumer Alert, *Paying the Debts of a Deceased Relative: Who is Responsible?* (July 2011), www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt004.shtm.

included: debt collection litigation and arbitration, debt buyers, and debt collectors' use of new technologies.

A. Debt Collection Litigation and Arbitration Outreach

In July 2010, the FTC issued a report derived from a series of nationwide roundtable discussions and public comments examining debt collection litigation and arbitration proceedings.⁴⁰ It concluded that the system for resolving consumer debt collection disputes is broken, and recommended significant reforms to improve efficiency and fairness to consumers.

The report identified four major consumer protection concerns in debt collection litigation and offered recommendations concerning how to address these concerns:

- Consumers frequently fail to appear or defend themselves and collectors sometimes fail to properly notify consumers of suits they have filed. The FTC therefore suggested that the states consider adopting measures to increase consumer participation in suits against them.
- Complaints filed in debt collection suits often do not contain sufficient information to allow consumers in their answers to admit or deny the allegations and assert affirmative defenses. The Commission consequently recommended that states consider requiring collectors to include more debt-related information in their complaints.
- Consumers may unknowingly waive statute of limitations defenses that are available to them.
 - Because consumers do not understand that in many states the statute of limitations is an affirmative defense that precludes suit, they rarely assert this affirmative defense. The Commission recommended that states assign to collectors the burden of proving that debts are not time-barred and require that collectors include the date of default and the statute of limitations in their complaints.
 - Because consumers are not aware that debt collectors cannot lawfully sue to recover on debt that is beyond the statute of limitations, to prevent deception, the Commission said that, in many circumstances, collectors who seek to collect on debt they know or should know is time-barred should disclose that they cannot lawfully sue consumers. Consumers likewise do not know that in many states making a partial payment on a

⁴⁰ FTC, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION, July 2010, *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

time-barred debt revives the entire debt for a new statute of limitations period. The FTC said that, in many circumstances, to avoid deception collectors seeking to recover in these states on debts beyond the statute of limitations should disclose to consumers that making a payment will revive such debt.

- Banks sometimes freeze funds in the bank accounts of indigent debtors even though the funds are exempt from garnishment by law. The FTC therefore recommended that federal and state laws be changed to limit the amounts frozen in accounts containing exempt funds.

The report also addressed concerns about requirements that consumers resolve debt collection through binding arbitration. Because consumers are often unaware of arbitration provisions, the report found consumers' agreement to accept arbitration was generally not an informed choice. The Commission recommended that creditors, collectors and others take steps to make consumers aware that they are agreeing to arbitration and provide consumers with a meaningful method of choosing whether to agree to arbitrate. Also, because the report concluded that the process in arbitration proceedings is not fair to consumers in many cases, the FTC recommended that: (1) arbitration forums and arbitrators eliminate bias and the appearance of bias; (2) arbitration proceedings be conducted in a manner likely to increase consumer participation; (3) arbitration awards contain more information about how the case was decided and how the award was calculated; and (4) arbitration processes and results be more transparent.

As a follow-up to the report's release, Commission staff sent copies of the report to the state clerks of court around the country. Staff subsequently initiated an outreach project to discuss the FTC's extensive research and expertise on debt collection issues generally and the Commission's July 2010 report and litigation recommendations specifically. As part of the project, Commission staff reached out to consumer advocacy groups, industry associations, and research institutions.

The FTC's outreach efforts have ranged from informal discussions with individuals, to webinars presented to broader audiences, to technical assistance on draft legislation. In some cases, Commission staff have provided general information regarding the issues raised in the July 2010 report, while in other cases FTC staff have assisted with respect to particular ideas for reform. For example, FTC staff provided informal technical views to state legislators concerning the costs and benefits of draft debt buyer legislation. In other states, debt collection reform recommendations have been proposed by the state Attorney General or by the state courts, a number of which were directly influenced by the Commission's recommendations in the July 2010 report.⁴¹

⁴¹ See, e.g., 171ST REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 6-7 (July 1, 2011) (noting that the FTC's report was among the sources consulted in developing changes in Maryland court rules), *available at* <http://mdcourts.gov/rules/ruleschanges.html>; Response of Creditors' Counsel Identified to

B. Debt Buyer Study

Debt buying has become a significant part of the debt collection system over the past decade, and many debts are purchased and resold several times over a period of years before collection efforts finally cease. Some have suggested that the age, amount, and quality of debt-related information transferred when debt is sold results in debt collectors increasingly seeking to collect from the wrong consumer, in the wrong amount, or both. To empirically evaluate these information flow concerns and related issues, the Commission undertook a study of the debt buying industry. In December 2009, the FTC issued orders to nine of the nation's largest debt buying companies, requiring them to produce extensive and detailed information about their practices in buying and selling consumer debt. The FTC anticipates issuing a report in 2012 with findings and recommendations, if appropriate, regarding the debt buying industry.

C. Debt Collection 2.0 Workshop

In April 2011, the FTC convened industry representatives, consumer advocates, regulators, researchers and others to discuss debt collection technologies at a public workshop, *Debt Collection 2.0: Protecting Consumers as Technologies Change*.⁴² Since the FDCPA was enacted in 1977, technologies for collecting and transmitting data, communicating, and making payments have advanced. Today's collectors, for example, increasingly communicate with consumers via electronic mail, mobile phones, text messaging, and social media. In connection with these developments, workshop participants discussed: how debt collection technologies have evolved in recent years; whether such technologies can increase the frequency with which collectors contact the right consumer seeking the right amount; the costs and benefits to consumers and collectors of employing newer technologies for information collection and storage, communication, and payment; and whether any legal or policy reforms might enhance consumer protection. The Commission anticipates releasing a report in 2012 with findings and recommendations, if appropriate, relating to debt collection technologies.

Delaware Court of Common Pleas Administrative Directive 2011-1 – Consumer Debt Collection Actions 1, May 2011 (noting that the Delaware Court of Common Pleas stated that the FTC reports were among the sources consulted in drafting an Administrative Directive setting forth pleading and practice requirements in debt collection cases), *available at* <http://courts.delaware.gov/commonpleas/docs/comment2n.pdf>.

⁴² The final transcript of the workshop is available at www.ftc.gov/bcp/workshops/debtcollectiontech/docs/transcript.pdf.

V. Rulemaking

In March 2012, the Commission rescinded a rule that set forth procedures for granting state exemptions from the FDCPA.⁴³ Prior to July 21, 2011, Section 817 of the FDCPA provided that the Commission was required to exempt any debt collection practices within any state from the FDCPA, if the practices are subject to requirements substantially similar to those imposed by the FDCPA and there is adequate provision for enforcement.⁴⁴

The Dodd-Frank Act transferred the Commission's rulemaking authority related to state exemptions under the FDCPA to the CFPB, effective July 21, 2011.⁴⁵ At the end of 2011, the CFPB exercised its authority and reissued the rule setting forth the procedures for granting state exemptions from the FDCPA.⁴⁶ Since the CFPB has reissued these procedures, there is no reason for the Commission to maintain its own version of the procedures, which has been superseded.⁴⁷

VI. Conclusion

The Commission hopes that the information contained in this letter assists the CFPB in its annual report to Congress on its administration of the FDCPA. If any other information would be useful or if you wish to request additional assistance, please contact Jessica Rich, Associate Director, Division of Financial Practices, at (202) 326-3224.

By direction of the Commission.

Donald S. Clark
Secretary

⁴³ Procedures for State Application for Exemption from the Provisions of the [Fair Debt Collection Practices] Act, 16 C.F.R. pt. 901.

⁴⁴ 15 U.S.C. § 1692o.

⁴⁵ Dodd-Frank Act, Pub. L. 11-203, § 1061, 124 Stat. 1376, 2035-39 (2010). July 21, 2011 is the "designated transfer date" established by the Treasury Department under the Dodd-Frank Act. See Dep't of the Treasury, *Bureau of Consumer Financial Protection; Designated Transfer Date*, 75 Fed. Reg. 57,252, 57,253 (Sept. 20, 2010).

⁴⁶ 76 Fed. Reg. 78,121 (Dec. 16, 2011).

⁴⁷ See 12 C.F.R. §§ 1006.1-6.8.

APPENDIX A:
Debt Collection Educational Material Distribution in 2011

Consumer or Business Educational Material	Offline Distribution		On-Line Access ⁴⁸	
	English Version	Spanish Version	English Version	Spanish Version
Brochures				
Credit and Your Consumer Rights	65,500	14,200	38,104	3,832
Settling Your Credit Card Debts	63,500	9,800	44,792	2,476
Debt Collection FAQs: A Guide for Consumers	57,000	7,300	493,882	6,954
Knee-Deep in Debt	67,500	11,500	250,940	3,613
Debt Collection Arbitration: The Who, What, Why and How	31,400	N/A	14,689	N/A
Consumer Alerts (Online Only)				
Paying the Debts of a Deceased Relative: Who is Responsible?	N/A	N/A	6,677	371
Ads Offering Debt Relief	N/A	N/A	4,527	1,194
Creditors Seeking Federal Benefits in Your Bank Account? Understanding Your Rights	N/A	N/A	11,476	N/A
Time-Barred Debts	N/A	N/A	22,541	976
Fake Debt Collectors ⁴⁹	N/A	N/A	N/A	N/A
Video (Online Only)				
Debt Collection Animated Video	N/A	N/A	30,206	4,298

⁴⁸ These numbers reflect the access of materials from the FTC's website and other official sources. It does not include access to materials that are downloaded from FTC channels and re-posted on outside websites.

⁴⁹ No available data due to recent release date.