FEDERAL TRADE COMMISSION ANNUAL REPORT 2005: FAIR DEBT COLLECTION PRACTICES ACT

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 it has 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, it shares overall enforcement responsibility with other federal agencies.[1] In addition, consumers who believe they have been victims of statutory violations may seek relief in state or federal court.

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.

[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.

As in past years, the Commission took significant steps in 2004 to curtail abusive, deceptive, and unfair debt collection practices. This report presents an overview of the types of consumer complaints the Commission received in 2004, a summary of the Commission's debt collection enforcement actions that became public after the 2004 report was issued, and a summary of the Commission's consumer and industry education initiatives last year. The report also proposes eight amendments to the FDCPA that we believe will improve the statute's clarity and effectiveness as a law enforcement tool, and strengthen the consumer protections it provides.

CONSUMER COMPLAINTS THE COMMISSION RECEIVED

The Commission receives most of its information about how debt collectors are complying with the Act directly from consumers through complaints that consumers file with the Commission.[2] Last year, consumer complaints to the Commission about third-party debt collectors increased both in absolute terms and as a percentage of all complaints that consumers filed with the Commission during the course of the year.[3] The number of consumer complaints filed in 2004 against third-party collectors – 58,687 – was higher than the number of consumer complaints filed against any other specific

[2] Consumers file complaints with the Commission via our toll-free hotline (877-FTC-HELP), online complaint forms, or physical mail. State attorneys general and other sources also refer complaints to the Commission and, occasionally, the Commission hears from debt collectors who are concerned that competitors' allegedly violative practices may cause them to lose business. When this report refers to "complaints," the term refers solely to complaints that consumers have filed directly with the Commission.

[3] In response to continuous efforts to promote the FTC's website and toll-free consumer complaint number, growing numbers of consumers contact the Commission every year. Last year, the total number of complaints we received directly from consumers about all industries rose to 345,112, from 275,434 in 2003, a 25% increase, and the number of complaints we received about third-party debt collectors ("FDCPA complaints") increased to 58,687, from 34,565 in 2003, a 70% increase. Because the increase in absolute numbers of complaints reflects, in part, the success of the Commission's consumer outreach and education efforts, we analyze collection industry trends in this report by looking at complaints alleging specific FDCPA violations as a percentage of all FDCPA complaints we have received. We believe this analysis depicts industry trends more accurately than would reliance on absolute numbers of complaints. Because many consumer complaints allege more than one FDCPA violation, the percentage figures for the individual FDCPA violations total more than 100% of FDCPA complaints.

industry last year.[4] The 58,687 third-party collector complaints represent 17% of all complaints the Commission received in 2004. By comparison, in 2003, consumers filed 34,565 complaints with the Commission about third-party collectors, representing 12.6% of all complaints received that year.[5]

The Commission recognizes that third-party collectors contact millions of consumers each year and, thus, the number of consumer complaints the Commission receives about such collectors is but a small percentage of the overall number of consumer contacts. At the same time, however, the Commission believes 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.[6] The 4.4 percentage points by which third-party collector complaints increased in relation to all complaints the Commission received – from 12.6% in 2003 to 17% in 2004 – represents a 34.9% level of growth in complaints about third-party collectors.[7]

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[4] In late 1999, the Commission instituted a toll-free telephone number, 1-877-ID-THEFT, for consumers to report the theft of their identities and any impediments they may have faced in clearing up the related problems. Last year, 245,877 consumers contacted the Commission directly to complain about such identity theft ("IDT") problems, about four times the 58,687 consumers who complained about third-party collectors. Because such IDT complaints include complaints about merchants, debt collectors, credit bureaus, and individual identity thieves, they are not considered complaints about one particular industry. The same applies to complaints received by our National Do Not Call registry. Accordingly, IDT complaints and National Do Not Call registry complaints are excluded from the complaint statistics that we provide in this report.

[5] The number of complaints the Commission received about in-house creditors' collectors also increased, both in absolute terms and as a percentage of total complaints. In 2003, we received 12,924 complaints about in-house collectors, representing 4.7% of all complaints received. In 2004, complaints about in-house collectors rose to 20,573, representing 6% of all complaints received. Combined, complaints about third-party debt collectors and in-house collectors represented 23% of all complaints the Commission received in 2004.

[6] We cannot determine the extent to which the complaints the Commission receives represent abusive debt collection practices in general. 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 enforces the Act or that the conduct they have experienced violates the Act.

[7] Similarly, the 1.3 percentage point increase from 2003 to 2004 in complaints about in-house (continued...)

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.[8] Some of the allegations that we hear most frequently are the following:

Demanding a larger payment than is permitted by law: The FDCPA prohibits debt collectors from misrepresenting the character, amount, or legal status of a debt.[9] In 2004, the Commission received more complaints alleging that collectors violated this provision of the FDCPA, both in percentage and absolute terms, than it received about any other FDCPA violation. Of the FDCPA complaints the Commission received in 2004, 31.6%, or 18,546 consumers, alleged that third-party collectors misrepresented the character, amount, or legal status of consumers' debts. This number is a significant increase from the 15.1% of FDCPA complaints that alleged this violation in 2003.[10] The FDCPA also prohibits debt collectors from collecting any amount unless it is "expressly authorized by the agreement creating the debt or permitted by law."[11] In 2004, 6% of the FDCPA complaints, or 3,494 consumers, alleged that collectors demanded unauthorized interest, fees or expenses, compared with 4.5% of FDCPA complaints alleging this violation in 2003.

Harassing the alleged debtor or others: In 2004, 24.1% of FDCPA complaints the Commission received, or 14,137 consumers, alleged that collectors harassed them by calling repeatedly or continuously. Another 15.1% of FDCPA complaints, or 8,859 consumers, alleged that collectors used obscene, profane or otherwise abusive language.

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[7](...continued)
collectors relative to all complaints the Commission received represents a 27.7% level of growth.

[8] The Commission does not verify the consumer complaints it receives, but uses them for various purposes, such as determining whether a collector's alleged improper conduct warrants further investigation and possible enforcement action.

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

[10] The Commission's legislative Proposal 7, discussed below, would address this issue by requiring collectors to itemize their fees and other charges, upon a consumer's written request.

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

In addition, 0.5% of complaints, or 272 consumers, alleged that collectors used or threatened to use violence if consumers failed to pay.

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.[12] In 2004, 10.6% of FDCPA complaints, or 6,233 consumers, alleged that third-party collectors falsely threatened a lawsuit or some other action that they could not or did not intend to take. In addition, 3.4% of FDCPA complaints, or 1,973 consumers, alleged that such collectors falsely threatened arrest or seizure of property.

Impermissible calls to 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.[13] In 2004, 8% of FDCPA complaints, or 4,697 consumers, alleged such contacts. Many of these consumers told us that debt collectors continued to call them at work after they or their colleagues specifically told the collectors that the consumer's employer prohibited such calls. 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. In 2004, 5.3% of FDCPA complaints, or 3,100 consumers, alleged that a third-party collector revealed an alleged debt illegally. Consumers alleged that third-party collectors contacted their employers, relatives, children, neighbors, and friends, and informed them about their 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 consumers' alleged debts also 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.

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

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

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.[14] 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. Last year, 4.9% of the FDCPA complaints to the Commission, or 2,895 consumers, alleged that collectors did not provide the required notice.

Some collectors call consumers demanding that they make payments directly to the collector's client, the alleged creditor. According to consumer complaints to the Commission, 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. This practice prevents consumers from even complaining about the collector to law enforcement agencies or Better Business Bureaus.

Failing to verify disputed debts: 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.[15] Last year, 3.9% of all FDCPA complaints, or 2,262 consumers, alleged that collectors failed to verify debts that the consumers allegedly owed. Many 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.

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.[16] This "cease communication" notice does not prevent collectors or creditors from filing suit against the

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[14] 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.

[15] Section 809(b), 15 U.S.C. § 1692g(b).

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

consumer, but it does stop collectors from calling the consumer or sending dunning notices. In 2004, 3.5% of FDCPA complaints, or 2,058 consumers, alleged that collectors ignored consumers' "cease communication" notices and continued their aggressive collection attempts.

Complaints about creditors' in-house collectors: The Commission also received 20,573 complaints in 2004 about creditors that were collecting their own debts, representing a substantial increase from 2003 in both percentage and absolute terms.[17] Because creditors are not generally covered by the FDCPA, some in-house collectors use no-holds-barred collection tactics in their dealings with consumers. While the Commission cannot pursue such creditors under the FDCPA, it has done so under the Federal Trade Commission Act ("FTC Act") in the past, and will continue to do so in the future as appropriate cases present themselves.[18]

ENFORCEMENT: THE FIRST PRONG OF THE FDCPA PROGRAM

The first prong of the Commission's FDCPA program is vigorous law enforcement. The Commission's FDCPA enforcement actions begin with investigations of certain debt collectors. If an investigation reveals evidence of significant FDCPA violations, the staff usually attempts to negotiate a settlement with the debt collector 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.[19] 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. In

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[17] *See supra* notes 5 & 7.

[18] For example, as discussed below, in the past year the Commission entered into consent orders with two Pennsylvania companies whose collection practices it charged violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. *See infra* at page 9.

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

addition, when the Commission seeks equitable remedies such as injunctive relief and restitution for consumers, rather than civil penalties, the Commission can, and does, file federal court complaints against debt collectors under the authority vested in it by the FDCPA and the FTC Act.

The Commission staff currently is conducting a number of non-public investigations of debt collectors to determine if they have engaged in significant violations of the Act. In addition, as discussed below, in the time since the Commission issued its 2004 report, it has reached settlements with defendants in a mortgage lending case that involved FDCPA violations; filed a new federal court action against a debt collector that it alleges is a recidivist violator of the FDCPA; obtained summary judgment against defendants in another FDCPA case; and entered into a consent order with two Pennsylvania companies that it alleged engaged in abusive and unfair debt collections.

In February 2005, the Commission reached a settlement in its seven-year case against ***Capital City Mortgage Corp.*** ("Capital City"), a Washington, D.C.-based mortgage lender and servicer whose practices launched a national assault on abusive lending. The Commission had alleged that Capital City violated the FTC Act, the FDCPA, the Truth in Lending Act, and the Equal Credit Opportunity Act, by inducing consumers to take loans secured by their homes, overcharging borrowers and, in some instances, causing consumers to lose their homes. The settlement prohibited Capital City and its co-defendants from future lending fraud, required them to pay consumer redress and other monetary relief totaling at least $750,000, and enjoined them from making home secured loans. Earlier, in May 2004, the Commission reached a separate settlement with Eric J. Sanne, Capital City's former general counsel. Sanne allegedly sent borrowers letters in which he falsely claimed he represented a third-party debt collector, rather than Capital City, and sought to collect money that consumers did not owe. The settlement permanently barred Sanne from participating in any debt collection business and ordered him to pay $20,000. The Commission filed its complaint against Capital City and its now-deceased president, Thomas K. Nash, in January 1998. The complaint alleged that the defendants often targeted consumers with fixed or low incomes, offering them loans secured by the equity of their homes, rather than their creditworthiness. The Commission alleged that Capital City included phony charges in monthly statements to borrowers, added phony charges to loan balances, forced consumers to make monthly payments for the entire loan amount while withholding some loan proceeds, foreclosed on borrowers who were in compliance with the terms of their loans, and failed to release liens on borrowers' homes after the loans were paid off.

In December 2004, the Commission filed an action in federal court in Illinois against ***Capital Acquisitions & Management*** ("CAMCO"), alleging that it had violated the FDCPA and engaged in deceptive practices while attempting to collect very old debts that were beyond the statute of limitations and too old to appear on credit reports. The Court issued temporary and preliminary injunctions that prohibited false claims and FDCPA violations, froze the assets of all defendants, including the principals, and appointed a receiver to take over the corporation. This action followed a settlement the Commission reached with CAMCO in March 2004 that required the defendants to pay a $300,000 civil penalty and barred them from engaging in abusive, deceptive, and illegal collection practices in the future. Nonetheless, between March and December, the Commission received more than 2,000 new consumer complaints about CAMCO's practices. In the subsequent December 2004 case, the Commission alleged that in addition to FDCPA violations, CAMCO regularly represented falsely that: (1) criminal action would be taken against them if they failed to pay; (2) CAMCO would exercise various civil remedies such as lawsuits, liens and garnishing wages; and (3) failure to pay would ruin the consumer's credit report. CAMCO is out of business. The preliminary injunction remains in effect during the continuing litigation, in which the Commission is seeking a court order that would permanently halt CAMCO's illegal activities and provide redress for consumers.

In December 2004, the Commission moved for summary judgment against ***Check Investors, Inc.***, two predecessor entities, corporate principal Barry Sussman, and corporate counsel Charles Hutchins. The Commission alleged that the defendants, who operated nationwide as National Check Control, engaged in numerous violations of the FDCPA and the FTC Act by, among other things, falsely threatening consumers with arrest and criminal and civil prosecution to extract money in excess of any debt the consumers may have owed. The Court granted the Commission's summary judgment motion in February 2005, and the Commission was preparing to redress consumers. Earlier, in October 2004, the Commission reached a settlement with Sussman's wife, Elisabeth, named as a relief defendant in the case. The settlement required Mrs. Sussman to turn over to the Commission approximately $600,000 that she allegedly received as a result of the defendants' illegal actions. Check Investors permanently closed its doors in 2003, shortly after the Court entered a preliminary injunction requiring it to comply with the FDCPA.

In October 2004, the Commission approved a final consent order barring two Pennsylvania companies, ***Applied Card Systems, Inc.***, and ***Applied Card Systems of Pennsylvania, Inc***., from engaging in a range of abusive and unfair collection practices. In a complaint accompanying the consent order, the Commission alleged that company representatives, among other things, regularly called consumers' relatives, neighbors, and employers for information about where consumers lived or worked, and that the

representatives repeatedly harassed third parties, sometimes using abusive and obscene language, even after the third parties said they had no information and asked the representatives to stop calling. In addition to barring the companies from harassing and abusing third parties, the consent order prohibits them from falsely representing the amount or status of a debt, threatening to take action against a consumer that they do not intend to take, collecting any amount other than the amount expressly stated in the agreement that created the debt, and applying a consumer's payment in a way that the consumer has not directed. The consent order also contains record-keeping requirements to help the Commission monitor the companies' compliance with the order.

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

The Commission's consumer and industry education initiatives form the second prong of the FDCPA program. The consumer education initiative informs consumers nationwide 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 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's staff issued a Commentary on the FDCPA in 1988 that provides the staff's detailed analysis of every section of the Act.[20] The comments serve as valuable guidance for consumers, their attorneys, courts, and members of the collection industry. The Commentary superseded staff opinions issued prior to its publication, but staff members issued many additional opinion letters after 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 available on the Commission's FDCPA web page, located at *www.ftc.gov/os/statutes/fdcpajump.htm.*

[20] 53 Fed. Reg. 50,097 (1988).

Tools specifically for consumers: The Commission informs consumers about their rights and responsibilities under the FDCPA by means of written materials, one-to-one guidance, and public addresses to consumer groups. First, the Commission provides written materials, including a "Facts for Consumers" brochure entitled "Fair Debt Collection," which explains the FDCPA in plain language. In 2004, the Commission distributed 81,000 of these brochures to consumers through non-profit consumer groups, state consumer protection agencies, Better Business Bureaus, and other sources of consumer assistance, including copies sent directly to consumers in response to inquiries to the Commission. In addition, online users accessed the brochure on the Commission's website approximately 300,000 times in 2004, nearly double the number from the previous year. The Commission also publishes Spanish-language versions of the "Fair Debt Collection" brochure and two related consumer brochures: "Credit and Your Consumer Rights" and "Knee Deep in Debt." The Commission distributed nearly 6,400 copies of the Spanish version of "Fair Debt Collection" in 2004, and online users accessed the brochure 8,075 times. In addition, in response to consumer inquiries and a Commission enforcement action, the Commission issued a new consumer alert in 2004 entitled "Time-Barred Debts," which focuses on a consumer's rights and responsibilities with respect to debts so old that creditors and debt collectors may no longer sue to collect them. All four of these publications are available on the Commission's website and in paper form.

Second, the Commission provides consumer education through its 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. A toll-free number, 1-877-FTC-HELP, makes it very easy 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" brochure or refer the consumer to the Commission's FDCPA 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.

Third, the Commission extends the reach of its consumer education initiative through public speaking engagements by Commission staff for consumer groups across the country. From local talk shows, to military bases, to county fairs, staff members inform consumers of their rights under the FDCPA and other consumer-finance statutes, and respond to a wide range of consumer questions and concerns.

Tools specifically for the collection industry: The Commission staff also delivers speeches and participates in panel discussions at industry conferences throughout the year. In addition to the presentations at industry conferences, the 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 amendments to the FDCPA. Commission staff members also provide interviews to trade publications. These interviews provide yet another vehicle for the staff to make its positions known to the nation's debt collectors.

LEGISLATIVE RECOMMENDATIONS:

The Commission recommends eight amendments to, or clarifications of, the Act. The Commission's legislative proposals, detailed below, would: (1) make explicit the standard for clarity required for collectors' notices to consumers; (2) clarify that debt collectors may continue their collection activities during a thirty-day period set aside for consumers to dispute their purported debts; (3) exempt from the FDCPA's provisions attorneys who pursue debtors solely through litigation (or similar "legal" practices); (4) allow the Commission to issue model debt collection letters for optional use by debt collectors; (5) clarify that collectors may communicate with a consumer only once after receiving a "cease communication" notice from the consumer; (6) expressly require collectors to take certain actions in response to a consumer's oral notification that the consumer disputes the purported debt; (7) require collectors to itemize their charges to consumers; and (8) encourage collectors to provide the name and address of the original creditor of the debt in their first communication with consumers. The Commission has recommended proposals one through four in past annual reports; we newly recommend proposals five through eight.

Proposal 1: Section 809(a) – Clarity of Notice

The Commission recommends that Congress amend Section 809 of the FDCPA to make explicit the standard for clarity to be applied to the consumer notice required by that section.[21] Section 809(a) requires debt collectors to send a written notice to each consumer within five days after first contacting the consumer, stating that if the consumer disputes the debt in writing within thirty days after receiving the notice, the collector will obtain and mail to the consumer verification of the debt.

As presently drafted, the FDCPA does not specify any standard for how the Section 809(a) notice must be presented to consumers, such as the color and size of the typeface and the location of the notice on the collection letter. 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 Section 809(a) notice and at the same time use much larger, prominent or bold-faced type in the text of the letter violate the Act.[22] The courts reasoned that the payment demand in the text both contradicts and overshadows the required notice.[23] 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).

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[21] Proposals 7 and 8, discussed below, also recommend amendments to the Section 809 validation notice.

[22] *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Swanson v. Southern Oregon Credit Serv.*, 869 F.2d 1222 (9th Cir. 1988). *See also United States v. National Fin. Serv.*, 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").

[23] *Miller*, 943 F.2d at 484; *Swanson*, 869 F.2d at 1225-26. Each case held that the format and the substance of the letter overshadowed the notice required by Section 809(a).

The Commission recommends that Congress eliminate this problem by amending Section 809 to require explicitly that the notice be "clear and conspicuous." That standard could be defined as "readily noticeable, readable and comprehensible to the ordinary consumer." The definition also could reference factors such as size, shade, contrast, prominence, and location that would be considered in determining whether the notice meets the standard. A number of Commission decisions and orders define the "clear and conspicuous" standard in a variety of contexts.[24] 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.

Proposal 2: Section 809(b) – Effect of Thirty-day Period

The Commission recommends that Congress amend Section 809(b) of the FDCPA to clarify that debt collectors may continue their activities to collect a debt during the thirty-day period that Section 809(a) establishes for consumers to dispute the debt, unless the consumer disputes or requests verification of the debt in writing. Section 809(b) provides that if a consumer, within the thirty-day period, disputes a debt in writing or requests verification of the debt, the collector must cease all collection efforts until it has obtained verification and mailed a copy of the verification to the consumer. The Commission consistently has taken the position that the existing statute permits collection efforts to continue during the thirty-day period if the consumer has not disputed the debt in writing or requested verification.[25] Federal circuit courts have arrived at the

[24] *See, e.g., Palm, Inc.*, Docket No. C-4044, 2002 FTC Lexis 17, *11-12 (Apr. 17, 2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and e-mail while revealing only in an inconspicuous, four-point disclosure "[a]pplication software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds"); and *Gateway Inc.*, File No. 992-3276, 2001 FTC Lexis 84, *39-40 (May 15, 2001) (consent order) (challenging ads for "free" or flat-fee internet services that disclosed in fine-print footnote that many consumers would incur significant additional telephone charges).

[25] The Commission articulated this position in an April 2000 advisory opinion, consistent with prior staff opinion letters and the Staff Commentary on the FDCPA. *See* 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.*

same conclusion.[26] Nonetheless, some continue to argue that the thirty-day period is a *grace* period within which collection efforts are prohibited, rather than a *dispute* period within which the consumer may demand verification of the debt.

The Commission recommends that Congress clarify the law by adding a provision to Section 809 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 any collection activity during the thirty-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt.

Proposal 3: 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.[27] The difficulties in applying the Act's requirements to attorneys in litigation, however, and the anomalies that result, remain. For example, pretrial depositions could violate Section 805(b) because they involve communicating with third parties about a debt.[28] 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 the 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,

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[26] 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." *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997) (Posner, J.). Similarly, 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." *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999).

[27] *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.").

[28] 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.

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.[29]

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 recommends that Congress re-examine the definition of "debt collector" contained in Section 803(6) and state that an attorney who pursues alleged debtors solely through litigation (or similar "legal" practices) – as opposed to one who collects debts by sending 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."

Proposal 4: Section 814(d) – Model Collection Letters

The Commission recommends that Congress amend the FDCPA to allow it to issue model letters that debt collectors could choose to send to consumers. The Commission believes that model letters would benefit consumers and collectors alike. Model letters would increase the likelihood that collectors will properly notify consumers of their rights under the FDCPA and, correspondingly, decrease the likelihood that consumers will be deceived or intimidated by the collectors' letters. Collectors would benefit from specific guidance regarding the form of their collection letters and, if they adhere to a model form, from a safe harbor for compliance purposes.

While we believe that model collection letters would be 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 or deleted from the existing set, from time to time. We therefore recommend that the FDCPA be amended to allow the Commission to issue model collection letters. Section 814(d) currently provides, in pertinent part, that the Commission may not promulgate "trade regulation rules or other regulations with respect

[29] 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.

to the collection of debts by debt collectors."[30] 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 these models in creating a collection letter, the collection letter shall be deemed to be in compliance with [the FDCPA]."[31]

We believe that this proposal is the best way to proceed in light of the Commission's considerable experience in drafting, and testing consumer comprehension of, "consumer friendly" notices and disclosures. Indeed, Congress recently gave the Commission the responsibility to draft a number of consumer notices under the Fair and Accurate Credit Transactions Act of 2003 ("the FACT Act"). 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.

Proposal 5: Section 805(c) – Permissible Collection Contacts After a Consumer's "Cease Communication" Notice

The Commission recommends clarifying Section 805(c) of the FDCPA, which provides that if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector may communicate with the consumer with respect to the debt only once more and only for three permissible purposes:

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies that are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

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[30] 15 U.S.C. § 1692*l*(d).

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

We believe Section 805(c) should be amended to clarify that, after a debt collector receives a consumer's written request to cease its communications with the consumer, the collector may contact the consumer only one more time and only for one or more of the permissible purposes. The amendment would end confusion that has led some collectors to believe that they may contact a consumer three separate times, with each contact relating to one of the permissible purposes.

Proposal 6: Sections 807(8) and 809(a)(3) – Effect of a Consumer's Oral Notice of a Disputed Debt

The Commission recommends amending Sections 807(8) and 809(a)(3) of the FDCPA to expressly provide that consumers who wish to dispute their purported debts – for the purposes of ensuring that collectors forward the disputes to consumer reporting agencies ("CRAs") and preventing collectors from assuming a debt is valid – may do so orally. The proposed amendment would make these FDCPA provisions consistent with corresponding provisions in the Fair Credit Reporting Act ("FCRA"). In addition, we believe that sound public policy argues against permitting a collector to assume that a purported debt is valid, or to report such a debt to CRAs as valid, simply because the consumer has disputed the debt orally rather than in writing.

Section 807(8) of the FDCPA prohibits collectors from "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." The few courts that have analyzed Section 807(8) and ruled on the issue have concluded that the absence of a specific requirement that the notice be in writing means that a collector must notify any CRA to which it reports that the consumer disputes the debt, even if the consumer disputes the debt orally.[32]

Section 809(a)(3) of the FDCPA requires debt collectors to include in their validation notices "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." The one United States appellate court that analyzed Section 809(a)(3) held that the language of that section permits a debt collector to assume a debt is valid unless the consumer disputes it in writing,[33] but most federal

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[32] *See, e.g., Brady v. The Credit Recovery Co.*, 160 F.3d 64, 67 (1st Cir. 1998).

[33] *Graziano v. Harrison* 950 F.2d 107, 112 (3d Cir. 1991). A statement to the same effect in *Mahon v. Credit Bur. of Placer County Inc.*, 171 F.3d 1197, 1202 (9th Cir. 1999) was dicta, and (continued...)

district courts that have addressed the issue have rejected that conclusion and held that a consumer is entitled to dispute a debt orally to overcome a collector's assumption that the debt is valid.[34]

We believe Sections 807(8) and 809(a)(3) should be amended to expressly provide that consumers may trigger their protections by orally notifying collectors that they dispute a debt. The proposed amendments would assure consistency between the FDCPA's dispute-reporting standard and the standard imposed by analogous provisions of the FCRA. Section 623(a)(3) of the FCRA provides: "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer." This provision contains no indication that debt collectors and other furnishers of information to CRAs may omit a notice of a dispute that was raised orally rather than in writing – in contrast to other provisions of the FCRA that specify other obligations that arise only upon receipt of a written notice from a consumer.

Similarly, Section 615(g) of the FCRA, which Congress recently added as part of the FACT Act, provides that, if a third-party debt collector for a creditor is notified that any information relating to a debt may be fraudulent or the result of identity theft, the collector must pass this information on to the creditor.[35] There is no indication in Section 615(g) that this notice must be in writing. Even if Sections 807(8) and 809(a)(3) of the FDCPA contained writing requirements, the FCRA would require debt collectors to report a consumer's dispute to CRAs if the consumer disputed the debt orally.

In addition to assuring that the dispute-reporting standards of the FDCPA and FCRA are consistent, public policy also favors assuring that consumers can trigger the protections of Sections 807(8) and 809(a)(3) by notifying collectors orally of any disputes. As one federal district court noted in interpreting Section 809(a)(3), "It is not unreasonable to believe that some consumers who wish to dispute an alleged debt may

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[33](...continued)
was made without any explanation or rationale.

[34] *See, e.g., Sanchez v. Weiss, Inc.*, 173 F. Supp. 2d 1029, 1033 (N.D. Calif. 2001) and *Ong v. American Collections Enterprise, Inc.*, 1999 U.S. Dist. LEXIS 409, *8 (E.D.N.Y. 1999) (holding that an oral dispute is sufficient to defeat the collector's assumption of validity). *But see Ingram v. Corporate Receivables, Inc.*, 2003 U.S. Dist. Lexis 7475, *17 (N.D. Ill. 2003); *Castillo v. Carter*, 2001 U.S. Dist. Lexis 2686, *10 (S.D. Ind. 2001) (holding that the dispute must be in writing).

[35] *See, e.g.*, FCRA Section 615(g), 15 U.S.C. § 1681m(g).

lack the ability or wherewithal to do so in writing, and that Congress chose to accord these oral-debt disputers some, but not all of the protections accorded those who dispute their debts in writing."[36]

The Commission agrees that good public policy can establish a hierarchy of protections by balancing the ease with which consumers can submit a dispute (and therefore obtain the protections afforded by the FDCPA) with the burdens imposed on industry. Sections 807(8) and 809(a)(3) impose only minimal burdens on debt collectors. In response to a dispute under Section 807(8), a collector merely is required to add language notifying CRAs – to which the collector is reporting already – that the consumer disputes the alleged debt. Likewise, a Section 809(a)(3) dispute simply prevents a collector from assuming a debt is valid. At the same time, the provisions provide important protections to consumers. Chief among them, if the debt collector reports the purported debt to a CRA, the debt will be reported as "disputed" on the consumer's credit report. In contrast, the explicit requirement in Section 805(c) of the FDCPA that a consumer who wants a debt collector to cease communications with him permanently must make the demand in writing is reasonable because complying with the demand imposes costs on the collector. Similarly, pursuant to Section 809(b) of the FDCPA, a written dispute requires a collector to cease collection efforts until the consumer receives verification of the debt. Again, the consumer's written request has a direct impact on the collector's ability to collect the debt.

Because complying with Sections 807(8) and 809(a)(3) imposes such minimal burdens on collectors, and because the provisions provide valuable protections to consumers who dispute their debts, we recommend that the two provisions be amended explicitly to permit oral as well as written disputes.[37]

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[36] *Ong*, 1999 U.S. Dist. LEXIS at *8. In addition to consumers who lack the ability or wherewithal to communicate with debt collectors in writing, many consumers say they never received a validation notice, and thus, never were informed that they needed to file a written dispute to benefit from certain FDCPA provisions.

[37] The logic of this differential scheme was recognized by the court in *Brady* in interpreting the requirements of existing Section 807(8) of the FDCPA:

> Under section [809(b)] a consumer must dispute a debt in writing, within an initial thirty-day period, in order to trigger a debt validation process. . . . Section [809(b)] thus confers on consumers the ultimate power vis-a-vis debt collectors: the power to demand cessation of all collection activities. . . . In contrast, [Section

(continued...)

We recognize that collectors have been concerned about uncertainties in what constitutes a consumer dispute of a debt. For example, collectors question whether they should assume that a consumer is disputing a debt when the consumer hangs up the telephone during a collection call or refuses to return calls in response to telephone messages. The Commission does not believe that these actions by consumers in themselves convey that there is a dispute, and we can provide compliance guidance to collectors that such actions do not require notifying a CRA of a dispute. Further, if desired, the FDCPA could be amended to add provisos specifying that, for purposes of Sections 807(8) and 809(a)(3), such actions are not disputes. These steps would provide greater clarity and certainty for collectors, without forcing consumers to dispute their debts only in a single and often more burdensome manner.

Proposals 7 and 8: Section 809 – Validation Notice Requirements

As noted above,[38] we are recommending three amendments to the validation notice required under Section 809 of the FDCPA.[39] Proposal 1, discussed above, would amend Section 809 to make explicit the standard for clarity to be applied to validation

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[37](...continued)
807(8)] does not affect debt collection practices at all. Instead, [Section 807(8)] merely requires a debt collector who knows or should know that a given debt is disputed to disclose its disputed status to persons inquiring about a consumer's credit history. Given the much more limited effect of this provision, Congress's decision not to condition its exercise on the submission of written notification makes logical sense.

Brady, 160 F.3d at 67 (citations omitted).

[38] *See supra* note 10.

[39] FDCPA Section 809(a) currently requires that validation notices contain the following: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

notices. Proposal 7 would require collectors to provide consumers with an itemization of the collectors' added charges, if a consumer submits a written request for such an itemization. Proposal 8 would encourage collectors to provide consumers with the name of the original creditor for the debt from the outset of the collection process. While Proposal 1 is directed at ensuring that validation notices are readily noticeable by consumers, Proposals 7 and 8 are directed at facilitating the collection process by enabling consumers to ascertain more quickly whether they owe the debt in question.

We recommend as Proposal 7 that Congress expand the Section 809 validation notice to provide that a consumer can obtain an itemization of all charges added after the current collector obtained the debt, if the consumer requests such an itemization in writing. These itemized charges would include, but not be limited to, interest charges, fees, and expenses.

Our recommendation is directed to ending a collection practice whereby some collectors bundle as a single "amount due" the dollar figure of the alleged debt, plus added fees, charges, and expenses. Confronted with a collection notice with such bundled charges, the consumer has no way of determining which charges are legitimate and which may be erroneous or subject to dispute. *See Federal Trade Comm'n v. Check Investors, Inc.*, Civ. No. 03-2115 (JWB) (D.N.J. May 12, 2003) (alleging that collector imposed impermissible charges and bundled them with the debt principal to create an "amount due" that far exceeded any legitimate debt). We believe that a requirement that collectors provide consumers, upon request, with an itemization of all collector-added charges would help consumers determine what they do owe, and identify charges that they question or dispute.

A required itemization of collectors' charges also would assist the Commission and consumers in enforcing two important provisions of the FDCPA: Section 807(2), which bars collectors from falsely representing the "character, amount, or legal status" of a debt or the compensation they may receive for the collection of a debt; and Section 808(1), which bars "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[40] Requiring collectors to inform consumers in validation notices that they have a right to know, if they make the request in writing, which charges the current collector has added will ensure

[40] As discussed above, the Commission received more complaints in 2004 that collectors allegedly violated Section 807(2) by falsely representing the character, amount, or legal status of a debt than it received about any other single FDCPA violation. *See supra* note 9 and accompanying text.

that consumers know not only that they have the right to this information, but also how to exercise that right.

We recommend as Proposal 8 that Section 809 be amended to provide that a collector who provides the name and address of the original creditor in the first written communication with a consumer need not offer or provide this information a second time as part of the validation notice or in response to a consumer request. Currently, Section 809(a) gives consumers the right, upon written request, to obtain the name and address of the original creditor and requires the collector to disclose this right in the validation notice. The Commission's proposal would permit collectors to avoid an additional mailing by including the original creditor's name in the first written communication. Of course, consumers would retain their right to request verification of the debt and, depending on the circumstances, it may be logical for debt collectors to repeat the name of the original creditor as part of their response to that request. Like the itemization of collector-added charges, the disclosure of the original creditor's name at the outset of the collection process would improve the efficiency of the process by permitting consumers to determine more readily whether the debt is valid.[41]

CONCLUSION

Although many debt collectors covered by the FDCPA already comply with the statute, the Commission continues to receive a significant number of complaints about those who do not. Through its FDCPA program of enforcement and education, the Commission encourages collectors who comply with the law to continue to do so, and provides strong incentives for those who are not complying to conform their future practices with the dictates of the law.

[41] As reflected in our Proposal 7 for itemization of collectors' charges, the Commission believes there are significant benefits to requiring collectors to disclose additional account information to consumers. In the future, as the Commission monitors consumer complaints, it will consider whether the flexible approach now recommended in Proposals 7 and 8 should be strengthened to require collectors to provide consumers with an itemization of all charges to an account, including charges by creditors and past collectors, and the identity of the original creditor, from the outset of the collection process.