



Collecting  
Consumer  
Debts  
The Challenges of Change

A Workshop Report

Federal Trade Commission

February 2009



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## CONTENTS

EXECUTIVE SUMMARY .....	i
I. INTRODUCTION .....	1
II. THE DEBT COLLECTION PROCESS .....	2
III. LEGAL FRAMEWORK OF DEBT COLLECTION .....	4
A. Fair Debt Collection Practices Act .....	4
B. Section 5 of the FTC Act .....	6
C. State Debt Collection Laws .....	6
D. Privacy and Data Security Laws .....	7
IV. THE ROLE OF THE FEDERAL TRADE COMMISSION .....	9
V. CHANGES IN DEBT COLLECTION INDUSTRY AND PRACTICES .....	11
A. Increased Consumer Debt and Delinquency Levels .....	11
B. Debt Collection Industry Overview .....	12
C. Evolution in Debt Collection Methods: Communication Technologies .....	14
D. Information Collection and Storage .....	17
1. Increases in Data Storage Capacity .....	17
2. Improvement in Database Technologies .....	18
E. Payment Methods .....	20
VI. MODERNIZING THE DEBT COLLECTION SYSTEM AND LEGAL FRAMEWORK .....	21
A. Information Flow in the Debt Collection System .....	21
1. Problems with Information Flow in the Debt Collection System .....	22
2. Solutions to Information Flow Problems .....	24
3. Future Directions in Information Flow .....	34
B. New Technologies .....	35
1. Communication Technologies .....	35
2. Payment Technologies .....	51
C. Debt Collection Litigation and Arbitration .....	55
1. Litigation .....	55
2. Arbitration .....	58
3. Collecting on Judgments and Awards .....	60
4. Time-Barred Debt and Discharged Debt .....	62
5. Future Directions in Litigation and Arbitration .....	65
D. Debt Collection Legal and Regulatory Systems .....	66
1. Private Enforcement of the FDCPA .....	66
2. Government Enforcement of the FDCPA .....	67
3. Rulemaking to Implement the FDCPA .....	68
VII. CONCLUSION .....	71

APPENDIX A: FAIR DEBT COLLECTION PRACTICES ACT .....A-1

APPENDIX B: FTC ACTIONS RELATED TO DEBT COLLECTION SINCE 1977.....B-1

APPENDIX C: INDIVIDUAL AND ORGANIZATIONAL COMMENTS SUBMITTED IN  
CONNECTION WITH THE WORKSHOP .....C-1

## EXECUTIVE SUMMARY

### Overview

In late 2007, the Federal Trade Commission (“FTC” or “Commission”) convened a public workshop to evaluate the need for changes in the debt collection system, including the Fair Debt Collection Practices Act (“FDCPA”), to protect consumers better. Based on the workshop record and its experience, the Commission concludes that the debt collection legal system needs to be reformed and modernized to reflect changes in consumer debt, the debt collection industry, and technology. This report sets forth these changes and the modifications to the law the FTC believes are needed to provide better consumer protection without unduly burdening debt collection.

As explained in detail in the body of the report, the Commission’s principal conclusions and proposals are:

- **Major problems exist in the flow of information within the debt collection system.**
  - The law needs to be changed to require that debt collectors have better information, making it more likely their attempts to collect are for the right amount and are directed to the right consumer.
  - The law also needs to be amended to mandate that collectors provide better information to consumers explaining their rights under the FDCPA.
- **Debt collection laws need to be modernized to take account of changes in technology.**
  - Debt collectors generally should be allowed to use all communication technologies, including new and emerging technologies, to contact consumers. The law, however, must be carefully crafted and applied to avoid collectors’ use of communication technologies in a manner that causes consumers to incur charges, or otherwise subjects them to unfair, deceptive, or abusive acts and practices.
  - Debt collectors generally should be allowed to use newer electronic payment methods to receive payments from consumers. To deter unauthorized access to the accounts of consumers through the use of these methods, however, the law needs to be changed to require that collectors obtain express verifiable consent from consumers before accessing their accounts.

➤ **Certain debt collection litigation and arbitration practices appear to raise substantial consumer protection concerns.**

- Among the concerns expressed were whether, given the current volume of state court debt collection lawsuits, some of the cases filed lack a sufficient evidentiary basis, whether procedural aspects of such lawsuits achieve the appropriate balance in protecting the interests of consumers and debt collectors, and whether the arbitration process adequately addresses consumer interests and is sufficiently transparent.
- Because the workshop record does not contain adequate information for the FTC to determine the nature and extent of these concerns, the agency will convene regional roundtables this year with state court judges and officials, debt collectors, collection attorneys, consumer advocates, arbitration firms, and other interested stakeholders to obtain more information about these concerns and develop possible solutions. The participation of state officials in these roundtables will be critical, because debt collection litigation and arbitration involve many issues of state as well as federal law.

➤ **Debt collection law must evolve to include a regulatory process that ensures that legal requirements keep pace with changes in the marketplace.**

- The law therefore should be changed to grant the Commission the authority to issue regulations to implement the FDCPA.

➤ **Debt collection law enforcement must be pursued aggressively to deter collectors from engaging in conduct that harms consumers.**

- Private actions, not FTC actions, were intended to be and should continue to be the main means of promoting industry compliance with the FDCPA. To increase deterrence, the law should be changed to increase the statutory damage amounts available in private FDCPA actions to reflect inflation since 1977.
- To hold more individuals, rather than just companies, responsible, and to obtain stronger monetary remedies, the FTC has modified its law enforcement approach in recent years, and the agency will continue to pursue enforcement in a way that will increase compliance with the law.

## Summary and Recommendations

Consumer credit is a critical component of today's economy. Credit allows consumers to purchase goods and services for which they are unable or unwilling to pay the entire cost at the time of purchase. By extending credit, however, creditors take the risk that consumers will not

repay all or part of the amount they owe. If consumers do not pay their debts, creditors may become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.

Debt collection activities, however, also may harm consumers. In 1977, Congress passed legislation to protect consumers from harmful debt collection practices and to protect ethical collectors from competitive disadvantage. The result was the landmark Fair Debt Collection Practices Act, which established specific standards of conduct for the collection industry. Consumer groups, labor groups, state and federal law enforcement officials, and collection industry trade associations supported the law's passage. The Federal Trade Commission is the primary governmental enforcer of the FDCPA. Consumers also may file their own actions against debt collectors who violate the statute.

The FDCPA prohibits abusive, deceptive, and unfair debt collection practices, and specifies numerous practices that are barred. Some debt collectors, such as those entities recently sued by the Commission, continue to use these unlawful practices. There was a general consensus at the workshop that the practices prohibited by Congress in the FDCPA harm consumers and that the prohibitions should be enforced vigorously. The Commission therefore believes there is a continuing need for both public and private actions to deter violations of the statute.

The FTC hosted its two-day workshop in October 2007, thirty years after the FDCPA was enacted. The goals of the workshop were to explore changes in the collection industry and examine their impact on consumers and businesses. In announcing the workshop, entitled "Collecting Consumer Debts: The Challenges of Change," the Commission solicited public comments on a number of topics. Experts representing consumer groups, the collection industry, academia, and government agencies participated in the workshop and submitted written comments. This report describes the information the Commission received in connection with the workshop and how the agency intends to respond to the consumer protection problems that information revealed.

## Debt Collection Industry Transformation

The Commission finds that the nature of consumer debt has changed in numerous important ways since enactment of the FDCPA. The amount of consumer debt has risen dramatically. The types of debt that consumers owe also have changed since 1977. Although all types of debt have increased, mortgage debt and credit card debt have increased the most, especially during the past decade. The five main types of delinquent debt that creditors now place with collectors are credit

card, telecommunication (*e.g.*, mobile phone), electric utility, healthcare, and government (*e.g.*, taxes) debt.

The debt collection industry has transformed during the past three decades. The workshop record shows that the third-party collection industry has increased its inflation-adjusted revenue more than sixfold and increased the number of collection industry jobs more than fourfold. The industry also has experienced significant consolidation as a result of mergers and acquisitions, as well as changes in technology. The most significant change in the debt collection business in the past decade, however, has been the advent and growth of debt buying (*i.e.*, the purchasing, collecting, and reselling of debts in default).

The invention and use of new technologies also has fundamentally altered the debt collection business. Communication technologies, in particular, have spurred profound changes in this industry. Debt collectors no longer must use individually-typed letters and manually-dialed telephone calls to contact consumers. Collectors now are able to easily and relatively inexpensively mass-produce and send letters to debtors. Collectors also now use sophisticated automated dialing and interactive voice recording technologies to efficiently place telephone calls to consumers. Consumers likewise use new communication technologies to handle incoming calls. They receive calls on mobile telephones as well as on landline telephones, and they use Caller ID services and answering machines to filter the calls they receive. Collectors and consumers also are beginning to explore communicating with each other through other new technologies such as email, text messaging, and social networking sites.

Technological changes not directly tied to communication also have had a profound impact on the debt collection industry. Technological innovations have increased exponentially the ability of creditors and debt collectors to obtain, store, and transfer data about consumers and their debts. Changes in database technologies have dramatically enhanced the ability of debt collectors to aggregate disparate pieces of information about consumers, thus making it cheaper and easier to locate and contact consumers. Technological innovations have also altered the methods that consumers can use to pay their debts. With the emergence of electronic payment technologies and systems—such as credit cards, debit cards, stored value cards, electronic benefit transfers, and automated check clearinghouse debits—consumers now have available a host of options for paying their debts in addition to paying by cash or check.

## Information Flow in the Debt Collection System

The FTC believes that there are currently two major problems in the flow of information in the debt collection system. The first major problem is that debt collectors have inadequate

information when they seek to collect from consumers. This increases the likelihood that collectors will reach the incorrect consumer, try to collect the wrong amount, or both.

Following the workshop, representatives of creditors, debt buyers, and debt collectors have commenced discussions as to how to enhance the information flow in the debt collection process. These discussions are critical in weighing carefully the costs and benefits of collecting, maintaining, and transferring information. Although such discussions hold promise, the FTC nevertheless believes it is important to change the law now to require that collectors have and convey to consumers more information in validation notices. To address this concern, the FTC recommends that Section 809(a) of the FDCPA be amended to require that debt collectors obtain and provide in the “validation notices” they send to consumers: (1) the name of the original creditor; and (2) an itemization of (a) the principal, (b) the total of all interest, and (c) the total of all fees and other charges that make up the debt.

A related information problem is that the limited information debt collectors obtain in verifying debts is unlikely to dissuade them from continuing their attempts to collect from the wrong consumer or the wrong amount. If a consumer disputes a debt, the collector is required to obtain verification of the debt and provide it to the consumer before renewing its collection efforts. Many collectors currently do little more to verify debts than confirm that their information accurately reflects what they received from the creditor. This is not likely to reveal whether collectors are trying to collect from the wrong consumer or collect the wrong amount. The FTC therefore concludes that collectors need to do more to increase the likelihood that the information they acquire during the verification process will correct errors. Specifically, the Commission recommends that Section 809(b) of the FDCPA be amended to require that, if a consumer disputes a debt, the debt collector must undertake a “reasonable” investigation that is responsive to the specific dispute the consumer has raised.

The second major problem with the current flow of information in the debt collection system is that collectors generally do not provide adequate information to consumers explaining their rights under the FDCPA. This makes it more difficult for consumers to exercise these rights. The Commission therefore recommends that Section 809(a) of the FDCPA be amended to require that debt collectors inform consumers in validation notices that (1) if they send a timely written dispute or request for verification, the debt collector must suspend collection efforts until it has provided the verification in writing; and (2) if they request in writing that the debt collector cease contacting them, the collector must comply.

The FTC believes that the changes described above will improve the flow of information in the debt collection system. The Commission, however, will continue to monitor the flow of information closely and make further recommendations as needed to improve it.

## New Technologies

The Commission concludes that debt collection laws need to be modernized to take account of changes in technology, especially changes in communication technologies. The FTC believes that debt collectors generally should be allowed to use all communication technologies, including new and emerging technologies, to contact consumers. However, the law also must be carefully crafted to avoid collectors' use of communication technologies in a manner that causes consumers to incur charges, or otherwise subjects consumers to unfair, deceptive, or abusive acts and practices.

Many of the changes in the law that the Commission recommends concern telephone calls between debt collectors and consumers. Most consumers in the United States now own mobile phones, and collectors would like to be able to contact consumers on these phones. However, calls placed to mobile phones and text messages sent to such phones frequently cause consumers to incur charges. Consumers should not have to pay to be contacted by a debt collector. Given the widespread prevalence of mobile calling plans that charge consumers based on the calls and text messages they receive, the FTC concludes that the law should incorporate a presumption that consumers will incur a charge for a call or text message made to their mobile phones. Thus, the law would generally prohibit debt collectors from contacting consumers via cell phones. However, the Commission also concludes that debt collectors should be permitted to contact consumers on their cell phones if, among other things, they have obtained prior express consent to such contacts.

Even if a collector is permitted to call a consumer's cell phone, the collector must comply with Section 805(a)(1) of the FDCPA, which prohibits calls at times that the collector knows or should know are inconvenient to the consumer— before 8:00 a.m. or after 9:00 p.m., local time at the consumer's location, unless the debt collector has knowledge to the contrary. Because a cell phone number's area code is not necessarily where the consumer is located, however, it may be difficult for collectors to determine whether they are calling consumers during permissible hours. The Commission believes that the law should be changed to permit debt collectors, provided that they have obtained a consumer's prior express consent to contact him or her via his or her mobile phone, to call the mobile phone between 8:00 a.m. and 9:00 p.m. in the time zone of the consumer's home address, unless the collector knows or should know that calls during those hours are inconvenient for the consumer.

Many collectors and consumers now record debt collection calls. There was a consensus at the workshop that the authority to tape calls would benefit both collectors and consumers, because it would provide a record to resolve disputes as to what transpired during the calls. Some state laws, however, permit the taping of calls, including calls between debt collectors and consumers, only if both parties consent. The Commission concludes that permitting consumers across the nation to tape debt collection calls without the debt collectors' consent would likely benefit consumers by enabling them to document abusive, deceptive, and unfair collection tactics. However, to accomplish this, federal law would need to preempt state law in those states that require both parties to consent. We take no position as to whether these state laws should be preempted in this instance. This matter should be carefully considered by Congress after obtaining input from the states on the merits of this approach.

The debt collection legal system needs to be modernized to reflect new payment technologies as well as new communication technologies. The Commission believes that the use of newer electronic payments methods (*e.g.*, remotely created paper checks or electronic transmission through the ACH system) generally benefits debt collectors and consumers by making debt payments more convenient, less expensive, and faster. The use of these systems to pay debts, however, poses some risks to consumers as well. Collectors may be able to obtain unauthorized access to the accounts of consumers through the use of these new payment methods. To address these concerns, the FTC recommends that the law be changed to require that debt collectors obtain express verifiable authorization from consumers before accessing their accounts and that collectors retain records of the authorization for a reasonable period of time.

Finally, a number of issues arose in connection with the workshop related to technologies on which insufficient information is available to allow the Commission to develop specific policy recommendations at this time. These issues are identified in the report, and the FTC welcomes information that bears on them. Such information is and will continue to be critical as the agency strives to ensure that consumers remain protected as technology advances.

## Debt Collection Litigation and Arbitration

Few topics discussed at the workshop provoked more heated discussion than the impact of debt collection litigation and arbitration on consumers. The workshop record nevertheless does not contain adequate information for the Commission to fully assess the nature and extent of consumer concerns about debt collection litigation and arbitration, or the costs and benefits of possible changes to address those concerns. Moreover, because virtually all collection lawsuits are decided in state court through the application of state substantive and procedural law, the

FTC does not at this time recommend any changes to the FDCPA or other federal law to address state debt collection litigation issues.

Nevertheless, the Commission believes that it can play an important role in developing more and better information about possible solutions to issues raised about debt collection litigation and arbitration, including issues such as time-barred debt and garnishment of federally-exempt funds. The FTC therefore will convene regional roundtables this year to discuss problems in debt collection litigation and arbitration and possible solutions with state court judges, debt collectors, collection attorneys, consumer advocates, arbitration firms, and other interested stakeholders. The Commission also may undertake law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other laws that the Commission enforces.

## **FDCPA Rulemaking**

The workshop record reveals how the passage of time and changes in technology and markets have created problems and uncertainties in the debt collection legal system for creditors, debt collectors, consumers, and others. To address such concerns more quickly in the future, the FTC recommends that Congress give the Commission the authority to issue rules under the FDCPA. The Commission recommends that Congress empower the agency to issue rules to address problems that exist today as well as to issue rules as necessary to combat new issues and concerns as they arise.

## **FDCPA Enforcement**

The FDCPA was intended to be and should be primarily a self-enforcing statute. Thus, private action rather than government law enforcement should be the main means of promoting industry compliance with the law. For private actions to be an effective deterrent, however, the damages available to successful litigants must be sufficient. The amount of statutory damages available to private litigants under the FDCPA has not been changed in more than thirty years. The FTC therefore recommends that Congress update the FDCPA's statutory damage amounts to reflect inflation during that period and, in the future, increase these amounts periodically.

Debt collection enforcement is also a priority for the Commission's financial practices program. Since the FDCPA was enacted, the FTC has brought more than 60 enforcement actions alleging law violations related to debt collection. The Commission has modified its law enforcement approach in recent years to heighten deterrence. The agency has sought not only increased civil penalties for FDCPA violations, but also consumer redress and disgorgement as forms of equitable monetary relief under Section 13(b) of the FTC Act. In addition, in

appropriate cases, the Commission has obtained immediate injunctive relief in federal court, including asset freezes and the appointment of receivers. The FTC also has successfully alleged that both debt collection companies and the individuals responsible for the companies' practices are liable. The Commission will continue an aggressive law enforcement program that will increase compliance with the law.

## Future Directions

The Commission believes that the debt collection system and the legal framework that governs it both need modernizing. The Commission hopes that the workshop and this report will help produce changes in debt collection law that will better protect consumers from abuse, unfairness, and deception while fostering competition among collection industry participants. Another important result of the workshop is the dialogue it fostered among critical participants in the debt collection system: consumer advocates, industry leaders, and government regulators. Representatives from all of these sectors have urged the Commission to continue to serve as a catalyst for progress on debt collection issues, and it intends to do so. Toward that end, the agency welcomes empirical data or any other information about debt collection issues.



## I. INTRODUCTION

Consumer credit is a critical component of today's economy. Credit allows consumers to purchase goods and services for which they are unable or unwilling to pay the entire cost at the time of purchase. By extending credit, however, creditors take the risk that consumers will not repay all or part of the amount they owe. If consumers do not pay their debts, creditors may become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.

Debt collection activities, however, also may harm consumers. In 1977, Congress passed legislation to protect consumers from abusive, deceptive, and unfair debt collection practices and to protect ethical collectors from competitive disadvantage.<sup>1</sup> The result was the landmark Fair Debt Collection Practices Act ("FDCPA"),<sup>2</sup> which established specific standards of conduct for the collection industry. Consumer groups, labor groups, state and federal law enforcement officials, and collection industry trade associations supported the law's passage.<sup>3</sup> The Federal Trade Commission ("FTC" or "Commission") is the primary governmental enforcer of the FDCPA,<sup>4</sup> but consumers also may file their own actions against debt collectors who violate the statute.<sup>5</sup>

In October 2007, thirty years after the FDCPA was enacted, the FTC hosted a two-day workshop to explore changes in the collection industry and examine their impact on consumers and businesses.<sup>6</sup> In announcing the workshop, entitled "Collecting Consumer Debts: The Challenges of Change," the Commission solicited public comments on a number of topics.<sup>7</sup>

1. S. REP. NO. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697 [hereinafter Senate Report].
2. 15 U.S.C. §§ 1692-1692p. A copy of the statute is included as **Appendix A** and is available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27.pdf>.
3. Senate Report, *supra* note 1, at 2.
4. FDCPA § 814(a), 15 U.S.C. § 1692l(a). As discussed below, debt collectors also are governed by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), which more generally prohibits unfair and deceptive acts and practices in or affecting commerce.
5. FDCPA § 813, 15 U.S.C. § 1692k.
6. *See* FTC Workshop, *Collecting Consumer Debts: The Challenges of Change* (Oct. 10-11, 2007) [hereinafter FTC Workshop]. A webcast of the workshop, a transcript of the event, and other related materials are available at <http://www.ftc.gov/debtcollectionworkshop>. References to the workshop transcript identify the speaker, the day of the workshops (*i.e.*, first or second), and the transcript page.
7. The request for comments is available at <http://www.ftc.gov/bcp/workshops/debtcollection/descrip.pdf>.

Experts representing consumer groups, the collection industry, academia, and government agencies participated in the workshop<sup>8</sup> and submitted written comments.<sup>9</sup>

As reflected in the workshop record, consumers' use of credit and the debt collection industry have undergone significant changes since the FDCPA was enacted. In this report, the Commission summarizes those changes, describes information that workshop participants and commenters provided, lays out principles to guide future debt collection policymaking, and suggests possible options to effectuate those principles.

Part II of this report presents a brief overview of the debt collection process; Part III discusses the legal framework in which debt collection takes place; and Part IV addresses the role of the Federal Trade Commission. Part V discusses changes in the debt collection industry and practices since the FDCPA was enacted. Part VI contains the Commission's recommendations for modernizing the debt collection system and legal framework. Part VII is a brief conclusion.

## II. THE DEBT COLLECTION PROCESS

The debt collection process commences when a company issuing credit to a consumer (*e.g.*, a credit card issuer or telecommunications company) determines that the account is delinquent and that the consumer must be contacted about the debt. In an effort to obtain payment, many credit issuers have their own collection departments contact delinquent consumers via telephone calls, collection letters (often referred to as “dunning letters” or “dunning notices”), and other communication methods.<sup>10</sup>

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8. The workshop agenda is available at <http://www.ftc.gov/bcp/workshops/debtcollection/agenda.pdf>.

9. The comments are available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/index.shtm>. A list of individuals and organizations who submitted comments is provided in **Appendix C**. Throughout this report, citations to comments identify the commenter's name, followed by the term “Comment” and the page of the comment being referenced.

10. Robert M. Hunt, *Overview of the Collections Industry* at slide 14, 2007 Workshop [hereinafter Hunt Presentation]. *See also* Robert M. Hunt Comment at 13 n.9 (citing Bureau of Labor Statistics data showing that issuers of credit cards alone employed nearly 18,000 collectors in 2004, which constituted 4% of the 450,000 people in the United States who were employed as bill and account collectors). Some creditors hire outside companies, often referred to as “first-party collectors,” to collect on accounts that are between 30 and 90 days past due but not yet charged off as losses by the creditor. *See KAULKIN GINSBERG, THE KAULKIN REPORT: THE FUTURE OF RECEIVABLES MANAGEMENT* 62 (7th ed. 2007).

If a credit issuer's in-house collectors are not successful in collecting during a limited period (usually between six months and a year), the issuer will "charge off the account."<sup>11</sup> At this point, the issuer typically will place the account with a third-party collector – either a contingency collection agency ("contingency agency") or a collection law firm. If the credit issuer places the account with a contingency agency, the credit issuer and agency will enter into a contract under which the agency will have a specific period (ranging from several weeks to several years) during which to collect.<sup>12</sup> If the contingency agency is successful in collecting on the debt, it will be paid a portion of the amount collected, with the average contingent fee rate in 2005 reported to be 28%.<sup>13</sup>

If the account is placed with a collection law firm, the firm may file suit against the consumer to collect. Collection law firms generally are paid either on an hourly basis or on a contingent fee basis.<sup>14</sup> Many of these firms also engage in collection practices that mirror those of contingency agencies, such as placing telephone calls and sending collection letters.<sup>15</sup> If a collection law firm is successful in collecting, it generally is paid a portion of the amount collected.<sup>16</sup> Rather than being paid contingency fees or hourly fees, some collection law firms also purchase debts and derive revenue from collections through judicial or non-judicial processes.<sup>17</sup>

If a creditor sells an account to a debt buyer, the account usually is sold as part of a large portfolio. Once a debt buyer has acquired a portfolio, it does one of the following: (1) retains the entire portfolio and collects on it; (2) retains and collects on part of the portfolio and resells the remaining accounts; or (3) resells the entire portfolio.<sup>18</sup> To the extent that a debt buyer retains all or part of a portfolio, it may (similar to the creditor that originally owned the debt) collect using its own collectors or place an account with a contingency agency or collection law firm.

11. KAULKIN GINSBERG, *supra* note 10, at 37; Debt Marketplace, Inc. Comment at 2. A credit issuer "charging off an account" means that the account is no longer listed as an account receivable on its books, and its value is charged against the credit issuer's reserves for losses. *Id.* at 3. See also NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION 14-15 (6th ed. 2008) [hereinafter NCLC TREATISE] ("Collection efforts continue on many charged-off debts for a substantial period of time after it is charged off. Any payment on the charged-off debt is then treated as income—a recovery on a bad debt—on the debt collector's books." (citing Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36,903 (June 12, 2000))).

12. KAULKIN GINSBERG, *supra* note 10, at 37.

13. ACA International (ACA) noted that in 1965 its members reported an average contingent rate of 40%, but the rate had dropped to 28% by 2005. See ACA Comment (June 6, 2007) at 70.

14. KAULKIN GINSBERG, *supra* note 10, at 73-74.

15. *Id.*

16. *Id.*

17. *Id.* at 74.

18. *Id.* at 49.

Many accounts are purchased and resold by a number of different debt buyers over a period of years before all collection efforts finally cease.

Debt buyers generally pay 5% or less of the amount owed on delinquent accounts they purchase.<sup>19</sup> The amount they pay varies based on a number of factors, key among them being the age of the debt and the number of collectors who have already attempted to collect it. The longer an account has been delinquent and the greater the number of collectors who have already attempted to collect on it, the less likely it is that the consumer will pay the debt. As the likelihood of payment drops, so does the amount debt buyers are willing to pay for the debt. Ultimately, the process of selling and collecting on an account continues until either the debt is paid or the cost of collecting on the debt exceeds its expected value.

### III. LEGAL FRAMEWORK OF DEBT COLLECTION

Debt collectors are subject to regulation under a number of federal and state statutes, some specific to debt collection practices, and others with general application. In addition to the FDCPA and state and local debt collection laws, debt collectors must comply with Section 5 of the Federal Trade Commission Act,<sup>20</sup> the Fair Credit Reporting Act,<sup>21</sup> the Gramm-Leach-Bliley Act,<sup>22</sup> and numerous other statutes.<sup>23</sup>

#### A. Fair Debt Collection Practices Act

The FDCPA is the heart of the federal regulatory scheme for debt collectors. Congress enacted the statute “to eliminate abusive debt collection practices by debt collectors, to insure that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”<sup>24</sup> It generally prohibits deceptive, unfair, and abusive debt collection practices, including “obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s

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19. *Id.* at 50 (estimating that debt buyers paid roughly 5 cents on the dollar in 2006 for charged-off credit card accounts, with the price varying based on different types and ages of portfolios); Hunt Presentation, *supra* note 10, & Tr. I at 45 (“Most of the debt is sold for something like 3 cents to 5 cents on the dollar.”). *But see* Gary E. Wood, Tr. I at 74 (debt buyers “can’t really buy much for a nickel anymore; it’s more expensive”).

20. 15 U.S.C. § 45(a).

21. 15 U.S.C. §§ 1681-1681x.

22. 15 U.S.C. §§ 6801-6809 (imposing requirements on financial institutions with respect to annual privacy notices, procedures for providing customers an opt-out from having certain information shared with nonaffiliated third parties, and safeguarding customers’ personally identifiable information).

23. *See, e.g.*, ACA Comment (June 6, 2007) at 5-6, 76; DBA International (DBA) Comment (June 2, 2007) at 4-5.

24. FDCPA § 802(e), 15 U.S.C. § 1692(e).

personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.”<sup>25</sup>

The FDCPA applies to third-party “debt collectors,” a term that includes contingency agencies, collection law firms, and debt buyers, but generally does not include creditors’ in-house collectors.<sup>26</sup> Congress’s rationale for applying the statute only to third-party collectors was that, “[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.”<sup>27</sup>

The Federal Trade Commission has primary enforcement authority under the FDCPA. The statute also tasks seven other federal agencies with FDCPA enforcement responsibility for entities within their jurisdiction.<sup>28</sup> Few of the entities these other agencies regulate are “debt collectors” under the FDCPA.

If a Commission investigation reveals FDCPA violations, the agency, through its own attorneys, can file suit in federal court seeking preliminary and permanent injunctive relief that would prohibit the collector from continuing to violate the Act, award restitution to consumers, order the disgorgement of ill-gotten gains, and impose other ancillary relief under Section 13(b) of the FTC Act.<sup>29</sup> Alternatively, the Commission may request that the Department of Justice file suit in federal court on behalf of the FTC, seeking a civil penalty and injunctive relief.

25. Senate Report, *supra* note 1, at 2.

26. FDCPA § 803(6)(A), 15 U.S.C. § 1692a(6)(A). A creditor, however, brings itself within the FDCPA’s coverage if it uses a “name other than his own which would indicate that a third person is collecting or attempting to collect such debts.” FDCPA § 803(6), 15 U.S.C. § 1692a(6).

27. Senate Report, *supra* note 1, at 2. Consistent with this reasoning, the Commission receives significantly fewer complaints per collector for creditors relative to third-party collectors. Nevertheless, complaints about creditor collection practices remain a significant concern that the FTC addresses through law enforcement actions under Section 5 of the FTC Act. *See, e.g., In the Matter of Applied Card Sys., Inc.*, FTC Docket No. C-4125 (Oct. 6, 2004); *FTC v. Citigroup Inc.*, No. 010CV-0606 (N.D. Ga. Mar. 6, 2001). At the workshop, neither consumer advocates nor industry representatives recommended that the FDCPA be generally expanded to cover creditors. Thus, there is no basis in the workshop record for the Commission to assess the costs and benefits of such an expansion of FDCPA coverage, including how such an expansion would affect entities like national banks that are subject to regulation by other federal agencies.

28. FDCPA § 814(b), 15 U.S.C. § 1692l(b). 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.

29. FTC Act § 13(b), 15 U.S.C. § 53(b), authorizes the Commission to sue in federal district court to obtain a preliminary injunction against entities that the Commission has reason to believe are violating any law enforced by the Commission. The court may grant the preliminary injunction or a temporary restraining order if the Commission shows that, weighing the equities and considering the Commission’s likelihood of ultimate success, the action would be in the public interest. Section 13(b) also permits federal district courts to issue a permanent injunction if the Commission seeks that remedy. FTC Act § 13(b)(2), 15 U.S.C. § 53(b)(2).

The FDCPA also gives consumers a private right of action. Consumers can file suit individually or as members of a class.<sup>30</sup> Consumers may be awarded any actual damages they sustain.<sup>31</sup> In addition, individual consumers may receive “statutory” damages of up to \$1,000, and class action plaintiffs may receive a statutory recovery “not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector.”<sup>32</sup> Courts further may require debt collectors to pay consumers’ court costs and attorney fees.<sup>33</sup>

## B. Section 5 of the FTC Act

Certain practices that violate the FDCPA also violate Section 5 of the FTC Act.<sup>34</sup> Thus, the Commission uses the FTC Act to halt unfair or deceptive debt collection practices by creditors and other entities not covered by the FDCPA.<sup>35</sup> In addition, in its enforcement actions against debt collectors covered by the FDCPA,<sup>36</sup> the Commission often alleges that the same practices violate both Section 5 and one or more FDCPA provisions.<sup>37</sup>

## C. State Debt Collection Laws

Although states cannot enforce the FDCPA, most states have their own debt collection laws. State debt collection regulatory schemes vary, but common approaches include statutes that: (1) set licensing standards for collection agencies; (2) proscribe specific types of misconduct and provide a private right of action for injured consumers; and (3) provide criminal penalties for certain misconduct, such as simulating legal process.<sup>38</sup> The FDCPA does not preempt such state

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30. See FDCPA § 813, 15 U.S.C. § 1692k.

31. FDCPA § 813(a)(1), 15 U.S.C. § 1692k(a)(1).

32. FDCPA § 813(a)(2), 15 U.S.C. § 1692k(a)(2).

33. FDCPA § 813(a)(3), 15 U.S.C. § 1692k(a)(3).

34. 15 U.S.C. § 45(a). To augment this general Section 5 authority, Congress passed the FDCPA to confer on the FTC the specific authority to challenge unfair, deceptive, and abusive acts and practices of debt collectors.

35. See, e.g., *In the Matter of Applied Card Sys., Inc.*, FTC Docket No. C-4125 (Oct. 6, 2004); *FTC v. Citigroup Inc.*, No. 010CV-0606 (N.D. Ga. Mar. 6, 2001).

36. In a settlement announced in November 2008, for example, the Commission alleged that the debt collector frequently misrepresented that consumers’ wages would be garnished if they did not pay. The FTC complaint alleged that these misrepresentations violated both Section 5 of the FTC Act and Section 807(4) of the FDCPA. *United States v. Acad. Collection Serv., Inc.*, No. 2:08-cv-01576-KJD-GWF (D. Nev. Nov. 14, 2008). See also *FTC v. Rawlins & Rivera, Inc.*, No. 6:07-cv-146 (M.D. Fla. Jan. 31, 2007); *FTC v. Capital Acquisitions & Mgmt. Corp.*, No. 04C7781 (N.D. Ill. Dec. 2, 2004).

37. If the Commission is able to prove a violation of one statute but not the other, “double pleading” allows the court to find a violation of at least one law. In the more usual circumstance where the Commission is able to prove a violation of both Section 5 and the FDCPA, double pleading gives the Commission the flexibility to seek relief for consumers under both laws.

38. NCLC TREATISE, *supra* note 11, at 731-41. Some state debt collection statutes extend coverage to creditors collecting their own debts. *Id.*

debt collection laws unless they are inconsistent with the FDCPA, and then only to the extent of the inconsistency.<sup>39</sup> A state statute is not inconsistent with the FDCPA if it affords consumers greater protection than the FDCPA.<sup>40</sup>

## D. Privacy and Data Security Laws

The Fair Credit Reporting Act (“FCRA”) imposes data privacy and accuracy standards on credit reporting agencies<sup>41</sup> and companies, including debt collectors, that use consumer reports or furnish information to them. The FDCPA and the FCRA are closely related in that debt collectors frequently report delinquent account information to credit reporting agencies, and delinquent accounts listed in credit reports are likely to be subject to debt collection.

Debt collectors and other entities that furnish information to credit reporting agencies (“furnishers”) violate the FCRA if they report information they know or have reasonable cause to believe is inaccurate.<sup>42</sup> The FCRA also provides procedures for consumers to dispute the completeness or accuracy of information, including delinquent accounts, appearing on their credit reports. It requires that credit reporting agencies and furnishers investigate disputes addressed to credit reporting agencies.<sup>43</sup> In addition, under a proposed rule, furnishers would be required to investigate disputes addressed directly to them.<sup>44</sup> The Act further imposes special rules for the reporting of medical debt,<sup>45</sup> as well as rules for reporting the correct date of delinquency. Credit reporting agencies use the date of delinquency to determine when the seven-year period for reporting an account as delinquent has expired.<sup>46</sup>

In 2003, the FCRA was amended to address, among other things, identity theft. In particular, the FCRA prohibits the sale of a debt if a credit reporting agency notifies the owner

39. FDCPA § 816, 15 U.S.C. § 1692n.

40. *Id.*

41. The FCRA uses the term “consumer reporting agency” when referring to credit reporting agencies. FCRA § 603(f), 15 U.S.C. § 1681a(f).

42. FCRA § 623(a)(1)(A), 15 U.S.C. § 1681s-2(a)(1)(A).

43. FCRA § 611(a), 15 U.S.C. § 1681i(a); FCRA § 623(b)(1), 15 U.S.C. § 1681s-2(b)(1).

44. 72 Fed. Reg. 70,944, 70,983-84 (Dec. 13, 2007) (to be codified at 16 C.F.R. § 660.4) (“FCRA Direct Dispute Rule”). This proposed rule was published pursuant to a provision added to the FCRA in 2003, FCRA § 623(a)(8), 15 U.S.C. § 1681s-2(a)(8), and the final rule is expected to be issued in the near future. Another proposed rule would require information furnishers, including debt collectors, to establish written policies and procedures regarding the accuracy and integrity of information they supply to credit reporting agencies. 72 Fed. Reg. 70,944, 70,983 (to be codified at 16 C.F.R. § 660.3) (implementing FCRA § 623(e), 15 U.S.C. § 1681s-2(e)) (“FCRA Accuracy and Integrity Rule”).

45. FCRA § 623(a)(9), 15 U.S.C. § 1681s-2(a)(9). *See also* FCRA § 605(a)(6), 15 U.S.C. § 1681c(a)(6).

46. FCRA § 623(a)(5), 15 U.S.C. § 1681s-2(a)(5).

of the debt that it relates to identity theft.<sup>47</sup> The amended FCRA also requires that, if a debt collector acting on behalf of a creditor is notified that the debt may be fraudulent or the result of identity theft, the collector must forward that information to the creditor.<sup>48</sup>

In addition to the FCRA, other statutes may impose privacy requirements on debt collectors. The Gramm-Leach-Bliley Act (“GLBA”),<sup>49</sup> for instance, governs the collection, sharing, and safeguarding of nonpublic personal information by “financial institutions,”<sup>50</sup> a term that includes debt collectors.<sup>51</sup> GLBA also requires debt collectors to implement appropriate safeguards to protect the security and integrity of “customer” information.<sup>52</sup>

The HIPAA Privacy Rule,<sup>53</sup> which implements the Health Insurance Portability and Accountability Act of 1996,<sup>54</sup> likewise regulates the privacy and sharing of personal medical information. Debt collectors who receive or create “protected health information,” for example while attempting to collect medical debts, may be covered under the Privacy Rule.<sup>55</sup> If so, they are restricted from sharing such information without patient consent. They also must comply with certain requirements under the Security Rule implementing HIPAA.<sup>56</sup>

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47. FCRA § 615(f), 15 U.S.C. § 1681m(f).

48. FCRA § 615(g), 15 U.S.C. § 1681m(g).

49. 15 U.S.C. §§ 6801-6809.

50. 15 U.S.C. § 6809(3).

51. 16 C.F.R. § 313.1(b). *See generally*, Federal Trade Commission, *How To Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act: A Guide for Small Business*, available at <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus67.shtm>. *See also* Federal Trade Commission, *Frequently Asked Questions for the Privacy Regulation*, available at <http://www.ftc.gov/privacy/glbact/glb-faq.htm>.

52. The FTC’s Safeguards Rule implements GLBA’s security requirements for entities under the FTC’s jurisdiction. *See* 16 C.F.R. pt. 314. The Safeguards Rule applies only to information about a consumer who is a “customer” of a financial institution, as that term is defined in the GLB Privacy Rule. Therefore, companies that are subject to the Safeguards Rule are either (1) financial institutions such as debt buyers that have “customer relationships” with consumers, or (2) financial institutions such as contingency debt collectors who receive customer information from another financial institution. *See generally* Federal Trade Commission, *Financial Institutions and Customer Information: Complying with the Safeguards Rule*, available at <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus54.shtm>.

53. Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”), 45 C.F.R. §§ 160 & 164, subpts. A & E.

54. 42 U.S.C. § 300gg-42.

55. The term “protected health information” under HIPAA “includes any *individually identifiable* health information. *Identifiable* refers not only to data that is explicitly linked to a particular individual (that’s *identified* information). It also includes health information with data items which reasonably could be expected to allow individual identification.” UNIVERSITY OF MIAMI, MILLER SCHOOL OF MEDICINE, PRIVACY/ DATA PROTECTION PROJECT, available at [http://privacy.med.miami.edu/glossary/xd\\_protected\\_health\\_info.htm](http://privacy.med.miami.edu/glossary/xd_protected_health_info.htm) (last visited Dec. 11, 2008) (emphasis in original).

56. 45 C.F.R. §§ 160 & 164, subpts. A & C.

Section 5 of the FTC Act may also impose duties on debt collectors relating to the security of consumer information.<sup>57</sup> It is unfair for a debt collector to fail to take reasonable measures to protect sensitive consumer information if the failure causes, or is likely to cause, substantial injury to consumers that is not offset by benefits to consumers or competition and that consumers cannot reasonably avoid.<sup>58</sup> Similarly, it is deceptive for a debt collector to promise to keep consumer data secure or to take specified measures to keep it secure, but then fail to do so.<sup>59</sup>

#### IV. THE ROLE OF THE FEDERAL TRADE COMMISSION

In implementing and enforcing the FDCPA, the Commission (1) investigates and brings law enforcement actions; (2) educates consumers and businesses; and (3) monitors the marketplace and develops policy proposals. Law enforcement is of paramount importance in protecting the rights of consumers. Since the FDCPA was enacted, the FTC has brought more than 60 law enforcement actions alleging illegal debt collection practices.<sup>60</sup> In most of these actions, third-party debt collectors were charged with violating the FDCPA. The Commission, however, also has challenged the debt collection practices of creditors and other entities under Section 5 of the FTC Act. Defendants in FTC actions challenging debt collection practices as unlawful have paid tens of millions of dollars in disgorgement of ill-gotten gains, consumer redress, and civil penalties.

In addition to investigating and bringing enforcement actions, the FTC educates consumers and businesses about the FDCPA and other debt collection-related laws the agency enforces. The Commission informs consumers of their rights under the FDCPA and how to exercise them. The FTC also educates consumers about the requirements that the FDCPA places on debt collectors. The FTC uses written materials, its website, one-on-one guidance, and public appearances to educate consumers. The Commission has published several brochures that explain the FDCPA

57. See generally Federal Trade Commission, *Protecting Personal Information: A Guide for Business*, available at <http://www.ftc.gov/infosecurity>.

58. The Commission has alleged that a number of companies violated the FTC Act by engaging in unfair security practices. See, e.g., *In the Matter of TJX Cos.*, FTC Docket No. C-4227 (July 29, 2008); *In the Matter of Reed Elsevier Inc. and Seisint, Inc.*, FTC Docket No. C-4226 (July 29, 2008); *United States v. ChoicePoint, Inc.*, No. 106-CV-0198 (N.D. Ga.) (settlement entered on Feb. 15, 2006); *In the Matter of CardSystems Solutions, Inc.*, FTC Docket No. C-4168 (Sept. 5, 2006); *In the Matter of DSW, Inc.*, FTC Docket No. C-4157 (March 7, 2006); *In the Matter of BJ's Wholesale Club, Inc.*, FTC Docket No. C-4148 (Sept. 20, 2005).

59. The FTC has alleged that a number of companies violated the FTC Act by making deceptive security claims. See, e.g., *In the Matter of Guidance Software, Inc.*, Docket No. C-4187 (April 23, 2007); *In the Matter of Nations Title Agency, Inc.*, FTC Docket No. C-4161 (June 19, 2006); *United States v. ChoicePoint, Inc.*, No. 106-CV-0198 (N.D. Ga.) (settlement entered Feb. 15, 2006); *In the Matter of Superior Mortgage Corp.*, FTC Docket No. C-4153 (Dec. 14, 2005); *In the Matter of Petco Animal Supplies, Inc.*, FTC Docket No. C-4133 (March 4, 2005).

60. For a list of the Commission's cases alleging illegal debt collection practices, see **Appendix B**.

and other debt collection topics in consumer-friendly terms.<sup>61</sup> Tens of thousands of consumers view these brochures every year, either in paper form or electronically on the FTC's web site.

Consumer contact representatives in the FTC's Consumer Response Center provide one-to-one guidance to consumers throughout the country who call them on a toll-free number. A large percentage of the calls to the Center are from consumers complaining about debt collectors. More generally, the Commission educates the public through interviews on local talk shows and presentations to consumer groups.

The Commission also provides guidance to creditors and debt collectors to improve industry compliance with the FDCPA and other laws. The FTC issues formal advisory opinions addressing particularly significant debt collection issues.<sup>62</sup> The Commission staff also delivers speeches and participates in panel discussions at conferences each year. The FTC staff further responds to telephone calls from collection industry members and consumer groups seeking guidance.

Finally, the Commission develops policy proposals on debt collection issues. Each year the Commission submits a report to Congress addressing the agency's efforts to enforce and implement the FDCPA.<sup>63</sup> These annual reports describe the number and types of consumer complaints the Commission receives about debt collectors, summarize recent FTC enforcement actions alleging illegal collection practices, and outline consumer and industry education initiatives the agency has undertaken. If appropriate, these annual reports also include recommendations from the Commission as to changes in debt collection laws that would be in the public interest. The FTC is submitting its most recent FDCPA Annual Report to Congress in February 2009, in conjunction with the release of this report.<sup>64</sup>

The FTC's two-day 2007 debt collection workshop and comment proceedings are part of the FTC's policy development process. So, too, is this report summarizing the workshop findings and making policy recommendations for the future.

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61. The brochures are available at <http://www.ftc.gov/bcp/menus/consumer/credit/debt.shtm>.

62. *See, e.g.*, FTC Adv. Op. to USFN (Mar. 19, 2008), *available at* <http://www.ftc.gov/os/2008/03/P084801fdcpa.pdf>; FTC Adv. Op. to ACA International (Oct. 5, 2007), *available at* <http://www.ftc.gov/os/closings/staff/P064803fairdebt.pdf>.

63. The FDCPA mandates that the FTC submit these annual reports. FDCPA § 815, 15 U.S.C. § 1692m.

64. FEDERAL TRADE COMMISSION ANNUAL REPORT 2009: FAIR DEBT COLLECTION PRACTICES ACT [hereinafter 2009 FTC ANNUAL REPORT], *available at* <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf>. The Commission's previous annual report, FEDERAL TRADE COMMISSION ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT [hereinafter 2008 FTC ANNUAL REPORT], is *available at* <http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf>.

## V. CHANGES IN DEBT COLLECTION INDUSTRY AND PRACTICES

### A. Increased Consumer Debt and Delinquency Levels

Since the enactment of the FDCPA, consumer debt has risen dramatically.<sup>65</sup> More and more Americans incur greater levels of debt, much of it attributable to mortgage debt and consumer debt.<sup>66</sup> Between 1985 and 2007, outstanding household debt in the United States increased from approximately 60% of annual disposable income to more than 125%, a jump due mostly to increased mortgage debt.<sup>67</sup> One workshop presenter noted that in the mid-1980s, it would have taken the average household seven months of after-tax income to pay off its household debt.<sup>68</sup> As of 2007, however, an average household would have needed fifteen months of after-tax income to pay off its household debt.<sup>69</sup> While household-debt-to-income ratios of consumers have nearly doubled,<sup>70</sup> lower interest rates and longer repayment terms have enabled many consumers to remain current on their debts.<sup>71</sup>

The nature of consumer debt has also shifted. Revolving consumer debt (which includes mostly credit card debt) increased at a compound annual growth rate of 5% between 1997 and

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65. Debt levels have risen more in some groups than in others. For example, the debt level among seniors is rising more rapidly than among other groups in the population. National Consumer Law Center & the National Association of Consumer Advocates (NCLC-NACA) Comment at 14. Credit card debt reportedly increased by 47% for those between age 55 and 64 from 1992 through 2001, but rose by 89% for those age 65 and over during the same period. Heather C. McGhee & Tamara Draut, *Retiring in the Red: The Growth of Debt Among Older Americans*, (2004), available at [http://archive.demos.org/pubs/retiring\\_2ed.pdf](http://archive.demos.org/pubs/retiring_2ed.pdf). For those between 65 and 69 years old – presumably, the newly-retired or nearly-retired – credit card debt was reported to have increased 217% during those years. *Id.* at 3.
66. See, e.g., Bill Hampel, *Overview of Household Debt Exposure* at slide 6, 2007 Workshop [hereinafter Hampel Presentation]; Hampel, Tr. I at 21. See also KAULKIN GINSBERG, *supra* note 10, at 5-6. In Hampel’s data, total “household” debt consists of mortgage debt plus “consumer” debt (e.g., credit card debt, installment loans, etc.).
67. Hampel Presentation, *supra* note 66, at slide 3. The ratio of household indebtedness to annual disposable income peaked at 126% in the third quarter of 2007. Since then it has backed off slightly, to stand at 123% as of the third quarter of 2008, the latest available data. This remains well above the levels typical of the past two decades. Bill Hampel (FTC correspondence on file with Federal Trade Commission, Division of Financial Practices); Federal Reserve Flow of Funds, Table L.100, available at <http://www.federalreserve.gov/releases/z1/Current/z1r-4.pdf>; Federal Reserve Flow of Funds, Table F.10, available at <http://www.federalreserve.gov/releases/z1/Current/z1r-3.pdf>.
68. Hampel Presentation, *supra* note 66, at slide 3; Hampel, Tr. I at 21.
69. Hampel Presentation, *supra* note 66, at slides 4-5, 13; Hampel, Tr. I at 22. Most of the increase comes from the size of a household’s mortgage debt rather than consumer debt.
70. The percentage of disposable household income needed to make required payment on debts, or the “debt service ratio,” also increased over the decade between 1997 and 2007, and prominent industry analysts predict that the debt service ratio will continue to rise. See KAULKIN GINSBERG, *supra* note 10, at 8-9.
71. Hampel Presentation, *supra* note 66, at slide 4; Hampel, Tr. I at 24-25.

2007.<sup>72</sup> During the same period, non-revolving consumer debt (which includes secured and unsecured loans for education and other personal property, but does not include home mortgages) increased at the much higher compound annual growth rate of 7.4%.<sup>73</sup> Mortgage debt (which includes consumer mortgage loans, home equity loans, and home equity lines of credit) increased at a compound annual growth rate of 6.1% between 2004 and 2007.<sup>74</sup>

The rate of delinquency for consumer accounts remained relatively stable during the decade between 1997 and 2007.<sup>75</sup> However, with the recent economic downturn, there has been an increase in consumer delinquency levels. For example, in January 2009, late payments on U.S. credit cards topped record levels, and defaults rose sharply to just below all-time highs.<sup>76</sup> Charge-offs on prime, general-purpose credit cards reached 7.5% in December 2008, 40% higher than in December 2007. Charge-offs on retail store credit cards were at 10.51% in December 2008, up 44% from a year before.<sup>77</sup> Similarly, the percentage of borrowers 60 or more days past due on their mortgage loans increased for the seventh straight quarter in the third quarter of 2008, reaching a national average of 3.96%.<sup>78</sup> That figure is approximately 54% higher than the figure for the third quarter of 2007.<sup>79</sup>

## B. Debt Collection Industry Overview

Debt collection in the United States has grown into a multi-billion dollar industry that employs thousands of collectors, domestically and abroad. The five types of debt that credit issuers historically have most often charged off and placed with collectors are credit card, telecommunication (*e.g.*, wireless telephone), electric utility, healthcare, and government (*e.g.*, taxes) debt.<sup>80</sup> Similarly, ACA International's *Top Collection Markets Survey* for 2006 found new debt collection business most prominent in the hospital, credit card, and telecommunications market sectors.<sup>81</sup>

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72. As of June 2007, American consumers held an average of almost \$3,000 in credit card debt. KAULKIN GINSBERG, *supra* note 10, at 7.

73. *See id.* at 6-7.

74. *See id.* at 8.

75. *See* ACA Comment (June 6, 2007) at 29-31.

76. Al Yoon, *US Credit Card Delinquencies at Record Highs – Fitch*, REUTERS, Feb. 4, 2009, available at <http://www.reuters.com/articlePrint?articleId=USN0428871920090204>.

77. *Id.*

78. Press Release, TransUnion, Mortgage Loan Delinquency Rates Rise for Seventh Straight Quarter (Dec. 8, 2008), available at <http://newsroom.transunion.com/index.php?s=43&item=502>.

79. *Id.*

80. *See* KAULKIN GINSBERG, *supra* note 10, at 11.

81. *See* ACA INTERNATIONAL, TOP COLLECTION MARKETS SURVEY (2007), at 7.

Since the early 1970s, the third-party collection industry has experienced a greater than sixfold increase in inflation-adjusted revenue and a greater than fourfold increase in collection industry jobs.<sup>82</sup> One workshop presenter reported that third-party collection agencies, including contingency agencies, collection law firms, and debt buyers, employed over 152,000 persons in 2007.<sup>83</sup> Some experts also predict substantial future growth for the debt collection industry. For example, industry analysts estimate that revenues from the United States contingency collection market will increase from \$10 billion in 2006<sup>84</sup> to \$11.6 billion in 2011.<sup>85</sup>

The debt collection industry also has experienced significant consolidation. In 1987, the four largest debt collectors were responsible for 11.4% of total collection industry revenues, and the twenty largest collectors generated 24.7%.<sup>86</sup> By 2002, the top four debt collectors garnered 19.2% of total collection industry revenues, and the twenty largest took in 35.2%.<sup>87</sup> As discussed in the next section, technological innovations appear to have supported the trend toward larger collection agencies. Another major source of consolidation seems to have been mergers and acquisitions. As an industry analyst described it, the debt collection industry “has been defined at least in part in terms of high-profile mergers and acquisitions.”<sup>88</sup>

The most significant change in the debt collection business in recent years has been the advent and growth of debt buying. Some companies simply buy debt and seek to recover on it. In addition to these companies, debt buyers also include collection law firms, contingency collection agencies, and investors who purchase and resell portfolios of delinquent debt.<sup>89</sup> Debt buyers purchase charged-off debt from credit card issuers, retail merchants, telecommunications providers, utilities, and other credit providers.<sup>90</sup> Purchased debt typically is classified by its age and the number of debt collectors who have attempted to collect it before it was sold.<sup>91</sup> Credit card debt constitutes about 90% of all debt sold today.<sup>92</sup> Debt buying increased substantially

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82. Hunt Presentation, *supra* note 10, at slide 3; Hunt, Tr. I at 38.

83. *Id.*

84. KAULKIN GINSBERG, *supra* note 10, at 37.

85. *See id.* at 47.

86. Hunt Presentation, *supra* note 10, at slide 9; Hunt, Tr. I at 45.

87. *Id.*

88. KAULKIN GINSBERG, *supra* note 10, at 96.

89. *See id.* at 48.

90. DBA Comment (June 2, 2007) at 2.

91. KAULKIN GINSBERG, *supra* note 10, at 48.

92. *See* ACA Comment (June 6, 2007) at 40.

over the decade between 1997 and 2007, and industry analysts estimate that debt buying will grow at an 11% rate over the next five years and reach annual revenues of \$6.2 billion by 2011.<sup>93</sup>

Like debt buyers, debt collection law firms recently have experienced significant growth and change.<sup>94</sup> Debt collection attorneys collect on all types of consumer debt, including credit card accounts, healthcare debts, mortgages, and auto loans.<sup>95</sup> The National Association of Retail Collection Attorneys (“NARCA”) estimates that owners of debt refer 5% of delinquent accounts to collection law firms.<sup>96</sup> Collection law firms file actions to collect on debts from original creditors, collection agencies, and debt buyers.<sup>97</sup> In addition, some collection law firms compete with contingency agencies in collecting on debt or with debt buyers in purchasing debt for collection.<sup>98</sup> Industry analysts estimate that collection law firms in the United States had revenues of \$1.17 billion in 2006,<sup>99</sup> and that this figure will grow at a rate of 16% a year to \$2.3 billion by 2011.<sup>100</sup>

### C. Evolution in Debt Collection Methods: Communication Technologies

New technologies have fundamentally transformed the debt collection industry, broadening the scope of operations from local and regional to national, and sometimes even to international.<sup>101</sup> Technological innovation has facilitated the creation of very large, full-service debt collection operations, while simultaneously enabling smaller, niche-focused collection

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93. *See id.* at 61.

94. *See id.* at 73.

95. National Association of Retail Collection Attorneys (NARCA) Comment (June 5, 2007) at 2.

96. *Id.* at 4.

97. KAULKIN GINSBERG, *supra* note 10, at 73.

98. *Id.*

99. *Id.* at 75.

100. *Id.* at 86.

101. *See* ACA Comment (June 6, 2007) at 37 (noting that technology deployed over the past decade has resulted in more first-party collection being moved offshore for both efficiency and cost-effectiveness); *id.* at 65 (stating that “[t]echnology has deconstructed natural geographic barriers in the collection industry”). The Commission has encountered these new international business arrangements in its law enforcement work. In 2007, for example, the Commission filed suit for violations of the FDCPA and the FTC Act against a California company that set up a debt collection call center in Mexico and used Voice over Internet Protocol (“VoIP”) technology to contact consumers in the United States. *See FTC v. Tono Records*, Case No. CV-07-3786 JFW (Rcx) (C.D. Calif. June 12, 2007).

operations to thrive.<sup>102</sup> Technological innovations also have given debt collectors more efficient and effective methods for tracking and contacting consumers.<sup>103</sup>

In 1977, when the FDCPA was enacted, debt collection operations were typically local or regional.<sup>104</sup> One workshop participant observed that the debt collection business thirty years ago was “based on paper transactions . . . [r]ecipe cards, file boxes being handed from creditor to debt collector, a very informal, low-tech operation.”<sup>105</sup> The high cost of long-distance telephone collection calls and a lack of options for affordable production and delivery of printed collection materials limited the operations of collectors. Consequently, debt collectors contacted consumers primarily by telephone calls placed to landline telephones or letters sent by United States mail.<sup>106</sup> These contacts were time-consuming: collectors spent time not only talking with consumers, but also dialing the telephone and waiting for the consumer to answer; letters were typically typed one by one.

In the years since the FDCPA was enacted, the adoption of computerized word processing and desktop publishing has made it possible for debt collectors to send customized mass-mailings with ease.<sup>107</sup> Landline telephones have been supplemented, and, in some cases, supplanted, by alternative communication technologies. Mobile phones, email, pagers, and facsimile machines provide a host of options for debt collectors to reach consumers, both at home and on the go.<sup>108</sup> Answering machines and voicemail systems make it possible for debt collectors to communicate with consumers who are unavailable to speak on the phone.<sup>109</sup>

102. See ACA Comment (June 6, 2007) at 27-28 (creditors hire third-party debt collectors “to take advantage of the expertise, technological advantages, and other efficiencies conferred by debt collectors which, in turn, permits credit grantors to downwardly adjust the minimum amount of debt deemed recoverable”); *id.* at 7-8 (“the majority of ACA members, however, are small businesses,” noting that 2500 of the organization’s approximately 3500 collection company members employ fewer than twenty people); Rozanne Andersen, Tr. I at 62 (noting that technology has “created some parity between those smaller collection agencies . . . and the larger collection agencies, because through the use of predictive dialers and auto dialers and other technologies, even the smallest collection agency can now collect on a nationwide basis and is no longer local in scope.”).

103. See ACA Comment (June 6, 2007) at 28 (“Technology and the efficiencies of third-party collectors permit lower balance accounts to be recovered more so than in the past.”).

104. *Id.* at 5.

105. Andersen, Tr. I at 61.

106. See, e.g., Lawrence A. Laskey, Tr. I at 206 (“In 1977, communication was through the United States mail or by landline telephone. You knew who you were talking to and with whom you were leaving a message. You knew the local time and where they were when you talked to them.”).

107. See, e.g., DBA Comment (June 2, 2007) at 9 (noting that large collectors often outsource mailings to “letter vendors,” but that mail can be bar-coded “to track and notate returned mail directly to the debt buyer’s computer system.”); Barbara A. Sinsley, Tr. I at 97 (noting that technology aids in compliance).

108. National Council of Higher Education Loan Programs (NCHELP) Comment at 4-5, 6.

109. Commercial Law League of America (CLLA) Comment at 1-2 (noting that when the FDCPA was enacted, answering machines were rare and voicemail had not yet been invented).

Automated dialing and interactive voice recording also have made debt collectors' calling campaigns substantially more efficient.<sup>110</sup> ACA noted that “[p]erhaps the single most significant change in technology since the enactment of the FDCPA is the use of predictive dialers,” which were employed by approximately 50% of ACA members surveyed in 2005.<sup>111</sup> Predictive dialers are automated computer systems that determine the number of calls to make based on the time of day, the number of collectors logged on to the system, and the average length of time collectors speak with consumers.<sup>112</sup> These dialers permit debt collectors to be far more productive, because they eliminate the time spent dialing and waiting for a consumer to answer.

Call recording technologies also have emerged, making it possible for collectors to preserve every collection call.<sup>113</sup> Debt collection supervisors may review the calls of their collectors. Creditors and other owners of debt also may review the collection calls of their contingency collection agencies or collection law firms.<sup>114</sup>

Consumers have swiftly adopted many new telephone technologies. For example, by June 2008 some 263 million subscribers, more than 84% of the United States population, owned cell phones.<sup>115</sup> By that date 16% of consumers had entirely replaced their landline telephones with cell phones.<sup>116</sup> One research firm reported that in 2007 the percentage of Americans in cellphone-only households for the first time exceeded the percentage in landline-only households.<sup>117</sup> In addition, many consumers now manage in-bound telephone calls through the use of technologies such as answering machines, voicemail systems, and caller identification

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110. KAULKIN GINSBERG, *supra* note 10, at 63.

111. ACA Comment (June 6, 2007) at 56.

112. Hunt Comment at 16. Hunt adds that “[t]hese calculations are more accurate when more collectors are used and, combined with the high fixed costs of such systems, may explain part of the increasing scale of collection agencies.” *Id.*

113. Robert L. DiGennaro, Tr. I at 119.

114. *See, e.g.*, Mark E. Davitt, Tr. I at 120 (“You have to do audits. You have to pull up calls from individuals and review those calls.”); Ira Leibsker, Tr. I at 123 (“I have auditors coming in from my clients almost on a weekly basis, a different client every week, who is auditing conversations.”).

115. CTIA (THE WIRELESS ASSOCIATION), WIRELESS QUICK FACTS (2008), *available at* <http://www.ctia.org/advocacy/research/index.cfm/AID/10323>.

116. *Id.* One commenter estimated that even more consumers – 20% – have traded in their landlines for cell phones. CLLA Comment at 2.

117. Alex Mindlin, “Cellphone-Only Homes Hit Milestone,” N.Y. TIMES (Aug. 27, 2007), *available at* <http://www.nytimes.com/2007/08/27/technology/27drill.html?scp=1&sq=Cell%20Phones%20Overtake%20Landlines&st=cse>. At the time of the survey by Mediamark Research, 14.0% of United States adults lived in households with one or more cell phones, but no landline; 12.3 % lived in households with a landline, but no cell phone. *Id.*

services (“Caller ID”). Consumers use these technologies to screen calls before answering and to ensure that calls are not missed if they are unavailable to answer the phone.<sup>118</sup>

Consumers similarly have begun to use other new communication technologies. Email has become a common method of communication for consumers, with approximately 80% of United States heads-of-households reporting that they have used this tool.<sup>119</sup> Some even newer technologies, such as text messaging and social networking sites, promise continuing changes in how consumers communicate.<sup>120</sup>

## D. Information Collection and Storage

Technological innovations over the past thirty years have increased exponentially creditors’ and debt collectors’ ability to obtain, store, and transfer data about consumers and their debts. In response to this new capability, many industry members use more efficient means of transferring data and store more data for longer periods of time than their predecessors.<sup>121</sup>

### 1. Increases in Data Storage Capacity

A key factor in the growth of information technologies is the dramatic increase in the ability to retain data. The FTC’s 2006 Tech-ade hearings addressed the subject of data storage.<sup>122</sup> An analyst who specializes in data storage research noted that over 2.5 million pages of text can now be stored in the same space that fifty years ago could hold only a short paragraph.<sup>123</sup> According to the same expert, data storage capacity continues to increase by 50% each year.<sup>124</sup>

The combination of steady increases in affordable storage capacity and increased collection of information in (and conversion of data to) digital formats has led to important changes in how

118. Laskey, Tr. I at 206.

119. See Jim Duffy, *20% of U.S. Has Never Sent E-mail*, PC WORLD, May 17, 2008, available at [http://www.pcworld.com/businesscenter/article/146019/20\\_of\\_us\\_has\\_never\\_sent\\_email.html](http://www.pcworld.com/businesscenter/article/146019/20_of_us_has_never_sent_email.html).

120. ACA Comment (June 6, 2007) at 5 (“Other technologies portend even further refinements in the collection process by the use of electronic mail, text messages, and cellular phones.”). Some sources predict that debt collection efforts may soon spread to social networking sites, such as MySpace and Facebook. See Posting of Jeff Michael to Credit/Debt Recovery Blog, available at <http://credit.typepad.com/credit/2007/11/the-future-of-d.html> (Nov. 8, 2007, 20:48 EST) (predicting that debt collectors may use such sites both to obtain information about consumers and to communicate with them).

121. See, e.g., ACA Comment (June 6, 2007) at 55 (“The electronic availability of this information allows debt collectors to readily access underlying account information, such as contracts or signed documents”).

122. *Computing Power and How It Will Be Used in the Marketplace of the Next Tech-ade*, FTC Hearings on Protecting Consumers in the Next Tech-ade (Nov. 6-8, 2006) [hereinafter Tech-ade]. The agenda, podcasts, transcripts, and report are available at <http://www.ftc.gov/techade>. Citations to the Tech-ade transcripts follow the same conventions mentioned *supra* note 6.

123. Sal Capizzi, Tech-ade Tr. II at 145.

124. *Id.*

debt collection is conducted.<sup>125</sup> Increased data storage capacity has fostered the use of document imaging, which “allows the user to create an electronically searchable version of a hardcopy document.”<sup>126</sup> According to ACA, nearly 60% of debt collectors who responded to a 2007 survey use document imaging.<sup>127</sup> Document imaging reduces the cost of document retention and allows easy access to information.<sup>128</sup> Industry commenters at the workshop noted that imaging technology enables “debt collectors to readily access underlying account information, such as contracts or signed documents.”<sup>129</sup> Digitized data can easily be shared between a creditor and a contingency collection agency or collection law firm, or provided when a debt buyer purchases a portfolio.

The general trend toward office automation, together with increased data storage capability and the emergence of document imaging technology, has also made it feasible and cost-effective for some debt collection activities to be conducted from offshore.<sup>130</sup> According to industry sources, this trend is particularly prominent among creditors collecting their own debt.<sup>131</sup> In addition to making collection from offshore more practicable, these same technological trends may decrease the cost of collection, thereby making it economical to collect smaller amounts than in the past.<sup>132</sup>

## 2. Improvement in Database Technologies

Another trend that has significantly changed debt collection over the past thirty years is the ability of companies to aggregate disparate pieces of information about consumers. Companies maintain their own proprietary databases containing customer data, but also have at their disposal a vast array of information from third-party information providers. Among other things, the information in these third-party databases can be used to locate a consumer, determine whether

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125. Hunt, Tr. I at 43.

126. ACA Comment (June 6, 2007) at 55.

127. ACA, 2008 AGENCY BENCHMARKING SURVEY (2008) [hereinafter ACA 2008 SURVEY]; ACA Comment (June 6, 2007) at 55 (noting that the results of a 2005 survey showed approximately 40% of respondents were using document imaging at that time).

128. See National Institute of Standards and Technology, *ATP Focused Program Competition 97-04 Digital Data Storage*, Nov. 1994, available at <http://www.atp.nist.gov/press/97-04dds.htm>.

129. ACA Comment (June 6, 2007) at 55.

130. *Id.* at 37.

131. See, e.g., *id.* at 37; KAULKIN GINSBERG, *supra* note 10, at 64-66.

132. ACA Comment (June 6, 2007) at 27-28. Because labor costs are lower in many offshore locations than in the United States, the cost for creditors to hire collectors has decreased. With this decrease in the labor costs of collection, it has become viable for creditors to collect debts with a lower expected value than in the past.

there is a reason the consumer should not be contacted about the debt, and predict whether, if contacted, he or she is likely to pay.<sup>133</sup>

Creditors use database technology to maintain the account information of consumers to whom they have extended credit. In most instances, creditors record and retain in searchable form information about the borrower – name, Social Security number (“SSN”), address, employer, references, and more. This information no longer resides on one or more sheets of paper, as it often did when the FDCPA was enacted.<sup>134</sup> Instead, creditors either key or scan the relevant information into computer databases where it can readily be stored, searched, or transferred. Creditors use this information for general business purposes and any in-house collection efforts. In addition, a creditor may transfer the information to a contingency collector or to a debt buyer.<sup>135</sup>

Database technology also has changed the techniques that creditors and debt collectors use to find consumers. Individuals who specialize in tracking people down are often referred to as “skiptracers.” As recently as twenty years ago, skiptracers trying to locate a consumer were limited largely to calling references, trying to find neighbors through paper copies of reverse-look-up directories, and, often, visiting the consumer’s former neighborhood in person.<sup>136</sup> Today, however, skiptracers typically access huge electronic databases that aggregate public and private sources of information such as telephone numbers, SSNs, real estate records, court records, and marriage records.<sup>137</sup> By entering a consumer’s name and identifying information, a skiptracer can obtain a great deal of information about the consumer,<sup>138</sup> including the names of relatives, addresses where the consumer has lived, and other people who lived at those addresses at the same time.<sup>139</sup> Free telephone directories are also widely available on the Internet, providing ready access to contact information for consumers nationwide.<sup>140</sup>

In addition to the databases that help debt collectors locate consumers, other databases disclose whether a debt cannot be collected because it has been discharged in a bankruptcy proceeding or the consumer who incurred the debt is now deceased. A debt buyer representative

133. Michael C. Lamb, Tr. II at 21; Hunt, Tr. I at 62-63.

134. Andersen, Tr. I at 61.

135. *See, e.g.*, Kathleen M. Pierce, Tr. I at 286.

136. Lamb, Tr. II at 12.

137. Lamb, Tr. II at 15.

138. Even though technology has increased the quantity of information now available to skiptracers, they may identify the wrong consumer as the debtor if the quality of that information is poor.

139. Lamb, Tr. II at 14.

140. DBA Comment (June 2, 2007) at 9. The FCRA also permits debt collectors and skiptracers to obtain credit reports on consumers in connection with collecting credit accounts. FCRA § 604(a)(3)(A); 15 U.S.C. § 1681b(a)(3)(A).

noted that, before a debt buyer takes any collection action on an account, “it is customary – probably beyond customary – to send the file out to be scrubbed for bankrupt and deceased accounts.”<sup>141</sup>

After acquiring location information about a consumer and determining based on database information that he or she is neither bankrupt nor deceased, debt collectors sometimes use mathematical scoring models to predict whether they will be able to collect the accounts in a portfolio.<sup>142</sup> Collectors use these scoring models in much the same way that creditors use credit scores to predict the likelihood that a prospective borrower will repay borrowed money. In fact, debt buyers often use scoring models to determine initially whether to purchase a portfolio of delinquent accounts and, if so, how much to pay for it.<sup>143</sup>

## E. Payment Methods

New technologies also have altered how consumers pay debt collectors. Payment options have greatly expanded since the FDCPA was enacted, when consumers primarily paid by cash or check. Many new electronic payment (“e-payment”) technologies and systems, such as credit cards, debit cards, stored value cards, electronic benefit transfers, and automated check clearinghouse (“ACH”) debits, have emerged.<sup>144</sup> These new methods can facilitate instantaneous payment, and consumers can use them to pay over the telephone or the Internet. The availability of these new, convenient payment mechanisms has given rise to new debt collection business models, such as companies that allow online debt negotiation and payment.<sup>145</sup>

Consumers and businesses have embraced the use of these new payment methods in many consumer transactions. In all consumer transactions, e-payments have been used more frequently than check payments since at least 2003. In 2006, more than two-thirds of all non-cash payment transactions were e-payments.<sup>146</sup> According to NACHA–The Electronic Payments

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141. Robin R. Pruitt, Tr. II at 37.

142. *See, e.g.*, Hunt, Tr. I at 62-63 (noting that the ability to use scoring models to predict the likelihood of repayment is a significant change in technology available to debt collectors over the past thirty years).

143. KAULKIN GINSBERG, *supra* note 10, at 56.

144. Jeanne Hogarth, Tech-ade, *supra* note 122, Tr. III at 6; *see also* Emily Gaumer, *Your Card Please*, COLLECTOR, Mar. 2005, at 45-46.

145. *See, e.g.*, Ann McDonald, *Collecting in Cyberspace*, COLLECTIONS & CREDIT RISK, Feb. 2005, at 20.

146. FEDERAL RESERVE SYSTEM, THE 2007 FEDERAL RESERVE PAYMENTS STUDY: NONCASH PAYMENT TRENDS IN THE UNITED STATES 2003-2006 (Dec. 10, 2007), 4-5, *available at* [http://www.frbservices.org/files/communications/pdf/research/2007\\_payments\\_study.pdf](http://www.frbservices.org/files/communications/pdf/research/2007_payments_study.pdf) [hereinafter 2007 FEDERAL RESERVE PAYMENTS STUDY]. Although electronic payments are made far more frequently than check payments, as of 2006 they still comprised less than half by value of all noncash money paid. *Id.* at 9.

Association, annual ACH payment<sup>147</sup> volume continues to double every five years.<sup>148</sup> Debit card volume has also increased significantly,<sup>149</sup> with consumers more and more frequently using debit cards for day-to-day transactions.<sup>150</sup> Although the Commission is not aware of data addressing the prevalence of new payment methods in paying debts in collection, the use of e-payments to pay debts seems likely to increase as these payment methods become more common in consumer transactions.<sup>151</sup>

## VI. MODERNIZING THE DEBT COLLECTION SYSTEM AND LEGAL FRAMEWORK

The Commission believes that the debt collection system should protect consumers from harm without unduly burdening the collection process. Based on the workshop record and the agency's experience, the Commission concludes that the debt collection system needs to be reformed to continue to strike this balance. Specifically, the FTC believes that reform should focus on achieving the goals articulated below. The report also suggests future public and private initiatives that should be implemented if these goals are to be met, charting a course for future directions in the debt collection industry.

### A. Information Flow in the Debt Collection System

Information is the lifeblood of the debt collection system. Based on the workshop record and its own experience, the Commission believes that there are two major problems with the flow of information from creditors to debt collectors and from debt collectors to consumers. The first is that debt collectors often have inadequate information when they contact consumers, thereby increasing the likelihood that they will reach the wrong consumer, try to collect the wrong amount, or both. The second is that debt collectors do not provide adequate information to consumers, thereby making it more difficult for consumers to assess whether they actually

147. Direct ACH debits are a way to remove money from a consumer's account pursuant to the debt collector-merchant's instructions, over an electronic clearing system known as the automated clearinghouse or "ACH."

148. Press Release, NACHA - The Electronic Payments Association, NACHA Reports More Than 18 Billion ACH Payments in 2007: US Financial Institutions Added 2 Billion ACH Payments to Annual Volume (May 19, 2008), available at [http://www.nacha.org/news/news/pressreleases/2008/2008/Volume\\_Final.pdf](http://www.nacha.org/news/news/pressreleases/2008/2008/Volume_Final.pdf).

149. Hogarth, Tech-ade, *supra* note 122, Tr. III at 6; see also 2007 FEDERAL RESERVE PAYMENTS STUDY, *supra* note 146, at 5 (the number of debit card payments in 2006 exceeded the number of credit card payments).

150. Mark MacCarthy, Tech-ade, *supra* note 122, Tr. III at 20.

151. See, e.g., ACA Comment (June 6, 2007) at 64 (Electronic payments are beneficial for both businesses and consumers; "[i]ndeed, consumers increasingly have come to request to make payments electronically."); DBA Comment (June 2, 2007) at 9 (expanding use of Internet-based payment portals providing for online payment).

owe the debt in question and exercise their rights under the FDCPA. Improving the flow of information within the debt collection system is critical to reforming the industry.

## 1. Problems with Information Flow in the Debt Collection System

At the workshop there was a broad discussion of the flow of information to debt collectors. A number of commenters identified the inadequacy of credit information as a significant source of problems for both consumers and debt collectors. When accounts are transferred to debt collectors, the accompanying information often is so deficient that the collectors seek payment from the wrong consumer or demand the wrong amount from the correct consumer.<sup>152</sup> NCLC and NACA commented that debt collectors often lack significant information about the debts they are attempting to collect, including the date the debt was incurred and a breakdown of the fees and charges added to the original debt.<sup>153</sup> An attorney who represents consumers in actions against debt collectors reported that debt buyers she has encountered receive only “an electronic spreadsheet that contains the consumer’s name, Social Security number, last known address, charge-off date, the amount owed, date and amount of last payment” when they purchase account portfolios.<sup>154</sup>

A leading association of debt buyers, DBA International (“DBA”), acknowledged that it is common for a debt buyer to receive only a computerized summary of the creditor’s business records when it purchases a portfolio, but added that “the due diligence process and representations and warranties in the purchase agreement help ensure the accuracy and integrity of the debts sold and provide some protections if the information provided is insufficient or incorrect.”<sup>155</sup> According to one workshop participant, it is industry practice to include in contracts between original creditors and initial, or “primary,” debt buyers the right to receive from the creditor, upon request, documentation needed to address consumer disputes or to support a lawsuit “for a particular amount of accounts in the portfolio and/or for a particular period of time.”<sup>156</sup> Some contracts between primary debt buyers and secondary debt buyers provide that, if the secondary debt buyer requests documentation to address consumer disputes or

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152. *See, e.g.*, NCLC-NACA Comment at 26-27; Margot Saunders, Tr. II at 213-14; Laura Udis, Tr. II at 216; Bev Evancic, Tr. I at 287-89; Anthony G. Looney, Tr. I at 291; Cary L. Flitter, Tr. I at 292-93; District Council 37 Municipal Employees Legal Services (DC 37) Comment at 3; Ron Jones Comment at 1.

153. NCLC-NACA Comment at 27-28.

154. Neighborhood Economic Development Advocacy Project (NEDAP) Comment at 5.

155. DBA Comment (June 2, 2007) at 12. DBA noted that “[a] debt buyer may request exclusion of accounts that (1) are pending or have been pending in bankruptcy, (2) involve alleged or established fraud, (3) have been paid prior to purchase, (4) are the accounts of deceased debtors, and/or (5) are other ‘problem’ accounts.” *Id.* at 7.

156. Pruitt, Tr. II at 63.

to support a lawsuit, the primary debt buyer will attempt to obtain it from the original creditor.<sup>157</sup> It does not appear, however, that secondary or subsequent debt buyers often use such contractual rights to obtain information from creditors through primary debt buyers.

Many participants at the workshop asserted that the owners of a debt should transfer adequate amounts of information whenever they assign an account to a contingency collector or collection attorney, or sell an account to a debt buyer. Debt collection industry representatives voiced strong support for improving the quality of information conveyed to debt collectors when accounts are transferred. For example, DBA commented that, “[b]ecause more information promotes a fair and appropriate result for consumers and therefore also results in higher collection rates, DBA has been and continues to be a very strong advocate for the transfer of all relevant information about a debt at the time of purchase.”<sup>158</sup>

Workshop participants and commenters offered several possible reasons why creditors often transfer inadequate information to collectors. A collection industry consultant noted that, although the ability to share information exists, the technology necessary to enable a creditor to transfer all documentation at the time of sale of the portfolio may be prohibitively expensive for many creditors.<sup>159</sup> Some industry commenters reported a concern that the cost to creditors of transferring all information may exceed the information’s value to debt collectors.<sup>160</sup> A collection attorney reported that, although new technology may make it feasible for creditors and debt collectors to store large quantities of data about accounts in collection, such documentation would be relevant to disputes less than one percent of the time his firm brings a collection claim.<sup>161</sup>

Creditor representatives also voiced privacy and security concerns about the routine transfer of large amounts of information along with accounts. For example, ACA, which represents creditors as well as third-party debt collectors and debt buyers, argued that a number of privacy laws restrict creditors’ sharing of consumers’ personal financial information with others in the debt collection system.<sup>162</sup> A collection industry consultant further noted that concerns about data security help drive decisions on whether to share information with other parties in the debt collection chain.<sup>163</sup>

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157. Pruitt, Tr. II at 64-65.

158. DBA Comment (Nov. 9, 2007) at 1.

159. Evancic, Tr. I at 296.

160. *See, e.g.*, Robert Markoff, Tr. I at 215-16.

161. Markoff, Tr. I at 215-16.

162. ACA Comment (June 6, 2007) at 76-78.

163. Evancic, Tr. I at 308-09. Ms. Evancic noted that the creditor must control the transfer of information to ensure that personally-identifying information is kept secure. *Id.* at 288, 308-09.

Collection industry members also voiced concern that current legislative proposals would prevent them from obtaining consumers' Social Security numbers when creditors assign or sell debts to them.<sup>164</sup> The collection industry consultant noted that, although debt collectors find SSNs particularly helpful in identifying the correct individual debtor, creditors remain cautious about releasing this sensitive information.<sup>165</sup> A representative of a consumer database company used by debt collectors reported that his company's technology is much more likely to find the correct consumer if the collector has an SSN.<sup>166</sup> The SSN, he added, "is a key link that differentiates one individual from someone else with a similar name."<sup>167</sup>

Based on the workshop record and other sources, the Commission concludes that the information received by debt collectors is often inadequate and results in attempts to collect from the wrong consumer or to collect the wrong amount.

## 2. Solutions to Information Flow Problems

### a. Substantiation for Debt Collectors' Claims

Collectors have a legal obligation to possess information to support the claims they make to consumers about debt, pursuant to both Section 5(a) of the FTC Act,<sup>168</sup> and Section 807 of the FDCPA.<sup>169</sup> Deceptive claims about the debts consumers owe violate both statutes, whether these claims are express or implied. A debt collector's representation that a consumer owes an amount of money also conveys the implied claim that the collector has a reasonable basis to substantiate the assertion that the consumer owes the debt.<sup>170</sup> If the collector does not have substantiation, this implied claim is false.

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164. Stacey J. Schacter, Tr. I at 199; Evancic, Tr. I at 288.

165. Evancic, Tr. I at 289-90.

166. Lamb, Tr. II at 13.

167. Lamb, Tr. II at 13. The Commission recently released a report addressing the role of Social Security numbers in the context of identity theft. As the Commission pointed out in the report, "[S]ince the creation of the SSN in 1936, the private sector increasingly has utilized it for various purposes – both as an identifier and an authenticator – because it is the only permanent, unique piece of information that most Americans have about themselves. . . . The SSN has, over time, become an integral part of our financial system." FEDERAL TRADE COMMISSION, SECURITY IN NUMBERS: SSN AND ID THEFT 11 (December 2008), available at <http://www.ftc.gov/os/2008/12/P075414ssnreport.pdf>.

168. 15 U.S.C. § 45(a). Section 5(a) prohibits "unfair or deceptive acts or practices in or affecting commerce."

169. 15 U.S.C. § 1692e. Section 807 of the FDCPA, 15 U.S.C. § 1692e, prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."

170. See, e.g., *FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008) (mortgage servicer settled allegations that it violated Section 5 of the FTC Act by lacking a reasonable basis for representations that it made to borrowers, including claims about the unpaid principal amount, the due date, the interest rate, the delinquency status, and fees and corporate advances that prior mortgage loan servicers had assessed).

The information needed to support a claim of consumer debt likely will depend, in part, on when the collector makes the claim. For example, a debt collector may need less information in an initial communication with a consumer than it would need to substantiate the claim once the consumer has disputed the debt. Whether a debt collector has a reasonable basis for its claim that a consumer owes a debt, therefore, is very fact-specific.<sup>171</sup>

In many situations, the account information a debt collector receives from the owner of the debt may provide a reasonable basis for asserting that a consumer owes the debt, even if the debt collector has attempted to collect from the wrong consumer or to collect the wrong amount. Indeed, courts have held that Section 813(c) of the FDCPA<sup>172</sup> exempts debt collectors from liability for collection errors made in reasonable reliance on information received from creditors that assign or sell accounts to them.<sup>173</sup> A debt collector may not avail itself of this defense, however, if its reliance on the creditor's representations was unreasonable.<sup>174</sup>

#### **b. Information Debt Collectors Should Include in Validation Notices**

Section 809(a) of the FDCPA<sup>175</sup> requires debt collectors, within five days after initially contacting a consumer, to send the consumer what is often referred to as a “validation notice.” The notice must contain:

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;

171. FTC Policy Statement Regarding Advertising Substantiation, *appended to In the Matter of Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

172. Section 813(c) of the FDCPA provides that “[a] debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 U.S.C. § 1692k(c).

173. *See, e.g., Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 497 (7th Cir. 2007) (bona fide error defense applied to debt buyer that attempted to collect a debt discharged in bankruptcy; debt buyer's reasonable steps to avoid the error included: (1) an understanding with firms that sell it debts that the firms would notify the debt buyer if they later discovered that the debt had been discharged; and (2) hiring a firm to conduct a computerized search of bankruptcies (search failed because creditor that sold the account had given the debt buyer the name that the consumer used at the time she opened the account, rather than the name she listed in her bankruptcy filing)); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992) (debt collector not liable for attempting to collect amount greater than consumer owed; collector reasonably relied on incorrect amount creditor printed on collector's referral form, which instructed creditors to claim only amounts legally due and owing).

174. *See, e.g., Clark v. Capital Credit & Collection Serv., Inc.*, 460 F.3d 1162, 1176 (9th Cir. 2006) (debt collector who attempted to collect disputed medical debt not entitled to summary judgment on bona fide error defense because consumers presented evidence indicating that collector knew of serious bookkeeping difficulties and billing problems in doctor's office, and debt collector presented no evidence that its reliance on the doctor's information was reasonable or that it maintained procedures to avoid errors).

175. 15 U.S.C. § 1692g(a).

- (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.

The Commission recommends that Section 809(a) be amended to require debt collectors to provide more and better information in validation notices to allow consumers to exercise their rights under the FDCPA more effectively. Specifically, the FTC recommends that validation notices include: (i) statements notifying consumers of two significant rights they have under the FDCPA; (ii) the name of the original creditor; and (iii) an itemization of the principal, total interest, and total fees that make up the debt.

**i. Rights that consumers have under Sections 809(b) and 805(c) of the FDCPA**

Section 809(b) of the FDCPA provides that, if a consumer disputes a debt or requests verification of the debt in writing within thirty days of receiving the validation notice, the debt collector must suspend collection efforts until it obtains verification of the debt and mails it to the consumer.<sup>176</sup> Section 805(c) of the FDCPA requires a debt collector to cease contacting a consumer about a debt if the consumer requests it in writing.<sup>177</sup> This latter provision does not prevent filing suit to collect the debt, but it does make it illegal for the collector to continue calling the consumer or sending him or her collection letters. The FDCPA does not require debt collectors to notify consumers of either of these rights, and few, if any, debt collectors appear to supply this information voluntarily.

NCLC and NACA recommended that collectors be required to notify consumers in every communication (including the validation notice) that they can demand that the collector cease further communication about the debt. Without this information being provided, NCLC and

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176. 15 U.S.C. § 1692g(b).

177. 15 U.S.C. § 1692c(c). Unlike under Section 809(b), there is no requirement that consumers exercise the Section 805(c) cease communication right within a certain period.

NACA report, “vulnerable consumers have no knowledge of their right to exercise this peace-providing protection.”<sup>178</sup>

Based on its experience, the Commission agrees that consumers do not appear to recognize that the FDCPA gives them the right to demand that collectors cease contacting them. It also appears that many consumers do not know that debt collectors must suspend collection efforts between the time they receive a consumer dispute and the time they supply the consumer with written verification. Consumers would benefit from knowing about these rights, and including information about them in the validation notices collectors already are required to provide would seem to impose small marginal costs on debt collectors.

One industry representative warned that requiring debt collectors to notify consumers that they have the right to cease communications might result in more debt collection lawsuits.<sup>179</sup> According to this commenter, if consumers who otherwise would reach a settlement with a debt collector instead shut off all communications because they are aware of their legal right to do so, debt collectors would have no practical alternative to filing a lawsuit. In response to these concerns, one regulator replied that the number of debt collection lawsuits filed was already quite high, so she was not especially concerned about a predicted increase in the number of suits filed.<sup>180</sup>

On balance, the Commission concludes that the benefits from requiring that validation notices provide consumers with more information about their rights under the FDCPA exceed the costs. The FTC therefore recommends that Congress amend Section 809(a) of the FDCPA to require that debt collectors inform consumers in validation notices that (1) if they send a timely written dispute or request for verification, the debt collector must suspend collection efforts until it has provided the verification in writing; and (2) if they request in writing that the debt collector cease contacting them, the collector must comply.

#### ii. Name of the original creditor

Section 809(a) requires that a debt collector include in the validation notice it provides to the consumer “the name of the creditor to whom the debt is owed.”<sup>181</sup> Once a debt has been sold, however, the owner of the debt will no longer be the original creditor. The Commission has received many complaints from consumers who reported collection attempts on behalf of owners

178. NCLC-NACA Comment at 32. *See also* Udis, Tr. II at 215 (state regulator recommended that the FDCPA be amended to require notifying consumers of their right to cease communications with debt collectors).

179. Leibsker, Tr. I at 111-12.

180. Marla Tepper, Tr. I at 167.

181. FDCPA § 809(a)(2), 15 U.S.C. § 1692g(a)(2).

of debt whose names the consumers did not recognize. Workshop commenters and panelists voiced similar concerns.<sup>182</sup>

In its 2005 Annual FDCPA Report,<sup>183</sup> the Commission stated that it would consider in the future whether collectors should be required to provide the name of the original creditor in their validation notices.<sup>184</sup> Identifying the original creditor seems likely to benefit consumers and collectors by making it easier to determine whether the collector is seeking the correct amount from the right consumer. Information identifying the original creditor is particularly important given that debt is often now resold a substantial number of times over the course of years. Because debt collectors already must provide validation notices to consumers, the marginal cost of adding the name of the original creditor to such notices likely would be small. The FTC therefore recommends that Congress require debt collectors to include in their validation notices the name of the original creditor<sup>185</sup> in addition to the name of the current owner of the debt.

### iii. Itemization of principal, interest, and fees

Section 809(a) of the FDCPA requires that validation notices include “the amount of the debt.” The provision does not require that this amount be broken out into principal, interest, and fees, and debt collectors often do not include such an itemization.<sup>186</sup> NCLC and NACA commented that

[c]ollectors often bundle extra charges, fees, and interest into the “amount of the debt.” This causes considerable confusion for consumers, who do not have the essential information to determine exactly where the debt was incurred, or whether the amount of debt includes illegal charges. . . . As seniors incur more and more debt, and as debt collectors collect on debt that may be years old, it is [a] particular problem for one with a fading memory to understand whether an alleged debt is valid.<sup>187</sup>

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182. NCLC-NACA Comment at 29; Mary Spector, Tr. I at 156.

183. FEDERAL TRADE COMMISSION ANNUAL REPORT 2005: FAIR DEBT COLLECTION PRACTICES ACT [hereinafter 2005 FTC ANNUAL REPORT] 22, available at <http://www.ftc.gov/reports/fdcpa05/050729fdcpaprpt.pdf>.

184. *Id.* at 23 n.41. This Report also recommended that Congress amend Section 809 to provide that a debt collector who states the name and address of the original creditor in its first communication with a consumer need not offer or provide that information a second time if the consumer requests it. *Id.* at 23.

185. The National Association of Retail Collection Attorneys, the only collection industry commenter that addressed a requirement that validation notices include the name of the original creditor, noted that it would not be opposed to such a requirement. NARCA Comment (June 5, 2007) at 7.

186. NCLC-NACA Comment at 29.

187. *Id.*

In its 2005 Annual Report, the Commission recommended that Congress amend Section 809(a) to permit a consumer to obtain from a debt collector, upon written request, an itemization of all charges added after that collector obtained the debt.<sup>188</sup> The FTC said that permitting consumers to obtain these itemized charges would allow them to determine whether any charges being demanded by a debt collector were erroneous or subject to dispute.<sup>189</sup> The agency also noted that requiring debt collectors to itemize charges would assist the Commission and consumers in enforcing two FDCPA provisions: (1) Section 807(2),<sup>190</sup> 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 (2) Section 808(1),<sup>191</sup> 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.”<sup>192</sup> The Commission further said that it would consider in the future whether debt collectors should be required to provide consumers in validation notices with an itemization of *all* charges to an account, including the original amount of the debt and charges by the original creditor and all prior collectors.<sup>193</sup>

Based on the workshop record and its experience, the agency recommends that Congress amend the FDCPA to require debt collectors to include in all validation notices an itemization of: (1) the principal; (2) the total of all interest; and (3) the total of all fees and other charges added. Consumer advocates stated that such a requirement would provide significant benefits to consumers.<sup>194</sup> For example, NCLC and NACA reasoned that requiring debt collectors to include both an itemization and the name of the original creditor “would reduce the number of questions and verification requests received, as many of the questions inherent in these requests would be answered with the information initially required.”<sup>195</sup> Debt collectors also would benefit from receiving an itemization at the time of transfer of debt, in that consumers would be more likely to recognize debts they have incurred and, therefore, may be more willing to discuss payment arrangements. Debt buyers, in particular, would benefit from obtaining such an itemization of

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188. 2005 FTC ANNUAL REPORT, *supra* note 183, at 22.

189. *Id.*

190. 15 U.S.C. § 1692e(2).

191. 15 U.S.C. § 1692f(1).

192. 2005 FTC ANNUAL REPORT, *supra* note 183, at 22.

193. 2005 FTC ANNUAL REPORT, *supra* note 183, at 23 n.41.

194. *See, e.g.*, New York City Department of Consumer Affairs (NYC-DCA) Comment at 3; NCLC-NACA Comment at 29; Able Debt Settlement, Inc. (Able) Comment at 12, 16.

195. NCLC-NACA Comment at 29.

debts they purchase, because they must distinguish between principal and interest to prepare Form 1099-C's to comply with Section 6050P of the Internal Revenue Code.<sup>196</sup>

Creditors typically store itemized data for all of their accounts in large electronic databases during the entire time they own the accounts. Although it appears that credit issuers often do not transfer this information when they sell account portfolios to debt buyers<sup>197</sup> or when they assign accounts to contingency collectors, the FTC is not aware of any technological impediment to such transfers. Because the information is stored in electronic databases, transfers from the creditor to debt buyers or third-party collection agencies would require no scanning and apparently minimal additional electronic storage space. It therefore does not appear that such transfers would impose substantial burdens on creditors and other owners of debt. In addition, adding to the validation notice the few numbers and words that make up this itemized breakdown would impose little marginal cost on debt collectors who already must provide this notice to consumers.

The Commission therefore recommends that Congress amend Section 809(a) to require debt collectors to include in all validation notices an itemization of: (1) the principal; (2) the total of all interest; and (3) the total of all fees and other charges added.<sup>198</sup> Consumer groups have consistently advocated for greater informational disclosure by debt collectors, as discussed above. In the future, the Commission may consider the costs and benefits of mandating that validation notices break these items out further to reveal the principal, interest, and fees that the original creditor and each debt collector added to the debt.

### c. Improving the Debt Verification Process

Section 809(b) of the FDCPA provides that, if a consumer disputes a debt in writing within thirty days of being notified of this right, a debt collector must suspend collection efforts until it “obtains verification of the debt” and mails it to the consumer.<sup>199</sup> The FDCPA does not, however, specify what constitutes “verification of the debt.” The Senate report issued at the time the

196. 26 U.S.C. § 6050P. Section 6050P of the Internal Revenue Code requires that debt buyers send a form to the Internal Revenue Service (Form 1099-C) whenever the debt buyer is deemed to have discharged a principal amount of \$600 or more owed on a debt. Because Section 6050P deems debt buyers to have discharged their debts under many circumstances (*e.g.*, including accepting less than the full amount owed and failing to engage in “significant, bona fide collection activity” during the previous 12-month period), debt buyers often must be able to distinguish between principal and interest to prepare Form 1099-C in compliance with the Internal Revenue Code. *See* Treas. Reg. § 1.650P-1; Letter from Donna Welch, Senior Counsel, Administrative Provisions & Judicial Practice, Internal Revenue Service, Department of the Treasury, to Rozanne M. Anderson, General Counsel, ACA International (Oct. 7, 2005), at 3.

197. *See, e.g.*, Ira Rheingold, Tr. I at 294.

198. For example, for a \$2000 debt, a debt collector might send a validation notice to the consumer stating: (1) \$1,000 - Principal; (2) \$750 - Interest; and (3) \$250 - Fees and Other Charges.

199. 5 U.S.C. § 1692g(b).

FDCPA was enacted stated that the provision was intended to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid. Since the current practice of most debt collectors is to send similar information to consumers, this provision will not result in additional expense or paperwork.”<sup>200</sup>

Consumer advocates assert that some debt collectors, particularly debt buyers, often do little or nothing to verify debts if consumers dispute their validity.<sup>201</sup> An attorney who represents consumers in actions against debt collectors reported that debt buyers typically do not have access to the original credit application with the consumer’s signature, the specific contract that applied to the consumer’s account, copies of original credit card statements, or customer service records that could confirm or clarify a fraud claim or a legitimate customer dispute.<sup>202</sup> According to one workshop speaker: “If somebody raises a dispute, the answer comes back [from the debt collector], ‘Well, that’s what the creditor says you owe them.’”<sup>203</sup> On the other hand, one creditor representative reported that the third-party debt collectors hired by her company are required to investigate and resolve consumer disputes, including contacting creditor representatives if necessary.<sup>204</sup>

As several commenters noted, courts have not interpreted Section 809(b) as requiring that debt collectors undertake substantial efforts to verify disputed debt.<sup>205</sup> In a leading case addressing this issue, *Chaudhry v. Gallerizzo*, consumers alleged that a collection attorney and his law firm violated Section 809(b) by failing to verify the inspection fee portion of a delinquent home loan debt.<sup>206</sup> In his first demand letter to the consumers, the collection attorney listed the amount owed for principal, interest, and inspection fees.<sup>207</sup> After receiving a letter from the consumers’ attorney disputing the amount of the debt, the collection attorney contacted the creditor and obtained confirmation that the sums were owed; verified the amounts of the debt in a letter to consumers’ counsel that again broke out the principal, interest, and inspection fees;<sup>208</sup> and forwarded a copy of the bank’s computerized summary of the consumers’ loan transactions.<sup>209</sup> The summary included a running account of the debt amount, a description of

200. Senate Report, *supra* note 1, at 4.

201. *See, e.g.*, NCLC-NACA Comment at 12-13; Flitter, Tr. I at 304-07.

202. NEDAP Comment at 5.

203. L. Saunders, Tr. I at 148.

204. Pierce, Tr. I at 317-18.

205. *See, e.g.*, Flitter, Tr. I at 310-11.

206. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 405-06 (4th Cir.), *cert. denied*, 528 U.S. 891 (1999). The consumers also alleged that the defendants failed to verify the legal fees portion of the debt. *Id.* at 406.

207. *Id.* at 400.

208. *Id.*

209. *Id.* at 406.

each transaction, and the date on which the transaction occurred.<sup>210</sup> The next day, the collection attorney sent the consumers' attorney another letter restating the amount of the inspection fees and indicating that the amount was correct.<sup>211</sup>

The district court found that the collection attorney had adequately verified the amount of the inspection fees.<sup>212</sup> The United States Court of Appeals for the Fourth Circuit affirmed the district court's holding, adding that

verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debts. [Internal citations omitted.] Consistent with the legislative history, verification is only intended to "eliminate the [recurring] problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. There is no concomitant obligation to forward copies of bills or other detailed evidence of the debt.<sup>213</sup>

A number of courts, including the only other federal circuit court to address the issue, have applied the Fourth Circuit's language in determining whether a collector's efforts to verify a debt were adequate.<sup>214</sup> Some debt collectors currently conduct verification consistent with their understanding of these court rulings, *e.g.*, by doing nothing more than providing consumers with a written statement that the amount being demanded is what the creditor claims is owed.

As explained above, Congress intended Section 809(b) to address the problem of debt collectors collecting from the wrong person, the wrong amount, or both. Many debt collectors have responded to verification requests by only confirming in writing for consumers that the amount demanded is what the creditor claims is owed. Collectors are conducting this minimal effort at the same time that consumers increasingly complain about efforts to collect from the wrong person or the wrong amount. The Commission believes that requiring a more substantial investigation of disputed debts is consistent with and would further the Congressional intent behind Section 809(b).

In connection with the workshop, consumer advocates proposed that debt collectors be required to conduct *reasonable* investigations and provide consumers with verification that

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *See, e.g., Clark v. Capital Credit & Collection Serv., Inc.*, 460 F.3d 1162, 1173-74 (9th Cir. 2006); *McCammon v. Bibler, Newman, & Reynolds*, 515 F. Supp. 2d 1220, 1225 (D. Kan. 2007); *Anderson v. Frederick J. Hanna & Assoc.*, 361 F. Supp. 2d 1379, 1383 (N.D. Ga. 2005).

is specific to the consumer's dispute.<sup>215</sup> One consumer advocate offered examples of such consumer-specific verification:

[I]f a consumer raises an identity theft dispute, the debt collector should provide verification that relates to the identity of the cardholder. If the consumer raises a dispute as to the amount, the debt collector should provide verification that relates to the amount. The verification should consist of copies of actual documents, not just a confirmation and renewed demand for the amount.<sup>216</sup>

Some debt collection industry representatives commented that, if the FDCPA is amended to require debt collectors to provide more substantial verification in response to consumer disputes, the new requirements should be flexible. According to NARCA,

The documentation required to verify the debt will vary depending on the nature of the original obligation. Any effort by the FTC to provide a "checklist" of information that would be required for adequate verification should be rejected because *detailed* proof of the debt is a matter reserved for a Court proceeding, rather than a pre-litigation collection process which, at any time, can be stopped in its tracks by a debtor's cease and desist demand pursuant to [Section 805(c) of the FDCPA].<sup>217</sup>

A representative of a large debt buyer likewise contended that "[n]o rigid minimum standard can apply to the many different types and ages of consumer debts in the United States. What constitutes sufficient documentation . . . will only work if it is subjective enough to take into consideration the many different types of delinquent consumer debts."<sup>218</sup>

The FTC believes that the FDCPA should be amended to require debt collectors to conduct "reasonable" investigations that are responsive to the specific disputes consumers have raised. This is the same standard that debt collectors already must meet to comply with the FCRA if a credit reporting agency transmits a consumer's dispute to the debt collector.<sup>219</sup> Thus, adding a "reasonable" investigation standard to the FDCPA would impose a burden on debt collectors

215. *See, e.g.*, NEDAP Comment at 8; NCLC-NACA Comment at 30-31.

216. NEDAP Comment at 8.

217. NARCA Comment (June 5, 2007) at 9 (emphasis in original).

218. Portfolio Recovery Associates (PRA) Comment at 2.

219. If a credit reporting agency notifies a furnisher of credit information that a consumer has disputed an account the furnisher has reported, the Fair Credit Reporting Act requires the furnisher to "conduct an investigation with respect to the disputed information." Section 623(b)(1)(A) of the FCRA, 15 U.S.C. § 1681s-2(b)(1) (A). Although Section 623(b)(1)(A) does not specifically state that furnishers must conduct a "reasonable" investigation upon learning of a dispute from a credit reporting agency, courts applying the provision have consistently adopted a "reasonable investigation" standard. *See, e.g., Gorman v. Wolpoff & Abramson, LLP*, No. 06-17226, slip op. at 277-80 (9th Cir. Jan. 12, 2009); *Westra v. Credit Control*, 398 F.3d 825, 827 (7th Cir. 2005); *Johnson v. MBNA America Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004); *King v. Asset Acceptance, LLC*, 452 F. Supp. 2d 1272, 1278 (N.D. Ga. 2006).

comparable to that which is already imposed under the FCRA.<sup>220</sup> In addition, Regulation Z, which implements the Fair Credit Billing Act,<sup>221</sup> imposes a “reasonable investigation” standard on creditors responding to written disputes.<sup>222</sup> Adopting a “reasonable investigation” approach would decrease consumer concerns about the prevalence of continued mistaken collection attempts, but also respond to collection industry concerns that the standard be flexible. To implement or effectuate such a standard, some combination of statutory language, rules, or guidance could be used to articulate with greater specificity what constitutes a “reasonable” investigation.

### 3. Future Directions in Information Flow

The FTC above has recommended that debt collectors be required to have more or better information to substantiate debt claims, prepare enhanced validation notices, and conduct reasonable investigations of disputed debts. If these requirements are imposed and implemented, they are likely to improve the quantity and quality of the information debt collectors receive from creditors and debt buyers.

In addition, industry and consumer representatives at the workshop indicated that it would be productive to have further discussions as to what particular information owners of debt should transfer with debt. Since the workshop, representatives of creditors, specifically credit card issuers, have discussed these issues with representatives of debt buyers and debt collectors.<sup>223</sup> The Commission believes that these discussions are critical to developing standards that weigh carefully the costs and benefits of collecting, maintaining, and transferring information about debt. The FTC also believes that industry should solicit the views of consumer representatives to assist in its development of standards.

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220. Another topic that was discussed at length during the workshop was credit reporting by debt collectors. Consumer advocates raised concerns that some debts are reported to credit reporting agencies multiple times, each with a different account number. *See, e.g.*, Ian Lyngklip, Tr. II at 114-15. Consumer representatives also asserted that some debt collectors “re-age” debts they report to credit reporting agencies, *i.e.*, report the account’s “date of delinquency” as being more recent than it really is, so the debt will stay on the consumer’s credit report longer than the seven years permitted by the FCRA; and that some debt collectors report accounts to credit reporting agencies without noting that the consumer has disputed the debt. *See, e.g.*, Lyngklip, Tr. II at 88, 128; Robert W. Murphy, Tr. I at 106. Collection industry panelists at the workshop agreed that re-aging accounts and intentionally failing to report disputes to credit reporting agencies violate the FCRA. *See, e.g.*, Michael C. Tormey, Tr. II at 92; Donald W. Redmond, Tr. II at 130.

221. 15 U.S.C. §§ 1666-1666j.

222. Regulation Z § 226.13(f), 12 C.F.R. § 226.13(f).

223. *See, e.g.*, DBA Comment (Nov. 9, 2007) at 2 (“DBA members are working hard to encourage originating creditors to provide enhanced documentation which includes detailed information about a debt, not only to benefit debt buyers and consumers, but also to fulfill certain legal obligations imposed on debt buyers . . .”).

While the Commission believes the adoption and implementation of the recommendations in this report and the industry's ongoing discussions are likely to result in more debt collection attempts being for the right amounts and being directed to the correct consumers, it is uncertain whether more will need to be done. The FTC therefore will continue to monitor closely the flow of information in the debt collection system and make further recommendations as necessary to protect consumers without unduly burdening the debt collection process.

## B. New Technologies

Many of the most important differences between debt collection when the FDCPA was enacted and debt collection today are the result of advances in communication technologies.<sup>224</sup> The tools that enable debt collection communication and information transmission today were in large part nonexistent thirty years ago. Much attention at the workshop and in the comments was devoted to discussing technological changes and their implications for the debt collection system.

### 1. Communication Technologies

A number of the panelists stressed that communication with consumers is essential for successful collections and that the inability to collect debts increases the cost of credit to everyone.<sup>225</sup> Debt collectors made clear their strong desire to use new communication technologies to contact consumers because doing so would make their collection efforts more efficient. In addition, debt collector representatives at the workshop argued that new technological contact methods increasingly will become the norm. They asserted that debt collectors will need to use such methods to reach consumers, especially younger consumers, who tend to be early adopters of new technology.<sup>226</sup> One industry representative posited that restrictions on the ability of collectors to contact consumers using new technologies would increase the amount of debt that goes uncollected.<sup>227</sup>

Most collectors, however, appear to be proceeding cautiously in using newer methods of contact due to concerns about their legality under the FDCPA and other laws. Collection industry representatives requested that laws and rules that govern contacts with consumers

224. See Andersen, Tr. I at 61- 62, 66; Hunt, Tr. I at 62-63; Jean Ann Fox, Tr. I at 64-67; Wood, Tr. I at 64-68.

225. See, e.g., DiGennaro, Tr. I at 109-110; Leibsker, Tr. I at 111-112; Murphy, Tr. I at 112; Cynthia R. White, Tr. II at 223.

226. See, e.g., ACA Comment (June 6, 2007) at 62-63 (“Other communications technologies, such as Short Message Service (SMS) text messages, instant messages and electronic mail (e-mail) are emerging as effective channels for debt collection and continue to replace the more traditional means of contacting consumers.”); NCHelp Comment at 6-7 (“[T]he use of automated voice and text messaging, and Internet email, are the communication methods of choice by millions of young debtors and their use should be specifically authorized for loan servicing and debt collection.”); Davitt, Tr. I at 107.

227. DiGennaro, Tr. I at 100.

using newer technologies be clarified or amended to facilitate debt collectors' use of these tools.<sup>228</sup> According to industry representatives, it is not clear whether or how they can use certain communication technologies (such as predictive dialers or answering machines) in compliance with the FDCPA.

When Congress enacted the FDCPA, it did not limit the methods debt collectors could use to contact consumers other than to prohibit contacting consumers by postcard.<sup>229</sup> The statute contemplated that debt collectors generally could make use of all available technologies (the mail, telephones, telegraphs, etc.) to communicate with consumers. However, the FDCPA also sought to prevent debt collectors from engaging in deceptive, unfair, and abusive conduct in using these methods to collect debts. The Act specifies when a debt collector may contact a consumer, where and under what circumstances those contacts may occur, and how a debt collector must protect a consumer's privacy in making the contacts.<sup>230</sup> Nevertheless, the use of new communication technologies raises issues not necessarily contemplated when the statute was enacted.

To provide more certainty to the industry and to protect consumers from harm, the Commission concludes that debt collection law needs to be modernized to take account of today's new communication technologies. The FTC believes that, as was the case with the original FDCPA, debt collectors generally should be allowed to use all communication technologies, including new and emerging technologies, to contact consumers. However, the law also must be carefully crafted to avoid consumers' being subject to unfair, deceptive, or abusive acts and practices or being charged for a collector's communications.

#### **a. Calls from Predictive Dialers**

Predictive dialers are automated dialing tools that eliminate the need for debt collectors to spend time dialing phone numbers and maximize the efficiency of collectors by using an

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228. See ACA Comment (June 6, 2007) at 59 (“The complexity involved in the use of these new technologies in compliance with Federal and state laws and regulations frequently can be a deterrent to their usage.”); CLLA Comment at 1-2 (discussing case law holdings regarding the permissibility of leaving messages for consumers on answering machines or voicemail); Mortgage Bankers Association (MBA) Comment at 4-5 (same); NARCA Comment (June 5, 2007) at 10 (criticizing a decision on debt collectors leaving answering machine messages as “unnecessarily restrictive of a collector’s right to communicate with a debtor concerning a debt”); NCHHELP Comment at 2-3 (arguing that debt collection calls should not be subject to the prohibition in the Telephone Consumer Protection Act against using automatic dialers to call cell phones); see also Richard Riese, Tr. II at 211; White; Tr. II at 223; Wood, Tr. II at 224.

229. FDCPA § 808(7), 15 U.S.C. § 1692f(7). Congress prohibited collectors from using postcards to contact consumers because the risks were too high of improper disclosure to third parties that a debt was being collected.

230. See, e.g., FDCPA §§ 805, 808; 15 U.S.C. §§ 1692c, 1692f.

algorithm to predict when collectors will be free to talk to consumers.<sup>231</sup> One researcher pointed out that technologies that automatically dial consumers' telephone numbers, such as predictive dialers, are critical tools for today's successful collection agency.<sup>232</sup> These tools enhance the number of contacts that can be made, thus increasing the likelihood of receiving payment on accounts in an industry where efficiency has become essential.<sup>233</sup> Workshop participants and industry experts asserted that predictive dialers have been widely deployed and have had a transformative effect on the industry, dramatically increasing contact rates.<sup>234</sup>

An inevitable side effect of using predictive dialers to contact consumers is that a dialer will sometimes reach more consumers than can be connected to available collectors. In these situations, a predictive dialer either disconnects the call (resulting in a "hang-up" call) or keeps the consumer connected with no one on the other end of the line in case a collector becomes available (resulting in "dead air").<sup>235</sup> A consumer attorney at the workshop noted that he had represented numerous clients troubled by such calls, including one senior citizen who received more than fifteen in a single day.<sup>236</sup>

The "hang-ups" or "dead air" that can result from calls made using predictive dialer technology may violate the FDCPA. Section 806(5) of the FDCPA prohibits debt collectors from "causing a telephone to ring . . . repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."<sup>237</sup> Currently, the FTC proceeds on a case-by-case basis in determining whether "hang-up" and "dead air" calls from a collector violate Section 806(5) of the FDCPA.

In addition, although it does not apply to calls to collect debt,<sup>238</sup> the Telemarketing Sales Rule ("TSR") contains a similar provision prohibiting as abusive a telemarketer "causing

231. Sytel Limited (Syte) Comment at 9-10.

232. Hunt, Tr. I at 41-42.

233. See Hunt, Tr. I at 41-42. Another participant noted that "[b]y many accounts, predictive dialer technology has increased borrower contact efficiency by over three hundred percent." NCHELP Comment at 3 n.3.

234. According to a 2005 study of its members, the ACA states that approximately 50% of those surveyed reported using autodialer or predictive dialer technology. ACA Comment (June 6, 2007) at 56.

235. Telemarketing Sales Rule, Final Rule, Statement of Basis and Purpose, 73 Fed. Reg. 51,154, 51,165 (Aug. 29, 2008) (codified at 16 C.F.R. § 310). See also Sytel Comment at 1.

236. Murphy, Tr. I at 101.

237. 15 U.S.C. § 1692d(5).

238. "Telemarketing" is defined under the Telemarketing Act and the Telemarketing Sales Rule (TSR) to mean a "plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call." 15 U.S.C. § 6306(4); 16 C.F.R. § 310.2(cc). Because debt collectors do not engage in telemarketing, the TSR does not apply to their activities. See, e.g., Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4664 n.1020 (Jan. 29, 2003) (codified at 16 C.F.R. § 310).

any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.”<sup>239</sup> The TSR further provides that call abandonment is abusive.<sup>240</sup> The TSR creates a “safe harbor”<sup>241</sup> for call abandonment if, among other things, a telemarketer “employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person,”<sup>242</sup> and allows the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call.<sup>243</sup> This TSR safe harbor allows the use of predictive dialers provided they are set to limit the percentage of abandoned calls that are placed.

One commenter from the predictive dialer industry proposed establishing predictive dialing standards for debt collection calls to limit the number of abandoned debt collection calls.<sup>244</sup> This approach would resemble the standard applicable to telemarketers under the TSR.<sup>245</sup> According to the commenter, a similar standard for all calls (not just telemarketing calls) currently is in place in the United Kingdom.<sup>246</sup>

The FTC lacks empirical data on how frequently debt collection calls result in “hang-ups” or “dead air” calls. The Commission therefore welcomes such data to help assess whether debt collectors using predictive dialers are subjecting consumers to a large number of these calls. If they are, the Commission may consider whether the law should set a limit on the permissible rate of call abandonment for debt collectors and, if so, what that limit should be.

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239. 16 C.F.R. § 310.4(b)(1)(i).

240. 16 C.F.R. § 310.4(b)(1)(iv). “An outbound telephone call is ‘abandoned’ under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.” *Id.*

241. This discussion refers to calls made by a live telemarketer, as opposed to those made using a prerecorded voice message.

242. 16 C.F.R. § 310.4(b)(4)(i). Recent amendments to the TSR provide that this percentage is “measured over the duration of a single calling campaign, if less than thirty days, or separately over each successive 30-day period or portion thereof that the campaign continues.” *Id.* See generally Telemarketing Sales Rule, Final Rule, Statement of Basis and Purpose, 73 Fed. Reg. 51,164 (Aug. 29, 2008) (codified at 16 C.F.R. § 310).

243. 16 C.F.R. § 310.4(b)(4)(ii).

244. Sytel Comment at 1 (suggesting that the Commission consider a regulatory scheme for predictive dialers in debt collection similar to the one adopted in telemarketing under the Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iv)).

245. Discussion of the rationale for adopting the 3% call abandonment standard in the Telemarketing Sales Rule can be found at Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4641-45 (Jan. 29, 2003) (codified at 16 C.F.R. § 310), available at <http://www.ftc.gov/os/2003/01/tsrfrn.pdf>.

246. Sytel Comment at 1.

## b. Calls to Mobile Telephones

The proliferation of mobile telephones also raises several issues not contemplated when the FDCPA was enacted. Increasingly, consumers are using mobile phones to the exclusion of landline phones. New technologies, such as mobile phones, text messages, email, call forwarding, and telephone number portability, raise novel consumer protection challenges that need to be addressed. The ability to contact consumers obviously is critical to debt collectors' successful recovery of monies consumers owe.<sup>247</sup> Debt collectors expressed a desire to be able to use as many methods of contact as possible, including contacts made to mobile phones, to maximize their chances of successfully reaching consumers.<sup>248</sup> Some debt collectors said that consumer adoption of new primary contact methods (*e.g.*, replacing their landline telephones with mobile phones) makes it necessary for debt collectors to have the right to contact consumers using the new technologies that are the primary means that others use to reach them.<sup>249</sup>

Consumer advocates, however, expressed serious misgivings about the possible consumer harm that might arise if debt collectors were free to contact consumers via mobile phones and other newer technology methods.<sup>250</sup> These commenters noted three primary concerns: (1) that some of these methods, such as mobile telephones, email, text messages, and instant messaging, may lack the requisite level of data security or confidentiality to be used for sensitive debt collection matters;<sup>251</sup> (2) that consumers may incur costs for some contacts using new technologies if, for example, the mobile calling plan of a consumer who receives a debt collection call does not permit unlimited minutes, or imposes charges for text messages;<sup>252</sup> and (3) that debt collectors using newer technologies may inconvenience or embarrass consumers by contacting them when they are driving, in appointments, or at work.<sup>253</sup>

247. *See, e.g.*, DiGennaro, Tr. I at 109-10; Leibsker, Tr. I at 111-12; White, Tr. II at 223.

248. *See, e.g.*, ACA Comment (June 6, 2007) at 62-63; NCHHELP Comment at 2, 4-6; Davitt, Tr. I at 107. *See also* Laskey, Tr. I at 206, 218; Schacter, Tr. I. at 213-14; Christopher G. Wunder, Tr. I. at 212.

249. *See, e.g.*, ACA Comment (June 6, 2007) at 62-63; NCHHELP Comment at 2, 4-6; Davitt, Tr. I at 107.

250. Sometimes if a subscriber discontinues his or her mobile phone service, a short time later his or her telephone number is reassigned to another subscriber. A collector seeking to recover a debt from the original subscriber may reach the new subscriber at the original subscriber's former mobile telephone number. *See, e.g.*, Carl Paulson Comment at 1. One commenter suggested that it might be difficult or impossible for a debt collector to even know it is calling a mobile phone, particularly because local number portability enables consumers to readily transfer landline telephone numbers to their mobile phones. DBA Comment (June 2, 2007) at 10-11 ("With the transportability of numbers and the ability to forward calls, it is quite possible for a debt collector to unknowingly make a call to a cell phone which results in an additional charge to the debtor . . .").

251. *See, e.g.*, L. Saunders, Tr. I at 163, 165. The workshop record contains no information bearing on the nature or extent of such data security and privacy concerns.

252. *See, e.g.*, L. Saunders, Tr. I at 165-66.

253. Crystal Feier Comment at 1; Rudy Cavazos, Jr., Tr. I at 166 (commenting that consumers are besieged by calls from creditors already, and that contact by mail would be preferable); L. Saunders, Tr. I at 165.

At the time of the October 2007 workshop, ACA commented that the legal and regulatory system imposed a significant restraint on debt collectors' ability to use predictive dialers to make collection calls.<sup>254</sup> The association pointed to the Telephone Consumer Protection Act ("TCPA")<sup>255</sup> and the rules that the Federal Communications Commission ("FCC") issued to implement the TCPA, which generally prohibit the use of autodialed and prerecorded calls to mobile phones.<sup>256</sup> To ensure that debt collectors could avail themselves freely of these technologies, ACA in 2005 filed a petition with the FCC seeking clarification that the prohibition against autodialed and prerecorded calls to mobile phones does not apply to "creditors and collectors when calling wireless telephone numbers to recover payments for goods and services received by consumers."<sup>257</sup>

In January 2008, several months after the workshop, the FCC issued a declaratory ruling on the petition.<sup>258</sup> In its analysis, the FCC noted that the TCPA's prohibition on calls made to mobile phones using automated dialers is subject to an exception for calls made with the "prior express consent" of the called party.<sup>259</sup> The FCC stated:

Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the "prior express consent" of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt . . . .

We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.<sup>260</sup>

In permitting debt collectors to call a consumer's mobile phone number using autodialed and prerecorded messages as long as the consumer has provided the number to a creditor,

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254. *See, e.g.*, ACA Comment (June 6, 2007) at 58-59.

255. 47 U.S.C. § 227.

256. 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

257. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (FCC Jan. 4, 2008), at 5 (request of ACA International for clarification and declaratory ruling) [hereinafter FCC Ruling].

258. FCC Ruling, *supra* note 257. *See also* 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

259. *Id.* at 6.

260. *Id.*

it appears that the FCC has removed much of the restraint on debt collectors' ability to use predictive dialers.<sup>261</sup>

Subsequently, in a short-lived decision, a federal district court rejected the FCC's interpretation of the TCPA.<sup>262</sup> The court concluded that a consumer who provides a mobile phone number to a creditor when entering into a credit arrangement has given only *implied* consent to be contacted at that number, and not the "prior express consent" that the TCPA requires before a debt collector may contact the consumer using autodialed or prerecorded calls. Importantly, this decision has since been vacated for lack of jurisdiction.<sup>263</sup>

Another issue involving mobile phones is the cost to consumers of debt collection contacts. The FTC is concerned that collection contacts to consumers' mobile phones will impose charges on consumers. The workshop record reflects that calls placed to mobile phones and text messages sent to such phones frequently cause consumers to incur charges.<sup>264</sup> The Commission does not believe that a consumer should have to pay to be contacted by a debt collector. Given the widespread prevalence of mobile calling plans that charge consumers based on the calls they receive, the FTC concludes that the law should presume that consumers will incur charges for calls and text messages made to their mobile phones, and, therefore, generally prohibit debt collectors from contacting consumers via mobile phones.

However, the Commission believes that the law should allow collectors to call consumers on their mobile phones if they have given "prior express consent" to such calls. Consistent with express consent requirements it has imposed in many contexts,<sup>265</sup> the Commission thinks that

261. *But see* Barbara A. Sinsley & Manuel Newburger, *Lucy, Her Football and the TCPA*, DEBT at 24 (Sept./Oct. 2008) (arguing that FCC ruling would not permit debt collectors to use autodialed and prerecorded calls to contact consumers who have specifically authorized the collectors to contact them by mobile phone, because such consent would not have been provided to a *creditor* and thus would not meet the FCC's "prior express consent" threshold).

262. *Leckler v. Cashcall, Inc.*, 554 F. Supp. 2d 1025, 1029-32 (N.D. Cal. May 20, 2008), *vacated* No. C07-04002 SI (Nov. 21, 2008).

263. *Id.*

264. *See, e.g.*, Feier Comment at 1; Murphy, Tr. I at 102; L. Saunders, Tr. I at 165-66; Cavazos, Tr. I at 166.

265. *See* 16 C.F.R. § 310.4(b)(1)(v) (requiring express written consent to receive pre-recorded telemarketing calls). *See also In the Matter of DirectRevenue LLC*, FTC Docket No. C-4194 (June 26, 2007) (distributor of adware prohibited from installing software on consumers' computers unless the company has "clearly and prominently" disclosed the material terms of the software and the consumer has given "express consent" by clicking on a clearly marked button or taking a substantially similar action); *In the Matter of Gateway Learning Corp.*, FTC Docket No. C-4120 (Sept. 10, 2004) (seller of education products prohibited from sharing a consumer's personal information unless it first obtains "express affirmative ('opt-in') consent" from the consumer); *In the Matter of America Online, Inc.*, FTC Docket No. C-4105 (Jan. 28, 2004) (Internet service provider prohibited from continuing to charge customers who have requested cancellation of service unless the company has first obtained "express informed consent" in a manner that clearly evidences that the customer is consenting to continued billing).

creditors and debt collectors should be permitted to place collection calls to the mobile phones of consumers only if: (1) the consumers have been adequately informed that they may receive collection calls on their mobile phones; and (2) the consumers have taken some affirmative step to indicate their agreement to receive such calls.<sup>266</sup> The Commission concludes that requiring that prior express consent be obtained provides consumers with enhanced protection against being charged without their consent for collection calls made to mobile phones.

If a debt collector has a consumer's prior express consent to contact the consumer's mobile phone, then it should be free to communicate with the consumer via that method so long as the debt collector has reason to believe that the consumer who provided that prior express consent can be contacted at that phone number, and so long as the collector complied with all other FDCPA provisions. The Commission will continue to monitor the prevalence and features of pricing plans for mobile telephones, and the law may need to be changed in the future if most consumers would not be charged based on the number of calls or text messages received or the time spent on calls to their mobile phones. Further, the Commission invites interested parties to provide information to assist the agency in developing additional future policy concerning the role of mobile phones in debt collection.

Even if a collector is permitted to call a consumer's mobile phone, the collector must comply with Section 805(a)(1) of the FDCPA. This section permits calls between 8:00 a.m. and 9:00 p.m., local time at the consumer's location, unless the debt collector knows this time period is inconvenient for the consumer. Because a mobile phone number's area code is not necessarily where the consumer is located, however, it may be difficult for collectors to determine whether they are calling consumers during permissible hours.<sup>267</sup>

The Commission believes that the law should be changed to permit debt collectors, provided that they have obtained a consumer's prior express consent to contact him or her via his or her mobile phone, to call the mobile phone between 8:00 a.m. and 9:00 p.m. in the time zone of the consumer's home address, unless the collector knows or should know that calls during those hours are inconvenient for the consumer.

### **c. Caller ID Disclosures**

Some workshop comments raised issues about the application of the FDCPA's disclosure requirements to collector calls to consumers with Caller ID service. If the recipient of a call

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266. As discussed above in the text, the FCC has interpreted the TCPA's "prior express consent" requirement in the context of autodialer calls to mobile phones to require only that consumers have provided their mobile phone numbers to a creditor. The FTC's articulation of "prior express consent" provides greater protection for consumers.

267. CLLA Comment at 2.

has purchased Caller ID service from his or her local telephone company, the caller's telephone number and (sometimes) name will appear on the recipient's telephone or on a separate display device attached to the telephone. This identifying information will be displayed after the first time the telephone rings, before the recipient answers the call.

Caller ID service did not exist at the time the FDCPA was enacted, as the service was first offered on a wide-scale commercial basis in the United States in the late 1980s. Despite its relatively recent origin, Caller ID services are now widely available in the United States. Virtually all cell phones plans include Caller ID services, and many consumers obtain Caller ID services for their landline telephones. In 2002, an industry trade association estimated that approximately 40% of American consumers used Caller ID services.<sup>268</sup>

Commenters raised two issues concerning the obligations of debt collectors who call the consumers on phones with Caller ID service. The first issue is whether debt collectors who convey false or misleading information (either telephone numbers or names) to consumers through Caller ID violate the FDCPA and Section 5 of the FTC Act. Prior private<sup>269</sup> actions indicate that a debt collector who makes a false or misleading representation in this context violates the FDCPA.<sup>270</sup> The Commission has alleged that this practice violates both the FDCPA and Section 5.<sup>271</sup>

The second issue raised was whether debt collectors who call consumers have an affirmative duty under the FDCPA to disclose information to them through Caller ID,<sup>272</sup> and, if so, what information must be disclosed. Section 806(6) prohibits a debt collector from "plac[ing] telephone calls without meaningful disclosure of the caller's identity." Although courts addressing what information must be disclosed have not been uniform, one court has held that meaningful disclosure "has been made if an individual debt collector who is employed by a debt collection company accurately discloses the name of her employer and the nature of her business

268. American Teleservices Association, *Consumer Study* (2002), available at <http://www.ataconnect.org/public/resourcecenter/consumerstudy2002.php>.

269. See, e.g., *Knoll v. Allied Interstate, Inc.*, 502 F. Supp. 2d 943, 947-48 (D. Minn. 2007) (debt collector transmitting a false name to a consumer's Caller ID violated Sections 806(6), 807(10), 807(14), and 808 of the FDCPA).

270. See also CLLA Comment at 2 (the commenter, the Commercial Law League of America, agrees that it is impermissible for a collector to present false information to a consumer's Caller ID).

271. See, e.g., *FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. 2008) (debt collector settled complaint allegations that it violated the FDCPA and Section 5 by making collection calls from outside the consumer's area code using cell phones that misleadingly displayed to the consumer's Caller ID service a number in the consumer's area code).

272. CLLA Comment at 2; NARCA Comment (June 5, 2007) at 10.

and conceals no more than her real name.”<sup>273</sup> The two litigated cases in which federal courts have addressed whether collectors have an affirmative duty under Section 806(6) to meaningfully disclose such information through Caller ID have reached different conclusions.<sup>274</sup>

In evaluating this issue, the Commission believes that it is useful to consider its experience with Caller ID under the Telemarketing Sales Rule. In 2003, the FTC amended the TSR to require that telemarketers transmit their telephone numbers and, if possible, their names, to Caller ID services.<sup>275</sup> The agency required that telemarketers transmit this information to consumers so that they would have a choice as to whether to accept calls from telemarketers.<sup>276</sup> The agency also mandated that telemarketers transmit the information to consumers because it would assist consumers in filing complaints with law enforcement officials.<sup>277</sup>

Requiring that debt collectors transmit their telephone numbers and names, if possible, to consumers’ Caller ID services would seem to convey similar benefits to the consumers. Although debt collectors must meaningfully disclose their identities when a consumer answers the phone, disclosure of identifying information via Caller ID beforehand provides two possible benefits to consumers. First, through Section 805(c) of the FDCPA’s requirement that debt collectors cease communication with a consumer upon written request,<sup>278</sup> Congress recognized that consumers have the right to decide not to communicate with a debt collector. Mandating that debt collectors transmit identifying information to consumers’ Caller ID services assists consumers who decide that they do not want to answer the phone to communicate with the debt collector and enables them to identify to whom they should address a written request to cease communication. Second, Section 806(5) of the FDCPA<sup>279</sup> prohibits debt collectors from “causing a telephone to ring . . . repeatedly or continuously with the intent to annoy, abuse, or harass any

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273. *Wright v. Credit Bureau of Ga., Inc.*, 548 F. Supp. 591, 597 (N.D. Ga. 1982) (in telephone conversation with consumer, debt collector’s use of an alias, rather than her real name, did not violate Section 806(6)). Another court concluded that, to comply with the “meaningful disclosure” requirement, a Caller ID device “need only display the true name, alias, or entity placing the call.” *Knoll*, 502 F. Supp. 2d at 946.

274. *Compare Knoll*, 502 F. Supp. 2d at 946-47 (debt collector violated Section 806(6) of the FDCPA by failing to “display the true name, alias, or entity placing the call,” thereby failing to provide a meaningful disclosure of identity), with *Glover v. Client Servs., Inc.*, 2007 U.S. Dist. LEXIS 73604, at \*18-19 (W.D. Mich. Oct. 2, 2007) (debt collector did not violate Sections 806(6), 807(10), or 808 of the FDCPA by blocking the transmission of identifying information to consumers’ Caller ID).

275. 16 C.F.R. § 310.4(a)(7).

276. Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4626-27 (Jan. 29, 2003) (codified at 16 C.F.R. § 310). Another important reason for requiring telemarketers to transmit this information was to enable consumers to lodge an entity-specific “Do Not Call” request with the telemarketer pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(A). *Id.* at 4626.

277. *Id.* at 4627.

278. 15 U.S.C. § 1692c(c).

279. 15 U.S.C. § 1692d(5).

person at the called number.” Mandating that debt collectors transmit identifying information to consumers’ Caller ID services assists consumers in identifying and complaining to law enforcement officials about collectors who engage in such conduct without having to pick up the phone.

On the other hand, displaying the identifying information of debt collectors on the telephones or devices of consumers may raise concerns that do not exist with telemarketing sales calls. In Section 805(b) of the FDCPA,<sup>280</sup> Congress put substantial limitations on the ability of debt collectors to reveal information to third parties, such as friends, family members other than spouses, and co-workers, regarding a consumer’s debts. These limitations recognize that such disclosure could cause harm to the consumer’s reputation. In contrast, if a third party learns through Caller ID that a consumer has received a telemarketing sales call, that disclosure would not appear to pose a risk of harm to the consumer’s reputation.

In addition, at least one court has questioned whether it is even technologically practicable for debt collectors to convey information sufficient to meaningfully disclose their identities on the small screen on telephones and devices used to display Caller ID information.<sup>281</sup> Industry commenters at the workshop raised the same concern.<sup>282</sup>

The challenges in applying the FDCPA in the context of Caller ID services are an apt illustration of how the debt collection legal framework has not kept pace with changes in technology and the marketplace. The workshop record, however, contains little factual information bearing on the costs and benefits of applying the FDCPA’s current disclosure requirements in the context of this specific new technology. The Commission thus invites interested parties to provide such information to assist the agency in developing future policy concerning the use of Caller ID in the debt collection context.

#### d. Call Recording

Both debt collectors and consumer groups stated that the taping of collection calls is beneficial to consumers and to the debt collection system. According to the ACA, a survey of its membership shows that in 2007, more than 40% of its debt collector members recorded calls

280. 15 U.S.C. § 1692c(b).

281. *Glover v. Client Servs., Inc.*, 2007 U.S. Dist. LEXIS 73604, at \*18 (W.D. Mich. Oct. 2, 2007) (“It is not clear how [a debt collector’s name, capacity, and purpose for calling] could be communicated via a Caller ID device.”).

282. See CLLA Comment at 2 (“Given the fifteen-character limit on Caller ID, this is simply unrealistic.”); NARCA Comment (June 5, 2007) at 10 (“Caller identification software limits the amount of information on the caller identification so it cannot include a ‘meaningful disclosure of the caller’s identity.’”).

with consumer consent, as a way to “monitor and critique collection calls.”<sup>283</sup> At the workshop, several debt collection representatives noted that call recording is routinely used for monitoring the performance of collectors. Calls are recorded both to provide positive feedback to agents who perform well and to ensure that law violations or inappropriate conduct can be addressed in a timely manner.<sup>284</sup> NCLC and NACA recommended that debt collectors be permitted to record conversations with consumers without the consumers’ knowledge or consent.<sup>285</sup> According to the two consumer groups, “This will eliminate disputes about what the collector and the consumer did or did not say, and will also enable debt collection agencies to supervise the behavior of their employees to ensure that they stay within the law.”<sup>286</sup>

NCLC and NACA also touted the benefits of call recording for consumers. They reported that consumers often complain of telephone calls in which debt collectors threaten, yell, curse, and lie. Noting that it is difficult for consumers to prove these abusive practices without the ability to record calls, the two consumer groups asserted that “[c]larifying the law to clearly allow recording of abusive telephone calls from debt collectors would enable consumers to protect themselves, and further the protective purposes of the [FDCPA].”<sup>287</sup>

Industry groups and consumer groups noted that some state laws require two-party consent for taping all telephone calls, including debt collection calls. In these states, therefore, both the debt collector and the consumer must consent before a call is recorded. Debt collectors as well as consumer advocates asserted that standardization of the law to allow taping of debt collection calls in all instances would be desirable.<sup>288</sup>

The Commission concludes that permitting consumers across the nation to tape debt collection calls without the debt collectors’ consent would likely benefit consumers by enabling them to document abusive, deceptive, and unfair collection tactics. However, to accomplish this, federal law would need to preempt state law in those states that require both parties to consent. We take no position as to whether these state laws should be preempted in this instance. This

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283. ACA 2008 SURVEY, *supra* note 127. This figure is up from 28% in the 2005 survey. ACA Comment (June 6, 2007) at 56.

284. *See, e.g.*, DiGennaro, Tr. I at 120; Davitt, Tr. I at 120.

285. NCLC-NACA Comment at 44.

286. *Id.*

287. *Id.* *See also* L. Saunders, Tr. I at 179.

288. *See, e.g.*, NCLC-NACA Comment at 44 (“The [FDCPA] should be amended to provide that a consumer or a debt collector is authorized to record a telephone conversation without the knowledge or consent of the other party, and that recording shall be admissible in court or other proceedings pursuant to this Act or state law respecting debt collection practices.”); L. Saunders, Tr. I at 179; Davitt, Tr. I at 131-32; DiGennaro, Tr. I at 131-32; Murphy, Tr. I at 131-32.

matter should be carefully considered by Congress after obtaining input from the states on the merits of this approach.

#### e. Calls to Answering Machines and Voicemail Systems

Industry members reported that the ability to leave messages for consumers on answering machines and voicemail systems (collectively, “voicemail”) is essential in seeking payment on delinquent debts.<sup>289</sup> These commenters contend, however, that recent court decisions have forced debt collectors who wish to leave voicemail messages to choose among conflicting FDCPA provisions,<sup>290</sup> or rely on other methods to communicate with consumers.

Until the past few years, most debt collectors, when leaving voicemail messages, requested that consumers call them about an important matter, without disclosing that the matter concerned a debt or that the call was from a debt collector.<sup>291</sup> Collectors apparently took this approach to avoid violating Section 805(b) of the FDCPA, which prohibits revealing to third parties the existence of a debt.<sup>292</sup> In recent years, however, a number of federal district courts have held that, to satisfy Sections 806(6) and 807(11) of the FDCPA,<sup>293</sup> debt collectors who leave voicemail messages must include in their messages: (1) the names of their employers; (2) the fact that they are debt collectors; and (3) if the message is a collector’s first communication with the consumer, the FDCPA “mini-Miranda” notice,<sup>294</sup> *i.e.*, a statement that the call is an attempt to collect a debt and that any information obtained will be used for that purpose.<sup>295</sup>

Since the courts began issuing these decisions, collection industry representatives have argued that providing this information to consumers risks revealing debts to third parties in violation of Section 805(b) of the FDCPA. In responding to an ACA request for an advisory opinion, the Commission in July 2006 wrote that it would not issue such an opinion because there already was clear court precedent that the FDCPA requires debt collectors who leave

289. See CLLA Comment at 1-2; NARCA Comment (June 5, 2007) at 10.

290. CLLA Comment at 1-2; NARCA Comment (June 5, 2007) at 10.

291. NCLC TREATISE, *supra* note 11, at 260.

292. ACA International, *Voice Mail Messages in the Wake of Foti* at 1 (updated Nov. 19, 2008) (available to ACA members as part of the association’s Fastfax Service) (on file with Division of Financial Practices, Federal Trade Commission).

293. 15 U.S.C. §§ 1692d(6), 1692e(11).

294. FDCPA § 807(11), 15 U.S.C. § 1692e(11).

295. See, e.g., *Masciarelli v. Richard J. Boudreau & Assoc.*, 529 F. Supp. 2d 183, 185 (D. Mass. 2007); *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 669 (S.D.N.Y. 2006); *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104, 1112, 1116 (C.D. Cal. 2005).

voicemail messages to reveal the names of the collectors' employers and deliver the mini-Miranda disclosure.<sup>296</sup>

Collection industry members and consumer advocates offered contrasting views on the court decisions applying Sections 806(6) and 807(11) of the FDCPA to voicemail, which are often referred to collectively as “*Foti*” after one of the leading cases.<sup>297</sup> ACA proposed several possible changes to the FDCPA, including an amendment to Section 805(b) to relieve debt collectors from liability for unintended or inadvertent disclosures to third parties through voicemail messages.<sup>298</sup> NARCA recommended that debt collectors be permitted to leave voicemail messages that request a return call but do not reveal the collector's identity or the nature of the call, *i.e.*, the kinds of messages that most debt collectors left before the *Foti* decisions.<sup>299</sup> In the recently-released edition of its treatise on debt collection, consumer advocacy group NCLC took a contrasting approach, suggesting that

[b]ecause many financially distressed consumers are forced by their circumstances to share telephone lines and answering devices with children, parents, roommates, and neighbors, a debt collector may not assume that a message left for the consumer will not be heard by a third party. In the absence of an individual voice mailbox for the consumer, a debt collector reaching an answering device must hang up and call back later or write the consumer to avoid the risk of an unlawful third party communication.<sup>300</sup>

A state regulator at the workshop suggested that Colorado law might present a useful model for amending the FDCPA.<sup>301</sup> The Colorado law requires a debt collector who calls a consumer to meaningfully disclose his or her identity only “after the consumer is identified as the debtor.”<sup>302</sup> If the call is picked up by an answering machine, the other party has not been identified as the debtor. The collector then may leave a message, but is not required to disclose his or her identity.

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296. Letter from Donald S. Clark, Secretary to the Federal Trade Commission, to Rozanne M. Andersen & Andrew M. Beato, *available at* [http://www.ftc.gov/os/statutes/fdcpa/letters/060728staffresponsesofadvisopin\\_public.pdf](http://www.ftc.gov/os/statutes/fdcpa/letters/060728staffresponsesofadvisopin_public.pdf).

297. *Foti*, 424 F. Supp. 2d at 643 (S.D.N.Y. 2006).

298. ACA Comment (Nov. 9, 2007) at 25.

299. NARCA Comment (June 5, 2007) at 10.

300. NCLC TREATISE, *supra* note 11, at 174. *See also* Jeff Sovern Comment at 4 (recommending that the FTC “encourage Congress to amend the FDCPA to clarify whether debt collectors can leave messages on telephone answering systems and if so, what can be said without incurring liability.”).

301. Udis, Tr. II at 220.

302. COLO. REV. STAT. § 12-14-106 (2008).

In attempting to leave messages and comply with Sections 805(b), 806(6), and 807(11) of the FDCPA, many debt collectors have for some time been leaving answering machine messages that are variations on the following model ACA suggested:<sup>303</sup>

This is a message for Mary Smith. If you are not Mary Smith please hang up or disconnect. If you are Mary Smith please continue to listen to this message. There will now be a three second pause in this message. (pause) By continuing to listen to this message you acknowledge you are Mary Smith. This is Bob Jones from ABC Collection Agency. This is an attempt to collect a debt and any information obtained will be used for that purpose. Please contact me about an important business matter at (phone #).

ACA reports that consumers have filed over 100 actions against its members claiming that messages like the one above violated Section 805(b)'s prohibition on revealing debts to third parties. In the only decision that appears to have addressed the merits of such a message, the court denied the debt collector's motion to dismiss the consumer's claim that the collector violated Section 805(b).<sup>304</sup> According to the court, although the message's warning might persuade third parties to stop listening to the message, it would not alert the consumer himself to disconnect the call if he were listening to the message with others nearby.<sup>305</sup> Thus, the hybrid message that debt collectors have been using in an effort to comply with Sections 805(b), 806(6), and 807(11) of the FDCPA has not to date protected them from private actions.<sup>306</sup>

The Commission believes that it would be useful to clarify the law concerning the application of Sections 805(b), 806(6), and 807(11) of the FDCPA in connection with debt collectors' obligations if they wish to leave voicemail messages. What is not clear from the workshop record or other sources, however, is whether the benefits to consumers of preventing third parties from learning from a voicemail message that they may owe a debt in collection outweigh the benefits to consumers of knowing when they listen to a voicemail message that the call is from a debt collector. The Commission welcomes interested parties to provide further

303. ACA International, *Voice Mail Messages in the Wake of Foti* at 4 (updated August 5, 2008) (available to ACA members as part of the association's Fastfax Service) (on file with Division of Financial Practices, Federal Trade Commission). ACA has recently updated this publication on November 19, 2008, in response to a court decision. See *infra* note 306.

304. *Berg v. Merch. Assoc. Collection Div.*, Case No. 08-cv-60660 (S.D. Fla. Nov. 31, 2008) (order denying defendant's motion to dismiss complaint with prejudice).

305. *Id.* at 10.

306. To address the *Berg* order (*supra* note 304), ACA recently amended its recommended message to include two additional sentences before the collector introduces him or herself: "Ms. Smith, you should not listen to this message so that other people can hear it as it contains personal and private information. There will now be a three second pause in this message to allow you to listen to this message in private. (pause)." ACA International, *Voice Mail Messages in the Wake of Foti* at 6 (updated Nov. 19, 2008) (available to ACA members as part of the association's Fastfax Service) (on file with Division of Financial Practices, Federal Trade Commission).

information bearing on the consumer benefits of leaving or not leaving voicemail messages to inform future agency recommendations concerning how to clarify the law in this context.

#### f. Other New Types of Contacts

Debt collectors expressed a desire to use new technologies, such as email, instant messaging, and specific technological devices such as emailed collection notices, web-based collection portals, and collection techniques involving interactive voice messaging, to communicate with consumers.<sup>307</sup> Industry commenters noted that these new methods of communication are increasingly popular, and that consumers may actually prefer to have debt collectors use these methods to contact them.<sup>308</sup> As with other new contact methods, however, industry commenters expressed uncertainty about the legality of using technologies like email to communicate with consumers.<sup>309</sup> ACA, for example, noted that “there is a tension between email and the FDCPA’s requirements that communications about a debt not be disclosed to third parties,”<sup>310</sup> because someone other than the consumer may view the contents of the email.<sup>311</sup>

The Commission is not aware of any data bearing on the extent to which third parties have access to debt collection emails and instant messages. In particular, the FTC is not aware of information demonstrating that third parties have greater access to debt collection messages conveyed through these methods than through letters, telephone calls, and other traditional means

307. *See, e.g.*, NCHelp Comment at 6 (“Email is a low cost, highly effective and, particularly among student borrowers, preferred means of communication.”); Wunder, Tr. I at 212 (“The FDCPA should allow creditors, consumers, and collection agencies to make full use of these technologies to the benefit of all involved.”).

308. *See, e.g.*, CLLA Comment at 3 (industry association suggested that “realistically, many consumers would prefer to communicate by email, rather than have to talk to collectors”); Debt Resolve Comment at 1 (reporting on survey in which 84% of consumers surveyed rated the concept of an online service facilitating payment of overdue bills as very appealing, in part because it avoids confrontation with a collections representative); ACA Comment (June 6, 2007) at 62-63; NCHelp Comment at 2; Laskey, Tr. I at 218 (“That would be my number one concern, that the law reflect the reality of that’s how consumers want to communicate . . . .”); Schacter, Tr. I at 214 (“[I]f a consumer wants us to communicate with them [by email], then we should be permitted to communicate with them in that fashion . . . .”).

309. MBA Comment at 5 (“It is unclear how these new methods of communicating [specifically noting email] interface with the FDCPA requirements.”). *But see* Debt Resolve Comment at 2-3 (FDCPA defines communication as “the convey[ing] of information regarding a debt directly or indirectly to any person through any medium, including the use of email.” (citing FDCPA § 803(2), 15 U.S.C. § 1692a(2))).

310. ACA Comment (June 6, 2007) at 63 (referring to Section 805(b) of the FDCPA).

311. *See* DBA Comment (June 2, 2007) at 9-10 (“However, notwithstanding the widespread use of e-mail for both business and personal communication these days, privacy considerations stemming from a concern that third parties may have access to a consumer’s e-mail are limiting debt buyers’ use of e-mail . . . .”); NCHelp Comment at 6 (“[B]ecause there is currently no reliable directory of email addresses, and due to the prevalence of ‘shared’ emails and the use of work emails (where privacy expectations are minimized), a greater risk of inadvertent disclosure to a third party exists, subjecting the sender to potential FDCPA strict liability exposure.”); *see also* Debt Resolve Comment, 4-7 (“[I]f the law, the courts, the ABA and state bar associations . . . all recognize that there is a reasonable expectation of privacy afforded to email communications, the use of this method is not precluded from debt collection practices.”).

for debt collectors to contact consumers. The agency encourages the provision of information addressing the prevalence of such message information being revealed to third parties to further consider and develop policy on this topic. In the absence of data demonstrating that there is a higher risk of revealing to third parties that a consumer's debt is in collection, the FTC does not believe that the imposition of any special limitations on debt collectors' use of email and instant messages is now justified. Nevertheless, the Commission emphasizes that if a debt collector reveals the existence of a debt to a third party through any method, including email and instant messaging, the collector is and should be liable for violating Section 805(b) of the FDCPA.

## 2. Payment Technologies

Consumers can pay their debts today through a wide variety of traditional and new payment methods. At the time the FDCPA was enacted, most people paid debts through paper checks sent by mail. Now, however, it is common to pay through a number of different electronic payment methods. These include credit and debit card payments, remotely created paper checks (or "demand drafts"), and electronic transmission through the ACH system.

Workshop participants and commenters discussed the impact of new electronic payment technologies. Collection industry representatives argued that access to newer electronic payment methods is "a critical component" of newer automated collection methods, such as email dunning notices, web-based collection portals, and techniques involving interactive voice messaging.<sup>312</sup> ACA emphasized that electronic payment methods enable debt collectors "to lower operating costs and increase efficiency . . . because [the debt collectors] do not have to process paper checks or money orders."<sup>313</sup> Consumers also appear to benefit from e-payments because they "eliminate the need for opening bills that arrive in the mail, writing and mailing checks, making checkbook ledger notations, and then mailing payments."<sup>314</sup> Debt buyer trade association DBA International also lauded the availability of "[v]arious internet-based payment portals providing for online payment" because they "expand the number of options a debtor has for satisfying his or her debt."<sup>315</sup>

The comments indicate that not only are e-payments often more convenient for debt collectors and consumers, but they frequently are much faster methods of paying bills, including

312. ACA Comment (June 6, 2007) at 64; DBA Comment (June 2, 2007) at 9.

313. ACA Comment (June 6, 2007) at 64-65.

314. Richard Buse, *e-Payment Options Enhanced By Interactive Voice Response*, COLLECTION ADVISOR, Jul.-Aug. 2005, at 32 (adding that "credit card-based e-Payments also build up frequent flyer miles and reward points for affinity programs.").

315. DBA Comment (June 2, 2007) at 9.

delinquent debts. This means that debt collectors receive payment sooner.<sup>316</sup> According to ACA, paying more expeditiously benefits consumers, who can “cure [a] delinquency or pay off [a] debt at the same time they receive [a debt collection] message. By doing so, they avoid additional collection attempts, while credit grantors benefit from lower payment processing costs.”<sup>317</sup>

The Commission believes that newer payment technologies generally benefit debt collectors and consumers by making debt payment more convenient, less expensive, and faster. The use of electronic payment systems to pay debts, however, poses some risks to consumers as well. In connection with the workshop, consumer representatives expressed concern about collectors obtaining unauthorized access to the accounts of consumers through the use of these new payment methods. According to NCLC and NACA, “debt collectors . . . often gain and abuse electronic access to a consumer’s financial accounts. Consumers have unauthorized debits made from their accounts, have difficulty canceling authorizations or unauthorized access, and are charged repeated fees from multiple presentments of the same debit.”<sup>318</sup>

NCLC and NACA described a variety of ways in which a consumer’s funds may be taken without authorization. They noted that “[a] common complaint by consumers results from the situation when they have provided a debt collector their bank account and routing numbers to allow a specific, single, withdrawal. Instead of the authorized amount, the debt collector makes a withdrawal of all the funds in the account, or makes multiple withdrawals when only one was authorized.”<sup>319</sup> Such withdrawals can be effectuated through any of several payment technologies. If processed as direct electronic ACH debits, the funds are “pulled” from the consumer’s account pursuant to the debt collector-merchant’s instructions, over an electronic

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316. Buse, *supra* note 314, at 32 (quoting an e-payments provider who notes that e-payments create administrative efficiencies and improve cash flow: with e-payments, “[t]he speed of money is there and the quality of money is there; you don’t have to deal with NSF issues and you’re no longer waiting for the checks to arrive in the mail.”).

317. ACA Comment (June 6, 2007) at 64.

318. NCLC-NACA Comment at 32-33; and *see* NCLC-NACA Comment at 4 (“Debt collectors and some fringe lenders like payday lenders steal funds directly from consumer accounts – through remotely created checks and illegal electronic transfers – by perverting the ACH and electronic transfer system, and consumers are often unable to stop or control these debits from their bank accounts.”); *see also* Fox, Tr. I at 67 (describing instances in which collectors have obtained unauthorized access to consumers’ accounts using electronic funds transfer and other e-payments technologies).

319. NCLC-NACA Comment at 19-20 (“One NACA attorney recently recounted this case: My client, a soldier in Iraq, gave [a large debt buyer] permission to debit his account for \$300 on May 1. [The debt buyer] instead cleaned out his account. He called [his bank] and asked that the debt buyer be blocked from any further access to the account. [The bank] told him that this is not sufficient to stop these debits from [debt buyer], that [debt buyer] is well known to the bank, and [debt buyer] will simply take further monies under a different name. Apparently this debt buyer routinely does this to soldiers.”).

clearing system known as the automated clearinghouse or “ACH.”<sup>320</sup> If processed instead as remotely created checks or “demand drafts,” the debt collector uses the consumer’s banking information to create a check that is unsigned, but reflects that the consumer authorized it.<sup>321</sup>

It is well established that posting unauthorized charges to consumers’ accounts is illegal. The Commission has used its authority under Section 5 of the FTC Act to take law enforcement action against those engaged in unauthorized billing or making unauthorized charges to consumers’ accounts.<sup>322</sup> Also in this regard, the Commission has adopted provisions in the TSR that prohibit posting a charge to a customer’s account without first obtaining “the express informed consent of the customer . . . to be charged for the goods or services . . . and to be charged using the identified account.”<sup>323</sup> Moreover, in any transaction involving an unconventional payment method—*i.e.*, any method other than “a credit card subject to protections of the Truth in Lending Act and Regulation Z, or a debit card subject to the protections of the Electronic Funds Transfer Act and Regulation E”—the TSR prohibits posting any charge without obtaining the customer’s “express verifiable authorization,” and sets forth specific procedures for doing so.<sup>324</sup> The FTC articulated two principal reasons for the latter prohibition: (1) the “belief that the use of novel payment methods may lead to unauthorized billing” if consumers fail to understand that a caller has the ability to place a charge using these methods; and (2) the concern that many emerging payment methods lack both dispute resolution rights and consumer protection against unlimited liability for unauthorized charges.<sup>325</sup>

Workshop participants and commenters agreed that unauthorized withdrawals from consumers’ accounts are illegal.<sup>326</sup> NCLC and NACA, however, stated that “claims are rarely pursued,”<sup>327</sup> and that often “[t]he issue in a case challenging an improper withdrawal from a bank account boils down to a ‘he said, she said.’ There is seldom any more evidence than the consumer’s recollection that the withdrawal was not authorized and the debt collector’s computer

320. The Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693, and Regulation E apply to direct electronic debits. ACH is the automated clearinghouse, governed by NACHA rules.

321. Remotely created checks are governed by Articles 3 and 4 of the Uniform Commercial Code and by Regulation CC.

322. *See, e.g., FTC v. Frankly Speaking, Inc.*, No. 1:05-CV-60 (WRS) (M.D. Ga. 2005); *FTC v. Webservice Media, LLC*, No. H-06-1980 (S.D. Tex. 2006).

323. 16 C.F.R. § 310.4(a)(6).

324. 16 C.F.R. § 310.3(a)(3).

325. *See* Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4605 (Jan. 29, 2003) (codified at 16 C.F.R. § 310).

326. NCLC-NACA Comment at 19-21; Andersen, Tr. I at 67.

327. NCLC-NACA Comment at 19-21.

record saying it was.”<sup>328</sup> NCLC, NACA, and CFA therefore recommended changes in federal law to ensure that debt collectors do not misappropriate consumers’ funds.<sup>329</sup>

It is important that collectors withdraw only the amount consumers have agreed to have withdrawn. Although the TSR does not apply to debt collectors, it does suggest an approach that could be adapted to deter debt collectors from making unauthorized withdrawals. Under the TSR, all transactions are required to have the consumer’s express informed consent, and if a telemarketer uses a billing method other than a credit card or a debit card,<sup>330</sup> the telemarketer must obtain the consumer’s “express verifiable authorization” for the payment by following specified procedures.<sup>331</sup> If the consumer provides such authorization orally, proof of it must be audio-recorded and retained for two years. The information that the TSR requires a telemarketer to audio-record and retain for express verifiable authorizations made orally includes: (1) the number of payments that will be submitted; (2) the dates that such payments will be submitted; (3) the amounts of the payments; (4) the consumer’s name; (5) adequate billing information so that the consumer understands which account will be used to collect payment; (6) a telephone number for consumer inquiries that is answered during normal business hours; and (7) the date of the consumer’s oral authorization.<sup>332</sup> Failure to retain the required documentation is a violation of the Rule.<sup>333</sup>

The Commission believes that, if similarly detailed records were obtained and retained in the debt collection context, disputes about authorization of payment would be more likely to be resolved based on an analysis of documentary evidence, rather than based on a determination of whether the debt collector’s or the consumer’s testimony about authorization is more credible. Based on the FTC’s experience enforcing the TSR, it does not appear that imposing such recording and retention requirements has been unduly burdensome on telemarketers.<sup>334</sup> The FTC therefore recommends that the law be changed to require that debt collectors obtain express

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328. *Id.*

329. NCLC-NACA Comment at 32-33; Consumer Federation of America (CFA) Comment at 12.

330. Consumers who use credit cards and debit cards to pay telemarketers are protected against unauthorized charges through the Truth in Lending Act and the EFTA, respectively.

331. *See* 16 C.F.R. § 310.3(a)(3). *See also* Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4604-05 (Jan. 29, 2003) (codified at 16 C.F.R. § 310). In addition, regardless of the payment method used, the TSR requires telemarketers to obtain a consumer’s “express informed consent” to cause the consumer’s billing information to be submitted for payment. 16 C.F.R. § 310.4(a)(6).

332. *See* 16 C.F.R. § 310.3(a)(3)(ii).

333. *See* 16 C.F.R. §§ 310.(a)(5) and 310.5(b).

334. *See, e.g.,* Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 60 Fed. Reg. 43,842, 43,857 (Aug. 23, 1995) (codified at 16 C.F.R. § 310) (minimizing the recordkeeping burden by requiring businesses to retain records that most businesses already maintain during the ordinary course of business).

verifiable consumer authorization before accessing the accounts of consumers and that they retain the records of the authorization for a reasonable period.

## C. Debt Collection Litigation and Arbitration

Litigation and arbitration are important parts of the debt collection process.<sup>335</sup> Creditors and debt collectors frequently use litigation and arbitration to collect outstanding debts. At the workshop, participants raised a wide variety of concerns about the fairness to consumers of the use of litigation and arbitration for resolving disputes concerning debt. Despite useful discussion of these concerns, the workshop record does not contain adequate information to enable the agency at this time to make recommendations relating to debt collection litigation and arbitration. To engage in a more comprehensive and detailed assessment of these issues, as well as to discuss alternative solutions, the FTC will convene regional roundtables in the near future to elicit, evaluate, and share information about debt collection litigation and arbitration.

### 1. Litigation

Lawsuits to collect on consumer debts are usually filed in state court,<sup>336</sup> either civil court of general jurisdiction or small claims court, depending on the amount at issue. Courts usually apply state contract law to decide these cases. Courts typically use state rules of civil procedure and local court rules to determine the procedures followed in these cases.

The vast number of debt collection suits filed in recent years has posed considerable challenges to the smooth and efficient operation of courts. The majority of cases on many state court dockets on a given day often are debt collection matters. According to the *Boston Globe*, for example, 60% of the more than 120,000 small claims cases filed in Massachusetts in 2005 were filed by debt collectors.<sup>337</sup> In Chicago's Cook County Circuit Court, according to press reports, more than 119,000 civil lawsuits against alleged debtors were pending as of June 2008.<sup>338</sup> At that time, some 12,000 such suits were assigned to a single judge in that circuit—

335. Arbitration is a form of dispute resolution in which parties have their dispute reviewed and resolved with a decision on the merits by one or more neutral parties. Katherine V.W. Stone, *Arbitration – National*, UCLA School of Law Research Paper No. 05-18, 2005, available at <http://ssrn.com/abstract=781204>. When an arbitral award is issued, the decision generally is final and not subject to appeal. *Id.* Proponents of arbitration often promote it as a fast and low-cost means of resolving disputes. See National Arbitration Forum, LLC (NAF) Comment (Aug. 13, 2007), *passim*.

336. Although a debt collection suit could be filed in federal court, this happens very rarely. This is partly because of the diversity jurisdictional limit on the amount in controversy of \$75,000, 28 U.S.C. § 1332, and partly because of requirements that a consumer be sued in a convenient forum, FDCPA § 811, 15 U.S.C. § 1692i.

337. Beth Healy, *A Debtor's Hell: Part 2, A Court System Compromised*, BOSTON GLOBE, July 31, 2006, available at [http://www.boston.com/news/special/spotlight\\_debt/part2/page1.html](http://www.boston.com/news/special/spotlight_debt/part2/page1.html).

338. Ameet Sachdev, *Debt Collectors Pushing To Get Their Day In Court*, CHICAGO TRIBUNE, June 8, 2008, available at <http://www.chicagotribune.com/news/nationworld/chi-sun-debtchasers-jun08,0,2426495,print.story>.

roughly twice the number of debt collection cases on that judge’s docket one year previously.<sup>339</sup> Consumer advocates likewise report that courts across the country are flooded by debt collection lawsuits.<sup>340</sup> Judges have expressed concern that the burden of handling the number of debt collection lawsuits on their dockets is making it difficult for them to handle other cases in an expeditious manner.

In addition, consumer groups maintain that debt collectors frequently use the court system in ways that harm consumers.<sup>341</sup> Some reported that debt collectors have insufficient evidence at the time they file a complaint to show that they are seeking to recover the correct amount from the right consumer. Consumer representatives also assert that consumers face substantial impediments to defending themselves in these proceedings. Consumers reportedly often are not properly served with notice of the debt collection suit,<sup>342</sup> thereby making it impossible for them to defend themselves.

Even if consumers are served, they face further obstacles in defending themselves in court. Sometimes collectors have waited long periods of time before filing suit, making it less likely that consumers will remember critical events or possess exculpatory documents and other information. Consumer groups also assert that consumers who are not represented by counsel may not know what evidence to present or how to present it. In short, the view of consumer groups concerning debt collection litigation was aptly described in a *Boston Globe* article: “Collectors are almost never asked to prove the debts they claim; defendants are rarely informed

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339. *Id.*

340. *See, e.g.*, NCLC-NACA Comment at 18 (asserting that courts in New York are overwhelmed by debt collection lawsuits and that many cases result in default judgment); *see also*, Murphy, Tr. I at 96 (stating that debt collection lawsuits account for the majority of cases filed in Broward County, Florida).

341. *See, e.g.*, NCLC-NACA Comment at 16-19; DC 37 Comment at 3 (“We estimate that in the past year, upwards of 80% of lawsuits against our clients based on credit cards were filed by a debt buyer. . . . When our lawyers challenge the bare and conclusory assertions made in lawsuits, the plaintiffs are unable to come forward with basic proof of the debt. . . . The frustration for our clients is endless, and they sometimes suffer monetary loss. The time and expense for our staff in unraveling these situations is significant.”); NEDAP Comment at 4 (“73% of our clients with a debt collection issue have been sued by a debt collection law firm, most often representing a debt buyer. We find that collection law firms routinely take actions that appear to violate the FDCPA as well as raise troubling ethical questions.”); NYC-DCA Comment at 2 (complaints received by the New York City Department of Consumer Affairs and testimony at that Department’s hearing “reflect that debt collection efforts are initiated and proceed through the court process despite insufficient proof demonstrating that a debt is actually due and owing”).

342. NCLC-NACA Comment at 16-17; NEDAP Comment at 4-5. *See also* Healy, *supra* note 337, reporting examples of facially proper Massachusetts small claims court service, by regular mail only, to consumers at out-of-date addresses, resulting in no notice at all. “Often these addresses are out of date, yet the courts assume the defendant was notified unless the letter is returned. This is a flawed system, the *Globe* found in a test: Of 100 letters sent to the same person at incorrect addresses across the state, just 52 came back . . . the other 48 simply went missing.” *Id.*

of their rights. And debtors, usually too strapped to afford a lawyer, have to contend with this legal mismatch alone.”<sup>343</sup>

Perhaps the most significant issue related to debt collection litigation is the prevalence of default judgments.<sup>344</sup> Debt collectors, for example, obtained 60,699 default judgments out of an estimated 130,000 debt collection lawsuits filed in Cook County, Illinois, in 2007.<sup>345</sup> Consumer groups report that consumers frequently do not appear to contest debt collection lawsuits because they have not been properly served, and, if they do not appear, the court enters a default judgment. According to consumer representatives, sometimes if consumers are properly notified of the suit and do appear to contest the debt, collectors then acknowledge that they lack evidence establishing the consumers’ debts,<sup>346</sup> and the court either postpones or dismisses the case.<sup>347</sup> Debt collectors, on the other hand, maintain that consumers frequently default to avoid incurring the costs of appearing and offering a defense that they know will be unavailing.

Debt collection litigation issues traditionally have been addressed as a matter of state law. State rules of civil procedure provide standards for the nature and extent of information a plaintiff, including a debt collector, must have to file a lawsuit. State bar rules provide standards that attorneys must meet before filing a lawsuit on behalf of a client. State statutes of limitations establish the amount of time a debt collector has in which to file a particular claim. State rules of civil procedure determine how debt collectors are to serve consumers notice upon the filing of a debt collection lawsuit.

Although state law is the primary source for addressing concerns about debt collection litigation, the Commission believes that it has an important role to play, too. First, FTC efforts to improve the flow of information from creditors and debt buyers to debt collectors should result in debt collection law firms having more and better information about the debts they collect at the time they file suit. Second, as discussed below, the Commission intends to convene roundtables at which state officials and other interested parties can share information about how their jurisdictions are addressing collection litigation problems, thereby learning from

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343. Healy, *supra* note 337.

344. The owner of a debt receives a number of benefits from obtaining a default judgment against a consumer. A judgment allows the owner of a debt to extend the life of the debt and use garnishment procedures to collect on the judgment. A judgment also makes it more difficult for the consumer to challenge the underlying debt. Specifically, the consumer usually has to show that the court improperly granted the default judgment before challenging the merits of the debt itself.

345. Sachdev, *supra* note 338.

346. *See, e.g.*, Sachdev, *supra* note 338 (citing an Urban Justice Center study finding that 99% of the sampled cases leading to default debt collection judgments in New York were based on legally insufficient evidence under state law); NEDAP Comment at 5-6; NCLC-NACA Comment at 16-19.

347. NCLC-NACA Comment at 16-17; DC 37 Comment at 3.

each other's experience. This should provide assistance to the states in addressing problems on procedural, substantive, and evidentiary issues that may arise in the debt collection litigation context. Finally, the Commission may take law enforcement action to address debt collection litigation activities to the extent that they violate the FDCPA, the FTC Act, or other laws that the Commission enforces.

## 2. Arbitration

Many consumer credit contracts provide that debts arising out of them cannot be litigated in court, but must be subject to arbitration. According to a September 2007 report by Public Citizen, such arbitration clauses often are buried in larger consumer credit contracts and consumers may not be aware that they are agreeing to arbitration when they sign credit applications.<sup>348</sup> Several commenters at the workshop noted the trend toward the increased use of arbitration as a means to collect debts. Arbitration clauses appear today with much greater frequency than they did thirty years ago in consumer credit contracts, such as agreements for credit cards, automobile loans, and personal loans.<sup>349</sup>

At the workshop, critics of the arbitration system asserted that arbitration proceedings are biased in favor of creditors.<sup>350</sup> Arbitration results generally are not reported, although they are required to be reported under California law.<sup>351</sup> Critics of arbitration cite recent data from California purporting to show that between 94 and 99 percent of debt collection arbitration proceedings were decided in favor of the creditor or debt collector.<sup>352</sup>

Arbitration proponents offered information to rebut the assertion that the arbitration process was biased in favor of creditors. They cited research indicating that debt collection *court* cases

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348. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, Sept. 2007, at 6 [hereinafter *The Arbitration Trap*], available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>. In some instances, a consumer may have the right to “opt out” of an otherwise binding arbitration clause within thirty days. *Id.*

349. Stone, *supra* note 335, at 1.

350. *See* discussion, Tr. II at 197-201. Robert J. Hobbs of NCLC argued that arbitration proceedings are like a secret court. He added that arbitrators are not bound by debt collection statutes, so if a consumer's attorney raises an FDCPA claim, the arbitrator can elect not to apply the statute. *Id.* at 198. *But see* NAF Comment (Aug. 13, 2007) at 3 (arbitration firm states that its arbitrators are required to follow the applicable substantive law in deciding a claim).

351. California, unlike other states, requires that arbitration firms publicize quarterly reports on arbitration cases that involve consumers. *See* Cal. Civ. Proc. § 1281.96.

352. *The Arbitration Trap*, *supra* note 348, at 13. *But see also* NAF Comment (Aug. 13, 2007) (California data show that arbitration and court proceedings yield substantially similar outcomes for comparable case types; win rates for consumers and businesses bringing claims in arbitration are within a few percentage points of win rates of individuals and businesses bringing contract claims in court); NAF Comment (Nov. 9, 2007) at 1-3 (93.8% win rate in California lender arbitration is slightly *less* than win rates obtained in two studies of lender court litigation).

in major United States cities were likely to be decided in favor of creditors or debt collectors 96 to 99 percent of the time.<sup>353</sup> According to arbitration proponents, because the “outcomes in arbitration mirror outcomes in court,” this suggests that there is no greater “creditor bias” in arbitration awards than in adjudicated cases.<sup>354</sup>

Critics of arbitration also suggested that the arbitrators themselves may have an incentive to rule in favor of creditors and debt collectors.<sup>355</sup> This is because such companies are “repeat players” in the arbitration system, and they hold the power to strike any potential arbitrator from a panel peremptorily. Thus, according to these advocates, if arbitrators wish to receive future contracts to arbitrate cases, they must avoid offending creditors or debt collectors.<sup>356</sup> Supporters of arbitration defend the integrity of the arbitrators who hear and resolve debt collection disputes. These proponents assert that many arbitrators are former judges and distinguished lawyers and would not decide matters to curry favor with creditors and debt collectors.

Consumer advocates further call into question the procedural fairness of arbitration proceedings. They assert that because the customary rules of evidence (such as the hearsay rule) and procedure (such as personal service of process) do not apply in arbitration forums, such proceedings lack the inherent fairness and procedural protections of the civil court system.<sup>357</sup> They further maintain that arbitration often is more expensive than litigation for consumers who must pay fees for each step in the process, including fees for hearings.<sup>358</sup>

Proponents of arbitration counter that the process used in arbitration proceedings is better for consumers than the process used in court proceedings.<sup>359</sup> For example, arbitration is claimed to allow consumers to: (1) engage in “document hearings” or “telephone hearings”

353. NAF Comment (Nov. 9, 2007) at 1-3.

354. NAF Comment (Aug. 13, 2007) at 3.

355. *See, e.g.*, Hobbs, Tr. II at 198 (arbitrators being paid by creditors could result in bias); NCLC-NACA Comment at 22-24 (“NAF appears to be an extremely unfair and untrustworthy substitute for the civil justice system for debt collection cases. . . . The NAF system is geared towards quickly awarding lenders the full amount the lenders claim a consumer owes or more, without performing much scrutiny of the magnitude or correctness of these awards.”); Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESSWEEK (June 16, 2008) available at [http://www.businessweek.com/magazine/content/08\\_24/b4088072611398.htm](http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm) [hereinafter *Banks vs. Consumers*] (anonymous NAF arbitrator reports on the firm’s efforts to attract creditor/collector claimants by pointing out the possible use of delays and dismissals to manipulate arbitration cases).

356. *See, e.g.*, *Banks vs. Consumers*, *supra* note 355 (citing Harvard Professor Elizabeth Bartholet’s statement that her arbitration decision awarding \$48,000 in damages to a consumer in a collections case was the reason she stopped receiving additional arbitration contracts from NAF).

357. *See, e.g.*, NCLC-NACA Comment at 22-24 (citing *The Arbitration Trap*, *supra* note 348); *but see* NAF Comment (Aug. 13, 2007) *passim* (NAF arbitration involves numerous guarantees of procedural fairness).

358. *The Arbitration Trap*, *supra* note 348, at 10 (“Individual consumers must ‘shell out costs up-front at every twist and turn in the case; loser pays rule may further financially burden consumers when imposed.’”).

359. NAF Comment (Aug. 13, 2007) at 3-5; NAF Comment (Nov. 9, 2007) at 5-8.

(thus avoiding the need and expense of traveling or taking time away from work); (2) pay an inexpensive fee;<sup>360</sup> (3) have their cases resolved more quickly; and (4) use simpler rules and procedures.<sup>361</sup> Specifically, arbitration proponents claim that its procedures are superior to court proceedings in that arbitrators are required to review the merits of each matter before reaching a decision even if the consumer does not appear, while courts often simply enter default judgments if the consumer does not appear.<sup>362</sup> Overall, arbitration proponents praise this alternative dispute resolution mechanism as faster and less expensive for businesses than litigation<sup>363</sup> and beneficial to consumers who participate.<sup>364</sup>

The workshop record reveals substantial disagreement among interested parties as to the advantages and disadvantages of arbitration for creditors, debt collectors, consumers, and the debt collection system. In addition, the discussion at the workshop revealed that there are some common issues for debt collection litigation and arbitration, such as the amount of information a debt collector must possess when commencing a proceeding and how to notify consumers when a matter has commenced in a particular forum.<sup>365</sup> Because the Commission concludes that more information and analysis is needed to develop policy recommendations concerning debt collection arbitration and because there are issues in common between debt collection litigation and arbitration, the FTC will explore the issue of debt collection arbitration in more detail at its future roundtables,<sup>366</sup> as discussed below.

### 3. Collecting on Judgments and Awards

If a litigation or arbitration proceeding results in a judgment or award favoring the owner of the debt, the owner will then seek to collect on that judgment or award. In the case of an arbitration proceeding, the debt owner must then petition the court to enforce the award.

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360. *Id.* at 5-6 (stating that consumer fee schedule, which is reduced relative to business fee schedule, is very reasonable).

361. NAF Comment (Nov. 9, 2007) at 5 (“The relative simplicity of arbitration is a great benefit for consumers because it spares them the labyrinth of rules and procedures that must be followed in a court proceeding, even by parties who have no attorney. The complexity and rigidity of court rules can be a minefield for unwary consumers.”).

362. *Id.*

363. United States Chamber of Commerce, *Elect Mediation and Arbitration*, available at [http://uschamber.com/sb/business/p12/p12\\_8925.asp](http://uschamber.com/sb/business/p12/p12_8925.asp).

364. NAF Comment (Nov. 9, 2007) at 4.

365. NCLC-NACA Comment at 23.

366. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, actively promotes arbitration as a fair, quick, and useful alternative to the court system, and specifies that valid contracts providing that any disputes that ensue in the future must be resolved by arbitration generally are enforceable. The FAA limits the grounds on which courts can refuse to enforce an arbitration award. 9 U.S.C. §§ 9-11. In developing recommendations related to debt collection arbitration, the Commission will consider the implications of the FAA.

Frequently, debt collectors seek to collect by garnishing consumers' wages or bank accounts. The Commission has stated that garnishment of wages generally is an appropriate means of collecting on a judgment or award.<sup>367</sup>

Consumer groups and others, however, assert that some collectors improperly garnish bank accounts containing federally-exempt funds such as Social Security benefits or disability funds.<sup>368</sup> They further assert that garnishing these funds presents extraordinary difficulties for consumers who subsist on them.<sup>369</sup> Because the law requires consumers to receive many such payments by direct deposit, consumers usually keep them in accounts in depository institutions. If a collector presents a financial institution (*e.g.*, a bank) with a state court garnishment order, the institution sometimes freezes the funds in the account, including the exempt funds, to comply with the order. While these accounts are frozen, institutions often charge "NSF" (insufficient funds) fees to consumers whenever anyone attempts to draw on the account. According to NCLC and NACA, "The number of people who are being harmed by these practices has escalated significantly in recent years, largely due to the increase in the number of recipients whose benefits are electronically deposited into bank accounts."<sup>370</sup>

At the workshop, participants agreed that garnishment of federally-exempt funds can cause hardship to consumers. Debt collector representatives asserted that it is unethical to garnish an account if it is known to contain only protected funds.<sup>371</sup> Collector representatives reported, however, that they only infrequently have *knowledge* that an account consists entirely of protected funds, and that consumers rarely respond to requests for information about the contents of their bank accounts prior to a freeze.<sup>372</sup> An FDIC representative, who generally urged debt collectors to avoid freezing exempt funds, commented that there is uncertainty as to whether financial institutions are legally prohibited from garnishing an account containing only protected funds, or whether the protected status of the funds is merely an issue that a consumer may raise after garnishment to unfreeze the bank account and recover the funds.<sup>373</sup>

The federal banking regulators have initiated steps to address the problem of financial institutions garnishing federally-exempt funds. In September 2007, the Board of Governors

367. *See, e.g.*, Statement of Basis and Purpose, FTC Credit Practices Rule, Final Rule, 49 Fed. Reg. 7740, 7744, 7755 (Mar. 1, 1984) (codified at 16 C.F.R. Part 444).

368. *See, e.g.*, NCLC-NACA Comment at 18; Gina Calabrese Comment at 5; NEDAP Comment at 7-8.

369. *See, e.g.*, NCLC-NACA Comment at 18; Calabrese Comment at 5.

370. NCLC-NACA Comment at 34.

371. *See, e.g.*, Adam J. Olshan, Tr. II at 151, 154-55, 161-62; Lynn Drysdale, Tr. II at 152; Hobbs, Tr. II at 152-53; Steven D. Fritts, Tr. II at 158-59.

372. Olshan, Tr. II at 154-55; Fritts, Tr. II at 158-60.

373. Fritts, Tr. II at 160.

of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration issued a joint request for public comment on proposed guidance seeking best practices for financial institutions to follow in protecting federally exempt funds.<sup>374</sup> The proposed guidance included nine “best practices,” including such features as: notifying the consumer; determining, as feasible, whether an account contains exempt funds; waiving NSF and other fees to the consumer while the account is frozen; and offering consumers segregated accounts that contain only federal benefit funds without commingling of other funds. The banking regulators received at least 22 comments on the proposed guidance from a variety of stakeholders.<sup>375</sup> To date, the proposed guidance has not been finalized.

The Commission believes the federal banking agencies should address this issue in the first instance, as it involves compliance by regulated financial institutions with federal laws concerning exempt funds and state court orders. The FTC, however, has prepared consumer education materials advising federal benefit recipients how to keep their funds protected and avoid commingling protected funds with any other funds.<sup>376</sup> In addition, the Commission will continue to monitor federal and state developments<sup>377</sup> related to garnishment of federally-exempt funds to determine whether additional FTC action would benefit consumers.

#### 4. Time-Barred Debt and Discharged Debt

Another issue discussed at the workshop was the collection of “time-barred debt” through litigation or arbitration. A debt is time-barred if it has been delinquent longer than the applicable state statute of limitations; for example, a creditor or debt collector may be required to file suit to collect on a debt within five years after the debt has become delinquent. By requiring that owners of debt file suit relatively close in time to the delinquency, statutes of limitations help ensure that courts have necessary evidence available to resolve disputes, and thus assist

374. Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007), available at <http://www.fdic.gov/news/news/press/2007/pr07078a.pdf>; Press Release, FDIC, Federal Financial Regulatory Agencies Request Comment On Proposed Statement of Best Practices On Garnishment Orders of Exempt Federal Benefit Funds (Sept. 19, 2007), available at <http://www.fdic.gov/news/news/press/2007/pr07078.html>.

375. See comments posted to the Federal Reserve Board at [http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc\\_id=OP%2D1294&doc\\_ver=1](http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc_id=OP%2D1294&doc_ver=1).

376. The FTC’s new consumer publication, *Garnishment of Government Benefits: Understanding Your Rights*, is available at <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt135.pdf>.

377. New York, for example, recently passed a statute providing that the first \$2,500 of exempt funds in a depository account must be protected from garnishment freezing and seizure by debt collectors or creditors. N.Y.C.P.L.R. Chapter 575 (2008). See also, *New York Passes Bill to Close Debt Collection ‘Loophole,’* INSIDEARM (Oct. 2, 2008); Press Release, New Yorkers For Responsible Lending, Governor Patterson Signs Landmark Legislation that Protects Elderly, Disabled, Veteran, and Lower Income New Yorkers From Abusive Debt Collection (Sept. 29, 2008).

consumers in defending themselves.<sup>378</sup> By mandating that collectors file suit by a certain date, a statute of limitations also provides a bright line for owners of debts and consumers as to when no further legal action to collect on a debt is permitted.

The FDCPA reinforces the protections that statutes of limitations provide to consumers. In private actions, courts have held that a collector threatening to sue on a time-barred debt violates one or more sections of the FDCPA: Section 807,<sup>379</sup> using false, deceptive, or misleading representations to collect a debt; Section 807(2)(A),<sup>380</sup> falsely representing the character, amount, or legal status of a debt; Section 807(5),<sup>381</sup> threatening to take an action that cannot legally be taken or that is not intended to be taken; and Section 807(10),<sup>382</sup> using a false representation or deceptive means to collect a debt.<sup>383</sup> The Commission likewise has brought enforcement actions alleging that debt collectors who falsely threatened to sue on time-barred debt violated Sections 807(2)(A), 807(5), and 807(10) of the FDCPA.<sup>384</sup>

Courts also have concluded that actually suing on time-barred debt violates the FDCPA.<sup>385</sup> One of these courts reasoned,

[T]he unfairness of [filing suit on a time-barred debt] is particularly clear in the consumer context where courts have imposed a heightened standard of care — that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits.<sup>386</sup>

It thus is a violation of the FDCPA to sue or threaten to sue consumers to recover on time-barred debt.

378. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”).

379. 15 U.S.C. § 1692e.

380. 15 U.S.C. § 1692e(2)(A).

381. 15 U.S.C. § 1692e(5).

382. 15 U.S.C. § 1692e(10).

383. See, e.g., *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 616 (N.D. Ill. 2001); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D. Ala. 1987).

384. See *United States v. Whitewing Fin. Group*, No. H-06-2102 (S.D. Tex. June 22, 2006); *FTC v. Capital Acquisitions & Mgmt. Corp.*, No. 04C7781 (N.D. Ill. Dec. 2, 2004).

385. See, e.g., *Ramirez v. Palisades Collection LLC*, 2008 U.S. Dist. LEXIS 48722, \*13 (N.D. Ill. June 23, 2008); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1271 n.2 (M.D. Fla. Feb. 22, 2008); *Kimber*, 668 F. Supp. at 1487.

386. *Kimber*, 668 F. Supp. at 1487.

The debt collection industry similarly recognizes that it is a violation of the FDCPA to sue or threaten to sue to recover on time-barred debt.<sup>387</sup> Consistent with the views expressed at the workshop, industry best practices and codes of ethical conduct also prohibit collectors from suing or threatening to sue on time-barred debt.<sup>388</sup> Collection industry representatives also noted, however, that statutes of limitation vary by state and by type of debt being collected, and that it often is difficult to determine which period is applicable to a particular debt collection claim.<sup>389</sup>

Although there is a consensus that suing or threatening to sue to collect time-barred debt is unlawful and unethical for debt collectors, a number of consumer advocates at the workshop reported that some collectors still make false threats of suit or actually sue on time-barred debts.<sup>390</sup> To address this conduct, the Commission will consider how to use its law enforcement and other consumer protection tools<sup>391</sup> to more effectively deter collectors from suing or threatening to sue on time-barred debt. The FTC also encourages the debt collection industry to increase its efforts to persuade collectors not to engage in these activities. The agency anticipates that more extended and detailed discussion of possible public<sup>392</sup> and private measures to deter collectors from suing or threatening to sue on time-barred debt will be an important component of the upcoming debt collection litigation and arbitration roundtables.

Another issue related to debt collection litigation is the collection of debts discharged in bankruptcy. A November 2007 article reported that some debt buyers now purchase and attempt to collect such discharged debt.<sup>393</sup> The federal Bankruptcy Code prohibits the collection of this type of debt.<sup>394</sup> Some courts have determined that consumers may assert a cause of action under

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387. Manuel H. Newburger, Tr. II at 170; Olshan, Tr. II at 171.

388. Newburger, Tr. II at 170 (“[N]o one in the collection bar is going to tell you that they should get to sue on time-barred debts if they’ve read the law.”). *See also* ACA Comment (Sept. 7, 2007) at 7 (citing ACA International’s Code of Ethics, Rule II.A.6, which provides that ACA members have a duty to “not threaten or initiate collection litigation on time barred debts.”).

389. *See, e.g.*, Newburger, Tr. II at 173; DBA Comment (Sept. 10, 2007) at 3-4. *See also* NCLC TREATISE, *supra* note 11, at 222 (“Within a single state, different statutes of limitation may arguably apply to a claim on a debt against a consumer.”).

390. *See, e.g.*, NCLC-NACA Comment at 23 (arbitration), 31-32 (lawsuits), 56 (lawsuits); Drysdale, Tr. II at 164-66.

391. The Commission has published a consumer brochure on time-barred debts, which is available at <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt144.shtm>.

392. For example, a possible response suggested in workshop comments was that the FDCPA should be amended to require that collectors attempting to collect on time-barred debts notify consumers that: (1) the debts are beyond the statute of limitations; (2) the law prohibits the collector from suing the consumer or taking the consumer to arbitration; and (3) if the consumer makes a partial payment on the debt, it may revive the debt and permit the collector to sue on it. NYC-DCA Comment at 3; NCLC-NACA Comment at 32.

393. Robert Berner & Brian Grow, *Prisoners of Debt*, BUSINESSWEEK, Nov. 12, 2007, available at [http://www.businessweek.com/print/magazine/content/07\\_46/b4058001.htm?chan=g1](http://www.businessweek.com/print/magazine/content/07_46/b4058001.htm?chan=g1).

394. *See* 11 U.S.C. § 524.

the FDCPA based on a debt collector collecting or seeking to collect on discharged debt,<sup>395</sup> while other courts have concluded that such a consumer must look solely to the bankruptcy courts for protection under the Bankruptcy Code.<sup>396</sup> The Commission believes that a debt collector who states or implies that a consumer has an obligation to pay a debt that has been discharged in bankruptcy is making a deceptive claim in violation of Section 807 of the FDCPA,<sup>397</sup> and the law should be amended to clarify that such conduct may be challenged as a violation of the FDCPA.

## 5. Future Directions in Litigation and Arbitration

The FTC has found that the lack of adequate documentation of alleged debts is a problem during the debt collection process, and believes the problem is exacerbated when a lawsuit is filed or an arbitration proceeding is commenced. At this stage in the collection process, the potential adverse consequences to the consumer of a collector's failure to obtain adequate debt-related information are greater, especially when a consumer has been misidentified or does not owe the amount claimed. This harm may be especially great for consumers who are not properly served notice of the suit, because such consumers do not know that they need to show up in court and defend the suit if they are to retain their rights.

This problem of inadequate debt-related information appears to stem in large part from the problems discussed above involving information flow: insufficient and inadequate documentation of debt information is transferred from creditors and debt buyers to debt collectors throughout a debt's life cycle. The FTC's previous recommendations made in connection with debt validation and verification should help address this problem.

Nevertheless, as discussed above, issues related to debt collection litigation and arbitration encompass a broad range of issues other than information flow. Virtually all collection proceedings are decided in state court through the application of state substantive and procedural law. Accordingly, the Commission believes that states should take the main role in addressing these issues. At least one state court system is working to resolve potential communication problems between debt collection attorneys and consumer debtors. In Massachusetts, a Small Claims Working Group — comprised of state officials, judges, consumer advocates, debt collection attorneys, and trial attorneys — has studied how the state court system handles its substantial influx of debt collection litigation.<sup>398</sup> The Working Group has suggested a number

395. See, e.g., *Randolph v. IMBS, Inc.*, 368 F.3d 726, 732-33 (7th Cir. 2004) (consumer may pursue an FDCPA claim against a debt collector who has attempted to collect on debt discharged in bankruptcy).

396. See, e.g., *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 504 (9th Cir. 2002).

397. Such a claim would violate Section 5 of the FTC Act as well.

398. MASS. DIST. CT., REP. OF THE SMALL CLAIMS WORKING GROUP (2007), available at <http://www.lawlib.state.ma.us/docs/smallclaimreport.pdf>.

of changes to the state court small claims system that are designed to ensure fair treatment of consumers and other defendants. Describing notice to defendants as a chief concern, the Working Group has recommended, among other things, that plaintiffs be required to verify a defendant's address before a default judgment may be entered.<sup>399</sup>

The Commission believes problems in debt collection litigation and arbitration are serious and need to be considered in a more comprehensive fashion. The FTC believes that it can play an important role through facilitating discussions among interested parties about how to address these problems. The agency therefore will host regional roundtables to discuss those issues and possible solutions with state court judges, governmental officials, contingency collection agencies, debt buyers, collection attorneys, consumer advocates, arbitrators, and other interested stakeholders.<sup>400</sup> In addition, the Commission may take law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other laws the Commission enforces.

## D. Debt Collection Legal and Regulatory Systems

### 1. Private Enforcement of the FDCPA

In enacting the FDCPA, Congress made clear that the FDCPA was intended to be a “primarily self-enforcing” statute, with private individual and class actions providing collectors with a powerful incentive to comply with the statute.<sup>401</sup> To deter illegal collection practices, Congress authorized courts to award individual consumers who sued successfully under the FDCPA any actual damages they suffered, plus additional, “statutory,” damages up to \$1,000.<sup>402</sup> Congress capped statutory damages for a class action of consumers at the lesser of \$500,000 or 1% of the debt collector's net worth.<sup>403</sup>

Congress has not changed the statutory damages amounts for individual and class actions in thirty years. Many consumer advocates expressed the opinion that such damage awards should be increased enough to keep pace with inflation to deter debt collectors from violating

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399. *Id.*

400. We note that NARCA recommended that the Commission take this step. *See* NARCA Comment (Nov. 8, 2007) at 3 (“The FTC should engage state judiciary officials to encourage dialogues similar to the one recently concluded in the Commonwealth of Massachusetts where attorneys, judicial officials and consumer advocates at the state level met to exchange ideas about debt collection litigation processes in small claims courts.”).

401. *See* Senate Report, *supra* note 1, at 5.

402. FDCPA § 813(a)(2)(A), 15 U.S.C. § 1692k(a)(2)(A).

403. FDCPA § 813(a)(2)(B), 15 U.S.C. § 1692k(a)(2)(B).

the statute.<sup>404</sup> NCLC and NACA report that, with inflation, \$1,000 in 1977 dollars equals approximately \$3,600 in 2008 dollars<sup>405</sup> and \$500,000 equals approximately \$1,800,000 in 2008 dollars.<sup>406</sup> Commenters also recommended that in the future these damage amounts should be adjusted periodically to keep pace with price increases.<sup>407</sup>

The Commission believes it is important for the FDCPA to be primarily a self-enforcing statute as Congress intended. Because the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations.<sup>408</sup> Private actions therefore are critical in deterring those who would violate the FDCPA. For private actions to be the effective deterrent that Congress intended, however, the statutory damage amounts in the FDCPA must remain adequate. The FTC thus recommends that the statutory damage amounts in the FDCPA be updated to reflect inflation since 1977 and that in the future these amounts be increased periodically.

## 2. Government Enforcement of the FDCPA

Debt collection enforcement is a priority in the FTC's financial practices program. As noted above, since the FDCPA was enacted, the Commission has brought more than 60 enforcement actions alleging law violations related to debt collection. The Commission will continue its law enforcement efforts to ensure that the debt collection system works effectively.

As part of these efforts, the Commission has modified its law enforcement approach to increase deterrence. The FTC not only has sought higher civil penalties for FDCPA violations, but also has sought consumer redress and disgorgement as forms of equitable monetary relief under Section 13(b) of the FTC Act.<sup>409</sup> In addition, in appropriate cases involving debt

404. *See, e.g.*, NCLC-NACA Comment at 46-48; Calabrese Comment at 7; Southern Methodist University Dedman School of Law (SMU) Comment at 7; NEDAP Comment at 9; DC 37 Comment at 3-4; Law Offices of Dean Malone (Malone) Comment at 1; Michael Worsham Comment at 1; Scott Kreppein Comment at 1-2; Aaron Wright Comment at 1.

405. NCLC-NACA Comment at 46-47. *See* United States Dept. of Labor, Bureau of Labor Statistics, <http://www.bls.gov/cpi/home.htm> (site's inflation calculator uses Consumer Price Index for a given calendar year or, for the current year, the latest monthly index value) (last visited Dec. 1, 2008).

406. NCLC-NACA Comment at 46-47. *See* United States Dept. of Labor, Bureau of Labor Statistics, <http://www.bls.gov/cpi/home.htm> (click on the inflation calculator) (last visited Dec. 1, 2008).

407. *See, e.g.*, NCLC-NACA Comment at 47.

408. As the Commission notes in its 2009 Annual Report, released concurrently with this report and available at <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf>, the agency received 71,004 complaints about third-party debt collectors in 2007, and 78,838 in 2008.

409. 15 U.S.C. § 53(b).

collectors, the Commission has obtained immediate injunctive relief in federal court, including asset freezes and the appointment of receivers.<sup>410</sup>

The FTC also has sought to increase deterrence through holding liable both debt collection companies and the individuals responsible for the companies' practices.<sup>411</sup> For example, the Commission announced such an action in November 2008 against a collection agency and its owner.<sup>412</sup> Under the terms of the consent decree, which settled FTC allegations that the collection agency violated the FTC Act and a number of FDCPA provisions, the collection agency and the owner are both responsible for paying the \$2.25 million civil penalty, the largest civil penalty the Commission has ever obtained in a debt collection case.

### 3. Rulemaking to Implement the FDCPA

To implement the laws that it passes, Congress typically confers rulemaking authority on administrative agencies to clarify or fill gaps in those laws.<sup>413</sup> It may delegate to an administrative agency the authority to promulgate rules to address specific issues Congress has identified. It also may delegate to administrative agencies more general authority to promulgate rules as needed to address other issues that may arise, such as adaptations that are needed to respond to changes in markets or technology.<sup>414</sup> Congress often delegates authority

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410. See, e.g., *FTC v. Rawlins & Rivera, Inc.*, No. 6:07-cv-146 (M.D. Fla. Jan. 31, 2007) (preliminary injunction halting illegal practices and, later, permanent injunction and payment of debt collector's ill-gotten gains to United States Treasury); *FTC v. Capital Acquisitions & Mgmt. Corp.*, No. 04C7781 (N.D. Ill. Dec. 2, 2004) (temporary restraining order prohibiting illegal collection practices, asset freeze, and company placed under control of receiver); *FTC v. Check Investors, Inc.*, No. 03-2115 (JWB) (D.N.J. May 12, 2003) (temporary restraining order and preliminary injunction).

411. See, e.g., *United States v. Acad. Collection Serv., Inc.*, No. 2:08-cv-1576 (D. Nev. Nov. 14, 2008) (corporate and individual defendant jointly liable for \$2.25 million civil penalty); *United States v. LTD Fin. Servs.*, No. H-07-3741 (S.D. Tex. Nov. 5, 2007) (corporate and individual defendants enjoined from violating FTC Act and FDCPA); *FTC v. Whitewing Fin. Group, Inc.*, No. H-06-2102 (S.D. Tex. June 22, 2006) (corporate and individual defendants jointly liable for \$150,000 civil penalty); *FTC v. Check Investors, Inc.*, No. 03-2115 (JWB) (D.N.J. July 18, 2005) (corporate and individual defendants jointly liable for \$10.2 million in redress to consumers).

412. *United States v. Acad. Collection Serv., Inc.*, No. 2:08-cv-1576 (D. Nev. Nov. 14, 2008). The complaint also named two individual officers who oversaw one of the company's collection centers but were not part of the settlement with the company and its owner. The Department of Justice represents the Commission in this matter.

413. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

414. "[I]t is entirely appropriate for [agencies] to make such policy choices [through issuing rules] – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865-66 (1984).

to administrative agencies so that they can apply their expertise to develop rules based on a comprehensive record exploring difficult or technical issues.<sup>415</sup>

Congress has delegated rulemaking authority to the FTC under various types of statutes. It has conferred authority on the FTC to promulgate rules to implement statutes concerning consumer financial services,<sup>416</sup> such as the Fair Credit Reporting Act<sup>417</sup> and the Gramm-Leach-Bliley Act.<sup>418</sup> In addition, Congress has delegated to the FTC the authority to promulgate implementing rules to address emerging technologies in the marketplace. For example, the Telemarketing and Consumer Fraud and Abuse Prevention Act directed the Commission to issue rules to address the use of telephone technologies in telemarketing.<sup>419</sup> The FTC issued the Telemarketing Sales Rule in 1995, revised it in 2003 to respond to changes in technology and the marketplace, and then revised it again in 2008 to address new technologies such as predictive dialers, Caller ID, and prerecorded and interactive telephone messages.<sup>420</sup> Similarly, the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act”) of 2003 directed the Commission to promulgate rules concerning the use of email to market goods and services, and the FTC has issued a number of rules to implement that Act.<sup>421</sup>

The FDCPA, however, does not authorize the FTC or any other agency to issue rules to implement the Act. Indeed, Section 814 of the FDCPA specifically prohibits the FTC and other agencies from promulgating rules concerning the collection of debts by debt collectors.<sup>422</sup> Instead, the FDCPA mandates that the Commission file a report with Congress each year describing its enforcement of the statute and providing any proposed legislative

415. Congress, for example, has given the Federal Reserve Board the authority to issue rules implementing financial services statutes such as the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, and the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*

416. Note that the FTC also enforces regulations that other agencies promulgate to implement consumer financial services statutes, such as the Federal Reserve Board regulations referred to in note 415 *supra*.

417. FCRA § 621(e), 15 U.S.C. § 1681s(e).

418. 15 U.S.C. § 6804.

419. 15 U.S.C. §§ 6101-6108, as amended.

420. *See* Final Rule Amendments and Statement of Basis and Purpose, Telemarketing Sales Rule, 73 Fed. Reg. 51,164 (Aug. 29, 2008); Statement of Basis and Purpose, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4623-28 (Jan. 29, 2003); Statement of Basis and Purpose and Final Rule, Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995) (all codified at 16 C.F.R. § 310).

421. *See, e.g.*, 69 Fed. Reg. 21,024 (Apr. 19, 2004) (adult labeling rule); 70 Fed. Reg. 3110 (Jan. 19, 2005) (primary purpose rule and others); 73 Fed. Reg. 29,654 (May 21, 2008) (various rules) (all codified at 16 C.F.R. § 316).

422. *See* FDCPA § 814(d), 15 U.S.C. § 1692l(d).

recommendations.<sup>423</sup> Although Congress has made substantive amendments to the FDCPA three times since it was enacted,<sup>424</sup> this framework has not ensured that legal requirements have kept pace with the changes in the debt collection industry.

The Commission agrees with commenters that the debt collection legal framework should be changed to enable the government to use rulemaking to respond more quickly and effectively to changes in technologies and the marketplace.<sup>425</sup> Many of the complex issues arising in contemporary debt collection could be addressed with enhanced consideration and expertise if they were resolved through a process of seeking comment, researching particular issues, and proposing and revising necessary and appropriate regulations. Making changes periodically through such a process would help ensure that the law continues to further Congress's intent to protect consumers from abusive, deceptive, and unfair debt collection practices, while also ensuring that debt collectors who refrain from such practices are not competitively disadvantaged.<sup>426</sup>

The Commission therefore believes that consumers and debt collectors would benefit if the agency were given the authority to issue rules to implement the FDCPA. Such rulemaking authority should direct the agency to promulgate rules on particular issues (including those identified elsewhere in this report) for which Congress believes that it would be beneficial to develop a factual record to which the FTC could apply its experience in debt collection matters. The Commission recommends that Congress also consider conferring on the Commission the general authority to issue necessary and proper rules to implement the FDCPA, thus enabling the agency to issue rules in the future to respond expeditiously and effectively to changes in technology and the marketplace.

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423. See FDCPA § 815, 15 U.S.C. § 1692m. *See also, e.g.*, 2008 FTC ANNUAL REPORT, *supra* note 64, available at <http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf>; 2009 FTC ANNUAL REPORT, *supra* note 64, available at <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf>; 2005 FTC ANNUAL REPORT, *supra* note 183, available at <http://www.ftc.gov/reports/fdcpa05/050729fdcpaprt.pdf>.

424. The substantive amendments to the FDCPA came in 1986, 1996, and 2006.

425. A number of workshop participants suggested that the FTC be given authority to promulgate rules under the FDCPA. *See, e.g.*, NARCA Comment (June 5, 2007) at 15 (“This expansion of regulatory oversight would help resolve potentially conflicting interpretations and would help ensure compliance, given the rapid technology changes in debt collection, without requiring the extensive and time consuming legislative process.”); ACA Comment (June 6, 2007) at 112 (proposing that “at five-year intervals . . . the Commission shall make regulatory changes as it deems necessary, work with Congress, and propose legislation in order to ensure” the Act’s effectiveness); M. Saunders, Tr. II at 233; Udis, Tr. II at 233; Wood, Tr. II at 224-25.

426. *See* FDCPA § 802, 15 U.S.C. § 1692 (purpose of FDCPA).

## VII. CONCLUSION

In the thirty years since enactment of the Fair Debt Collection Practices Act, American consumers have experienced many important changes. They have faced a revolution in technology, leading to many new ways to communicate, store and transmit information, and make payments. Consumer household debt has likewise been transformed dramatically in amount and in kind. The conduct of debt collection has also been transformed in many ways, such as the dramatic advent of debt buying, and the vastly increased number of debt collection suits and arbitration proceedings.

Through its 2007 workshop and related proceedings, the Commission has taken stock of the most important changes for consumers and industry that relate to debt collection. The FTC has carefully reviewed the workshop transcript and the many comments received, and in this report has endeavored to enumerate general policy principles, recommend important changes to the law, and identify issues that require further study or attention. The Commission hopes that this report and its future activities will lead to helpful changes in debt collection law, policy, and practice.



APPENDIX A: FAIR DEBT COLLECTION PRACTICES ACT

**F** air  
**D** ebt  
**C** ollection  
**P** ractices  
**A** ct



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## **THE FAIR DEBT COLLECTION PRACTICES ACT**

As amended by Pub. L. 109-351, §§ 801-02, 120 Stat. 1966 (2006)

As a public service, the staff of the Federal Trade Commission (FTC) has prepared the following complete text of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p.

Please note that the format of the text differs in minor ways from the U.S. Code and West's U.S. Code Annotated. For example, this version uses FDCPA section numbers in the headings. In addition, the relevant U.S. Code citation is included with each section heading. Although the staff has made every effort to transcribe the statutory material accurately, this compendium is intended as a convenience for the public and not a substitute for the text in the U.S. Code.

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### **TABLE OF CONTENTS**

- § 801 Short title
  - § 802 Congressional findings and declaration of purpose
  - § 803 Definitions
  - § 804 Acquisition of location information
  - § 805 Communication in connection with debt collection
  - § 806 Harassment or abuse
  - § 807 False or misleading representations
  - § 808 Unfair practices
  - § 809 Validation of debts
  - § 810 Multiple debts
  - § 811 Legal actions by debt collectors
  - § 812 Furnishing certain deceptive forms
  - § 813 Civil liability
  - § 814 Administrative enforcement
  - § 815 Reports to Congress by the Commission
  - § 816 Relation to State laws
  - § 817 Exemption for State regulation
  - § 818 Exception for certain bad check enforcement programs operated by private entities
  - § 819 Effective date
-

15 USC 1601 note

**§ 801. Short Title**

This title may be cited as the “Fair Debt Collection Practices Act.”

15 USC 1692

**§ 802. Congressional findings and declaration of purpose**

- (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
- (b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.
- (c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.
- (d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.
- (e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 USC 1692a

**§ 803. Definitions**

As used in this title—

- (1) The term “Commission” means the Federal Trade Commission.
- (2) The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- (3) The term “consumer” means any natural person obligated or allegedly obligated to pay any debt.

§ 801

15 USC 1601 note

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- (4) The term “creditor” means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
- (5) The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
- (6) The term “debt collector” means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
- (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
- (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only

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- for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
- (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
  - (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
  - (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
  - (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity
    - (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
    - (ii) concerns a debt which was originated by such person;
    - (iii) concerns a debt which was not in default at the time it was obtained by such person; or
    - (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.
- (7) The term “location information” means a consumer’s place of abode and his telephone number at such place, or his place of employment.
- (8) The term “State” means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

**§ 804. Acquisition of location information**

15 USC 1692b

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

- (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
- (2) not state that such consumer owes any debt;
- (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
- (4) not communicate by post card;
- (5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
- (6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

**§ 805. Communication in connection with debt collection**

15 USC 1692c

(a) **COMMUNICATION WITH THE CONSUMER GENERALLY.** Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

- (1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the

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- consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;
- (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or
  - (3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.
- (b) **COMMUNICATION WITH THIRD PARTIES.** Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.
- (c) **CEASING COMMUNICATION.** 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 shall not communicate further with the consumer with respect to such debt, except—
- (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 which are ordinarily invoked by such debt collector or creditor; or

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

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

- (d) For the purpose of this section, the term “consumer” includes the consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

**§ 806. Harassment or abuse**

15 USC 1692d

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
- (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
- (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)<sup>1</sup> of this Act.
- (4) The advertisement for sale of any debt to coerce payment of the debt.
- (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
- (6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller’s identity.

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1. Section 604(3) has been renumbered as Section 604(a)(3).

15 USC 1692e

**§ 807. False or misleading representations**

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
- (2) The false representation of—
  - (A) the character, amount, or legal status of any debt; or
  - (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
- (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
- (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
- (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
- (6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—
  - (A) lose any claim or defense to payment of the debt; or
  - (B) become subject to any practice prohibited by this title.
- (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

§ 807

15 USC 1692e

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- (8) Communicating 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.
  - (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
  - (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
  - (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
  - (12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
  - (13) The false representation or implication that documents are legal process.
  - (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
  - (15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
  - (16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

15 USC 1692f

**§ 808. Unfair practices**

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The 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.
- (2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.
- (3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
- (4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
- (5) Causing charges to be made to any person for communications by concealment of the true propose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.
- (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
  - (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
  - (B) there is no present intention to take possession of the property; or
  - (C) the property is exempt by law from such dispossession or disablement.

§ 808

15 USC 1692f

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- (7) Communicating with a consumer regarding a debt by post card.
  - (8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

**§ 809. Validation of debts**

15 USC 1692g

- (a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
  - (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.
- (b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original credi-

§ 808

15 USC 1692f

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tor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

- (c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.
- (d) A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).
- (e) The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

15 USC 1692h

### **§ 810. Multiple debts**

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 809

15 USC 1692g

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**§ 811. Legal actions by debt collectors**

15 USC 1692i

- (a) Any debt collector who brings any legal action on a debt against any consumer shall—
- (1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
  - (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—
    - (A) in which such consumer signed the contract sued upon; or
    - (B) in which such consumer resides at the commencement of the action.
- (b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

**§ 812. Furnishing certain deceptive forms**

15 USC 1692j

- (a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.
- (b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

**§ 813. Civil liability**

15 USC 1692k

- (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

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- (1) any actual damage sustained by such person as a result of such failure;
  - (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or  
(B) in the case of a class action,
    - (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and
    - (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and
  - (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.
- (b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—
- (1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
  - (2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

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- (c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
  - (d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.
  - (e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

**§ 814. Administrative enforcement**

15 USC 1692f

- (a) Compliance with this title shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this title is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.
- (b) Compliance with any requirements imposed under this title shall be enforced under—

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- (1) section 8 of the Federal Deposit Insurance Act, in the case of—
    - (A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;
    - (B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act, by the Board of Governors of the Federal Reserve System; and
    - (C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;
  - (2) section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;
  - (3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;
  - (4) the Acts to regulate commerce, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;
  - (5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and
  - (6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

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The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

- (c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law, except as provided in subsection (d).
- (d) Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title.

### **§ 815. Reports to Congress by the Commission**

15 USC 1692m

- (a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title.
- (b) In the exercise of its functions under this title, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

15 USC 1692n

**§ 816. Relation to State laws**

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

15 USC 1692o

**§ 817. Exemption for State regulation**

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

15 USC 1692p

**§ 818. Exception for certain bad check enforcement programs operated by private entities**

(a) In General.—

- (1) TREATMENT OF CERTAIN PRIVATE ENTITIES.— Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 803(6), with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).
- (2) CONDITIONS OF APPLICABILITY.—Paragraph (1) shall apply if—
  - (A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

§ 816

15 USC 1692n

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- (B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and
  - (C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—
    - (i) complies with the penal laws of the State;
    - (ii) conforms with the terms of the contract and directives of the State or district attorney;
    - (iii) does not exercise independent prosecutorial discretion;
    - (iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—
      - (I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and
      - (II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;
    - (v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—
      - (I) the alleged offender may dispute the validity of any alleged bad check violation;
      - (II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft,

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- or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and
- (III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and
- (vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.
- (b) Certain Checks Excluded.—A check is described in this subsection if the check involves, or is subsequently found to involve—
- (1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;
  - (2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;
  - (3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;
  - (4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

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- (5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or
- (6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.
- (c) Definitions.—For purposes of this section, the following definitions shall apply:
- (1) STATE OR DISTRICT ATTORNEY.—The term “State or district attorney” means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1, United States Code), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth’s attorneys, solicitors, county attorneys, and state’s attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.
- (2) CHECK.—The term “check” has the same meaning as in section 3(6) of the Check Clearing for the 21st Century Act.
- (3) BAD CHECK VIOLATION.—The term “bad check violation” means a violation of the applicable State criminal law relating to the writing of dishonored checks.

15 USC 1692 note

**§ 819. Effective date**

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

### LEGISLATIVE HISTORY

House Report: No. 95-131 (Comm. on Banking, Finance, and Urban Affairs)

Senate Report: No. 95-382 (Comm. on Banking, Housing and Urban Affairs)

Congressional Record, Vol. 123 (1977)

April 4, House considered and passed H.R. 5294.

Aug. 5, Senate considered and passed amended version of H.R. 5294.

Sept. 8, House considered and passed Senate version.

Enactment: Public Law 95-109 (Sept. 20, 1977)

Amendments: Public Law Nos.

99-361 (July 9, 1986)

101-73 (Aug. 9, 1989)

102-242 (Dec. 19, 1991)

102-550 (Oct. 28, 1992)

104-88 (Dec. 29, 1995)

104-208 (Sept. 30, 1996)

109-351 (Oct. 13, 2006)

Revised January 2009

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## APPENDIX B: FTC ACTIONS RELATED TO DEBT COLLECTION SINCE 1977

*United States v. Acad. Collection Serv., Inc.*, No. 2:08-CV-1576 (D. Nev. Nov. 14, 2008)  
*FTC v. Cash Today, Ltd.*, No. 3:08-cv-00590 (D. Nev. Nov. 6, 2008)  
*FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008)  
*FTC v. CompuCredit Corp.*, No. 1:08-cv-01976 (N.D. Ga. June 10, 2008)  
*United States v. LTD Fin. Servs.*, No. H-07-3741 (S.D. Tex. Nov. 5, 2007)  
*FTC v. Tono Records, Inc.*, No. CV-07-3786 (C.D. Cal. June 12, 2007)  
*FTC v. Rawlins & Rivera, Inc.*, No. 6:07-cv-146 (M.D. Fla. Jan. 31, 2007)  
*United States v. Whitewing Fin. Group*, No. H-06-2102 (S.D. Tex. June 22, 2006)  
*FTC v. Capital Acquisitions & Mgmt. Corp.*, No. 04C7781 (N.D. Ill. Dec. 2, 2004)  
*In the Matter of Applied Card Sys., Inc.*, FTC Docket No. C-4125 (Oct. 6, 2004)  
*United States v. Capital Acquisitions & Mgmt. Corp.*, No. 04-C-50147 (N.D. Ill. March 24, 2004)  
*United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. Nov. 12, 2003)  
*FTC v. Check Investors, Inc.*, No. 03-2115 (D.N.J. May 12, 2003)  
*United States v. DC Credit Servs., Inc.*, No. 02-5115 (C.D. Cal. June 27, 2002)  
*United States v. United Recovery Sys., Inc.*, No. H-02-1410 (S.D. Tex. Apr. 17, 2002)  
*FTC v. Citigroup Inc.*, No. 1:01-CV-00606 (N.D. Ga. Mar. 6, 2001)  
*United States v. Performance Capital Mgmt., Inc.*, No. 01-01047 (C.D. Cal. Feb. 8, 2001)  
*United States v. N. Am. Capital Corp.*, No. 00-CV-0600E (W.D.N.Y. July 10, 2000)  
*United States v. Nat'l Fin. Sys., Inc.*, No. CV-99-7874 (E.D.N.Y. Dec. 1, 1999)  
*In the Matter of Federated Dep't Stores, Inc.*, FTC Docket No. C-3893 (Aug. 27, 1999)  
*United States v. Perimeter Credit, L.L.C.*, No. 1:99-CV-0454 (N.D. Ga. Feb. 18, 1999)  
*In the Matter of Gen. Elec. Capital Corp.*, FTC Docket No. C-3839 (Dec. 11, 1998)  
*In the Matter of May Dep't Stores Co.*, FTC Docket No. C-3848 (Nov. 2, 1998)  
*United States v. Nationwide Credit, Inc.*, No. 1:98-CV-2920 (N.D. Ga. Oct. 6, 1998)  
*United States v. Lundgren & Assocs.*, No. CIV-S-98-1274 (E.D. Cal. July 2, 1998)  
*FTC v. Capital City Mortgage Co.*, No. 1:98-CV-00237 (D.D.C. Jan. 29, 1998)  
*United States v. Int'l Masters Publishers, Inc.*, No. 3:97 CV 1136 (D. Conn. June 10, 1997)  
*United States v. Trans Cont'l Affiliates, Inc.*, No. 95-1627 (N.D. Cal. May 15, 1997)  
*United States v. United Compucred Collections, Inc.*, No. C-1-97-0369  
 (S.D. Ohio. Apr. 15, 1997)  
*United States v. United Creditors Alliance Corp.*, No. SA-CV-96-861 (C.D. Cal. Sept. 10, 1996)  
*United States v. Chynoweth Corp.*, No. C96 1137 (W.D. Wash. July 23, 1996)

*United States v. G & L Fin. Servs., Inc.*, No. D-96-2178 (D.N.J. May 15, 1996)  
*United States v. Allied Bond & Collection Agency, Inc.*, No. 96-CV-1086 (E.D. Pa. Feb. 13, 1996)  
*United States v. Great Lakes Collection Bureau, Inc.*, No. 95-CV-0745A  
(W.D.N.Y. Aug. 30, 1995)  
*United States v. Bally's Health & Tennis Corp.*, No. 94-0821 (D.D.C. Apr. 14, 1994)  
*United States v. Payco Am. Corp.*, No. 93-c-0801 (E.D. Wis. Aug. 2, 1993)  
*United States v. HLD, Inc.*, No. C93-566 (W.D. Wash. Apr. 22, 1993)  
*United States v. D.C. Credit Servs. Inc.*, No. 92-3777 (C.D. Cal. June 24, 1992)  
*United States v. Nationwide Credit, Inc.*, No. 1-92-CV-1219 (N.D. Ga. May 22, 1992)  
*United States v. Nat'l Fin. Servs., Inc.*, No. R-91-226 (D. Md. Jan. 25, 1991)  
*United States v. Jerome E. Stadd*, No. R-90-2293 (D. Md. Sept. 4, 1990)  
*United States v. Ralco Prods. Co.*, No. 8M-90-2292 (D. Md. Sept. 4, 1990)  
*United States v. DMM Mgmt. Consultants*, No. R-90-2291 (D. Md. Aug. 31, 1990)  
*In the Matter of Am. Family Publishers, Inc.*, FTC Docket No. D-9240 (Apr. 16, 1990)  
*United States v. David Renner*, No. 89-1503-Civ-T-10 (A) (M.D. Fla. Nov. 7, 1989)  
*United States v. NCB Bus. Servs., Inc.*, No. 89-6834 (S.D.N.Y. Oct. 16, 1989)  
*United States v. Debt Collectors, Inc.*, No. H-88-4218 (S.D. Tex. Dec. 5, 1988)  
*United States v. Cont'l Transactions, Inc.*, No. 88-1816 (N.D. Ga. Aug. 19, 1988)  
*United States v. Jeffrey K. Williams*, No. C-87-102 (E.D. Wash. Feb. 9, 1987)  
*United States v. Cent. Adjustment Bureau, Inc.*, No. 3-80-1671-R (N.D. Tex. Dec. 22, 1985)  
*In the Matter of Avco Fin. Servs., Inc.*, FTC Docket No. C-3141 (Aug. 9, 1984)  
*United States v. Cash Flow, Inc.*, No. B-80-485 (D. Conn. Oct. 31, 1983)  
*United States v. Milton Shaffner*, No. 83-C-3130 (N.D. Ill. May 5, 1983)  
*United States v. Consumer Fin. Corp.*, No. 82-4409 (D.N.J. Dec. 29, 1982)  
*United States v. Iowa Credit Syndicate of Ft. Dodge, Inc.*, No. 1C-82-3029  
(N.D. Iowa Apr. 22, 1982)  
*In the Matter of Aldens, Inc.*, FTC Docket No. C-3076 (Oct. 8, 1981)  
*FTC v. Don H. Sly*, No. CV-81-H-427-E (N.D. Ala. Mar. 19, 1981)  
*United States v. Collegiate Recovery & Credit Assistance Programs, Inc.*, No. 81-C-89-E  
(N.D. Okla. Mar. 11, 1981)  
*United States v. Universal Collection Bureau, Inc.*, No. 81-575 (S.D.N.Y. Jan. 30, 1981)  
*United States v. Credit Rating Bureau, Inc.*, No. 81 C 0303 (E.D.N.Y. Jan. 23, 1981)  
*United States v. Utah Bureau of Collections, Inc.*, No. C-80-0574 A (D. Utah Oct. 3, 1980)  
*United States v. Radiology Consultants, Inc.*, No. 80-559 W (W.D. Okla. May 12, 1980)  
*United States v. ACB Sales & Serv., Inc.*, No. 80-251 (D. Ariz. Apr. 3, 1980)  
*United States v. Collectron, Inc.*, No. JH-80-711 (D. Md. Mar. 27, 1980)  
*United States v. Telecheck Washington, Inc.*, No. JH-90-710 (D. Md. Mar. 27, 1980)

*United States v. Capital Credit Corp.*, No. 80-0652 (D.D.C. Mar. 13, 1980)

*United States v. United Compucred Collections, Inc.*, No. C-1-80-103  
(S.D. Ohio Feb. 21, 1980)

*United States v. First Fed. Credit Control, Inc.*, No. 79-2274 (N.D. Ohio Dec. 10, 1979)



## APPENDIX C: INDIVIDUAL AND ORGANIZATIONAL COMMENTS SUBMITTED IN CONNECTION WITH THE WORKSHOP

1. Able Debt Settlement, Inc. (Lewis, Ralph) (7/26/2007) #529233-00029
2. ACA International (Beato, Andrew) (6/6/2007) #529233-00016
3. ACA International (Beato, Andrew) (9/7/2007) #529233-00031
4. ACA International (Beato, Andrew) (11/9/2007) #529233-00059
5. American Financial Services Association (Himpler, Bill) (11/13/2007) #529233-00060
6. Anonymous (9/10/2007) #529233-00032
7. ASSET Inc. (Meany, William) (6/6/2007) #529233-00019
8. Beckwith, Judy (10/5/2007) #529233-00044
9. Bell, Raymond (10/12/2007) #529233-00046
10. Bond, Randy (10/30/2007) #529233-00051
11. Brown, Harry (10/24/2007) #529233-00050
12. Calabrese, Gina (6/6/2007) #529233-00014
13. Carey, Mark (9/26/2007) #529233-00039
14. Commercial Law League of America (Goch, David) (5/31/2007) #529233-00008
15. Conley, Hans (4/27/2007) #529233-00002
16. Consumer Federation of America (Fox, Jean Ann) (6/22/2007) #529233-00026
17. DBA International (Sinsley, Barbara) (6/2/2007) #529233-00010
18. DBA International (Sinsley, Barbara) (9/10/2007) #529233-00033
19. DBA International (Sinsley, Barbara) (11/9/2007) #529233-00057
20. Debt Marketplace, Inc. (Hammond, Dennis) (6/7/2007) #529233-00021
21. Debt Resolve, Inc. (Burchetta, James) (10/11/2007) #529233-00045
22. District Council 37 Municipal Employees Legal Services (Martin, Robert) (11/7/2007) #529233-00052
23. Eads, Kathleen (9/11/2007) #529233-00034
24. Feier, Crystal (5/24/2007) #529233-00007
25. Ford Motor Credit Company LLC (Korman, David) (11/15/2007) #529233-00061
26. Fugate Law Office (Fugate, John) (10/16/2007) #529233-00047
27. Golden, Richard A (6/5/2007) #529233-00011
28. Griffin, Brian (5/17/2007) #529233-00005
29. Hankins, Mark (6/1/2007) #529233-00009
30. Hunt, Robert (7/6/2007) #529233-00028
31. International Association of Commercial Collectors (Eisenberg, Paul) (6/14/2007) #529233-00027
32. Jones, Ron (9/27/2007) #529233-00040

33. Kesler, Kecia (9/12/2007) #529233-00035
34. Kreppein, Scott (6/7/2007) #529233-00020
35. Kumar, Punit (11/18/2007) #529233-00062
36. Law Offices of Dean Malone, P.C. (Malone, Dean) (10/17/2007) #529233-00048
37. Lesser & Jordan (Jordan, Craig) (1/8/2008) #529233-00069
38. Malone, Carmen (12/17/2007) #529233-00067
39. Milan, Keir (9/24/2007) #529233-00038
40. Mortgage Bankers Association (Vidal, Vicki) (6/13/2007) #529233-00023
41. NARCA - National Assoc. of Retail Collection Attorneys (White, Cynthia) (6/5/2007) #529233-00013
42. NARCA - National Assoc. of Retail Collection Attorneys (White, Cynthia) (11/8/2007) #529233-00053
43. National Arbitration Forum, LLC (Haydock, Roger) (8/13/2007) #529233-00030
44. National Arbitration Forum, LLC (Haydock, Roger) (11/9/2007) #529233-00058
45. National Consumer Law Center & the National Association of Consumer Advocates (Saunders, Lauren) (6/6/2007) #529233-00018
46. National Council of Higher Education Loan Programs (Fitzgibbon, Timothy) (6/6/2007) #529233-00017
47. Neighborhood Economic Development Advocacy Project (Wilner, Claudia) (11/9/2007) #529233-00054
48. New York City Department of Consumer (Tepper, Marla) (11/9/2007) #529233-00055
49. North American Collection Agency Regulatory Association (Johnson, Kurt) (11/23/2007) #529233-00066
50. Paulson, Carl (5/23/2007) #529233-00006
51. Portfolio Recovery Associates, Inc. (Redmond, Donald) (6/5/2007) #529233-00022
52. Sabhi, Raminder (10/3/2007) #529233-00042
53. Sasek, Cynthia (4/24/2007) #529233-00001
54. SMU Dedman School of Law (Spector, Mary) (11/9/2007) #529233-00056
55. Sovern, Jeff (6/6/2007) #529233-00015
56. Sytel Limited (Blyth, Sue) (9/17/2007) #529233-00036
57. Tuggle, Joe Nathan (4/28/2007) #529233-00003
58. Vaithianathan, Muthukumar (11/20/2007) #529233-00064
59. Worsham, Michael (1/7/2008) #529233-00068
60. Wright, Aaron (5/14/2007) #529233-00004



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