

Insights and Commentary from Dentons

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CFPB ANNUAL REPORT 2012

Fair Debt Collection Practices Act



Consumer Financial
Protection Bureau

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Introduction

The Consumer Financial Protection Bureau (“CFPB” or “the Bureau”) is pleased to submit to Congress its first annual report summarizing its activities to administer the Fair Debt Collection Practices Act (“FDCPA” or “the Act”), 15 U.S.C. §§ 1692 *et seq.*, during the past year. These activities represent the Bureau’s inaugural effort to curtail deceptive, unfair, and abusive debt collection practices in the marketplace prohibited by the FDCPA. Illegal collection practices cause substantial harm to consumers, who may pay amounts not owed, unintentionally waive their rights, suffer emotional distress, and experience invasions of privacy. Such practices can even place consumers deeper in debt.

The Bureau’s program to administer and enforce the FDCPA has only just begun. The Bureau came into existence on July 21, 2011. On January 4, 2012, the President appointed Richard Cordray as the Bureau’s first Director.

The Federal Trade Commission (“FTC”) has prepared this report annually since enactment of the FDCPA in 1977. The Dodd-Frank Act transferred that responsibility from the FTC to the Bureau.¹ The FTC has provided the Bureau with a letter summarizing its debt collection activities during the past year. As in past years, the FTC took significant steps in 2011 to curtail illegal debt collection practices. Information about the FTC’s activities is incorporated into this report, and the FTC’s letter is included in this report as Appendix A. *See* 15 U.S.C. § 1692m(b) (providing that the Bureau may obtain for the annual report the views of any other federal agency which exercises enforcement functions under the FDCPA). The Bureau is grateful to the FTC for its assistance with this first annual report.

Under the Dodd-Frank Act, the Bureau has primary government responsibility for administering the FDCPA. The Bureau shares overall enforcement responsibility with the FTC and other federal agencies. In addition, the Bureau has the authority to prescribe rules with respect to debt collection; issue guidance concerning compliance with the law; collect complaint data; educate consumers and collectors; and undertake research and policy initiatives related to consumer debt collection.² Significantly, pursuant to its supervisory authority over nonbanks, the Bureau has proposed a rule that if finalized as proposed would allow it to supervise and examine larger debt collectors, the first federal supervision program for the debt collection industry.³

This report (1) provides background on the FDCPA and the debt collection market; (2) summarizes the number and types of consumer complaints the FTC received in 2011; (3) describes the Bureau’s supervision program as it relates to debt collection; (4) presents recent developments in FTC law enforcement and the Bureau’s advocacy program; (5) discusses recent research and policy initiatives; and (6) discusses plans for coordination and cooperation between the Bureau and the FTC in the administration of the FDCPA.

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

² *See, e.g.* Dodd-Frank Act §§ 1013, 1021, 1061, 1089.

³ *See* Section III (describing the Bureau’s supervision program as it relates to debt collectors).

I. Background

Debt collection is a large, multi-billion dollar industry that directly affects many consumers. In 2011, approximately 30 million individuals, or 14 percent of American adults, had debt that was subject to the collections process (averaging approximately \$1,400).⁴

In 1977, Congress passed the FDCPA to eliminate abusive collection practices by debt collectors and to ensure that those debt collectors who refrain from using abusive practices are not competitively disadvantaged. The FDCPA created important parameters on debt collection activities such as the time and place collection calls could be made, restrictions on how and to whom debts are communicated, and prohibitions on deceptive, threatening, and abusive collection tactics. The FDCPA's prohibition of deceptive, unfair, and abusive practices applies to third-party debt collectors. For the most part, creditors are exempt when they are collecting their own debts.

Today's collection industry is markedly different from the industry contemplated by the FDCPA 35 years ago. Key new economic players—debt buyers and collection law firms—have entered the industry since its inception. Additionally, the industry has seen dramatic technological advances. Forty years ago, collection activities depended on typewritten collection notices and local phone calls. Collection firms may now use sophisticated analytics to identify the specific debtors to target. Predictive dialers and internet telephony have lowered the cost of contacting consumers so that a small collections firm economically can reach out to hundreds of thousands of consumers. Database improvements have facilitated the sale of debt and created a new sub-industry of debt buyers. But, even as the industry has changed, abuses remain an issue. The collection industry continues to be a top source of complaints to the FTC.

Consumer debt collection is critical to the functioning of the consumer credit market. By collecting delinquent debt, collectors reduce creditors' losses from non-repayment and thereby help to keep consumer credit available and potentially more affordable to consumers. Available and affordable credit is vital to millions of consumers because it makes it possible for them to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase.

There is also a need to protect consumers from debt collectors who violate the FDCPA or who engage in deceptive, unfair, or abusive collection practices. These practices are not only illegal; they can be counterproductive when they impact a consumer's employment and ability to repay the debt. Debt collectors who refrain from using unlawful debt collection practices should also not be competitively disadvantaged.

⁴ Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (February 2012), http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q42011.pdf.

II. Consumer Complaints

As part of its July 21, 2011 launch, the Bureau established a Consumer Response function, responsible for addressing consumer complaints and inquiries. At launch, the Bureau began taking complaints on its website and via telephone, mail, fax, and by referral from other agencies.

The complaint system – which includes a toll-free number and a complaint form on the Bureau website – began with a focus on credit cards and expanded to include mortgage complaints on December 1, 2011, and bank account products and consumer loans on March 1, 2012. The Bureau will continue to expand its coverage to include all nonbank products and services, including debt collection complaints, before the end of 2012.

To assist with the Bureau's first annual report, the FTC has provided to the Bureau the following data on consumer complaints regarding debt collection submitted to the FTC in 2011.

CONSUMER COMPLAINTS SUBMITTED TO THE FTC

The FTC receives copious information about the conduct of debt collectors from complaints consumers file with the FTC and from its enforcement work this past year.⁵ The FTC uses consumer complaints generally to monitor the industry, select targets, and conduct preliminary analysis that, with further factual development, might reveal or help prove a law violation.

Based on the FTC's experience, many consumers never file complaints with anyone other than the debt collector itself. Other consumers complain only to the underlying creditor or to enforcement agencies other than the FTC. Some consumers may not be aware that the conduct they have experienced violates the FDCPA or that the FTC enforces the FDCPA. For these reasons, the total number of consumer complaints the FTC receives may understate the extent to which the practices of debt collectors violate the law.

On the other hand, the FTC acknowledges that not all of the debt collection practices about which consumers complain necessarily comprise legal violations. Many consumers complain of conduct that, if accurately described, would indeed violate the FDCPA, or Section 5 of the FTC Act, 15 U.S.C. § 45. The FTC, however, does not verify whether the information consumers provide is accurate unless the agency undertakes such an inquiry in connection with its law enforcement activities.

Moreover, even if accurately described, some conduct about which consumers complain does not violate the FDCPA. For example, a consumer may complain that a debt collector will not accept partial payments on the same installment terms that the original lender permitted when the account was current. Although a collector's demand for accelerated payment or larger installments may be frustrating to the consumer, such a demand generally does not violate the FDCPA. To the extent that consumers complain

⁵ Consumers may file complaints with the FTC via its toll-free hotline (1-877-FTC-HELP), online complaint forms at <https://www.ftccomplaintassistant.gov>, or United States mail.

about conduct that may not or does not violate the FDCPA, the FTC's complaint data may overstate the extent of law violations.

Finally, consumers may complain of conduct about which more information is needed to determine whether it would violate the law. If a consumer complains that a debt collector has threatened to file a civil lawsuit to collect a debt, for example, the FTC cannot determine whether such conduct violates the FDCPA without investigating whether the debt collector had the requisite intention to do so.⁶

Despite these limitations, the FTC continues to believe that consumer complaint data provides useful insight into the acts and practices of debt collectors. Below is a description of trends that the FTC has observed in the overall number of debt collection complaints it has received as well as the types of practices about which consumers complain most frequently. The total number of FTC complaints, as well as the number of complaints reported to the FTC about any specific practice, fluctuate yearly for a variety of reasons. To convey the relative impact of a particular practice on consumers during the past year, this report presents the percentage of all 2011 FTC complaints related to each specific practice. To assist in identifying trends over time, this report compares the percentage of all FDCPA complaints to the FTC in 2011 that mention a practice with the percentage of all such complaints in 2010 that did so.

1. TOTAL NUMBER OF FTC COMPLAINTS⁷

Hundreds of thousands of consumers contact the FTC every year about consumer protection issues. With respect to debt collection, the FTC receives both consumer inquiries and complaints. The FTC's Consumer Response Center ("CRC") makes every effort to distinguish between these two categories of contacts. The data presented here include only consumer contacts that the CRC has identified as complaints.⁸ When this section of the report references "complaints," it includes only complaints that consumers have filed directly with the FTC, as opposed to any other body.⁹

ALL COLLECTORS: The FTC continues to receive more complaints about the debt collection industry than any other specific industry.¹⁰ Complaints about third-party debt collectors¹¹ and in-house collectors in 2011 together totaled 142,743 complaints¹² and accounted for 27.16% of all complaints the FTC received.¹³

This represents an increase in absolute terms but a small decrease as a percentage of total complaints over 2010, when the agency received 141,285 debt collection complaints, accounting for 27.23% of all complaints the FTC received.

THIRD-PARTY DEBT COLLECTORS: In 2011, consumer complaints to the FTC about third-party debt collectors ("FDCPA complaints") increased in absolute terms and as a percentage of all complaints that consumers filed directly with the FTC. The FTC received 117,374 FDCPA complaints in 2011, representing 22.3% of all complaints it received directly from consumers. By comparison, in 2010, the FTC received 109,254 FDCPA complaints, representing 21.1% of the complaints it received directly from consumers.

⁶ 15 U.S.C. § 1692e(5), prohibits debt collectors from threatening "to take any action that cannot legally be taken or that is not intended to be taken." This prohibition includes false threats of suit.

⁷ The 2010 complaint numbers identified in this year's report differ slightly from those identified in last year's report, because, in connection with a quality assurance review, the FTC staff reviewed and re-coded some complaints after the 2011 Annual Report was issued.

⁸ In general, consumer complaints concern the alleged behavior of specific actors, whereas consumer inquiries ask for information about their legal rights or other topics.

⁹ In contrast, the Federal Trade Commission's Annual Consumer Sentinel Network Data Book includes in the complaint numbers the complaints submitted to certain other entities that partner with the FTC in Consumer Sentinel, the agency's law enforcement complaint-sharing system. See FTC Consumer Sentinel Network Data Book: January-December 2011 (Feb. 2012) at 6, <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2011.pdf#3>. For this reason, the total number of debt collection complaints set forth in this report is less than the number stated in the FTC's Annual Consumer Sentinel Network Data Book.

¹⁰ The FTC does not count in the total number of debt collection complaints any identity theft or Do Not Call Registry complaints that may involve debt collection. The FTC does not consider identity theft and Do Not Call complaints to be reports about any specific industry. Identity theft complaints are excluded because such complaints relate to a variety of actors, rather than a single industry. Do Not Call Registry complaints similarly are excluded because the complaints capture the actions of a variety of industries that use telemarketing to contact consumers. Note, however, that some identity theft and Do Not Call Registry complaints may implicate deceptive, unfair, or abusive debt collection practices. For example, a consumer may complain about suspected identity theft when a debt collector is contacting him or her about a debt he or she never incurred. To that extent, the FDCPA complaint data in this report may under-report consumer complaints about debt collection practices.

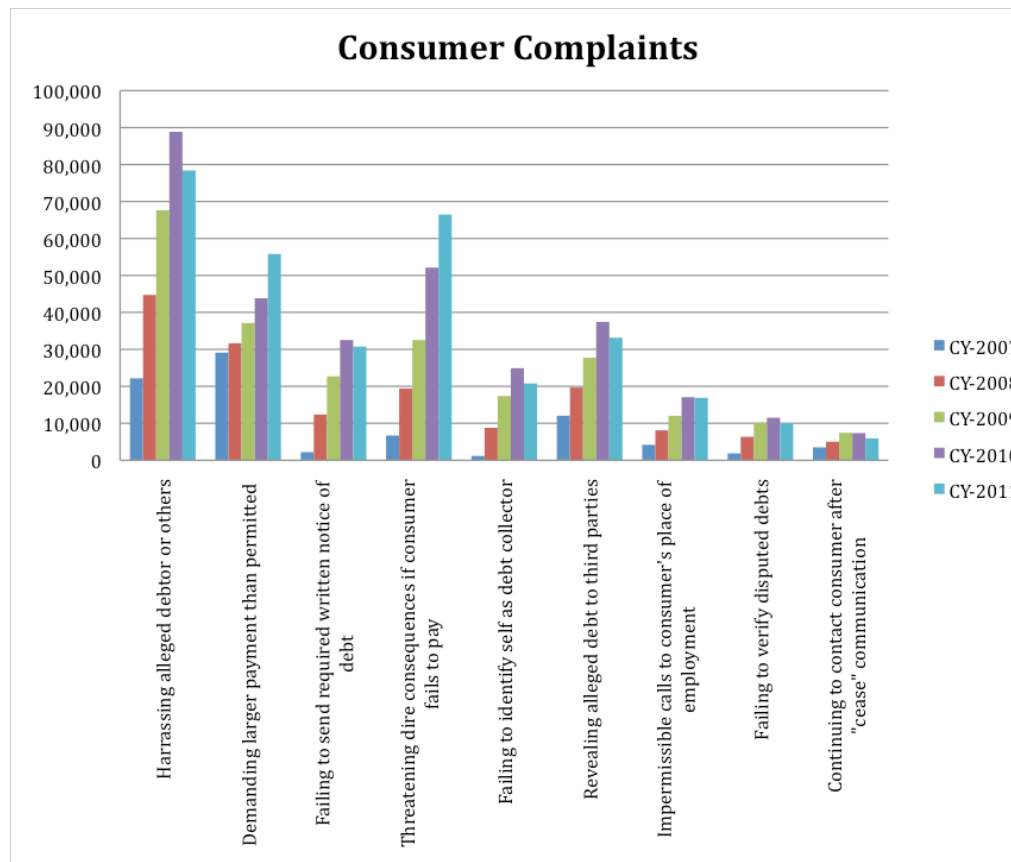
IN-HOUSE DEBT COLLECTORS: Last year, the number of complaints the FTC received about creditors' in-house collectors decreased slightly, both in absolute terms and as a percentage of total complaints. In 2011, the FTC received 25,369 complaints about in-house collectors, representing 4.8% of all complaints received. In 2010, the FTC received 32,031 complaints about in-house collectors, representing 6.2% of all complaints received.

Although the FTC received over one hundred thousand consumer complaints about third-party collectors in 2011, it recognizes that collectors contact millions of consumers each year. The number of complaints the FTC receives about debt collectors, therefore, corresponds to only a small fraction of the overall number of consumers contacted.

2. FTC COMPLAINTS BY CATEGORY

In addition to evaluating the total number of complaints about third-party debt collectors, it also is instructive to consider the specific types of debt collection practices about which consumers complain. Because consumer complaints frequently address more than one debt collection practice, the complaint may have been assigned many more than one code by the FTC's CRC.¹⁴ Thus, if one adds together all the complaints for each of the fifteen debt collection codes each year, the total exceeds the number of FDCPA complaints the FTC actually received in that year.¹⁵

The following graph compares the number of complaints received in each debt collection practice category from 2007 through 2011.



¹¹ "Third-party debt collectors" include contingency fee collectors and attorneys who regularly collect or attempt to collect, directly or indirectly, debts asserted to be owed or due another, as well as debt buyers collecting on debts they purchased in default.

¹² Some complaints are directed toward both third-party debt collectors and in-house creditor collectors. Thus, the total number of complaints against all debt collectors is slightly less than the sum of all third-party complaints and all in-house creditor complaints.

¹³ See Appendix B for a chart showing the number of third-party collector complaints, in-house collector complaints, and total debt collector complaints in 2011 and 2010.

¹⁴ Each CRC code assigned to an FDCPA complaint corresponds to a potential law violation.

¹⁵ See Appendix C for a chart showing the number and percentage of FTC complaints for each FDCPA violation code in 2011 and 2010.

HARASSING THE ALLEGED DEBTOR OR OTHERS: This complaint category encompasses four distinct violation codes. Under the FDCPA, debt collectors may not harass consumers to try to collect on a debt.¹⁶

In 2011, 40.4% of FDCPA complaints the FTC received, or 47,362 complaints, claimed that collectors harassed the complainants by calling repeatedly or continuously. This was the most frequent law violation about which consumers complained during 2011, as it was in 2010, when 54,216 FDCPA complaints, representing 49.6% of FDCPA complaints, stated that collectors harassed them by calling repeatedly or continuously.

Also in 2011, 14.1% of FDCPA complaints, or 16,576 complaints, claimed that a collector had used obscene, profane, or abusive language. In 2010, 16.1% of FDCPA complaints or 17,556 complaints, raised concerns about this practice. Allegations that collectors called before 8:00 a.m., after 9:00 p.m., or at other times that the collectors knew or should have known were inconvenient to the consumer, made up 8.9% of complaints, or 10,488 complaints, in 2011, down from 11.8% of complaints, or 12,885 complaints, in 2010. Reports that collectors used or threatened to use violence if consumers failed to pay accounted for 3.4% of FDCPA complaints, or 3,977 complaints, in 2011, down from 3.8% of complaints, or 4,182 complaints, in 2010.

DEMANDING AN AMOUNT OTHER THAN IS PERMITTED BY LAW OR CONTRACT: This category includes two different FDCPA law violation codes. First, the FDCPA prohibits debt collectors from misrepresenting the character, amount, or legal status of a debt.¹⁷ The types of complaints that fall into this category, for example, are reports that a debt collector is attempting to collect either a debt the consumer does not owe at all or a debt larger than what the consumer actually owes. Other complaints in this category state that collectors are seeking to collect on debts that have been discharged in bankruptcy. For the fourth consecutive year, this was the second most common category of FDCPA complaint. In 2011, there were 46,482 complaints describing this conduct, representing 39.6% of FDCPA complaints, up from 33,203 complaints, or 30.4% in 2010.

Second, the FDCPA prohibits debt collectors from collecting any amount unless it is “expressly authorized by the agreement creating the debt or permitted by law.”¹⁸ In 2011, 7.9% of FDCPA complaints, or 9,314 complaints, asserted that collectors demanded interest, fees, or expenses that were not owed (such as unauthorized collection fees, late fees, and court costs). In 2010, 9.7% of FDCPA complaints, or 10,613, made these assertions.

FAILING TO SEND REQUIRED WRITTEN NOTICE OF THE DEBT TO CONSUMER: The FDCPA requires that debt collectors send consumers a written notice that includes, among other things, the amount of the debt, the name of the creditor to whom the debt is owed, and a statement that, if within thirty days of receiving the notice the consumer disputes the debt in writing, the collector will obtain verification of the debt and mail it to the consumer.¹⁹ Many consumers who do not receive this notice are unaware that they must dispute their debts in writing if they wish to obtain verification of the debts. In 2011, 26.2% of the FDCPA complaints, or 30,742 complaints, reported that collectors did not provide the required notice, down from 29.8% of all FDCPA complaints, or 32,516 complaints, in 2010.

¹⁶ 15 U.S.C. § 1692d.

¹⁷ 15 U.S.C. §1692e(2).

¹⁸ 15 U.S.C. § 1692f(1).

¹⁹ 15 U.S.C. § 1692g(a).

THREATENING DIRE CONSEQUENCES IF CONSUMER FAILS TO PAY:

The FDCPA bars debt collectors from making threats as to what might happen if the consumer fails to pay the debt, unless the collector has the legal authority and the intent to take the threatened action.²⁰ Among other things, collectors might threaten to initiate civil suit or criminal prosecution, garnish wages, seize property, cause loss of job, have a consumer jailed, or damage or ruin a consumer's credit rating. In 2011, 30.2% of FDCPA complaints, or 35,473 complaints, reported that third-party collectors falsely threatened a lawsuit or some other action that they could not or did not intend to take, an increase from the 25.3% of FDCPA complaints, or 27,554 complaints that reported the same type of conduct in 2010. Also in 2011, 23.0% of FDCPA complaints, or 27,624 complaints, alleged that such collectors falsely threatened arrest or seizure of property, up from the 18.6% of FDCPA complaints, or 20,307 complaints, reporting such conduct in 2010.

FAILING TO IDENTIFY SELF AS A DEBT COLLECTOR: To avoid creating a false or misleading impression, the FDCPA requires a debt collector to disclose in all communications with a consumer that he or she is a debt collector and, in the first communication with the consumer, that he or she is attempting to collect a debt and that any information obtained will be used for that purpose.²¹ Consumers who do not receive such notification may reveal under false pretenses information that will later be used against them to collect the alleged debt. In 2011, 17.7% of all FDCPA complaints, or 20,781 complaints, alleged the collector failed to provide the required "mini-Miranda" warning, down from 22.8% of FDCPA complaints, or 24,894 complaints, in 2010.

REVEALING ALLEGED DEBT TO THIRD PARTIES: The FDCPA generally prohibits third-party contacts for any purpose other than obtaining information about the consumer's location.²² Collectors calling to obtain location information also are prohibited from revealing that a consumer allegedly owes a debt.²³

Improper third-party contacts may embarrass or intimidate the consumer who allegedly owes the debt and be a continuing aggravation to the third parties. In some cases, collectors reportedly have used misrepresentations as well as harassing and abusive tactics in their communications with third parties, or even have attempted to collect from the third party. Contacts with consumers' employers and co-workers about consumers' alleged debts also may jeopardize continued employment or prospects for promotion. Relationships between consumers and their families, friends, or neighbors may additionally suffer from improper third-party contacts.

This past year, 17.5% of FDCPA complaints, or 20,519 complaints, claimed that collectors called a third party repeatedly to obtain location information about the consumer,²⁴ down from 21.8% of complaints, or 23,847 complaints, in 2010. The third parties contacted included employers, relatives, children, neighbors, and friends. Also in 2011, 10.8% of all FDCPA complaints, or 12,636 complaints, reported that debt collectors illegally disclosed a purported debt to a third party, down from the 12.4% of FDCPA complaints, or 13,576 complaints, reporting these disclosures in 2010.

IMPERMISSIBLE CALLS TO CONSUMER'S PLACE OF EMPLOYMENT:

Under the FDCPA, a debt collector may not contact a consumer at work if the collector knows or has reason to know that the consumer's employer prohibits such contacts.²⁵ By continuing to contact consumers at work under these circumstances, debt collectors may

²⁰ 15 U.S.C. § 1692e(4)-(5).

²¹ 15 U.S.C. § 1692e(11). This requirement does not apply if the communication at issue is a formal pleading made in connection with a legal action. *Id.* 15 U.S.C. § 1692d(6) also provides that it is generally an abusive practice to place telephone calls without meaningful disclosure of the caller's identity.

²² 15 U.S.C. § 1692c(b). Location information includes a consumer's home address and telephone number or place of employment. 15 U.S.C. § 1692a(7).

²³ 15 U.S.C. § 1692b(2).

²⁴ 15 U.S.C. § 1692b(3). Prohibits a debt collector contacting a third party for location information from communicating with the third party more than once, unless the third party requests it or the collector reasonably believes the third party's earlier response was erroneous or incomplete and that the third party now has correct or complete location information.

²⁵ 15 U.S.C. § 1692c(a)(3).

put them in jeopardy of losing their jobs. In 2011, 14.4% of FDCPA complaints, or 16,895 complaints, related to calls to consumers at work, down from 15.6% of FDCPA complaints, or 17,058 complaints, in 2010.

FAILING TO VERIFY DISPUTED DEBTS: The FDCPA also mandates that, if a consumer submits a dispute in writing, the collector must cease collection efforts until it has provided written verification of the debt.²⁶ Many consumers complained that collectors ignored their written disputes, sent no verification, and continued their collection efforts. Other consumers reported that some collectors continued to contact them about the debts between the date the consumers submitted their dispute and the date the collectors provided the verification. Last year, 8.5% of all FDCPA complaints, or 10,000 complaints, claimed that collectors failed to verify disputed debts. In 2010, 10.5% of all FDCPA complaints, or 11,498 complaints, were of this type.

CONTINUING TO CONTACT CONSUMER AFTER RECEIVING “CEASE COMMUNICATION” NOTICE: The FDCPA requires debt collectors to cease all communications with a consumer about an alleged debt if the consumer communicates in writing that he or she wants all such communications to stop or that he or she refuses to pay the alleged debt.²⁷ This “cease communication” notice does not prevent collectors or creditors from filing suit against the consumer to collect, but it does prohibit collectors from calling the consumer or sending dunning notices. In 2011, 5.0% of FDCPA complaints, or 5,922 complaints, reported that collectors ignored “cease communication” notices and continued their collection attempts, down from 6.7% of complaints, or 7,353 complaints, in 2010.

²⁶ 15 U.S.C. § 1692g(b).

²⁷ 15 U.S.C. § 1692c(c).

III. Bureau Supervision of Debt Collection Activities

TYPES OF CFPB SUPERVISION AUTHORITY

Under the Dodd-Frank Act, the Bureau has the authority to supervise many creditors who collect their own debts or hire third party debt collectors, their service providers for collection services, and, if the Bureau's proposed "larger participant" rule is finalized as proposed, larger nonbank debt collectors. Section 1025 of the Act authorizes the Bureau to supervise large insured depository institutions and credit unions with more than \$10 billion in total assets and their affiliates, as well as their service providers, which could include third-party debt collectors.²⁸ Section 1026 of the Act in turn allows the Bureau to require reports from smaller insured depository institutions and to include its examiners on a sampling basis at the prudential regulator's examinations of such entities to assess compliance with the requirements of Federal consumer financial law, including the FDCPA. Under the Dodd-Frank Act, Section 1026(e), the Bureau also has supervisory authority over some service providers to smaller depository institutions, in coordination with the appropriate prudential regulator.

In Section 1024, the Act also authorizes federal supervision for the first time of certain nonbank entities that engage in offering or providing a consumer financial product or service. Specifically, the Bureau has authority to supervise nonbank entities in the residential mortgage, payday lending, and private education lending markets. In addition, for other nonbank markets for consumer financial products or services, the Bureau has the authority to supervise "larger participants" under Section 1024(a)(1)(B). The Dodd-Frank Act requires the Bureau to define such "larger participants" by rule and establishes July 21, 2012 as the deadline for the Bureau's initial larger participant rule, which is discussed below.²⁹ In addition to supervising the entities identified in Section 1024(a)(1), the Bureau can also supervise their service providers, including third-party debt collectors.³⁰

Finally, Section 1022(c)(1) instructs the Bureau to monitor for risks to consumers in the offering or provision of consumer financial products or services, including debt collectors. To conduct this monitoring, Section 1022(c)(4) authorizes the Bureau to gather information regarding the business conduct and activities of covered persons, including debt collectors, and to required covered persons to file such reports or information as the Bureau deems necessary to fulfill its monitoring responsibilities.

THE CFPB'S ROLLOUT OF ITS SUPERVISION PROGRAM AND EXAMINATION MANUALS

The Bureau has begun to supervise non-bank entities within its jurisdiction, and the more than 100 large banks, thrifts, and credit unions that have assets over \$10 billion and their affiliates. In general, the CFPB's supervision activities will include gathering reports

²⁸ See Dodd-Frank Act §§ 1025(a)-(b), (d) (subjecting service providers to the CFPB's supervision authority, to the same extent as if the CFPB were an appropriate Federal banking agency, and requiring coordination with the appropriate prudential regulator).

²⁹ Pursuant to Dodd-Frank Act § 1024(a)(1)(C), the Bureau also has supervision authority where it has reasonable cause to determine, by order after notice and an opportunity to respond, that a covered person is engaging or has engaged in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

³⁰ See Dodd-Frank Act § 1024(e) (subjecting service providers to the Bureau's supervision authority, to the same extent that an appropriate Federal banking regulator would be able to supervise the service provider if it were in a service relationship with a bank, and requiring coordination with the appropriate prudential regulator, if applicable).

from and conducting examinations of supervised entities. The examination process will be an ongoing process of pre-examination scoping and review of information, data analysis, onsite examinations, and regular communication with supervised entities, as well as follow-up monitoring. When necessary, CFPB's examiners will coordinate and work closely with the CFPB's enforcement staff to take appropriate enforcement actions to address harm to consumers.

The Bureau is implementing its nonbank supervision program based on its assessment of risk to consumers, including consideration of factors such as the volume of business, types of products or services, and the extent of state oversight. The Bureau is also coordinating with federal and state regulators to maximize overall supervisory capability and minimize regulatory burden.

In scoping individual examinations for all supervised entities, the Bureau will focus on the risks to consumers, including the risk that a supervised entity will not comply with Federal consumer financial law. Through the scoping process, the Bureau will direct resources to areas of higher degree of risk and will determine on an exam-by-exam basis whether to look at collections issues based on the degree of risk relative to other areas.

The Bureau's Supervision and Examination Manual, released in October 2011, is the field guide for examiners to use in supervising both depository institutions and other consumer financial services providers. It includes FDCPA examination procedures that mirror those of the Federal Financial Institutions Examination Council.³¹ The Manual's examination procedures related to unfair, deceptive, or abusive acts or practices ("UDAAP") also instruct examiners to evaluate whether servicing and collections practices raise potential UDAAP concerns.

The Bureau's *Mortgage Servicing Examination Procedures* and *Short-Term, Small-Dollar Lending Examination Procedures*, which were released in October 2011 and January 2012 respectively, include instructions to ensure that the servicer is complying with the FDCPA to the extent it applies.³² The mortgage servicing procedures also include additional modules relating to loss mitigation and foreclosure, and direct examiners to consider whether collections staff transfer borrowers to loss mitigation staff, in accordance with the institution's policies and procedure.³³

Consistent with the policies of the prudential regulators, the CFPB's policy is to treat information obtained in the supervisory process as confidential and privileged.³⁴

RULEMAKING PROPOSAL TO ADD DEBT COLLECTORS AS "LARGER PARTICIPANTS"

In the summer of 2011, the Bureau sought public comment about possible markets to include in its initial larger participant rule and available data sources the Bureau could use to define larger participants in nonbank markets. After reviewing the comments received, the Bureau on February 16, 2012, announced a proposed rule to include larger participants in the debt collection and consumer reporting markets under its nonbank supervision program. This proposal would establish the first federal supervision

³¹ See CFPB Supervision and Examination Manual ("Manual") 531-39 (FDCPA 1-7) (Oct. 13, 2011), http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf.

³² See *Id.* at 729, 732, 746 (Mortgage Servicing 2, 5, & 19); Short-Term, Small Dollar Lending Examination Procedures 14 (Jan. 19, 2012), <http://www.consumerfinance.gov/wp-content/uploads/2012/01/Short-Term-Small-Dollar-Lending-Examination-Manual.pdf>.

³³ See Manual 747-54 (Mortgage Servicing 20-27).

³⁴ See 12 C.F.R. Part 1070; CFPB Bulletin 12-01 (Jan. 4, 2012), http://www.consumerfinance.gov/wp-content/uploads/2012/01/GC_bulletin_12-01.pdf.

program for the debt collection and consumer reporting industries.

Under the proposed rule, debt collectors with more than \$10 million in annual receipts resulting from consumer debt collection would be subject to supervision. Based on available data, the Bureau estimates that the proposed rule would cover approximately 175 debt collection firms — or 4 percent of debt collection firms — and that these firms account for 63 percent of annual receipts from the debt collection market. The Bureau has proposed annual receipts as the criterion for both debt collection and consumer reporting because it approximates market participation in these two markets.

If the rule is finalized as proposed, debt collectors and credit reporting agencies that qualify as larger participants would be subject to the same supervision process as banks and other nonbanks subject to the Bureau's supervision. The proposed rule will remain open for comment until April 17, 2012, sixty days from the date of publication in the Federal Register.

IV. Enforcement

FTC LAW ENFORCEMENT ACTIONS

As explained in the FTC Letter, to improve deterrence in recent years, the FTC has focused on bringing a greater number of cases and obtaining stronger monetary and injunctive remedies against debt collectors that violate the law. Over the past year, the FTC has brought or resolved seven debt collection cases, the highest number of debt collection cases that it has brought or resolved in any single year. In its two civil penalty cases, *United States v. West Asset Management, Inc.*, and *United States v. Asset Acceptance, LLC*, the FTC obtained \$2.8 million³⁵ and \$2.5 million,³⁶ respectively, the two largest civil penalty amounts the agency has ever obtained in cases alleging violations of the FDCPA. Furthermore, in each of its five Section 13(b)³⁷ cases involving debt collection, the FTC has obtained preliminary or permanent injunctive relief, with the preliminary relief in many of these cases including ex parte temporary restraining orders with asset freezes, immediate access to business premises, and appointment of receivers to run the debt collection business.

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

1. INFORMATION USED IN THE COLLECTION PROCESS

The FTC reports that one of the Commission's major consumer protection concerns is the quantity and quality of information that debt collectors have, use, or convey to others in their collection activities. The FTC recently addressed some of these issues in a case against one of the largest debt buyers in the United States. In January 2012, the FTC announced a settlement with Asset Acceptance, LLC ("Asset"), a debt collector that purchases and collects on portfolios of charged-off consumer debt.³⁸ Among other things, the FTC's complaint alleged that Asset violated the FTC Act by continuing collection attempts on disputed debts without a reasonable basis, and violated the FDCPA by failing to obtain and provide verification of debts in response to written requests from consumers made within thirty days of receiving a validation notice.³⁹ In addition, the complaint alleged that Asset violated the Fair Credit Reporting Act ("FCRA") by furnishing inaccurate information to credit reporting agencies, failing to provide consumers with written notice within thirty days of furnishing negative information to credit reporting agencies, and failing to reasonably investigate notices of consumer disputes received from credit reporting agencies. To resolve these allegations, the settlement agreement requires Asset to pay a \$2.5 million civil penalty, enjoins Asset from violating the FDCPA and FCRA, and prohibits Asset from engaging in information

³⁵ *United States v. West Asset Mgmt., Inc.*, No. 1-11-CV-0746 (N.D. Ga. Mar. 14, 2011); see also Press Release, Leading Debt Collector Agrees to Pay Record \$2.8 Million to Settle FTC Charges (Mar. 16, 2011), <http://www.ftc.gov/opa/2011/03/wam.shtm>. The largest civil penalty obtained by the Commission in a previous debt collection case was \$2.25 million. See *United States v. Acad. Collection Serv., Inc.*, No. 2:08-CV-1576 (D. Nev. Nov. 19, 2008).

³⁶ *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 31, 2012)(court entered order); see also Press Release, Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception (Jan. 30, 2012), <http://www.ftc.gov/opa/2012/01/asset.shtm>. The Commission vote authorizing the staff to refer the complaint and consent decree to the Department of Justice was 3-1, with Commissioner J. Thomas Rosch voting no.

³⁷ Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission."

³⁸ *Id.*

³⁹ *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 30, 2012) (complaint filed).

practices that are the same as or similar to those alleged to be unlawful in the complaint.

2. TIME-BARRED DEBT

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

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

3. COLLECTION ON PAYDAY LOANS

Some of the FTC's recent law enforcement efforts have focused on defendants who collect debts (or purport to collect debts) related to payday loans. In February 2012, in *FTC v. American Credit Crunchers, LLC*, the FTC filed such an action in federal district court in Illinois against defendants who allegedly contacted consumers from call centers in India and made misrepresentations and threats to convince them to make payments on debts arising from payday loans.⁴⁰ According to the complaint, however, the consumers either had not taken out a payday loan at all or had taken out a payday loan that the defendants were not authorized to collect. The FTC's complaint alleged that the

⁴⁰ Compliant, *FTC v. American Credit Crunchers, LLC*, No. 12cv1028 (N.D. Ill. Feb. 13, 2012); see also Press Release, Court Halts Alleged Fake Debt Collector Calls from India, Grants FTC Request to Stop Defendants Who Often Posed as Law Enforcement (Feb. 21, 2012), <http://www.ftc.gov/opa/2012/02/acc.shtm>.

defendants violated the FDCPA and Section 5 of the FTC Act. The FTC obtained an ex parte temporary restraining order with an asset freeze, immediate access to the premises, and the appointment of a receiver.⁴¹ The FTC continues to litigate this matter.

The FTC also litigated two other Section 13(b) actions against debt collectors seeking to recover on payday loans. In the first case, *FTC v. LoanPointe, LLC*, the FTC challenged the wage garnishment practices, among other things, of a payday loan operation.⁴² The FTC alleged that the operation attempted to garnish wages to collect on payday loans, without first obtaining a state court order. Although federal law allows federal agencies to require employers to garnish employees' wages without a state court order if the employees owe money to the federal government, private parties, such as payday lenders in this case, must obtain a court order to garnish wages. Nevertheless, the defendants allegedly sent documents to the employers of consumers that mimicked the documents that the federal government sends in collecting on its own debts, thereby falsely representing that the defendants (like the federal government) were entitled to garnish wages without obtaining a state court order. The FTC alleged that this conduct violated the FDCPA and the FTC Act, and a federal court ordered temporary and preliminary injunctive relief against the defendants. After the FTC settled against an individual defendant who was an owner of the operation,⁴³ in July 2011 the court granted summary judgment against the remaining defendants, entered a permanent injunction against them, and ordered that they pay \$294,436 in monetary relief.⁴⁴

In the second case, *FTC v. Payday Financial, LLC*, the FTC again challenged the wage garnishment practices, among other things, of an operation that purportedly has an association with a Native American tribe and that collects on payday loans.⁴⁵ Like the defendants in *LoanPointe*, the defendants allegedly sent documents to consumers' employers that mimicked the documents that the federal government sends in collecting on its own debts, falsely representing that under tribal laws they (like the federal government) were entitled to garnish wages without obtaining a state court order. The FTC alleged that this conduct violated the FTC Act. After the FTC filed its complaint, the parties stipulated to and subsequently entered into a preliminary injunction to immediately halt the alleged unlawful conduct.⁴⁶ The FTC continues to litigate this matter.⁴⁷

4. OTHER EGREGIOUS COLLECTION PRACTICES

In addition to bringing actions in federal court to address law violations that arose in the payday lending context, the FTC brought two additional actions under Section 13(b) of the FTC Act in response to egregious debt collection practices. In the first case, *FTC v. Forensic Case Management Services, Inc.*,⁴⁸ the FTC's complaint alleged that the defendant debt collector charged its small business clients a contingent fee for collecting on their debts, yet failed to forward to these clients the amounts due when they received payments from consumers. The FTC's complaint also alleged that the defendants, among other things: threatened to physically harm consumers and to desecrate the bodies of their dead relatives; threatened to kill consumers' pets; used obscene and profane language in collection calls; revealed consumers' debts to third parties; and falsely threatened

⁴¹ *FTC v. American Credit Crunchers, LLC*, No. 12cv1028 (N.D. Ill. Feb. 14, 2012) (temporary restraining order).

⁴² Complaint, *FTC v. LoanPointe, LLC*, No. 2:10 CV 00225 DAK (D. Utah, Mar. 15, 2010); see also Press Release, FTC Charges Payday Lender with Deceiving Employers in Scheme to Collect Debts (April 7, 2010), <http://www.ftc.gov/opa/2010/04/getecash.shtm>.

⁴³ In August 2010, the FTC settled with Mark S. Lofgren, one of the owners of the payday loan and debt collection scheme. See *FTC v. LoanPointe, LLC*, No. 2:10 CV 00225 DAK (D. Utah, Aug. 26, 2010) (final order as to defendant Mark Lofgren); Press Release, Payday Loan Defendant Settles FTC Charges; Illegally Tried to Garnish Borrowers' Wages (Sept. 2, 2010), <http://www.ftc.gov/opa/2010/09/getecash.shtm>.

⁴⁴ *FTC v. LoanPointe, LLC*, No. 2:10 CV 00225 DAK (D. Utah Dec. 9, 2011) (final order); see also Press Release, Court Rules in Favor of FTC; Orders Defendants in Payday Lending Case to Pay More Than \$294,000 for Illegal Garnishment of Consumers' Paychecks (Dec. 19, 2011), <http://www.ftc.gov/opa/2011/12/getecash.shtm>.

⁴⁵ Complaint, *FTC v. Payday Fin., LLC*, No. 3:11-cv-03017-RAL (D.S.D. Sept. 6, 2011); see also Press Release, FTC Action Halts Allegedly Illegal Tactics of Payday Lending Operation That Attempted to Garnish Consumers' Paychecks (Sept. 12, 2011), <http://www.ftc.gov/opa/2011/09/payday.shtm>.

⁴⁶ *FTC v. Payday Fin., LLC*, No. 3:11-cv-03017-RAL (D.S.D. Sept. 7, 2011) (stipulated preliminary injunction).

⁴⁷ In March 2012, the Commission amended its complaint to seek civil penalties from the defendants for violating the FTC's Credit Practices Rule. Amended Complaint, *FTC v. Payday Fin., LLC*, No. 3:11-cv-03017-RAL (D.S.D. March 1, 2012); see also Press Release, FTC Charges That Payday Lender Illegally Sued Debt-Burdened Consumers in South Dakota Tribal Court Without Jurisdiction (Mar. 7, 2012), <http://www.ftc.gov/opa/2012/03/paydayshtm>.

⁴⁸ Complaint, *FTC v. Forensic Case Mgmt. Servs., Inc.*, No. LACV11-7484 (C.D. Cal. Sept. 12, 2011).

threatened consumers with lawsuits, arrest, seizure of assets, and wage garnishment. The FTC alleged that the conduct of the defendants violated the FDCPA and the FTC Act. The court granted the FTC's motion for an ex parte temporary restraining order with an asset freeze, appointment of a receiver, and immediate access to business premises.⁴⁹ The court subsequently granted the FTC's motion for a preliminary injunction.⁵⁰ The FTC continues to litigate this matter.

The other Section 13(b) action the Commission filed to challenge egregious law violations of a debt collector was *FTC v. Rincon Management Services, LLC*.⁵¹ The FTC's complaint charged that the defendants, among other things, made Spanish-language and English-language calls to consumers and their employers, family, friends, and neighbors, falsely representing that they were process servers seeking to deliver legal papers that purportedly related to a debt collection lawsuit. In many instances, the defendants also allegedly issued false threats that consumers would be arrested if they did not respond to the calls. In addition, in many instances the defendants allegedly made false claims that they were attorneys or employees of a law office, and demanded that consumers pay "court costs" and "legal fees." The Commission's complaint alleged that this conduct violated the FDCPA and the FTC Act. The court granted the FTC's ex parte motion for a temporary restraining order, including an asset freeze and the appointment of a receiver,⁵² and the court subsequently entered a preliminary injunction.⁵³ The Commission continues to litigate this matter.⁵⁴

BUREAU LAW ENFORCEMENT AND ADVOCACY ON BEHALF OF CONSUMERS

The Bureau currently is conducting non-public investigations of debt collection practices to determine whether they violate the FDCPA or the Dodd-Frank Act. It has not yet taken enforcement actions under Section 814 of the FDCPA, 15 U.S.C. § 16921. In addition, in the past year, the Bureau filed three amicus briefs in cases arising under the FDCPA—two in the federal courts of appeals and a third, in coordination with the Solicitor General and the Federal Trade Commission, in the U.S. Supreme Court.

1. PAUL AND ANGELA BIRSTER V. AMERICAN HOME MORTGAGE SERVICING, INC. (11TH CIRCUIT)

The Bureau's amicus brief in this case concerns FDCPA coverage in the foreclosure context—an important issue on which the federal courts are divided.

Some courts have unduly restricted the FDCPA's protections by rejecting challenges to abusive practices occurring in the context of foreclosure proceedings. In particular, courts have concluded that businesses involved in enforcing security interests are not "debt collectors" subject to most of the Act's requirements, and that activity surrounding

⁴⁹ *FTC v. Forensic Case Mgmt. Servs., Inc.*, No. LACV11-7484 (C.D. Cal. Sept. 13, 2011) (ex parte temporary restraining order).

⁵⁰ *FTC v. Forensic Case Mgmt. Servs., Inc.*, No. LACV11-7484 (C.D. Cal. Sept. 27, 2011) (preliminary injunction); see also Press Release, At FTC's Request, Court Orders Debt Collector to Stop Deceiving Clients and Abusing Consumers (Sept. 30, 2011), <http://www.ftc.gov/opa/2011/09/rumson.shtm>.

⁵¹ Complaint, *FTC v. Rincon Mgmt. Servs., LLC*, No. ED CV 11-01623 (C.D. Cal. Oct. 11, 2011).

⁵² *FTC v. Rincon Mgmt. Servs., LLC*, No. ED CV 11-01623 (C.D. Cal. Oct. 11, 2011) (ex parte temporary restraining order); see also Press Release, At FTC's Request, Court Orders Debt Collection Operation to Stop Deceiving and Abusing Consumers (Oct. 26, 2011), <http://www.ftc.gov/opa/2011/10/rincon.shtm>.

⁵³ *FTC v. Rincon Mgmt. Servs., LLC*, No. ED CV 11-01623 (C.D. Cal. Nov. 10, 2011) (order granting preliminary injunction).

⁵⁴ The FTC engaged in other law enforcement activities in the past year, including a policy statement regarding deceased consumers' accounts and an amicus brief opposing a class action settlement in *Vassalle v. Midland Funding*. For additional information on these and other initiatives, see Appendix A (FTC Letter at 7-10).

foreclosure or other enforcement of security interests is not debt collection covered by the Act. These decisions have left consumers vulnerable to abusive collection tactics as they fight to save their homes from foreclosure.

In this FDCPA action, the district court granted summary judgment to Defendant American Home Mortgage Servicing, Inc. (“AHMSI”), concluding that the Plaintiffs’ FDCPA allegations related to efforts to enforce a security interest, which do not qualify as “debt collection” under the Act. Plaintiffs appealed on August 4, 2011, and filed their opening brief on November 14. The appeal presents the questions (1) whether an entity that satisfies the Act’s general definition of “debt collector” is subject to the entire Act even though its principal purpose is the enforcement of security interests and (2) whether conduct related to enforcement of a security interest can also qualify as debt collection activity covered by the Act.

The Bureau filed its amicus brief in support of the Plaintiffs on December 21, 2011. The Bureau’s brief explained that the district court erred when it concluded that AHMSI did not qualify as a debt collector and that its actions in this case did not relate to debt collection. The case remains pending on appeal.

2. MARX V. GENERAL REVENUE CORP. (10TH CIR.)

The Bureau’s amicus brief in this case argued that a recent Tenth Circuit decision erodes two important FDCPA protections—the general ban on contacting third parties in connection with debt collection and the FDCPA’s limitation on the defendant’s ability to recover costs.

While attempting to collect on Plaintiff Olivia Marx’s defaulted student loan, General Revenue Corporation (“GRC”) inquired into Marx’s employment status to assess her eligibility for wage garnishment. When Marx’s employer asked GRC to make its request in writing, GRC sent it a fax bearing GRC’s full name, a fax header designating “Sallie Mae” as the sender and asking for Marx’s employment status, hire date, full- or part-time status, and title, as well as the employer’s address.

Marx sued, contending that the fax violated the FDCPA’s prohibition on communicating with third parties in connection with debt collection. After a bench trial, the district court concluded that Marx did not prove any FDCPA violations, and awarded GRC \$4,543 in costs under the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 54(d) without finding that Marx brought suit in bad faith. Marx appealed both the judgment and the costs award.

The court of appeals issued a 2-1 decision on December 21, 2011, with the majority holding that the recipient’s subjective understanding determines whether a fax is a “communication” under the FDCPA, and that a successful defendant is always entitled to its costs under Fed. R. Civ. P. 54(d) despite the language of the FDCPA. Marx filed a petition for rehearing on January 19, 2012.

On January 26, 2012, the Bureau filed its amicus brief arguing that the decision unduly limits the Act's general ban on contacting third parties in connection with debt collection. The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors. The earlier briefing largely omitted this crucial background, leading the majority to adopt an interpretation that conflicts with the statute's text, purposes, and accepted understanding.

Second, the brief argues that the decision erroneously concludes that the FDCPA does not supplant Fed. R. Civ. P. 54(d)'s default rule that prevailing parties may recover costs "[u]nless a federal statute ... provides otherwise," even though the FDCPA provides that prevailing defendants may recover costs "[o]n a finding by the court that [the suit] was brought in bad faith and for the purpose of harassment."⁵⁵ The majority's opinion misinterprets the statutory text, creates a circuit split, and undermines Congress's goal of encouraging private enforcement of the Act.

On January 30, 2012, the court denied the petition for rehearing.

3. FEIN, SUCH, KAHN & SHEPARD, P.C. V. ALLEN (U.S. SUPREME COURT)

The case raised the issue whether a communication to a consumer's attorney from a debt collector seeking payment of unlawful fees is actionable under section 1692f(1) of the Fair Debt Collection Practices Act, which generally prohibits attempts to collect unlawful fees.⁵⁶

The petitioner—debt collection law firm Fein, Such, Kahn & Shepard, P.C.—argued that the question presented by this case was not limited to claims under section 1692f(1). Instead, petitioner argued that communications to a debtor's attorney can never give rise to liability under any provision of the FDCPA. The consumer respondent argued that this case only implicates section 1692f(1), and that communications to a debtor's attorney can constitute an "unfair or unconscionable means" of attempting to collect a debt in violation of that section.

The Supreme Court called for the views of the Solicitor General on October 3, 2011. In conjunction with the Solicitor General's Office and the FTC, the Bureau filed a brief on December 21, 2011. The brief takes the position that certiorari should be denied because the court of appeals decision is correct and there is no square conflict among the court of appeals.

On January 23, 2012, the Supreme Court denied certiorari.

⁵⁵ 15 U.S.C. § 1692k(a)(3).

⁵⁶ 15 U.S.C. § 1692f(1).

V. Research and Policy Initiatives

THE BUREAU'S RMR DIVISION

The Research, Markets, and Regulations (“RMR”) division of the Bureau is responsible for analyzing consumer financial markets and consumer behavior, providing analytics to support the Offices of Fair Lending, Supervision and Enforcement, identifying areas where there is a need to consider improving the functions of a particular consumer financial market, developing and prioritizing policy initiatives in various market areas, identifying and analyzing alternative policy approaches, and, where a decision is made to proceed through regulation, developing the rules themselves.

The Deposits, Cash, Collections & Reporting Markets office is responsible for the debt collection and debt buying market. In the last year, members of the markets team have attended numerous collection and debt buying industry conferences, met with representatives from the industry trade associations and had over two dozen meetings with collections companies, debt buyers, collection attorneys, and consumer groups.

THE FTC'S RESEARCH AND POLICY INITIATIVES

In the past year, the FTC has continued to monitor and evaluate the debt collection industry and its practices. As discussed in Appendix A and in the FTC's 2011 Annual Report,⁵⁷ important policy topics examined by the FTC in the past year included: debt buyers; debt collectors' use of new technologies; and debt collection litigation and arbitration. The Bureau looks forward to coordinating these and other research and policy initiatives with the FTC in the coming year.

⁵⁷ For the most recent annual report, see FTC, Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act (2011), <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf>

VI. Cooperation and Coordination Between The Bureau and The FTC

The Dodd-Frank Act requires the Bureau and the FTC to work together to coordinate their enforcement activities and promote consistent regulatory treatment of consumer financial products and services.

In January 2012, the Bureau and the FTC entered into a Memorandum of Understanding (“MOU”) to coordinate efforts to protect consumers and avoid duplication of federal law enforcement and regulatory efforts.⁵⁸ In the MOU, the agencies have supplemented the requirements of the Dodd-Frank Act to create a strong and comprehensive framework for coordination and cooperation. Among other things the two agencies have agreed to:

- Meet regularly to coordinate upcoming law enforcement, rulemaking, and other activities.
- Inform the other agency, absent exigent circumstances, prior to initiating an investigation or bringing an enforcement action. This notice will prevent duplicative or conflicting enforcement efforts and undue burdens on industry.
- Consult on rulemaking and guidance initiatives to promote consistency and reflect the experience and expertise of both agencies.
- Cooperate on consumer education efforts to promote consistency of messages and maximum use of resources.
- Share consumer complaints.

The MOU will enable the Bureau and the FTC to work together to ensure fair and vigorous implementation of the FDCPA.

⁵⁸ Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Jan. 2012), <http://ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>

Conclusion

The Bureau will continue to develop its debt collection program over the coming year, and will work actively to protect consumers from the unfair, deceptive, and abusive conduct of some debt collectors. The Bureau looks forward to performing this work in cooperation with the FTC.⁵⁹

⁵⁹ The Bureau would like to thank the FTC and particularly Tom Pahl and David Torok for their valuable contributions to this report.

Appendix A



Federal Trade Commission

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 13, 2012

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

Dear Mr. Cordray:

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

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

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

I. FTC Authority

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

II. Law Enforcement Activities

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

A. Law Enforcement Actions

To improve deterrence in recent years, the Commission has focused on bringing a greater number of cases and obtaining stronger monetary and injunctive remedies against debt collectors that violate the law. Over the past year, the FTC has brought or resolved seven debt collection cases, the highest number of debt collection cases that it has brought or resolved in any single year. In its two civil penalty cases, *United States v. West Asset Management, Inc.* and *United States v. Asset Acceptance, LLC*, the Commission obtained \$2.8 million⁵ and \$2.5 million,⁶

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

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

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

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

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

1. Information Used in the Collection Process

One of the Commission's major consumer protection concerns is the quantity and quality of information that debt collectors have, use, or convey to others in their collection activities. The FTC recently addressed some of these issues in a case against one of the largest debt buyers in the United States. In January 2012, the Commission announced a settlement with Asset Acceptance, LLC (Asset), a debt collector that purchases and collects on portfolios of charged-off consumer debt.⁷ Among other things, the Commission's complaint alleged that Asset violated the FTC Act by continuing collection attempts on disputed debts without a reasonable basis, and violated the FDCPA by failing to obtain and provide verification of debts in response to written requests from consumers made within thirty days of receiving a validation notice.⁸ In addition, the complaint alleged that Asset violated the Fair Credit Reporting Act (FCRA) by furnishing inaccurate information to credit reporting agencies, failing to provide consumers with written notice within thirty days of furnishing negative information to credit reporting agencies, and failing to reasonably investigate notices of consumer disputes received from credit reporting agencies. To resolve these allegations, the settlement agreement requires Asset to pay a \$2.5 million civil penalty, enjoins Asset from violating the FDCPA and FCRA, and prohibits Asset from engaging in information practices that are the same as or similar to those alleged to be unlawful in the complaint.

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

⁷ *Id.*

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

2. Time-Barred Debt

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

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

3. Collection on Payday Loans

Some of the FTC's recent law enforcement efforts have focused on defendants who collect debts (or purport to collect debts) related to payday loans. In February 2012, in *FTC v. American Credit Crunchers, LLC*, the Commission filed such an action in federal district court in Illinois against defendants who allegedly contacted consumers from call centers in India and made misrepresentations and threats to convince them to make payments on debts arising from payday loans.⁹ The consumers, however, either had not taken out a payday loan at all or had taken out a payday loan that the defendants were not authorized to collect. The Commission's complaint alleged that the defendants violated the FDCPA and Section 5 of the FTC Act. The FTC obtained an ex parte temporary restraining order with an asset freeze, immediate access to the premises, and the appointment of a receiver.¹⁰ The FTC continues to litigate this matter.

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

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

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

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

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

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

¹³ *FTC v. LoanPointe, LLC*, No. 2:10 CV 00225 DAK (D. Utah Dec. 9, 2011) (final order); *see also* Press Release, Court Rules in Favor of FTC; Orders Defendants in Payday Lending Case to Pay More Than \$294,000 for Illegal Garnishment of Consumers' Paychecks (Dec. 19, 2011), www.ftc.gov/opa/2011/12/getecash.shtm.

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

entered into a preliminary injunction to immediately halt the alleged unlawful conduct.¹⁵ The FTC continues to litigate this matter.¹⁶

4. Other Egregious Collection Practices

In addition to bringing actions in federal court to address law violations that arose in the context of collecting in the payday lending context, the Commission brought two additional actions under Section 13(b) of the FTC Act in response to egregious debt collection practices. In the first case, *FTC v. Forensic Case Management Services, Inc.*,¹⁷ the FTC's complaint alleged that the defendant debt collector charged its small business clients a contingent fee for collecting on their debts, yet failed to forward to these clients the amounts due when they received payments from consumers. The Commission's complaint also alleged that the defendants, among other things: threatened to physically harm consumers and to desecrate the bodies of their dead relatives; threatened to kill consumers' pets; used obscene and profane language in collection calls; revealed consumers' debts to third parties; and falsely threatened consumers with lawsuits, arrest, seizure of assets, and wage garnishment. The FTC alleged that the conduct of the defendants violated the FDCPA and the FTC Act. The court granted the Commission's motion for an ex parte temporary restraining order with an asset freeze, appointment of a receiver, and immediate access to business premises.¹⁸ The court subsequently granted the FTC's motion for a preliminary injunction.¹⁹ The Commission continues to litigate this matter.

The other Section 13(b) action the Commission filed to challenge egregious law violations of a debt collector was *FTC v. Rincon Management Services, LLC*.²⁰ The FTC's complaint charged that the defendants, among other things, made Spanish-language and English-language calls to consumers and their employers, family, friends, and neighbors, falsely

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

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

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

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

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

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

representing that they were process servers seeking to deliver legal papers that purportedly related to a debt collection lawsuit. In many instances, the defendants also allegedly issued false threats that consumers would be arrested if they did not respond to the calls. In addition, in many instances the defendants allegedly made false claims that they were attorneys or employees of a law office, and demanded that consumers pay “court costs” and “legal fees.” The Commission’s complaint alleged that this conduct violated the FDCPA and the FTC Act. The court granted the FTC’s ex parte motion for a temporary restraining order, including an asset freeze and the appointment of a receiver,²¹ and the court subsequently entered a preliminary injunction.²² The Commission continues to litigate this matter.

B. Other Law Enforcement Related Activities

1. Policy Statement Regarding Decedent’s Debts

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

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

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

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

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

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

2. Abusive Debt Collection Litigation: Midland Amicus Brief

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

Consistent with concerns expressed about the proposed settlement by state attorneys general and consumer protection advocates, the FTC's amicus brief argued that if the court accepted the settlement, class members would have to give up too much in exchange for too little. Class members would receive only a small payment, capped at \$10. In return, they would surrender their rights under the FDCPA and state laws to challenge Midland's actions related to the company's use of affidavits in debt collection lawsuits. This would include, the FTC argued, perhaps even the right to challenge improper default judgments obtained by Midland. The

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

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

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

amicus brief also noted that nothing in the settlement limited Midland's uses of personal information that consumers provide in connection with the proposed settlement. In keeping with its long-standing position that information collected for one purpose should not be used for other, undisclosed purposes, the FTC asserted that consumer information obtained in connection with a class action settlement should be used solely to process settlement payments.²⁷ Although the court ultimately approved the settlement agreement in *Midland*, the FTC's amicus brief served to highlight - for the court and for the public - some of the abuses in debt collection litigation that raise major consumer protection concerns.²⁸

3. Collector Communication with Represented Consumers: Fein Amicus Brief

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

Among other things, the joint brief advocated that the Supreme Court not grant certiorari in this case because the decision of the Third Circuit is consistent with the plain language of the

²⁷ Following the FTC's amicus brief, Midland stipulated that none of the information collected through the settlement claims process will be used for the purpose of collecting debts of the class members. *Vassalle v. Midland Funding, LLC*, No. 3:11-CV-0096, at 17 (N.D. Ohio Aug. 12, 2011) (opinion and judgment).

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

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

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

³¹ 15 U.S.C. § 1692f(1).

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

FDCPA, the structure of the FDCPA, and the underlying purposes of the FDCPA, which are to protect consumers and prevent abusive debt collectors from gaining an unfair competitive advantage. In January 2012, the Supreme Court denied the petition for certiorari.³³

4. Risk to Effective Law Enforcement: Gag Clauses

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

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

III. Consumer and Business Education Materials

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

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

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

paper and online; an online informative video;³⁵ and discussions between consumers and the FTC's Consumer Response Center staff.³⁶

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

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

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

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

³⁶ The highly trained contact representatives in the FTC's Consumer Response Center respond to thousands of telephone calls and written communications (in both paper and electronic form) from consumers each weekday.

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

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

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

IV. Research and Policy Development Activities

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

A. Debt Collection Litigation and Arbitration Outreach

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

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

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

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

who seek to collect on debt they know or should know is time-barred should disclose that they cannot lawfully sue consumers. Consumers likewise do not know that in many states making a partial payment on a time-barred debt revives the entire debt for a new statute of limitations period. The FTC said that, in many circumstances, to avoid deception collectors seeking to recover in these states on debts beyond the statute of limitations should disclose to consumers that making a payment will revive such debt.

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

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

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

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

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

B. Debt Buyer Study

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

C. Debt Collection 2.0 Workshop

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

V. Rulemaking

In March 2012, the Commission rescinded a rule that set forth procedures for granting state exemptions from the FDCPA.⁴³ Prior to July 21, 2011, Section 817 of the FDCPA provided that the Commission was required to exempt any debt collection practices within any

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

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

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

state from the FDCPA, if the practices are subject to requirements substantially similar to those imposed by the FDCPA and there is adequate provision for enforcement.⁴⁴

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

VI. Conclusion

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

By direction of the Commission.

Donald S. Clark
Secretary

⁴⁴ 15 U.S.C. § 1692o.

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

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

⁴⁷ See 12 C.F.R. §§ 1006.1-6.8.

APPENDIX A:
Debt Collection Educational Material Distribution in 2011

Consumer or Business Educational Material	Offline Distribution		On-Line Access⁴⁸	
	English Version	Spanish Version	English Version	Spanish Version
Brochures				
Credit and Your Consumer Rights	65,500	14,200	38,104	3,832
Settling Your Credit Card Debts	63,500	9,800	44,792	2,476
Debt Collection FAQs: A Guide for Consumers	57,000	7,300	493,882	6,954
Knee-Deep in Debt	67,500	11,500	250,940	3,613
Debt Collection Arbitration: The Who, What, Why and How	31,400	N/A	14,689	N/A
Consumer Alerts (Online Only)				
Paying the Debts of a Deceased Relative: Who is Responsible?	N/A	N/A	6,677	371
Ads Offering Debt Relief	N/A	N/A	4,527	1,194
Creditors Seeking Federal Benefits in Your Bank Account? Understanding Your Rights	N/A	N/A	11,476	N/A
Time-Barred Debts	N/A	N/A	22,541	976
Fake Debt Collectors ⁴⁹	N/A	N/A	N/A	N/A
Video (Online Only)				
Debt Collection Animated Video	N/A	N/A	30,206	4,298

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

⁴⁹ No available data due to recent release date.

Appendix B

APPENDIX B

Year	2011	2010
Total Debt Collection (“DC”) Complaints	142,743	141,285
DC Complaints as Percentage of All FTC Complaints ¹	27.16%	27.23%
Total Third-Party DC Complaints	117,374	109,254
Third-Party DC Complaints as Percentage of All FTC Complaints	22.3%	21.1%
Total In-House DC Complaints	25,369	32,031
In-House DC Complaints as Percentage of All FTC Complaints	4.8%	6.2%

¹ The Term “All FTC Complaints” refers to all industry-specific complaints received by the FTC in a given calendar year. It excludes identity theft and Do Not Call Registry complaints.

Appendix C

APPENDIX C

FDCPA Complaint Category	Total 2011 Complaints	Percentage of 2010 FDCPA Complaints	2011 Category Rank	Total 2010 Complaints	Percentage of 2010 FDCPA Complaints	2010 Category Rank
Repeated Calls	47,362	40.4%	1	54,216	49.6%	1
Misrepresent Debt Character, Amount, or Status	46,482	39.6%	2	33,203	30.4%	2
Falsely Threatens Illegal or Unintended Act	35,473	30.2%	3	27,624	25.3%	4
No Written Notice	30,742	26.2%	4	32,516	29.8%	3
Falsely Threatens Arrest, Property Seizure	27,027	23.0%	5	20,307	18.6%	7
Fails to Identify as Debt Collector	20,781	17.7%	6	24,894	22.8%	5
Repeated Calls to Third Parties	20,519	17.5%	7	23,847	21.8%	6
Improperly Calls Debtor At Work	16,895	14.4%	8	17,058	15.6%	9
Uses Obscene, Profane, or Abusive Language	16,576	14.1%	9	17,556	16.1%	8
Reveals Debt To Third Party	12,636	10.8%	10	13,576	12.4%	10
Calls Before 8:00 a.m., after 9:00 p.m., or at Inconvenient Times	10,488	8.9%	11	12,885	11.8%	11
Refuses to Verify Debt After Written Request	10,000	8.5%	12	11,498	10.5%	12
Collects Unauthorized Fees, Interest, or Expenses	9,314	7.9%	13	10,613	9.7%	13
Calls Debtor After Getting "Cease Communication" Notice	5,922	5.0%	14	7,353	6.7%	14
Uses or Threatens Violence	3,977	3.4%	15	4,182	3.8%	15