
THE AGENCY EXAMINER™

A Monthly Newsletter for Collection and Recovery Managers Professionals
providing information concerning Collection Agency Auditing,
Evaluation and Monitoring and Other Collection Concepts

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Fair Debt Collection Practices Act

The FTC Reports to Congress

In June, the Federal Trade Commission released their report to Congress on the Fair Debt Collection Practices Act, (FDCPA) as they have each year since it was enacted in 1977. The Commission is no longer required to submit this report, since Section 303(a)(1) of Title III of the Federal Reports Elimination and Sunset Act of 1995, however, they plan to continue to submit them, as they convey the Commission's enforcement priorities and legislative recommendations to both the public and to Congress.

For the most part, creditors are exempt from the FDCPA when they are collecting their own debts. As the report says, "most debt collectors conform their practices to the standards the Act imposes."

The Commission reports on

the consumer complaints they have received regarding how debt collectors are complying with the Act. More consumers complained to the Commission about third-party collectors than about any other industry in 1999, (11,800 complaints). "The Commission continues to believe that the number of consumers who complain to the agency represents a relatively small percentage of the total number of consumers who actually encounter problems with debt collectors." However, the Commission also discussed that not all consumers who complain have law violations. For example, often times consumers will complain that a debt collector would not accept partial payments on the same installment terms that the original lender provided when the account was current. The report states,

"Although a collector's demand for accelerated payment or larger installments may, in these circumstances, be frustrating to the consumer, such a demand is not a violation of the Act. However, the report continues with complaints that, if accurately described, are clear violations of the Act, such as:

- Harassing the alleged debtor or others. (Most frequent complaint.)
- Failing to send the required consumer notice. (Written notice with amount of the debt, name of creditor and a statement that if, within

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30 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.)

- Failing to verify disputed debt. (If the consumer does submit in writing above, then the collector must cease collection efforts until he has provided written verification of the debt.)
- Calling consumer place of employment. (If known that employer prohibits the consumer from receiving calls.)
- Revealing alleged debt to third parties.
- Continuing to contact consumers after receiving "cease communication" notice.
- Threatening dire consequences if consumer fails to pay. (False or misleading threats.)
- Demanding a larger payment than is permitted by law. (The FDCPA prohibits debt collectors from misrepresenting the amount a consumer owes, or collecting any amount unless it is "expressly authorized by the agreement creating the debt or permitted by law.")
- Complaints about creditors' in-house collectors.

The Commission staff, based on complaints from consumers, state or local agencies, or other industry members, may investigate certain debt collectors. If an investigation reveals evidence of significant FDCPA violations, the staff would contact the debt collector and attempt to negotiate a settlement before recommending that the Commission issue a complaint. If a settlement is reached and the Commission accepts the staff's recommendation to approve a proposed consent order, the Commission delivers the proposed order and accompanying complaint to the Department of Justice, who files the documents in the appropriate federal district court. If a settlement is not reached, the Commission requests that the Department of Justice file suit on behalf of the Commission. The staff conducts a number of non-public investigations of debt collectors to determine whether they are or have engaged in serious violations of the Act.

The Commission also made legislative recommendations, four of which have been reported and discussed in prior years.

Clarity of Notice

The Commission continues to recommend that Congress

amend Section 809 to make explicit the standard for clarity to be applied to the notices. It does not specify any standard for how the notice must be presented. Two courts have held that the letters that use small or otherwise obscured print might violate the Act. The Commission recommends a more conspicuous format by mandating that it be "clear and conspicuous." The Commission suggests that the new standard could be defined as "readily noticeable, readable and comprehensible to the ordinary consumer."

Effect of Thirty-day Period

The Commission and its staff have consistently read Section 809(b) to permit a debt collector to continue to make demands for payment or take legal action within the thirty-day period unless the consumer disputes the debt or requests verification during that time. Nothing within the language of the statute indicates that Congress intended an absolute bar to appropriate collection activity. The Commission articulated this position in an April 2000 advisory opinion. Federal courts have addressed the issue, and basically arrived at the same conclusion.

However, some continue to argue that the thirty-day time frame set forth in Section 809 is a grace period within which collection efforts are prohibited, rather than a dispute period within which the consumer may insist that the collector verify the debt. The Commission's recommendation is that the law be clarified by adding a provision expressly permitting appropriate collection activity within the thirty-day period, if the debt collector has not received a letter from the consumer disputing the debt, or requesting verification.

Litigation Attorney As "Debt Collector"

The Supreme Court has resolved the conflict in the federal courts concerning whether attorneys in litigation to collect a debt are covered by the Act. The difficulties in applying the Act's requirements, however, and the anomalies that result, still remain. The report illustrates the example of a pretrial deposition, which could violate Section 805(b) because it involves communicating with third parties about a debt. They indicate that the validation notice in a complaint doesn't make sense in a litigation context. If the consumer does

make such a request, it appears that Section 809(b) requires the attorney to put the lawsuit on hold until he or she provides the verification. The report continues as follows. "Because it still seems impractical and unnecessary to apply the FDPCA to the legal activities of litigation attorneys, and because ample due process protections exist in that context, the Commission continues to recommend that Congress re-examine the definition of "debt collector" and state that an attorney who pursues alleged debtors solely through litigation (or similar "legal" practices) — as opposed to one who collects debts through the sending of dunning letters or making calls directly to the consumer (or similar "collection" practices) — is not covered by the statute. Alternatively, Congress could amend the definition of "communication" to state that the term "does not include actions taken pursuant to the Federal Rules of Civil Procedure or, in the case of a proceeding in a State court, the rules of civil procedure available under the laws of such State."

Early Out Programs

The Commission staff also addressed the issue of collection of "early-out" or "debt that was not in default when it was obtained" from the

creditor. Some early-out companies are arguing that they are exempt from the FDCPA, when in fact, apart from the fact that they acquire the debt prior to default, these businesses function in all respects like typical debt collectors. The Commission believes that the intent was to exempt only businesses whose collection of delinquent debts is secondary to their function of servicing current accounts. Therefore, the Commission recommended that Congress amend this exemption so that its applicability will depend upon the nature of the overall business conducted. Therefore, the mortgage services (who acts more like a creditor than a debt collector) would not be covered, where a debt collector that primarily collects delinquent accounts would be within the scope of the FDCPA.

Model Letters

The new recommendation in this year's report is for an amendment to help address the difficulties with complying with the FDCPA requirements for collection letters. Collectors are suggesting model letters, which, if adhered to, would insulate them from liability for the form of the letters. The Commission recommends a slight amendment to address this issue. ■

Selecting Collection Agencies Using a Proposal Process

Although a complex proposal process won't be appropriate for all creditors, agencies or attorney relationships, it can be appropriate for some. Here's an idea of how the process works, so you may determine if it fits with your situation or your needs. We'll follow one collection professional's story as he utilized this process for selecting his agencies. How he used a Request for Proposal (RFP) process to select the most appropriate agency for his company is interesting and may offer some ideas for your own company. He started by sending a pre-selection questionnaire to various agencies that had solicited his business during the prior year, or were currently doing business with his company.

This process helped him to evaluate the agencies that would do the best job for his company.

The first step in the evaluation process was the pre-selection questionnaire that asked basic questions about the agencies. By reviewing the pre-selection questionnaire, the credit executive

was able to weed out certain agencies that didn't appear well suited for his type of accounts. Keep in mind at this stage of the process, you aren't looking for formal proposals. You just want a method of weeding out the top prospects for a more de-

tailed review. For example, if they weren't licensed in every state where he intended to place accounts, they were disqualified. If they were too large, or too small for him, they were disqualified.

If they didn't have experience with his type of accounts, they were also disqualified. If their questionnaire was not returned by

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Sample Agency Pre-Selection Questionnaire

1. How long has your company been in business?
2. Who are the main principals in your organization?
3. What type of accounts does your agency collect?
4. List any areas of specialty?
5. Number of collectors and other staff?
6. Do collectors handle their own skip tracing, or is there other staff that handles skip tracing?
7. How many accounts per collector do you normally work?
8. Can the client remotely monitor collector's activity?
9. What territory do you collect in? What states are you licensed in?
10. Identify the location(s) of your office(s) that would most likely handle (your company's) accounts.
11. List your office hours. Are Saturdays or Sundays required?
12. What information do you request from the client?
13. Will you accept second placements?
14. Do you report debtors to credit bureaus? Which bureaus?
15. Can a terminal be installed in the client's office for on-line access to account information?
16. Please list your skip tracing facilities and procedures.
17. Describe your legal policies and procedures.
18. Please list four references that we can call.
19. What volume of monthly placements (number of accounts or dollar amount) would make our company a key client in your office?
20. Detail your current workload and describe how our accounts would impact your organization.

the deadline, they were disqualified. In sending these pre-selection questionnaires, it is important to make clear that you are not looking for a proposal. Responses should be limited to the questions asked. You're mixing the concepts of wanting detailed information about the agencies, with needing a method of identifying good prospective agencies. You'll notice rates are not even mentioned. In setting up a similar program for evaluating agencies for your company, you will want to customize the basic pre-selection questionnaire (and subsequently the RFP) with any information or questions specific to your company or industry.

In evaluating the pre-selection questionnaire, you may also want to assign points to the responses and ask the highest scoring agencies to submit a formal proposal. Or, the creditor may want to visit the highest scoring agencies. Either way, you want to minimize the number of formal proposals by only asking the pre-qualified candidates to submit the additional information. This saves you time in the evaluation process, and dealing with a large number of prospective agency/attorney candidates. It saves their time as well.

Nobody wants to submit a proposal when they are obviously not in the running.

Back to our credit manager's story. Those agencies that passed his initial selection process criteria were then asked to complete formal proposals.

The RFP Process

Before he even finalized the RFP's, however, he established a score system for evaluating the responses. That also helped him to make sure he asked all the important questions. For each basic category, such as facilities, experience and background, compliance, etc., he determined what his "ideal" agency or attorney firm would be, based on his needs.

This credit manager then sent a formal Request for Proposal to each of the agencies who passed the initial pre-selection process, detailing the exact type of information he was requesting. This detailed request enabled him to evaluate the agencies, based on their answers to his specific question, and allowed him to analyze their performance potential more fairly.

Because he asked them to address certain specific

questions he asked, he felt it was easier to compare the different companies.

In customizing this process for your operation, decide in advance if any answers or actions will disqualify an applicant. For example, will late entries be accepted or discarded? Also, if an agency can't take automated placements (and that is how you intend to place accounts), will that disqualify them completely?

You'll also want to be sure to give the agencies some information about the accounts you have to place, the amount of volume, and consistency of volume, and the form of placement. The more information you offer about your type of business, the more specific the agencies can be in responding to certain questions.

The RFP should make known your requirements regarding contracts, insurance, indemnity and other formalities. In addition, you will want to ask these top rated candidates from your pre-selection process to provide additional information, such as the following:

- Copy of the latest annual report issued to shareholders or an audited financial statement.

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- Samples of all forms, letters or telegrams to be used for collection.
- Bank references and account numbers.
- History of the agency and key members of the management and collection team, including the make-up of the agency and experience with your type of accounts.
- Geographic area served by the agency. If multiple offices are to be used, how the accounts are to be distributed and facts regarding the various offices that will be utilized.
- Description of automated abilities to handle accounts, from placement procedures to remittance, including type of software, hardware and autodial technology. Information on the process of closing and returning accounts to the client should also be included.
- Description of the normal method used to collect amounts, including specific work standards, based on balance range of the account. Include both the number of written contacts and telephone contacts for specific balance ranges, including small balance information.
- Description of the number of accounts worked by the collector on a daily basis and in the collector's file.
- Detailed procedures for handling partial payment accounts.
- Detailed procedures for skip accounts, including facilities available in-house, on-line, or otherwise.
- Information regarding the credit bureau usage and which bureaus are used. This includes whether debtors are reported to bureaus and whether bureau reports are used in the collection process.
- Description of the training of collectors, including initial training program and on-going training and monitoring (including specifics on FDCPA training and testing).
- Description of the collector compensation program and any incentive programs.
- Information as to any policy or procedures for handling complaints.
- Description of the procedures for legal accounts and any parameters for these accounts, such as minimum balances for suit, etc. If fees differ for legal accounts, detail when the increase takes place (at in-house legal, when sent to an attorney, when suit filed, etc.)
- Cash handling, mail opening and remittance procedures. Indicate the checks and balances.
- Procedures for payments on multiple accounts, when there are multiple placement and multiple clients.
- Procedures for NSF checks. If a service charge is added, indicate whether it is paid before the collection of principal or after.
- Policy on interest. If added, include whether shared with the client or not.
- If applicable, details regarding whether small business or minority-owned.
- Any formal policy on equal opportunity.
- Additional comments regarding specific client activity that would be beneficial to the agency.
- Current workload from existing clients.
- Disaster relief procedures.

As proposals were received, our credit manager evaluated them by using a weighted formula scoring system for agency / attorney selection that emphasized the most important areas for him and his company. Then he went to visit the top three companies before

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making the final decision.

Be sure you include this step in your process. Some agencies can look great on paper, but you want to establish an ongoing relationship, so be sure you complete the process with an on-site visit. And, don't neglect the reference checking. Too many people believe that an agency won't give you a poor reference. It happens.

When you're on-site at the agency, talk about your accounts and your expectations. Determine if there is a match. Not all creditors and agencies/attorneys are right for each other. Many niche players are there. Be sure you tell it like it is in this stage, not later.

Selecting agencies can be as simple as a lunch and a handshake, but the relationship might not be that simple. By taking the time to appropriately select the right vendor to match your needs, you set the stage for a long-term mutually beneficial relationship. The time invested is well worth it.

And, we still didn't discuss rates! Remember, you will get what you pay for. Set the stage to get the most for your money. Select right, expect good service, expect a lot, and be willing to pay appropriately—for long term success. ■

Colorado Enacts Licensing Changes

Effective July 1, Colorado's Fair Debt Collection Practices Act will require third party debt collectors to notify consumers of their right to:

- Request that collectors cease contact at the debtor's home or work, and
- Request that collectors cease all contact with the debtor.

In addition, the current statute requires a collection agency to provide certain information about the Colorado Collection Agency Board. The information must be disclosed in the first written communication. To avoid violating this new law, agencies collecting consumer debts from Colorado debtors must change their letters accordingly. In addition, the new law describes procedures for when a consumer disputes a debt, in addition to the requirements under the federal Fair Debt Collection Practices Act.

According to the American Collectors Association, the new law, HB 00-1182 (Chapter 218) also provides some relief for debt collectors as well. It reduces the

time frame in which a lawsuit may be filed against a debt collector for violation of the CFDCPA and eliminates the requirement that debt collectors and solicitors be registered.

The new law also requires all fines to be remitted to the general fund instead of the collection agency cash fund. It clarified the licensing requirements to show that:

- The administrator may deny a license or take other disciplinary measures if the applicant's principle or manager has fraudulently obtained or attempted to obtain a license;
- The administrator may reject a license application if the entity does not have a positive net worth;
- No person may be a principle owner or operator of a collection agency if the person has been convicted of a financial felony, and the administrator may reject a license for failing to comply with such requirement.

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It also clarifies that the bond a collection agency maintains shall cover all of its clients, and allows for such an account to be in an out-of-state financial institution if the institution has an in-state branch. The entire law can be accessed at <http://www.state.co.us>. ■

Enforcement Actions

North American Capital Corporation (NACC), a collection agency owned by GE Capital, has agreed to pay a fine of \$250,000 as part of a settlement with the Federal Trade Commission to resolve allegations that it violated the Fair Debt Collection Practices Act (FDCPA) when attempting to collect delinquent consumer credit accounts. According to the FTC, the company's debt collectors made impermissible third party contacts regarding consumers' debts, such as to the consumers' employers and co-workers; harassed consumers by using obscene or profane language; and made false and misleading representations, such as that the consumers' wages would be garnished and their property seized. In addition to the civil penalty, the proposed consent decree to settle the FTC charges includes broad prohibitions on future FDCPA violations, and would require NACC to inform consumers it contacts in writing that they may stop the company from contacting them about the debt. ■

CALENDAR OF EVENTS

Inbound-Outbound Customer Contact

800-882-8684
Hilton Resort
San Diego, California
September 12-15, 2000
www.inbound-outbound.com

Making The Most of Your Scorecard

702-731-7110
Caesars Palace
Las Vegas, Nevada
September 13-14, 2000
www.fairisaac.com

Buyer/Seller 101

by *The Debt Marketplace, Inc.*
562-903-7220
Southern California
September 14-15, 2000
November 9-10, 2000

Merchants Research Council Fall Conference

214-999-6722
Loew's Ventana Canyon Resort
Tucson, Arizona
September 24-27, 2000
(Membership organization. Call for more information about the organization.)

The Second Consumer Credit Reporting World Conference

"Data Technology Providing New Business Opportunities"
202-408-7411
The Fairmont Hotel
San Francisco, California
October 8-10, 2000
www.acb-credit.com

National Association of Retail Collection Attorneys

2000 Fall Collection Conference
800-633-6069
The Westin Michigan Avenue
Chicago, Illinois
October 26-29, 2000

Faulkner & Gray Credit Card Collection

407-831-7670
Mandalay Bay
Las Vegas, Nevada
October 29-November 1, 2000

4th Annual Debt Buyers' Association Conference

562-903-7222
Paris Las Vegas
Las Vegas, Nevada
February 14-16, 2001
www.debtbuyers.com

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