

## Recommendations to the CFPB Regarding Debt Collection Problems April 2013

On a daily basis the attorneys with whom we work assist consumers who have been victimized by unfair, deceptive and abusive debt collection practices. The effects of these debt collection abuses on people take a terrible toll: stress, threats to employment, fear, lost or stolen funds from bank accounts, frustration and the embarrassment. The raw emotional toll from the constant and horrendous harassment by debt collectors is simply appalling.

The current legal scheme is completely inadequate to stop these abuses. The abusive activities of debt collectors have consistently been *the leading cause for complaint year after year to the FTC*. From a high starting point, the sheer number of these complaints has skyrocketed in recent years, from 13,950 in 2000 to 142,743 in 2011 – a 900% increase in just ten years.<sup>1</sup>

The Fair Debt Collection Practices Act (FDCPA) contains important protections, but compliance is woefully inadequate and additional reforms are needed to address newer debt collection abuses. The effects of predatory lending (both personal and residential) and the housing meltdown have exposed millions more consumers to the debt collectors' abusive tactics. More vigorous government enforcement of the FDCPA and supervision of debt collectors will be helpful, but will not be sufficient to address all of the issues. Below we set out some preliminary ideas for additional measures needed to bring this industry into line.

The ideas set out here are not new – we and other advocates for consumers have been touting them for years. There are numerous important tweaks and fixes that need to be applied to the primary law limiting debt collection abuses – the FDCPA. But tweaks and minor changes will not address this problem. The problem of abusive debt collection in this nation needs a holistic and thoughtful response. The Consumer Financial Protection Bureau has the authority and the mandate to protect consumers from many of these problems:

1. **Ensure collection actions brought only against people who actually owe the debts and owe the amounts being collected.** This means two standards must be met:
  - a) Before initiating any collection activities, collectors must be required to have in their possession and have reviewed the primary records to prove a) the fact that the consumer actually owes the debt (the credit application and the original contract, including the name of the original creditor); b) the debt is really the amount being sought through an itemization of the credit extended, the interest

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<sup>1</sup> Data in the CFPB's Annual Report, issued 2012, show that in 2011, as in other recent years, the FTC received more complaints about debt collection than any other single industry. Specifically, the agency received 142,743 complaints in 2011, and 141,285 debt collection complaints in 2010. The top three categories of complaints about third-party collectors were:

- Harassment of alleged debtor or others
- Threatening dire consequences if consumer fails to comply;
- Demanding larger payment than permitted.

charged, payments made, and the fees assessed; c) the date, source and amount of the most recent payment.

b) Before seeking a judicial or arbitration judgment, debt collectors should provide authentic business records establishing the essential facts about the debt.

2. **Consumer information must travel with the debt and subsequent collectors should be held responsible for past collection acts.** Currently a consumer's attempt to dispute a debt with the creditor or a debt collector is not passed along with the debt. Collectors should not be able to launder the debt of defenses simply by selling it to another collector who can then restart the harassment. Instead, all information related to the collection of the debt, should be required to accompany the debt, and subsequent collectors should be held responsible for failing to abide with previous requests. No debt should be sold or assigned (or bought or accepted for collection) without business records to provide critical information:
  - The information about the debt described in Paragraph 1 (above);
  - Requests and responses to validation requests or disputes;
  - Settlements concerning the debt;
  - Status of debt in relation to the statute of limitations;
  - Representation of the consumer by an attorney and attorney's contact information;
  - Information regarding inconvenient time or place for communication;
  - Discharge of debt or listed in bankruptcy;
  - Illness or disability claimed by the consumer or known to the collector;
  - Known or claimed violation of the FDCPA to date;
  - Other information relevant to the collection of the debt.
  
3. **Meaningful investigation and verification of the debt should be required.** When a consumer requests verification of the debt, collectors should be required to conduct a reasonable investigation of the original business records to verify the identity of the debtor, the amount of the debt and the date of the last payment. The investigation should be responsive to the specific dispute raised by the consumer. Also, an investigation should be required in response to a request for verification, even if the initial 30 day period has passed.
  
4. **Prohibit the deceptive collection of time-barred debts.** The principle behind statutes of limitations is that the information relating to the debt is too old to be a reliable basis for a judgment. Moreover, most consumers do not understand that they have a defense to paying a debt for which the statute of limitations has run. The CFPB should prohibit the collection of time-barred debts, as some courts have indicated

already that this practice is unfair and deceptive.<sup>2</sup> Failing that, collectors seeking collection of these debts should be required to disclose prominently that a) a complete defense exists to a lawsuit on these debts, and b) making payments on the debt will cause the consumer to lose this defense. The CFPB should also ban the issuance of credit cards to pay time-barred debts.

5. **Consumers should be provided with repeated notices of their right to cease communications with debt collectors and should be able to exercise the right orally.** The FDCPA currently provides consumers the right to tell collectors to stop pestering them, but there is no requirement that collectors inform consumers of this important right. That should be changed and collectors should be required to tell consumers in every communication that the harassment can be halted. (Collectors are still permitted to pursue collection activities in court.) Consumers should be able to exercise this right orally by a simple request of “stop calling.”
6. **Specific limits should be imposed on the use of electronic collection methods by collectors.** Debt collectors should be required to obtain written confirmation of any oral authorization of a withdrawal from the consumer’s account, which must be signed by the consumer prior to the withdrawal and to provide consumers with a clear disclosure that any authorization of withdrawal is revocable. The following practices should be specifically prohibited:
  - Failing to honor a consumer’s oral or written instruction to stop or modify electronic or ACH access to the consumer’s account;
  - Debiting a consumer’s account, whether by ACH or electronic debit, in an amount other than which the consumer has specifically authorized;
  - Requiring consumers to inform the payee before honoring a request to stop an ACH or electronic debit;
  - Charging a fee to revoke authorization for a preauthorized electronic or ACH debit;
  - Creating a remotely created check after electronic payments are revoked.
  - Permitting multiple re-presentation of an electronic debit.
7. **Collection attorneys should be required to provide a plain English explanation of the steps a consumer needs to take to avoid a default or a loss rights whenever the collection attorney communicates with the consumer in connection with a law suit or arbitration.** Many legal notices used in state civil proceedings use arcane

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<sup>2</sup> *McRill v. Nationwide Credit, Inc.*, 2012 WL 6727974 (C.D. Ill. Dec. 6, 2012). The court denied the defendant’s motion to dismiss the §§ 1692e and f claims that its dun was deceptive and unfair by failing to disclose the dates of the transactions and the fact that the debt was time-barred where the dun did not threaten legal action. The court noted that “the FTC’s position on the collection of time-barred debts, particularly as articulated in the Asset Acceptance Complaint and the FTC’s 2010 report on debt collection practices, (is) . . . entitled to respect.”

language useable only by an experienced lawyer familiar with the state's civil procedure. There is growing evidence that the most common civil suit in the United States is a debt collection suit against a consumer where the cost of counsel exceeds the amount of the debt -- making representation unrealistic. Debt collection complaints filed in court generally fail to identify the underlying claims sufficiently. A significant portion of consumers would contest liability or the amount of the claim but fail to provide a written answer because the summons commands them to appear or file an answer.

8. **Creditors should be required to comply with basic principles of appropriate collection behavior.** Many of the complaints brought to the FTC relate to abusive debt collection practices by creditors. Only a handful of states have laws limiting creditors' collection abuses. Most of the prohibitions applicable to collectors should be made applicable to creditors by the CFPB. The CFPB should use its authority to ban unfair, deceptive and abusive behavior and prohibit creditors from applying the FDCPA prohibitions to creditors.
9. **Consumers should be able to record abusive telephone calls.** In many states it is not clear that consumers have the right to record phone calls without the consent of the other party. The CFPB should extend this right to consumers in every state.
10. **Debt collectors, debt buyers and creditors should be barred from compelling arbitration of consumer claims relating to collections' abuses.**
11. **Necessary legislative updates.** Additionally, updates are necessary for the FDCPA. The CFPB should support Congressional changes including:
  - Adding language to support the idea that courts should consider awarding damage awards per violation for "egregious" activities.
  - Increasing the statutory damages provision of \$1,000 to \$4,000, and adding an automatic yearly increase based on the CPI index.
  - Updating and clarifying the class relief provisions by adjusting the \$500,000 for inflation, and changing the award of damages from 1% of the *net worth* of the debt collector, to *net revenue*.
  - Clarifying that the remedy of injunctive relief is an appropriate tool of judicial relief under the FDCPA for private enforcement against repeat and poorly capitalized offenders.

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