COMMENTS ON THE PROPOSED
DECEASED DEBT COLLECTION POLICY STATEMENT

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The undersigned counsel ("Commenters") welcome the opportunity to comment on the FTC's proposed Deceased Debt Collection Policy Statement (the "proposed Policy Statement"). Commenters represent a portion of the deceased collection industry as well as numerous other debt collectors, debt buyers, and creditors. We sincerely appreciate the Federal Trade Commission's comprehensive and thoughtful study of the area of the collection of deceased debts and the guidance this policy statement will ultimately provide regarding the complex intersection of debt collection and probate law.

The proposed Policy Statement addresses three aspects of deceased collections: 1) locating the person who has authority to pay a decedent's debt from the assets of the estate ("authorized person"); 2) communicating with an authorized person; and 3) not misleading an authorized person regarding his or her personal liability for the decedent's debts. This Comment will address each of these policy recommendations.

I. Locating the Person with Authority to Pay a Decedent's Debt from Assets of the Estate

The Fair Debt Collection Practice Act "(FDCPA") permits communications in connection with debt collection with a "consumer".[1] Moreover, the section of the FDCPA titled "Communications in connection with debt collection", 15 U.S.C. § 1692c(d), indicates that the term "consumer" includes, in addition to the individual who incurred the debt, "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." As the Commission's proposed Policy Statement notes, under modern probate law,

[1] "The term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). An estate is, definitionally, not a "natural person," and a debt owed by an estate is not a debt owed by a "consumer" under the statutory scheme. As a result, an account placed for collection while the consumer is still alive is a consumer debt, even if the consumer subsequently dies; hence the Act's reference to an executor or administrator. However, an account placed for collection after the debtor's death does not satisfy the statutory definition as it is not an obligation of a natural person; rather, it is an obligation of an estate. Any other reading of the Act renders the words "natural person" meaningless in the context of accounts referred for collection solely from probate estates. This comment should not be viewed as a concession of the Act's applicability to the collection of estate debts.

"additional categories of persons [beyond executors and administrators] have the authority to pay the decedents debts from assets of the estate."[2]

Commenters certainly believe that checking probate filings first should be a best practice While it may sometimes be difficult to identify authorized persons, this is not a challenge when a formal probate proceeding has been instituted. A review of the probate registrar's filings, or a service such as Probate Finder™, would identify persons who have been appointed as executor, administrator, personal representative under informal or summary administration, or universal successor. Once a probate has been identified, there is no need to make any collection contacts of the type that are of concern to the Commission. Instead, debt collectors need only file a probate claim. If sufficient assets are available the creditor will be paid reasonably promptly out of estate assets, and there should be no need for a family member to field collection calls or respond to collection letters. The FTC's encouragement of debt collectors to utilize current technologies comports with the FTC's 2009 Report "Collecting Consumer Debt Challenges of Change"[3] as well as the 2009 Report by the General Accounting Office "Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology."[4]

Commenters agree that the use of modern technologies to locate formal estates is a logical and efficient practice which prevents miscommunication, much like the common practice of debt collectors checking for bankruptcies via databases which locate and track bankruptcy filings.[5] Accordingly, Commenters

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[2] Proposed Policy Statement, p. 16.

[3] 2009 Collecting Consumer Debt Challenges of Change, p. 71, "In the thirty years since enactment of the Fair Debt Collection Practices Act, American consumers have experienced important changes. They have faced a revolution of technology, leading in new ways to communicate, store and transmit information, and make payments".

[4] 2009 Report to congressional requestors: Credit Cards "Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology". "FDCPA enacted in 1977 has been an impartial tool in addressing unfair third party debt collection practices, but it has not kept up with the evolving marketplace or changes with technology, and the FTC has previously recommended that Congress make certain changes to the Statutes". P. 50.

[5] *Banko*® is an example.

recommend that the final Policy Statement state clearly that a best practice when collecting deceased debts is always to check first for any probate filings in order to identify the authorized persons and, in most cases, to file a probate claim. Such an approach serves to minimize contact with family members and avoid the necessity of any further collection activity.

II. Communicating with an Authorized Person

The FDCPA permits debt collectors to send initial collections letters to "consumers" even if there is no assurance that the person opening the letter will be the consumer. Every day collectors send letters to family homes, group or retirement homes, or other settings where mail is handled by persons other than the addressee. Given the mobility of the U.S. consumer population, mail, including collection letters, is often delivered to consumers' former addresses after they have moved. Nevertheless, the FDCPA does not require a collector to have any degree of assurance that the mail will be opened only by the addressee, so long as it has been properly addressed. Imposing such a requirement would completely disrupt the collections process.

In the context of deceased collections, as the proposed Policy Statement states, "the collector may send a letter in an envelope addressed to either 'The Estate of * * *' or 'The executor or administrator of the estate of * * *.'"[6] Yet, the proposed Policy Statement takes the position that initial contacts must be "location" contacts which do not reveal any information about the debt:

> The collector should state clearly and prominently at the outset that the communication is directed to the executor or administrator of the decedent's estate, or to the estate itself. But until a **named individual** with authority to pay the decedent's debts is identified and located, collectors generally should treat these communications

[6] 75 Fed. Reg. at 62933 n.36.

> as location communications under Section 804 of the FDCPA. The communication should state that the collector is seeking to identify and locate the person who has the authority to pay any outstanding bills of the decedent out of the decedent's estate, **but cannot make any other references to the debts of the decedent,** including providing any information about the specific debts at issue.

75 Fed. Reg. at 62393 (emphasis added)(footnotes omitted).

Commenters urge the Commission to reconsider this approach to permit properly addressed envelopes to be initial – not location – communications. Doing so would be less likely to cause confusion and not upset grieving family members who, with the proposal, would receive a call or letter to the person authorized to pay from the assets of the estate with no explanation.

A. Federal Crime to Open Someone Else's Mail

The proposed Policy Statement notes that "some individuals who do not have the authority to pay the debts of the decedent out of the assets of his estate often undertake various activities concerning the decedent, including opening his mail."[7] To avoid revealing the decedent's debts to such individuals, the proposed Policy Statement would not permit information relating to these debts in the body of the letter. Yet, if correspondence is directed to the executor or estate of the decedent, collectors would have a reasonable basis to expect that such mail would be opened only by the proper addressee. In fact, under federal criminal law, it is a crime to open someone else's mail without authorization:

> Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined under this title or imprisoned not more than one year, or both.[8]

The proposed Policy Statement appears to require debt collectors to expect that the families of deceased debtors will violate this criminal

[7] 75 Fed. Reg. at 62393 n.36.
[8] 18 U.S.C. § 1703(b).

statute. Commenters respectfully assert that a Commission Policy Statement should instead be based on the assumption that people will comply with the law and will not improperly and unlawfully open mail addressed to others.

B. Additional Steps to Ensure that Mail is Opened by an Authorized Person

If there are concerns about who will be opening mail directed to executors or estates, the final Policy Statement could suggest some added protections to ensure that mail is opened only by authorized persons. By way of example, the collection industry has developed a workable approach to telephonic messages in the context of the case law under the FDCPA.[9] Multiple courts have held that a voice mail message left for the consumer must contain disclosure of the debt collector's name, the debt collector's employer, that the caller is attempting to collect a debt and any information obtained will be used for that purpose, and that the caller is a "debt collector".[10]

The collection industry, in response to these telephonic message cases, is aware of and concerned about the issues of third party disclosure. ACA International has released a "FastFax" (guidance memo) on telephone messages which encourages the listener to a message to hang up or cease listening to a message if he or she is not the consumer to avoid the third-party disclosure issue. Similarly, debt collectors, collecting on deceased debt, could issue a similar notification or "warning" on the outside of an initial notice letter on the envelope containing the following statement:

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[9] *Foti v. NCO Financial Systems*, 2006 U.S. Dist. LEXIS 13857 (S.D.N.Y. 2006); *Hosseinzadeh v. M.R.S. Assocs., Inc.,* 387 F. Supp. 2d 1104 (C.D. Cal. 2005), *Joseph v. J.J. Mac Intyre Cos., L.L.C.*, 281 F. Supp. 2d 1156 (N.D. Cal. 2003), *Joseph v. J.J. Mac Intyre Cos., L.L.C.*, 281 F. Supp. 2d 1156 (N.D. Cal. 2003), *Stinson v. Asset Acceptance LLC*, 2006 U. S. Dist. Lexis 42266(E.D. Va. 2006)(vacated upon settlement)' *Johnson v. Riddle*. 443 F.3d 723 (10th Cir. 2006) (*Johnson II*) In *Johnson v. Riddle*. 305 F.3d 1107 (10th Cir. 2002) (*Johnson I*), *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005); *Lewis v. ACB Bus. Serv., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). *Shapiro v. Haenn*, 222 F. Supp. 2d 29, (D. Me. 2002); *Irwin v. Mascott*, 112 F. Supp. 2d 937, 963 (N.D. Cal. 2000). *Hernandez v. Midland Credit Mgmt.,* 2007 U.S. Dist. LEXIS 16054 (N.D. Ill. 2007).

[10] 15 U.S.C. § 1692e(11).

> **"TO THE *EXECUTOR, ADMINISTRATOR OR PERSONAL REPRESENTATIVE OF THE ESTATE OF _____.***
> ***DO NOT OPEN IF YOU ARE NOT THE EXECUTOR, ADMINISTRATOR, OR PERSONAL REPRESENTATIVE*"*.**

Such a warning presents potential problems under 15 U.S.C. § 1692f(8) which forbids the use of any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails. However, it could be used if the Commission issues a formal opinion that such a disclaimer is "benign" and does not violate Section 1692f(8).

C. Location-only Communications Unnecessarily Delay Resolution of Debts

Families of the deceased and collection agencies for the decedent's debts share a common interest in having decedent's debts resolved as efficiently as possible, with the least number of collection contacts possible. Requiring initial correspondence to be location communications guarantees there will be multiple communications with surviving family members. This runs contrary to Congressional policy found in the recently enacted Credit Card Accountability Responsibility and Disclosures Act of 2009 ("Card Act"), specifically, Section 504 "Procedure for Timely Settlement of Estates of Decedents Obligors" which states as follows:

> The Board, in connection with the Federal Trade Commission and each other agency referred to in section 108(a), shall prescribe regulations to require any creditor, with respect to any credit card account under an open end consumer credit plan, to establish procedures to ensure that any administrator of an estate of any deceased obligor with respect to such account can resolve outstanding credit balances in a timely manner.[11]

[11] The Commentary from the staff of the Federal Reserve on the Card Act regulations make clear that, in describing the individuals who may obtain information about a deceased consumer's account, the term "administrator" was not intended to have a narrow meaning. Instead, the Commentary states that "the term 'administrator' of an estate means an ***administrator, executor***, or any personal representative of an estate who is authorized to act on behalf of the estate." Permitting a "personal representative" who is "authorized to act" appears to impose a relatively low burden of

The goal of this provision and its implementing regulations is to allow estates to be quickly wrapped up by requiring card issuers to promptly provide payoff information. Requiring location-only calls would not further, and would, in fact, be contrary to this policy.

D. The FDCPA Imposes No Condition Precedent for Deceased Collections

By proposing that a location information search take place <u>before</u> communicating in connection with the collection of a debt the Proposed Policy Statement actually conflicts with the clear language of the FDCPA which allows communication under Section 1692c(d) with an "executor" or "administrator," both of whom are included in the definition of "consumer" in the context of third-party communication rules.

A debt collector should not have any higher duty to a deceased consumer's estate than to a living consumer. Under the FDCPA, there are no conditions precedent required to communicating initially with a consumer. A debt collector is allowed to begin its collection efforts and may at times find a consumer has an attorney or is bankrupt.[12] Yet, there is no duty on the part of the collection agency to determine whether a bankruptcy has been filed or an attorney retained *before* sending an initial notice under Section 1692g(a) or placing a collection call. The case law interpreting the FDCPA holds quite clearly that a debt collector that does not have prior knowledge of attorney representation or bankruptcy information, does not violate the FDCPA by communicating with the consumer.[13]

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proof versus use of much strict terms such as "designated" or "appointed"; terms which suggest a need to obtain formal approval or appointment from a court or other official entity. Regulation Z Commentary, 22.6.11(c)(1) (emphasis supplied).

[12] Collectors might also think the consumer is alive and only in trying to reach the consumer learn (s)he is deceased.

[13] *Randolph v. IMBS Inc.,* 368 F.3d 726 (7th Cir. 2004); *Graziano v. Harrison,* 950 F.2d 107 (3rd Cir. 1991); *Cavanaugh v. HSBC Card Services, Inc.,* Case No. 3:10-cv-356-HES_TEM (Sept. 21, 2010) (attorney representation

Furthermore, inherent in the Act's requirement of mailing a validation notice is the risk that someone in the consumer's household other than the consumer will open a letter that is addressed solely to the consumer.

The FDCPA arguably allows letters to be mailed to a deceased consumer, yet it is an almost certainty that the sending of letters addressed to the decedent will result in their being opened by others. Nevertheless, nothing in the FDCPA would appear to prohibit such a mailing.

It would be problematic to require only within the area of deceased collections an entirely *new* step not heretofore required within any other area of FDCPA-regulated collection activity. The proposed Policy would impose the condition precedent of requiring the debt collector to "locate" by mail, telephone, or other allowable means, the person "authorized to pay the decedents debt" from assets of the estate, *before* communicating with that person. This would afford to probate estates, formal and informal, protections and rights not granted by Congress to living consumers.

This proposal would create a confusing anomaly. Surviving family members may not understand the "location information" questions which could not disclose the debt, and therefore could be related to any number of matters, not just the decedent's debts.[14] Surviving family members of older consumers who are aware of the scams perpetrated on the elderly will have good reason to be suspicious (and even fearful) of callers who ask questions but who won't say what they want or why they are calling. Commenters further ask the Commission to consider the completely predictable stress imposed upon a

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not imputed); and *Hubbard v. National Bond Collection,* 126 BR 422 (D. Del. 1991) (Bankruptcy knowledge cannot be imputed from creditor to debt collector).

[14] Survivors may think the locator or skip tracer is selling funeral home services, counseling services, auction services, real estate sales, coin dealers, etc.

grieving widow whose family members report to her that they keep receiving mysterious calls from a person who will not say why she is calling.

The scenario of having a call or letter directed to "the person with authority to pay the decedents debt with the assets of the estate" with no further explanation, would more than likely result in little or no information and further heartache to the grieving family as to why someone is calling or writing with no explanation. Requiring multiple communications will also mean that debts will not be resolved in a timely manner. In the case of higher-interest debts this could add further burden to limited probate estates.

The proposal itself acknowledges this problem:

> [I]n asking a third party for identification and location information for a person with the requisite authority, the collector almost inevitably will have to state or imply that the decedent owed a debt, for example "I am trying to find the person who has the authority to pay John Smith's outstanding bills out of assets in John's estate."

75 Fed. Reg. at 62393 n.37. This demonstrates why it is a mistake to create a hybrid initial notice which implies that a debt exists but provides no useful information for surviving family members to arrange for it to be satisfied.

Finally, the two-step approach set forth in the Proposed Policy appears to run afoul of 15 U.S.C. § 1692b. That section states that any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall:

> (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and***, only if expressly requested, identify his employe***r;

Any collector sending a written communication to locate the executor or administrator as appears to be contemplated by the proposed Policy would have

to disclose the name of his employer in sending the communication. (A debt collector may not send any written communication which creates a false impression as to its source. 15 U.S.C. § 1692e(9).) While such a disclosure is necessary and proper in a validation notice it is prohibited in a location letter. Thus, the policy creates a standard of conduct which appears to violate the Act and which invites litigation.

Commenters strongly encourage the FTC to consider and modify its proposal and we would request that the FTC issue a policy on deceased collections which allows initial – not location –communications as recommended above in order that live consumers and the representatives of deceased consumers are afforded the same rights, with less confusion. With an initial – and not a location -- letter, it is more likely that the correct person, (with authority to pay from assets of the estate) will contact the debt collector and resolve the debt in a more timely manner, a result consistent with the goals of the Card Act. If a formal estate is somehow missed in the initial public record search, the person with that authority is more likely to timely contact the debt collector in response to an initial letter. Moreover, if an outbound call is made by the debt collector to confirm that the person with authority to pay has received the initial letter, then that person will have the benefit of the information on the particular indebtedness.

E. The FDCPA Mandates that Persons Who Receive Location Communications Be Treated Differently than Consumers

The FDCPA, 15 U.S.C. § 1692g(a) requires that a debt collector send to a consumer a validation notice within five days of the collector's initial communication with the consumer in connection with the collection of a debt. If debt collectors are to treat executors and administrators as "consumers" for FDCPA purposes then the collectors would be required to send validation notices to such persons within five days of their initial communications. However, if the

initial communications are location letters as the Commission proposes then the collectors will have no way of knowing the exact date on which the executor or administrator received the location letter, and they will not know when or if to send the validation notice in order to meet the five-day deadline.

Thus, the proposed Policy creates a "Catch-22" in which a collector may not send a validation notice as its initial communication, thereby effectively compelling violations of Section 1692g for the purpose of attempting to enforce Section 1692c in a manner that is inconsistent with Congress' reference to executors and administrators. This problem is solved if the Policy is modified to to be addressed as proposed above.

F. Collectors Should Be Permitted to Pose Specific Questions When Identifying the Authorized Person

The proposed Policy Statement states that collectors may not ask leading questions in order to identify authorized persons. Yet, as the Policy Statement demonstrates, this is an extraordinarily complicated area of law, even for lawyers. Unsophisticated surviving family members cannot be expected to understand all of the nuances of probate law. Therefore, without asking leading questions, or attempting to persuade family members to say they are something they are not, collectors should nonetheless be permitted to pose specific questions designed to reveal whether the person on the phone has authority to pay the deceased's bills. Requiring collectors to pose only open-ended questions is likely to lead to confusion, particularly with elderly, infirm, and ill surviving family members.

A typical call may start out with the collector asking to speak to a person with authority to handle the affairs of the decedent. The person on the other end might answer, "Well, I'm his wife, so I guess I am." In response, it would be reasonable to ask her to verify that she will be paying the bills owed by the estate, rather than asking her question about who will be paying the bills.

III. Mandating a Non Liability Disclaimer So As Not to Mislead the Person with Authority to Pay

A. Avoiding Inaccurate Disclosures

Commenters agree that steps should be taken to make clear to authorized persons that they are not being asked to pay the decedent's debts from their own funds. Specifically, the Commission proposes that in order to avoid creating a misimpression:

> it may be necessary for the collector to disclose clearly and prominently that: (1) It is seeking payment from the assets in the decedent's estate; and (2) the individual could not be required to use the individual's assets or assets the individual owned jointly with the decedent to pay the decedent's debt.

Commenters agree that the first point, regarding collection of funds from the decedent's estate represents an important disclosure that should be made. However, the second statement is problematic because it is legally incorrect and, therefore, would require collectors to misrepresent the authorized person's potential liability.[15] There are numerous situations in which the authorized person might also be personally liable on the debt. They include, but are certainly not limited to, community property states, joint accounts, the doctrine of necessaries, *etc.* Therefore the second point should either be deleted or modified. It might be modified to state that "the individual *may* not be required . . ." If the Commission pursues this approach, it should also issue a formal opinion that such a disclosure is permissible under the FDCPA to insulate debt collectors from private FDCPA liability if they follow this recommended approach. Alternatively, the goal of the second sentence could be accomplished by modifying the first sentence to read: "It is seeking payment *only* from the

[15] If the collector is an attorney such a statement may violate the ethical prohibition on giving legal advice to an unrepresented person. *See* Model D.R. 4.3: "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, . . ."

assets in the decedent's estate." This would avoid having the collector making statements regarding the legal liability of family members.

B. Impracticality of Obtaining Acknowledgment

The Commission is considering whether an acknowledgment of receipt of these disclosures must be obtained from the person making the payment:

> The Commission will also consider whether the collector has obtained an acknowledgment at the time of the first payment that the person understands that he or she is obligated to pay debts only out of the decedent's assets and is not legally obligated to use his or her own assets—including those jointly owned with the decedent—to pay the debts.

It is not clear whether the acknowledgment would have to be written or oral. In any event, in this day of automated payment methods, a significant number of payments are made electronically (*e.g.*, check over the phone, credit card, automated payment). It is very difficult or impossible in this context to obtain any acknowledgment. Even in the traditional case of a person sending a check, would the collector be expected to return the check if it came without the acknowledgement? Would such a requirement provide sufficient additional protection to offset the inconvenience to payors of having their checks returned? What if returning or refusing a payment due to lack of an FTC-mandated acknowledgment results in a foreclosure or repossession?[16] Commenters urge the Commission not to adopt an acknowledgement requirement. Indeed, the adoption of such a requirement would be tantamount to the promulgation of FDCPA regulations – conduct which is presently forbidden to the Commission. *See* 15 U.S.C. § 1692l(d).

[16] Many FDCPA-regulated debt collectors collect mortgage and auto debts between the date of delinquency and the date of foreclosure or repossession. Any policy which impairs the ability of such collectors to accept payments will, of a certainty, cause the creditors they represent to initiate foreclosure or repossession where those remedies might have been avoided. To that extent an acknowledgment requirement would harm the persons whom the Commission most wants to protect.

Conclusion

Commenters again wish to thank the FTC for this opportunity to comment on the Proposed Policy. The FTC has undertaken a commendably thorough analysis in examining the collection of decedents' debts. Our concerns center on the requirement that the first communication directed to the estate be treated as a location communication and on the potential requirement of an acknowledgment of lack of personal liability. With regard to the former we believe we have proposed a workable and logical alternative which reflects current laws and collection realities. With regard to the latter we respectfully assert that such a requirement is inappropriate and unmanageable.

Respectfully submitted,

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