



West Asset Management, Inc.
7171 Mercy Road
Omaha, NE 68106
(402) 391-5285

November 8, 2010

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: Deceased Debt Collection Policy Statement

Dear Secretary of the Commission:

We are writing to provide comments related to the proposed statement of enforcement policy regarding communications in connection with collection of a decedent's debts. We agree with the Commission's interest in clarifying the application of the Fair Debt Collection Practices Act ("FDCPA") to this type of debt collection, and the attempt to further protect consumers from illegal collection practices. The proposed Policy Statement is accurate in the manner in which it describes the myriad of ways in which the estate or final affairs of a decedent are handled. The methods for enforcing the claims of creditors vary widely and it is extremely difficult to apply rigid statutory requirements to those methods. While we agree with the general theme of the Policy Statement and many of the standards set forth therein, we believe there may be situations where the proposed policy is too narrow in its scope or may cause additional uncertainties that will make the process of winding up a decedent's final affairs unnecessarily difficult.

We appreciate the Commission's acknowledgement that it is difficult to apply some of the more technical provisions of the FDCPA to the collection of decedents' debts so that such collection activity can be done in a lawful manner. From our perspective, the most important element is clear and full disclosure without misrepresentation to those with whom a collector communicates. By its nature, this is a very sensitive form of debt collection because often the family members or friends of the decedent are still grieving at a time when they are also trying to sort out financial matters which they may or may not have previously had any involvement with. We believe the Commission should also advance an interest in helping these individuals resolve the decedent's affairs in an efficient and timely manner. Such a position would be entirely consistent with recent amendments to Section 504(a) of the Truth in Lending Act wherein Congress gave a clear directive to promulgate regulations that among other things "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." Clearly, Congress has recognized that it is most beneficial to consumers when creditors and their agents make it easier for administrators to resolve claims, not more difficult.

Turning to the language of the proposed Policy Statement, we agree that it is sometimes necessary in this form of debt collection to speak to individuals other than those who are enumerated in Section 805(d) including a person "who otherwise has authority to pay the debts of the decedent out of the decedent's assets." We are concerned, however, that the language around this exception may be too narrowly focused on the source of the funds used to pay the debt rather than the more important issue of whether or not there were any misrepresentations or misleading statements made by the collector. If an individual fully understands that they are not personally liable for a claim but may have reasons that they wish to resolve the matter, the FDCPA should not prohibit a collector from discussing the debt with them. As noted by the FTC, in a traditional debt collection context a debt collector could simply insist on

first obtaining the consent of the debtor before discussing the debt with a third party. In the area of collecting decedent's debts, however, no such consent is possible and the focus of the policy should be on full disclosure related to personal liability, and an absence of any misrepresentation or harassment, not whether the individual taking control of the financial affairs of the decedent has legal authority or technical responsibility for specific estate assets, nor in limitation to the collector's ability to identify such person.

For example, it is not uncommon for a family member to assume the role of acting as the family spokesperson or handling the final affairs where there has been no court order and no formal probate estate has been opened (and may never be opened). In some such cases there are no liquid assets (i.e., cash or equivalents) available with which to pay creditors' claims. There may, however, be other assets such as real property, artwork, jewelry, etc. that the family wishes to preserve for sentimental or other reasons. In such situations, family members often pay creditors' claims from their own funds to avoid the necessity of selling the assets of the decedent. In other cases, those administering an estate may decide to pay creditor claims from their own funds to avoid having to deal with claims being filed in the estate thereby prolonging the estate process and potentially driving up costs and fees. Provided that the mandates in the Policy Statement requiring full disclosure and avoidance of any misrepresentation have been met, we see no practical reason that a debt collector should be prohibited from discussing the claim with such a person and accepting a payment under these circumstances.

In addition, we agree with the Commission's assessment that identifying and locating the proper individual with whom to discuss the debt of a decedent can be difficult under the strict confines of the FDCPA. There is no reason to believe that Congress would have intended for collectors and those handling a decedent's final affairs to engage in a cat and mouse game regarding the nature and terms of an outstanding debt. It is our position that a collector should commence any line of questioning by asking if anyone has been appointed as the executor, administrator or personal representative of the estate. In cases where a formal court proceeding has been commenced, or where an individual was otherwise named in such a capacity by the decedent's will or trust documents, this should result in a fairly straight forward discussion. In the event that the decedent's assets and liabilities are being handled more informally, we disagree that asking for the person "handling the final affairs of the decedent" would be too vague for a consumer to understand, or that it would be somehow more confusing than asking for the person who "has the authority to pay the decedent's outstanding bills out of the assets in the estate." To the contrary, words such as "authority" and "estate" connote a level of formality that may not be relevant and could easily lead to confusion about the duties and obligations of the family members.

In regard to privacy concerns related to the deceased individual, we believe that this can be adequately addressed in a manner similar to other privacy related regulations. Instead of trying to regulate the specific words and phrases that a collector should use when speaking with a third party, our suggestion is to use a standard similar to that used under the HIPAA privacy rules. The policy should recognize an interest in protecting the decedent's privacy to the extent possible, and therefore limit a collector's disclosure to the "minimum necessary" to accomplish the goal of locating the proper individual. This would allow the collector enough flexibility to adjust to the myriad of situations that might arise, but at the same time require deference to the decedent's privacy interests. It is important to recognize that the people dealing with creditors and collectors may be in a state of confusion about how to handle the affairs of the decedent or their responsibility for doing so. To further complicate the situation by forcing collectors to be vague and secretive about the nature of the call only creates more anxiety for the family members. As long as the collector is truthful and clear about the reason for the inquiry, and keeps the disclosure of information to a minimum, the interests of the surviving family members in maintaining order during a difficult time should outweigh the privacy interests of someone who is now deceased. We would also request that the Commission clarify that to the extent a formal probate estate has been opened and a claim has been properly filed therein, the debt has become a matter of public record and

therefore the collector should be able to discuss at least the basic elements of the debt with those handling the estate affairs.

The proposed Policy also states that calls made during the period in which the collector is trying to identify the proper party with whom it should be speaking should be treated as calls for location information under Section 804 of the FDCPA. While we agree with this conceptually, we would point out that in many cases the debt collector calls the decedent's last known home phone number in an attempt to locate the proper individual. To the extent that a person answers the phone who does not reside at that location (e.g., a surviving child or other relative) the collector should not thereafter be barred from calling that number in the future in order to attempt to reach other individuals who might have relevant information. We request that the Policy Statement be clarified to note that to the extent the collector contacts an individual at a phone number where the person contacted does not reside, the collector is not prohibited from calling that number again to attempt to obtain location information.

The Commission also suggests the manner in which written communications should be addressed including salutations such as: "To Executor of the Estate of" or "To the Estate of" the decedent. However, in footnote 36 the Commission goes on to state that the body of the letter "cannot include information relating to the decedent's debt." We believe this approach will lead to significant confusion for those handling the decedent's final affairs, and may also lead to civil claims under the FDCPA. First, it is our position that by addressing the letter as suggested by the Commission, the receiving party is adequately put on notice as to whether or not they are the proper person to open it. In the event they are, in fact, the proper person to receive the letter it would serve the recipient's interests better if it included a clear summary of the debt along with the disclosures and warnings provided for under the FDCPA. A more reasonable policy is to mandate that any written correspondence be clearly directed to the estate of the decedent or the person responsible for administering the estate (e.g., the executor), and to then clearly disclose all of the relevant facts about the debt including the disclosures and warnings required by the FDCPA. The Policy might further require that any such communication clearly state that only the assets of the decedent or any person jointly obligated on the debt are liable for the balance due as suggested by the Commission elsewhere in the Policy.

The proposed Policy further notes that collectors might in some cases identify the proper person with whom to speak through a search of relevant court records. While collectors generally do search for estate filings we ask that the Commission clarify that such a search is not required as a condition precedent to commencing phone calls or sending appropriate letters as otherwise described in the Policy. In some cases, local court records are not easily accessible and even where a formal estate will be opened nothing may be filed for several months after the date of death. Furthermore, collectors may not know the county or even the state where an estate would be properly opened.

We would likewise urge the Commission to consider clarifying its position with respect to statements about liability for the underlying debt. The proposed Policy indicates that collectors should consistently advise individuals that it communicates with that they are not personally liable for the debt. There are, however, situations where that might not be a true statement. For example, it is not uncommon for accounts to remain open after a consumer's death because the creditor is unaware that the consumer has passed. If charges are made to an account that are clearly beyond the date of death, it is quite possible that an individual who knowingly used the account of the decedent for their own benefit is personally liable for those post-death charges. Other examples include states where spouses are statutorily liable for the other's debts. In certain states, such liability may be limited to the purchase of "necessaries" such as medical services, food, shelter, etc., but in any event it might be misleading to advise a surviving spouse that he or she is not liable for the debt if they may be statutorily liable for some or all of the outstanding balance.

Secretary of the Commission
November 8, 2010
Page 5 of 4

Additionally, the Commission indicates in the proposed Policy that joint account holders are not liable for the debts of the decedent. While a joint account holder may not be personally liable for the separate debts of the decedent, it is quite possible under state law that assets held in joint ownership are at least partly subject to creditors' claims of one of the account holders. We agree that collectors should not make statements indicating that such persons or assets are accountable, but to impose a blanket rule that there could never be liability in such cases is overbroad.

Finally, we would urge the Commission to consider clarifying that to the extent that an executor or other person handling the final affairs of the decedent have retained an attorney, all further communications related to the debt must be directed to the attorney as mandated under Section 805(a)(2). Additionally, where a creditor's claim has been otherwise barred through a formal estate process the collector is thereafter prohibited from engaging in any further collection attempts related to that debt.

Thank you for your consideration of these matters. We look forward to your response, and to working with the FTC to formulate a policy that provides necessary protection for consumers while also allowing for creditors to obtain payment on legitimate outstanding accounts.

Sincerely,


Greg Hogenmiller
Vice President & Deputy General Counsel