November 8, 2010

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

Re: Deceased Debt Collection Policy Statement

Dear Mr. Secretary:

This letter is submitted by Phillips and Cohen Associates, Ltd. ("PCA") as a public comment regarding the FTC's Statement of Policy Regarding Communications in Collection of a Decedent's Debt (the "Statement"). PCA is a full service third-party collection agency and is a leader in deceased debt collection.

PCA commends the FTC for its efforts to understand the various ways in which estates are resolved and analyze how these different methods impact the ability to collect debts from estates.

PCA is strongly supportive of the FTC's position that "it is consistent with the purposes of the FDCPA, and in the public interest, to allow [deceased] debt collectors to communicate with the person who has authority to pay a decedent's debts from the assets of the estate, even if that person does not fall within the specific categories listed in Section 805(d) [of the FDCPA]."

Specifically, the categories listed in 805(d) to whom a collector may disclose the debt includes the consumer's "executor" and "administrator," but those terms are not defined in the FDCPA. As the FTC details in the Statement, many individuals now die intestate (*e.g.* without a will and therefore without an "executor") and their estates are resolved through processes that do not involve the appointment of anyone with the title of "Administrator." These include, among others:

- Informal probate processes in which a "Personal Representative" (rather than an Administrator) has the authority to distribute the assets and pay the debts of the decedent's estate;

- Universal succession procedures, under which no Administrator is appointed;
- Small estate resolution procedures that are available in most states, which often do not require the appointment of an Administrator; and
- Extra-judicial estate resolution in which a family member or friend pays the debts and distributes the assets of the estate without involving the courts.

An interpretation of the FDCPA that limited the definition of "administrator" to those with that specific title and excluded those who performed the exact same functions in the processes outlined above (hereinafter "Informal Administrators"), would not only be inconsistent with the purposes of the FDCPA, but also lead to significant negative consequences for consumers.

As the statute itself, the legislative history, and subsequent FTC opinions have made clear,[1] the purpose of the FDCPA prohibition against disclosing a consumer's debt to a third party was to outlaw the tactic of bullying a consumer into paying a debt by disclosing a debt (or threatening to do so) to friends, family members and work colleagues. Clearly, therefore, interpreting 805(d) to allow communications with Informal Administrators, who after all have specifically assumed the responsibility of paying the debts and distributing the assets of the decedent, would not in any way frustrate the purposes of that section.

Furthermore, while the drafters of the FDCPA clearly intended to proscribe misleading and abusive collection practices, they were equally clear that they did not want to create an environment in which debt collection would be so restricted that creditors would not be able to collect debts without involving the courts.[2] But that is exactly the situation in which collectors would find themselves if 805(d) were interpreted to exclude Informal

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[1] *See, e.g.* §802(a) ("There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."); S. Rep. No. 95-382 (1977): "[The legislation] prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs."); FTC Staff Opinion (Fisher), August 19, 1992 ("The restriction imposed by Section 805(b) on communicating with third parties is intended to prevent unscrupulous debt collectors from embarrassing consumers or tarnishing their reputations by revealing their debts to friends, neighbors, employers, and family members who do not already know of them.")

[2] *See, e.g.* Rep. Chalmers P. Wylie, ranking Republican on Consumer Affairs subcommittee, speaking in support of FDCPA ("I would not support any legislation which would force creditors to skip the collection process altogether and either write off a bad debt or go to court. Our courts are all too clogged with cases as it is. And if the debt collection business is wiped out some retailer may turn to dealing on a cash-and-carry basis, thereby denying credit to those who really need it the most. I do not want to encourage the attitude that you can get something for nothing, especially in economically depressed times when persons who are honest might be tempted to evade just debts, and in the long run a rising level of debt writeoffs will add to the cost of doing business. So, what we need to do, as I said at the outset, is write a reasonable bill which would not encourage the deadbeat, and will also protect the honest debt collectors. I think we have come up with a bill such as that.") Cong. Rec. 7789, July 27, 1976.

Administrators. With respect to a very significant percentage of deceased debts, there would quite literally be no human being alive with which the collector could legally discuss the debt. Rather than resolving the debt amicably or through fair negotiation, creditors would have to either write off debt that might otherwise be paid voluntarily (raising the cost of credit to other customers) or go to court to collect the debt. Particularly given the fact that relatives are grieving and often overwhelmed by the responsibilities of handling the final affairs of their loved one, such an interpretation would seem to leave nobody better off and everybody – families, creditors, courts and consumers generally – worse off.

As a result, PCA strongly supports the FTC's conclusion that allowing collectors to speak with Informal Administrators is both permitted by the FDCPA and in the public interest.

PCA is also supportive of much of the related guidance in the Statement including, most significantly, that collectors have an affirmative responsibility to help avoid creating the misimpression that Informal Administrators are personally responsible for paying the debts of the decedent in instances in which they are not. PCA, however, believes that there are a few particular details in the Statement that may lead to unintended consequences for collectors and consumers or that are inconsistent with the purposes of the FDCPA. As a result, PCA respectfully requests that the FTC consider amending or clarifying three parts of the Statement.

First, the Statement states that, in attempting to identify an Informal Administrator, the collector may say to a friend or relative of the decedent that they are "trying to locate the person who has the authority to pay any outstanding bills of the decedent out of the decedent's estate." PCA has no objection to using this language, but is concerned that, without further clarifications by the FTC, doing so could lead to claims by private litigants that it was violating the FDCPA. Recognizing that the FTC's interpretation of the FDCPA is not binding on courts, it can nevertheless be persuasive and we would therefore request that the FTC make clear in its Statement that:

- In the FTC's opinion, when attempting to identify the "consumer" in the context of collecting a debt of a deceased person, asking for "the person who has the authority to pay any outstanding bills of the decedent out of the decedent's estate" does not violate §804(2) or §805(b).
- In the FTC's opinion, such an inquiry is properly considered acquisition of location information pursuant to §804 and therefore does not count as "the initial communication with the consumer" that would have the effect, among other things, triggering the requirements of §809 (validation of debts) and §807(11) (which has come to be known as the "Mini-Miranda").

Second, the Statement requires that, to avoid creating the misimpression that an Informal Administrator is personally liable for the debts of the decedent, "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." As stated previously, PCA is strongly supportive of the principle that collectors have an affirmative responsibility to help avoid creating the misimpression that Informal Administrators are personally responsible for paying the debts of the decedent in instances in which they are not. In PCA's view, however, the above-quoted language goes far beyond that principle, oversimplifies the law to the point of misstating it in many circumstances, and would not survive scrutiny under the "least sophisticated consumer" standard that courts apply to the FDCPA. Specifically:

- In (1), the word "estate" is a legal term that is unlikely to be understood by the least sophisticated consumer. A statement that the collector "is seeking payment out of the decedent's assets" would be simpler, better understood and more effective in informing consumers.
- In (2), the words "could not" make the clause factually untrue. "Could not" in that context means that there are no possible circumstances under which the Informal Administrator might be personally liable for the decedent's debts. There are, however, a number of circumstances under which an Informal Administrator might, in fact, be liable. These include, among others, if s/he is a universal successor, if s/he is a spouse in a community property state and if s/he incurred debt (*e.g.* by using a credit card) after the decedent passed away. As a result, even if this clause remains in the Statement, we would suggest replacing the word "could" with the word "may."
- In (2), the clause "assets the individual owned jointly with the decedent" makes the statement factually incorrect in a number of scenarios in which the law may in fact require that assets held "jointly" be used to satisfy the debt of the decedent. For example, assets held by the decedent as a "tenant in common" (which most consumers would consider as being held "jointly") become part of the estate and must be used to satisfy the debts of the estate. Also, as discussed above, if the decedent lived or owned property in one of the nine community property states (which include California and Texas), then certain assets held by the spouse could be required to be used to satisfy the debts of the decedent. Because of these and other possible factual scenarios, PCA does not believe that collectors should be required to make any statement to all Informal Administrators about assets held "jointly." Consumers are already protected by the FDCPA against collectors making any false or misleading representations and this, of course, would extend to any collector stating, if it were not true, that assets jointly held by the decedent and another individual were required to be used to satisfy the debt of the decedent.
- Finally, PCA is concerned that, taken as a whole, the above quoted language may not be viewed by a court as satisfying the "least sophisticated consumer" test. We believe that a single concise statement such as "we are seeking payment of this debt only from the decedent's assets and not from any other source" is significantly more understandable to the least sophisticated customer than the language proposed in the Statement and is equally if not more protective of their interests.

- If the FTC believes that a specific statement is needed related to the Informal Administrator, we would suggest that an unsophisticated consumer would be more likely to understand a statement such as "we are seeking payment of this debt only from the decedent's assets and you are not personally responsible for paying this debt."
- Regardless of the exact formulation, however, PCA respectfully requests that the Statement be clarified to specifically note that there are some circumstances in which an Informal Administrator might be personally liable for the debts of the decedent (*e.g.* universal succession, spouse in a community property state) and if the collector has a reasonable good faith belief that any of these circumstances might apply, it would not be required to make a statement about the non-use of the Informal Administrator's assets or his or her liability.

Third, the Statement suggests that collectors of deceased may be prohibited from sending the "validation of debts" letter required by §809 to the "Executor or Administrator of the estate of [the decedent]" until they have identified a named individual who meets the definition of "consumer," which includes the consumer's attorney, spouse, guardian, executor, administrator, and Informal Administrator (hereinafter "Right Party"). PCA believes that this prohibition would make it harder for Right Parties to quickly and efficiently resolve estates and serve no purpose for which the FDCPA was enacted.

From experience, PCA knows that the vast majority of validation letters are received by, and extremely helpful to, Right Parties who are trying to resolve the financial affairs of the decedent. PCA recognizes the possibility that someone other than a Right Party might open the validation letter, but to prohibit the sending of a letter that is most often helpful to the families of the decedent because it may be very occasionally opened by someone else seems to be in nobody's interest. As discussed above, the legislative history makes it clear that the purpose of §805(b) was to prevent the abusive and unfair collection practice of pressuring a debtor to pay by revealing or threatening to reveal the existence of the debt to family members, coworkers and friends. Such outrageous tactics can hardly be compared to the act of sending a letter to "The Executor or Administrator of the estate of [the decedent]" that will most often be opened by a Right Party, but will occasionally be opened by a family member or friend who is most likely acting at the direction of the Right Party. Such a disclosure will not lead to any of the ills for which that provision or the FDCPA generally, was designed to prevent such as "marital instability,"[3] "loss of jobs,"[4] "embarrass[ment],"[5] and the "tarnishing of reputations."[6]

The Statement does correctly point out that another purpose of the FDCPA was to prevent "invasions of privacy," but in our opinion, given the inevitable acts that take

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[3] §802(a).
[4] *Id.*; S. Rep. No. 95-382 (1977).
[5] FTC Staff Opinion, August 19, 1992 (Fisher).
[6] *Id.*

place after a person dies (*e.g.* cleaning out of their closet, disposing of their personal effects, opening their mail), having their debts disclosed to a person designated by the family to open mail hardly seems a significant invasion of privacy. This is particularly true because, once a person has been designated by the family to open the mail of the decedent, it is likely that they have already opened mail sent by first-party creditors (sent prior to their being made aware of the death) that disclose much of the same information.

In sum, PCA believes that the privacy interests protected by prohibiting third-party collectors from sending validation letters are extremely small compared to the significant benefits that validation letters provide to Right Parties in helping them to efficiently resolve the estates of their loved ones. As a result, PCA urges the FTC to amend the Statement to specifically allow for validation letters to be sent, with the appropriate disclosures, to "The Executor or Administrator of the estate of" the decedent to the last known address of the decedent.

We appreciate the opportunity to comment on the Statement and thank the FTC for considering our views.

Sincerely,

Phillips & Cohen Associates, Ltd.

cc: Jonathan M. Grossman, Esq., Cozen O'Connor, P.C.
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