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November 8, 2010

VIA ELECTRONIC SUBMISSION

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

Re: Deceased Debt Collection Policy Statement

Dear Mr. Secretary:

The following comments are submitted on behalf of ACA International ("ACA") in response to the Federal Trade Commission's request for comments on the proposed statement of enforcement policy regarding communications in connection with collection of a decedent's debts (hereinafter "Policy Statement").

ACA strongly supports the Commission's effort to use the proposed Policy Statement to bring clarity to the complexities involved when collecting on a decedent's debt. ACA's comments address the three main components of the Policy Statement, specifically: (1) the Commission's intent not to bring enforcement actions against collectors communicating with third parties consistent with the Policy Statement; (2) clarifying the circumstances in which a debt collector may locate an appropriate person with whom to discuss the decedent's debt, including contacting third parties; and (3) addressing possible FDCPA and FTC Act violations where consumers are misled when communicating with them about a personal obligation to pay a decedent's debt.

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I. Background on ACA International.

ACA International is an international trade association originally formed in 1939 and composed of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,000 company members, including credit grantors, collection agencies, attorneys, asset buyers and vendor affiliates.

The company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activities of ACA members are regulated primarily by the FTC under the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; in addition to numerous other federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering debts, including those created in the context of healthcare operations. In so doing, Congress committed the primary regulation of the recovery of debts to the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 1692i.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than ten employees, and more than 2,500 of the members employ fewer than twenty persons.

ACA members are a crucial component in safeguarding the health of the economy. Uncollected consumer debt threatens America's economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States \$683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. By itself, outstanding credit card debt has doubled in the past decade and now approaches three quarters of one trillion dollars.

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As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. They represent the local family doctor, hospital, or nursing home. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are returned to business and reinvested. For example, ACA members recovered and returned over \$40 billion in 2007 alone, a massive infusion of money into the national economy.¹ Without an effective collection process, the economic viability of these businesses, and by extension, the American economy in general, is threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

II. Response to Request for Comment.

ACA recognizes that estate collection must be approached with compassion and great care. Collecting from the deceased is a sensitive matter, requiring a delicate appreciation and balance for seeking recovery of legitimate financial obligations and for the context in which such collections are undertaken.

Collection efforts regarding a financial obligation where a consumer has passed away are primarily regulated by the FDCPA and state law, as summarized in the proposed Policy Statement. Although certain provisions of the FDCPA only apply to communications with a consumer, many of the protections of the FDCPA extend to individuals beyond the person obligated to pay the debt. A debt collector is prohibited from engaging in any harassment or abuse; from making any false, deceptive, or misleading representations; and from using any unfair means in connection with the collection of a debt from any person, including the executor or representative of an estate or other relative.

With regard to ACA's membership, the Association counsels that the first step in compliant estate collection is to attempt to identify the administrator or executor of the decedent's estate in order to establish how the consumer's assets are distributed upon passing, including whether the consumer's estate will proceed through probate as well. This person is often referred to as the personal representative.

¹ PricewaterhouseCoopers, Value Of Third-Party Debt Collection To The U.S. Economy in 2007: Survey and Analysis, *available at* <http://www.acainternational.org/files.aspx?p=/images/12546/pwc2007-final.pdf>.

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The law permits debt collectors to contact relatives to find out who the personal representative or executor is to commence collections from the estate or through probate. A debt collector is permitted to contact a third party to acquire location information about the "consumer." The definition of a "consumer" in Section 805(d) includes, for example, the consumer's spouse, parents (if the consumer is a minor), guardian, administrator, or executor. Thus, the law permits a collector to contact relatives or other third parties in an attempt to locate the personal representative. In this regard, ACA agrees with the Commission's conclusion that collectors are permitted to communicate with the person who has authority to pay a decedent's estate, even if that person does not fall within the enumerated categories listed in Section 805(d) of the FDCPA.

Since a personal representative is considered a "consumer" under the FDCPA, the personal representative is afforded all the protections and rights available to the consumer under the Act. This includes the ability to cease communications with the collector regarding the debt. If a collector receives a written notice from the personal representative requesting the collector cease communication or refusing to pay the obligation, the collector is obligated to comply with this request.

As the Commission notes, in some instances the person with authority to pay the decedent's debts cannot be ascertained without contacting third parties to seek location information under Section 804. Absent the known identity of an executor or administrator of the estate, contacting a third party to identify an authorized party creates the risk of a third party disclosure of the existence of the decedent's debt. In this setting, the proposed Policy Statement indicates that the collector inevitably will be required to state to the third party that he or she is attempting to find the person who has authority to pay the decedent's debts. In the view of ACA, this type of limited and general reference does not pose a significant invasion of the decedent's privacy rights. It is well established that the right to privacy is an individual right such that the deceased generally have a reduced privacy interest as compared to the privacy rights during life. Any modest infringement on the privacy interest after death is not an infringement on an individual's privacy right, but of the estate. Moreover, there is a substantial benefit that is obtained from permitting these general communications with third parties to locate the authorized representative of the estate because doing so avoids litigation that otherwise draws down on the assets of the estate.

Finally, the Commission proposes that, to avoid misimpressions of personal liability for the decedent's debt, the collector disclose to an individual 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 owned jointly with the decedent to pay the debt. ACA disagrees with this disclosure for two reasons.

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First, in some cases, a consumer's spouse, next-of-kin, relatives, or other individual may be legally responsible for a financial obligation. The FDCPA does not identify who is liable for an existing debt. This is a fact-specific inquiry depending on the contract or agreement creating the obligation, state law, and the type of debt. For instance, an individual who co-signed or otherwise personally guaranteed the decedent's obligation may be legally responsible for the remaining debt. In the case of a joint account, such as a credit card, the surviving account holder may be liable for the unpaid debt.

In certain circumstances, a surviving spouse may be liable for the debt of the deceased spouse under state law. In states that observe the doctrine of necessities, a spouse is liable to a creditor who sells or provides goods or services to that person's spouse, as long as the goods or services are rendered for necessities. Necessaries include food, medicine, clothing, shelter and personal services that are typically considered reasonably essential for the preservation and enjoyment of life. For example, the doctrine of necessities may provide a non-deceased spouse is responsible for medical debt incurred by his or her spouse prior to passing. Because state laws on these issues vary, it is important to be cognizant of the relevant state law provisions.

Heirs may also be liable for the debts of the deceased if the deceased gifted away their assets shortly before death, or otherwise acted in a manner to defraud creditors. State law varies, but there is generally a "look-back" period of six months to evaluate the validity of gifts. Conversely, if the heir of the deceased removed assets from the estate, assumed liability for the pre-death hospital/nursing care, or otherwise guaranteed payment, the heir may be liable for some or all of the deceased debts.

As these examples demonstrate, there are circumstances in which the individual contacted may be jointly liable for the decedent's debt, and thus a broad disclosure suggesting the contrary in a communication with the individual is unnecessary and may actually be misleading. To address this, the Policy Statement should note that it is not *per se* misleading if the collector does not to make the proposed disclosure where the collector has reason to believe that the individual contacted as an estate representative may also have individual liability for one or more of the decedent's debts.

Second, the disclosure would require the collector to expressly inform the third party that it "is seeking payment for the assets in the decedent's estate." This expressly or by implication discloses the existence of a debt to a third party in possible violation of Section 805(b). If the Commission intends to evaluate the collector's compliance with the FDCPA according to whether this disclosure is communicated to an individual, then the mandated disclosure cannot also expose the collector to litigation either by the Commission or by an individual directly for an alleged third party disclosure violation. ACA suggests that the

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Policy Statement include a statement that where the collector delivers the disclosure required by the Commission, there is no third party disclosure violation subjecting the collector to liability.

ACA appreciates the opportunity to comment on the proposed amendments. If you have any questions, please contact Andrew Beato at 202-737-7777.

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