



ESTATE DEBT COALITION

September 18, 2019

Comment Intake – Debt Collection
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2019-0022

To whom it may concern:

This letter is submitted by the Estate Debt Coalition (“EDC”) as a public comment in response to the Bureau’s proposed rule to amend Regulation F, 12 CFR part 1006, which implements the Fair Debt Collection Practices Act (“FDCPA”) (the “Proposed Rule”). EDC is comprised of three of the largest debt collection agencies that specialize in decedent debt: AscensionPoint Recovery Services, LLC; Estate Information Services, LLC; and Phillips & Cohen Associates, Ltd.

As an initial point, EDC appreciates the efforts by the Bureau over the past few years to learn more about the collection process and procedures that have evolved related to estate debt (also called “decedent debt”). It is critically important to all involved in the process of resolving the debts of estates, including those responsible for administering the estate, probate courts, creditors, and collectors, that the rules promulgated take into account the unique factual circumstances surrounding estate debt so as not to create unintended barriers to fair and efficient estate resolution.

Definition of Consumer

EDC is strongly in support of proposed comment 6(a)(4) which states that the terms “executor” and “administrator,” as used in the definition of “consumer” in § 805(d) of the FDCPA, include the “personal representative of the consumer’s estate,” and further defines a “personal representative” as “any person who is authorized to act on behalf of the deceased consumer’s estate.” This interpretation is necessary because a significant majority of estates are now resolved through informal, abbreviated, or extrajudicial processes that are unique to each state, and many such processes do not involve the formal appointment of an “Executor” or “Administrator.” Without such an interpretation, the efforts of many consumers to quickly and

inexpensively close the estates of loved ones would be needlessly frustrated because collectors would be prohibited by law from discussing the decedent's debt with them.

Notably, this part of the Proposed Rule is consistent with the policy set forth by the last federal agency to consider this issue, the Federal Trade Commission ("FTC"). In its 2011 Statement of Policy Regarding Communications in Connection With the Collection of Decedents' Debts¹ ("FTC Policy Statement"), the FTC stated that it would forebear from taking law enforcement action against a debt collector "for communicating about a decedent's debts with . . . an individual who has the authority to pay the debts out of the assets of the decedent's estate."² While the difference between the Bureau's and the FTC's respective formulations may be relevant to location communications (as discussed below), they are functionally identical as to the underlying principle that people lawfully performing the duties of formally appointed Executors or Administrators, without such appointments, are considered first parties, with whom debt collectors may communicate. EDC strongly supports the conclusion of both the Bureau and the FTC in this respect.

Our only concern with the Proposed Rule in this respect is that, while the both the commentary³ and the Official Interpretations⁴ make the Bureau's position on this issue clear, the term "Personal Representative" is not included in § 1006.6 among the individuals included in the definition of "consumer." Given the importance of this issue and the Bureau's extensive commentary on this point, we would request that the Bureau insert in § 1006.6:

(5) The Personal Representative of the consumer's estate, which includes any person who is authorized to act on behalf of the deceased consumer's estate;

Permissible Language in Location Communications

Since the FTC Policy Statement was issued in 2011, EDC members seeking to identify the individuals informally performing the function of an Executor or Administrator, have asked to speak to the person "who has the authority to pay the outstanding bills of the decedent out of the assets of the decedent's estate." While this language is admittedly a bit awkward, it has been very successful in communicating with even the least sophisticated consumer because the person hearing that request nearly always knows whether or not s/he is the person who has such authority. Consumers sometimes need the question repeated, but they rarely, if ever, ultimately fail to understand it or need to ask follow-up questions. In this respect, this language has worked

¹ 76 Fed. Reg. 44,915, 44,919 (July 27, 2011).

² *Id.* at 44919.

³ *See, e.g.*, page 73 of the Proposed Rule ("The Bureau proposes to interpret the terms executor and administrator as used in the FDCPA to include personal representatives, which is defined in proposed comment 6(a)(4)-1 as any person who is authorized to act on behalf of the deceased consumer's estate.").

⁴ *See* Official Interpretation to Section 1006.6, Paragraph 6(a)(4) on page 496 of the Proposed Rule ("The terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's assets extrajudicially.").

extremely well in quickly identifying the correct person with whom the collector should be speaking. We believe that the use of this language is one of the reasons that complaints to the Bureau related to estate debt collections are rare.

The FTC carefully considered the privacy implications of permitting a reference to “outstanding bills” in a location communication. The legislative history of the FDCPA makes it clear that the purpose of § 804(2) was to prohibit the clearly abusive practice of seeking to embarrass a debtor by calling friends, family, and work colleagues and telling them about the debt.⁵ As the FTC also noted, however, nearly all people who die receive bills afterwards and so a reference to “outstanding bills” does not even indicate that the decedent was delinquent in paying his or her bills at the time of death.⁶ In this context, disclosing to friends or family members of the decedent that he or she had “outstanding bills” in an effort to locate the person authorized to pay such bills is a far cry from the abusive collection tactics that Congress was seeking to prevent in enacting § 804(2). As a result, we not only believe that the FTC provided an efficient means of identifying the person authorized to pay the outstanding bills of the decedent, but also properly balanced the privacy interests of the decedent with the interest of collectors and those managing estates to efficiently find each other.

Proposed comment 10(b)(2)-1, by contrast, would limit the location inquiry to the person “who is authorized to act on behalf of the deceased consumer’s estate.” EDC appreciates the simplicity of this language and acknowledges the laudable intentions of further protecting the privacy of the decedent by not using the word “bills,” but is concerned that this language will not be understandable to many consumers. For example, some might ask in response “act in what way?” or “what do you mean by ‘act’?” We could not think of a good answer to such questions that would further educate the consumer as to with whom the collector was seeking to speak without using a term like “bills” or “debts,” which are the very words that the Bureau is seeking to avoid being used. It is not in the interest of either the collector or the person with whom s/he is speaking to limit the collector’s words so much that the legitimate purpose of the inquiry cannot be understood.

As a result, EDC believes that it would be in the best interests of both consumers and collectors for collectors to be permitted to continue to use the FTC’s language. Should the Bureau believe that the FTC’s language by itself is not feasible, however, then EDC would support a combination of both the Bureau’s and the FTC’s language wherein the collector would initially use the Bureau’s proposed language, and if it elicited a clear response would say no more, but if the consumer did not understand the inquiry or asked a follow-up question, then the collector would be permitted to respond with specific reference to the person “with the authority to pay the outstanding bills” of the decedent.

⁵ S. Rep. No. 95-382 (1977); 1977 U.S.C.C.A.N. 1695, 1699.

⁶ See 75 Fed. Reg. 62,389, 62,393 n.37 (October 8, 2010).

Affirmative Disclosure that the Individual is not Personally Liable for the Debt of the Estate

Telling or implying to a family member that they are personally responsible for the debts of the decedent when they are not is a clear FDCPA violation. EDC supports strong enforcement against any collector employing such tactics. We further believe that an affirmative disclosure of non-liability prevents misunderstandings even when no misrepresentation has taken place. As a result, all EDC members affirmatively disclose non-liability in every communication and believe strongly in having an affirmative non-liability disclosure requirement.

We believe that these disclosures are part of the reason that complaints to the Bureau regarding estate collections are rare and that no enforcement cases have been brought against estate debt collectors since issuance of the FTC Policy Statement. We therefore urge the Bureau to require a clear disclosure of non-liability in every oral and written communication. As to specific language we suggest: “We are only seeking to collect debts from the estate and you are not personally liable for such debts.”

We do want to raise one caveat to the above that we believe should be addressed in the final rule. There are some circumstances in which an estate debt collector may be speaking to a person who is both the personal representative of the estate and who may also be liable for certain debts of the decedent. One such circumstance is when speaking to the spouse of a decedent in a community property state. If the collector has a good-faith belief that the personal representative may, in fact, be personally liable for the debts of the decedent, then the collector should not be required to make an affirmative statement to the contrary.

Cooling Off Period

In Footnote 208 of the Proposed Rule, the Bureau solicits comments on whether or not there should be a “cooling off” period after a person’s death, during which a communication with the personal representative would be automatically interpreted as “unusual” or “inconvenient” under § 805(a)(1). EDC believes that the best practice is to observe a cooling off period of 21-28 days, which all of our members currently do. We would support an interpretation consistent with our practice. We would be opposed to a longer cooling off period, however, because some jurisdictions require notice of a claim to be filed in a probate case as early as four months after public notice of death, and it is in the interest of both collectors and personal representatives to have a reasonable opportunity to speak prior to such a deadline.

Furthermore, if the Bureau decides to impose a cooling off period in the final rule, EDC strongly supports that it would be automatically terminated if and when the personal representative affirmatively contacts the collector. It is clearly not in the interest of a personal representative to forbid him or her from communicating at a time of his or her choosing.

Model Validation Notice

EDC strongly supports the Bureau’s proposal to establish a safe harbor for collectors who utilize a model validation notice. We comment only to note that estate collectors will necessarily have to make a number of changes to the model validation notice to account for the unique circumstances of estate debt collection. In particular, we note the language that states “[w]e are trying to collect a debt that you owe” This is obviously not true in the estate collection context and could mislead the personal representative to believe that s/he is personally responsible for the debt when s/he is not. As such, references to the personal representative owing a debt should be deleted and replaced with a clear statement that the estate owes the debt and not the personal representative. Our concern is that enough changes such as this, as well as the inclusion of a non-liability disclosure, could provide the basis for a court to conclude that the notice is not “substantially similar” to Model Notice B-3, thereby excluding estate debt collectors from enjoying the same safe harbor protections provided to the rest of the industry.

In order to ensure that the safe harbor applies to estate collection, we respectfully suggest that the Bureau create a model validation notice specifically for estate collections. We have included as Exhibit A a draft of such a Model Notice B-4 for estate collections. Exhibit B is our draft tracked to the Bureau’s proposed Model Notice B-3. Alternatively, the same purpose could be accomplished by an explicit statement in the Proposed Rule that modifications to Model Notice B-3 by estate collectors that accurately identify the accountholder and the parties who are liable and not liable for the debt(s) are acceptable, and that such modifications render the modified form “substantially similar” to Model Notice B-3. Such a statement would provide estate debt collectors with the same safe harbor protection and the rest of the industry.

* * *

We would again like to thank the Bureau for recognizing the importance of ensuring that the FDCPA is applied to the unique area of estate debt collection in a manner that simultaneously protects the rights of consumers and allows for the efficient resolution of estates. We would welcome the opportunity to answer any follow-up questions that the Bureau may have.

Sincerely,

Estate Debt Coalition

ESTATE DEBT COALITION - EXHIBIT A

North South Group
P.O. Box 121212
Pasadena, CA 91111-2222
(800) 123-4567 from 8am to 8 pm EST, Monday to Saturday
www.example.com

To: Personal Representative of the Estate of John Smith
2323 Park Street
Apartment 342
Bethesda, MD 20815

Reference: 584-345

On behalf of our client and office, please accept our sincere condolences for your loss. **North South Group is a debt collector.** We are trying to collect a debt that is owed by the Estate of John Smith to Bank of Rockville. We will use any information you give us to help collect a debt. Please note that we are only seeking to collect debts from the estate and you are not personally liable for such debts.

Our information shows:

John Smith had a Main Street Department Store credit card from Bank of Rockville with account number 123-456-789.

As of January 2, 2017, John Smith owed: \$2,234.56

Between January 2, 2017 and today:

<u>John Smith was charged this amount in interest:</u>	<u>+ \$75.00</u>
<u>John Smith was charged this amount in fees:</u>	<u>+ \$25.00</u>
<u>John Smith paid or was credited this amount toward the debt:</u>	<u>- \$ 50.00</u>
<u>Total Amount of the debt now:</u>	<u>\$2,284.56</u>

How can the estate dispute this debt?

- * **Call or write to us by November 12, 2019, to dispute all or part of the debt.** If the estate does not, we will assume that our information is correct. If the estate writes to us by November 12, 2019, we must stop collection on any amounts the estate disputes until we send you information that shows the estate owes the debt.
- * The estate may use the form below or may write to us without the form. The estate may also include supporting documents. We accept disputes electronically at www.example.com/dispute.

What else can you do?

- **Write to ask for the name and address of the original creditor.** If the estate writes by November 12, 2019, we will stop collection until we send you that information. The estate may use the form below or write to us without the form. We accept such requests electronically at www.example.com/request.
- **Learn more about the estate's rights under federal law.** For instance, the estate has the right to stop or limit how we contact it. Go to www.consumerfinance.gov.
- Contact us about the estate's payment options.
- Review state disclosures on reverse side, if applicable.
- Póngase en contacto con nosotros para solicitar una copia de este formulario en español.

Mail this form to:

North South Group
P.O. Box 121212
Pasadena, CA 91111-2222

Personal Representative of John Smith
2323 Park Street
Apartment 342
Bethesda, MD 20815

How does the estate want to respond?

Check all that apply:

It wants to dispute the debt because it thinks:

- This is not John Smith's debt.
- The amount is wrong.
- Other (please describe on reverse or attach additional information).

I want you to send me the name and address of the original creditor.

I enclosed this amount: \$ _____

Make your check payable to North South Group.

Include the reference number 584-345

Quiero esta forma en español.

ESTATE DEBT COALITION - EXHIBIT B

North South Group
P.O. Box 121212
Pasadena, CA 91111-2222
(800) 123-4567 from 8am to 8 pm EST, Monday to Saturday
www.example.com

To: ~~Person A~~ Personal Representative of the Estate of John Smith
2323 Park Street
Apartment 342
Bethesda, MD 20815

Reference: 584-345

On behalf of our client and office, please accept our sincere condolences for your loss. North South Group is a debt collector. We are trying to collect a debt that ~~you owe~~ is owed by the Estate of John Smith to Bank of Rockville. We will use any information you give us to help collect a debt. Please note that we are only seeking to collect debts from the estate and you are not personally liable for such debts.

Our information shows:

~~You~~ John Smith had a Main Street Department Store credit card from Bank of Rockville with account number 123-456-789.

As of January 2, 2017, ~~you~~ John Smith owed: \$2,234.56

Between January 2, 2017 and today:

~~You~~ John Smith ~~was~~ ere charged this amount in interest: + \$75.00

~~You~~ John Smith ~~was~~ ere charged this amount in fees: + \$25.00

~~You~~ John Smith paid or ~~was~~ ere credited this amount toward the debt: - \$ 50.00

Total Amount of the debt now: \$2,284.56

How can ~~you~~ the estate dispute this debt?

- * **Call or write to us by November 12, 2019, to dispute all or part of the debt.** If ~~you do~~ the estate does not, we will assume that our information is correct. If ~~you~~ the estate writes to us by November 12, 2019, we must stop collection on any amounts ~~you~~ the estate disputes until we send you information that shows ~~you~~ the estate owes the debt.
- * ~~You~~ The estate may use the form below or ~~you~~ may write to us without the form. ~~You~~ The estate may also include supporting documents. We accept disputes electronically at www.example.com/dispute.

What else can you do?

- **Write to ask for the name and address of the original creditor.** If ~~you~~ the estate writes by November 12, 2019, we will stop collection until we send you that information. ~~You~~ The estate may use the form below or write to us without the form. We accept such requests electronically at www.example.com/request.
- **Learn more about ~~your~~ the estate's rights under federal law.** For instance, ~~you~~ the estate ~~have~~ has the right to stop or limit how we contact ~~you~~ it. Go to www.consumerfinance.gov.
- Contact us about ~~your~~ the estate's payment options.
- Review state disclosures on reverse side, if applicable.
- Póngase en contacto con nosotros para solicitar una copia de este formulario en español.

Mail this form to:

North South Group
P.O. Box 121212
Pasadena, CA 91111-2222

~~Person A~~

Personal Representative of John Smith

2323 Park Street
Apartment 342
Bethesda, MD 20815

How does ~~you~~ the estate want to respond?

Check all that apply:

It wants to dispute the debt because it thinks:

This is not ~~my~~ John Smith's debt.

The amount is wrong.

Other (please describe on reverse or attach additional information).

I want you to send me the name and address of the original creditor.

I enclosed this amount: \$ _____

Make your check payable to North South Group.

Include the reference number 584-345

Quiero esta forma en español.