

E. Kirschner Declaration of Trust and David E. Kirschner as trustee, the Margaret Kirschner Declaration of Trust and Margaret Kirschner as trustee, The Noble Foundation, Philip and Cheryl Kirschner, Khajha Kirschner, Pamela Kirschner Bolduc, the Mary C. Kirschner 2007 Trust, and David E. Kirschner as trustee of the Mary C. Kirschner 2007 Trust; to retain, as a group acting in concert, voting shares of Town and Country Financial Corporation, Springfield, Illinois, and thereby indirectly retain control of Town and Country Bank, Springfield, Illinois, and Logan County Bank, Lincoln, Illinois.

In connection with the above application, Margaret Kirschner, individually and as trustee and co-trustee of various trusts, has applied to retain voting shares of Town and Country Financial Corporation, Springfield, Illinois, and thereby indirectly retain control of Town and Country Bank, Springfield, Illinois, and Logan County Bank, Lincoln, Illinois.

In addition, David E. Kirschner, individually and as trustee and co-trustee of various trusts, has applied to retain voting shares of Town and Country Financial Corporation, Springfield, Illinois, and thereby indirectly retain control of Town and Country Bank, Springfield, Illinois, and Logan County Bank, Lincoln, Illinois.

C. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Stephen L. Grobel, Tabb, Virginia; to individually acquire voting shares of First Community Bancorp, Inc., Glasgow, Montana, and thereby indirectly acquire voting shares of First Community Bank, Glasgow, Montana.

In addition, Stephen L. Grobel and Peter J. Grobel, Helena, Montana, as members of the Grobel Family Group, to acquire voting shares of First Community Bancorp, Inc., and thereby indirectly acquire voting shares of First Community Bank, Glasgow, Montana.

D. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105-1579:

1. Castle Creek Capital Partners IV, L.P., and persons that are acting with, or control Castle Creek Capital Partners IV, L.P. (Castle Creek Advisors IV, LLC; Castle Creek Capital IV, LLC; John T. Pietrzak; Pietrzak Advisory Corp.; John M. Eggenmeyer, III; JME Advisory Corp.; William J. Ruh; Ruh Advisory Corp.; Mark G. Merlo; Legions IV Corp.; Joseph Mikesell Thomas and Thomas Advisory

Corp., all of Rancho Santa Fe, California; to acquire voting shares of First NBC Bank Holding Company, and thereby indirectly acquire voting shares of First NBC Bank, both of New Orleans, Louisiana.

Board of Governors of the Federal Reserve System, July 22, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

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**BILLING CODE 6210-01-P**

## FEDERAL TRADE COMMISSION

### Statement of Policy Regarding Communications in Connection With the Collection of Decedents' Debts

**AGENCY:** Federal Trade Commission ("FTC" or "Commission").

**ACTION:** Policy statement.

**SUMMARY:** Pursuant to the FTC's authority to enforce the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692l(a), and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, the Commission issues this final Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts ("Statement").<sup>1</sup> When a person dies, creditors and the debt collectors they hire usually have the right to collect on the person's debts from the assets of his or her estate. Sections 805(b) and (d) of the FDCPA prohibit debt collectors from contacting individuals other than the debtor to collect a debt, unless the individual is the debtor's spouse, parent (if the debtor is a minor), guardian, executor, or administrator. The Commission has learned that, to recover on a decedent's debts, some debt collectors contact the decedent's relatives, although these relatives may have no authority to pay the debts from the decedent's estate and no legal obligation to pay the debts from their own assets. By contacting persons who are not specified in Section 805 of the FDCPA, and by engaging in practices that may deceive those persons about their obligations, these debt collectors may be violating the FDCPA. The Commission recognizes, however, that imposing unnecessary restrictions on a debt collector's ability to collect a decedent's debt from the person authorized to pay those debts

<sup>1</sup> An enforcement policy statement describes the Commission's future enforcement plans, goals, and objectives with respect to a particular industry or practice. Enforcement policy statements do not have the force or effect of law, but they may reflect the Commission's interpretation of a legal requirement.

may instead cause some debt collectors to seek to recover by invoking the probate process, imposing substantial costs on the estate and delaying the distribution of assets to heirs and beneficiaries. To balance these interests and protect consumers from unfair, deceptive, and abusive practices, this Statement announces that the FTC will forebear from enforcing Section 805(b) of the FDCPA, 15 U.S.C. 1692c(b), against a debt collector for communicating about a decedent's debts with persons specifically identified as appropriate to contact under Section 805 of the FDCPA (e.g., spouse, parent, guardian, executor, or administrator) or any other person who has the authority to pay the decedent's debts from the assets of the decedent's estate. The Statement also clarifies how a debt collector can comply with the law in locating the person who has the requisite authority with whom to discuss the decedent's debts. Finally, the Statement explains how a debt collector can avoid engaging in deceptive practices in communicating with a third party about a decedent's debts.

**DATES:** This final statement of policy is effective on August 29, 2011.

**ADDRESSES:** Requests for copies of this Statement should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Room 130, Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final Statement, are available at (<http://www.ftc.gov>).

**FOR FURTHER INFORMATION CONTACT:** Christopher Koegel or Quisaira Whitney, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326-3224.

#### SUPPLEMENTARY INFORMATION:

#### I. The Proposed Policy Statement and Public Comments Received

On October 8, 2010, the Commission published in the **Federal Register** a notice of proposed statement of enforcement policy regarding communications in connection with the collection of decedents' debts ("proposed Statement").<sup>2</sup> The proposed Statement addressed three issues under the FDCPA pertaining to debt collectors who attempt to collect on the debts of deceased persons: (1) With whom a debt collector may lawfully discuss a decedent's debt consistent with the

<sup>2</sup> 75 FR 62,389 (Oct. 8, 2010).

limitations in Sections 805(b) and (d) of the FDCPA; (2) how a debt collector may locate the appropriate person with whom to discuss the debt and seek payment; and (3) how a debt collector can avoid misleading consumers about their personal obligation to pay the debt.

The proposed Statement noted that Sections 805(b) and (d) of the FDCPA limit the persons whom a collector can contact about a debt (including a decedent's debt) to the debtor's spouse, parent (if the debtor is a minor), guardian, executor, or administrator. The proposed Statement then described the evolution of state probate laws and estate resolution procedures that, in recent years, have expanded the class of persons who have the authority to pay a decedent's debts from the assets of the decedent's estate beyond those listed in Sections 805(b) and (d). In light of these developments, the Commission proposed that it would forebear from taking enforcement action against collectors who contacted persons other than those listed in Sections 805(b) and (d), if those persons had the authority to pay the decedent's debts from the estate's assets. The proposed Statement further described permissible means by which a collector could identify and locate a person with such authority, and admonished collectors not to deceive such persons into believing they were obligated personally to pay the debt, recommending that collectors disclose affirmatively that the person was not so obligated.

The notice requested public comment on the overall costs, benefits, necessity, and regulatory and economic impact of the proposed Statement and designated November 8, 2010, as the deadline for filing public comments. On November 8, 2010, the Commission extended the deadline for submission of public comments until December 1, 2010.<sup>3</sup>

In response to the proposed Statement, the Commission received 145 total comments<sup>4</sup> from stakeholders, including consumer and community groups, state law enforcers, attorneys who represent debt collectors, debt collectors who specialize in the collection of deceased accounts, and individual consumers. As discussed further below, the comments provided a diverse array of opinions and suggestions on the proposed Statement. Based on the comments and other information obtained by the Commission, the Commission has made

several revisions to the proposed Statement in this final Statement.

## II. Background

### A. Probate Law and Estate Resolution

Most debts incurred in life do not simply vanish upon death.<sup>5</sup> Instead, the decedent's estate (comprised of the assets held by the decedent at the time of death) is responsible for paying them. Some debts arise from accounts on which the decedent was current at the time of death (e.g., the amount owing for the decedent's last electric bill, even if he or she was current on the account at the time of death). Other debts may be on bills for which the decedent was delinquent in making payments at the time of death (e.g., the amount owing for the last six months on the decedent's electric bill). Regardless of whether the decedent was current or delinquent on a bill at the time of death, creditors and collectors, for a period of time, generally are permitted under state law to seek to recover from the decedent's estate.

To understand consumer protection concerns related to collecting on decedents' debts requires knowledge not only of the FDCPA but of state probate and estate law as well. As detailed in the proposed Statement,<sup>6</sup> there is no single set of laws and procedures that governs the resolution of a decedent's estate in all or even most states. Indeed, even individual counties in some states have their own requirements. Generally, however, there are two main questions that probate and estate laws answer: (1) What assets are part of the estate, and thus at least potentially subject to creditors' claims; and (2) what procedures will the estate use to distribute its assets.

### 1. Assets in the Decedent's Estate

Not all of a decedent's assets become part of his or her estate. Assets that pass outside of the estate generally include: (1) Those that are jointly owned by the decedent and another person;<sup>7</sup> and (2) those that pass directly to individuals

<sup>5</sup> See, e.g., Portillo ("as debt doesn't disappear when a person dies \* \* \*"). Comments are identified by the name of the organization or the last name of the individual who submitted the comment.

<sup>6</sup> 75 FR 62,389 at 62,390–62,392 (Oct. 8, 2010).

<sup>7</sup> Common examples of joint assets that do not become part of the estate are the proceeds of joint bank accounts, and real property held by joint tenancy. In addition, in the ten states with community property laws, assets accumulated during a marriage generally are considered joint property, but the state laws vary as to which assets of the community can be reached by creditors of one of the spouses. The community property states are Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

named as beneficiaries.<sup>8</sup> Assets that never become part of the decedent's estate generally are beyond the reach of creditors and third-party debt collectors. All other assets, including cash and real and personal property owned solely by the decedent, become part of the decedent's "gross estate." Funeral and administrative expenses, homestead and exempt property allowances, and family allowances<sup>9</sup> are paid out of the estate first, leaving the "net estate." Creditors and third-party debt collectors can seek to collect amounts the decedent owes them from the net estate,<sup>10</sup> after which the remaining assets in the estate are transferred to the decedent's heirs (if the decedent died without a will) or beneficiaries (if the decedent had a will).

### 2. Distribution of Estate Assets

How a decedent's assets are distributed also depends on the probate practices that are administered under state laws and procedures, which vary significantly. All of the various procedures, however, are designed to ensure that creditors are provided with notice of the decedent's passing, and that some finality is achieved with regard to the decedent's financial affairs.

At the time Congress enacted the FDCPA, most estates were resolved through a process known as formal probate and administration. In that process, the probate court appoints a person with the title of "executor" or "administrator" to handle the estate's affairs. Section 805 of the FDCPA allows collectors to contact persons with those titles about the decedent's debts.

Formal probate, however, has proven to be time-consuming and expensive for consumers.<sup>11</sup> For example, many estates

<sup>8</sup> Such assets include the proceeds from life insurance policies (where the beneficiary is not the estate), union or pension benefits, Social Security benefits, veterans' benefits, and various types of retirement accounts.

<sup>9</sup> A "family allowance" is an amount of money payable out of the estate to support, typically, the spouse and minor children during the pendency of the estate administration.

<sup>10</sup> In some circumstances, another person, including a surviving relative, may be personally liable for the decedent's debts. Examples include a person who shared a joint credit card account with the decedent or who co-signed or guaranteed repayment of credit extended to the decedent. In such cases, both the other person and the decedent's estate are liable for the account balance at the time of the decedent's death. This Statement does not apply if a creditor or a collector is collecting from a person who is personally liable for the decedent's debt, because in those circumstances the person is a "consumer" rather than a third party for purposes of Section 805(b) of the FDCPA.

<sup>11</sup> See, e.g., Nat'l Consumer Law Ctr. at 4 ("Survivors often feel the costs of probate are prohibitive."); Steven Seidenberg, *Plotting Against Probate: Efforts by estate planners, courts and legislatures to minimize probate haven't killed it*

<sup>3</sup> 75 FR 70,262 (Nov. 17, 2010).

<sup>4</sup> One comment was submitted twice (nos. 89 and 90, by the National Consumer Law Center); thus, the Commission received 144 distinct comments, which are available at <http://www.ftc.gov/os/comments/decedentdebtcollection/index.shtm>.

that go through formal probate remain open for 18 months, and, in some cases, even longer. This delay is due, in part, to mandatory periods during which the estate must publish notice of the probate proceeding to potential creditors, as well as months-long periods in which creditors have a right to file claims against the estate.<sup>12</sup> In instances where the estate includes significant assets, states generally have determined that the benefits of such rigorous notice requirements outweigh the costs to estates, heirs, and beneficiaries.

Most states, however, permit less formal procedures for resolving smaller estates. These procedures are quicker, easier, and less expensive for consumers. For example, nineteen states have adopted the Uniform Probate Code ("UPC"),<sup>13</sup> which makes probating a will and administering an estate simpler and less expensive and gives more flexibility to executors than formal probate.<sup>14</sup> The UPC and similar state laws have created a "flexible system of administration" designed to provide persons interested in decedents' estates with the level of procedural and adjudicative safeguards appropriate for the circumstances.<sup>15</sup>

In addition, the UPC and state laws generally exempt entirely certain "small estates"<sup>16</sup> with no real property from probate and administration. These laws provide two additional ways of distributing the small estate's assets: (1) Collection of personal property using an out-of-court affidavit process; and (2) "summary administration."<sup>17</sup> Under

these various alternatives to formal probate, the person who is authorized to deal with the estate's creditors often does not receive the title of "executor" or "administrator," but is called a "personal representative," "universal successor," or some other title. Finally, extrajudicial disposition of decedents' estates also occurs, whereby heirs distribute the assets without state probate codes providing any procedural or adjudicative safeguards.

In sum, there are multiple ways of distributing an estate's assets other than through the traditional formal probate process. Because of this evolution of probate law, most estates today do not go through formal probate, and thus no executor or administrator is appointed.<sup>18</sup> Instead, far more estates are administered through one of the less formal options. But even when the estate is administered outside of the probate process, a creditor or collector always has the option of initiating a formal probate of the estate in order to collect on a debt, thereby preventing the estate's survivors from taking advantage of the benefits of the less formal probate alternatives.<sup>19</sup> In most cases, filing these actions "impose[s] legal, accounting and other professional expenses and fees on those families, unnecessarily draining off assets that could otherwise go to the family."<sup>20</sup>

#### B. Current Industry Practice in Collecting Decedents' Debt

A number of debt collectors now specialize in the collection of debts owed by deceased debtors. The FTC has conducted investigations of several of these collectors and, in doing so, has reviewed recordings of thousands of collection calls. From this law enforcement experience and the comments received in response to the proposed Statement, the Commission has gained insight into the current practices of collectors who seek to recover on decedents' debts.

In collecting on deceased accounts, collectors must first identify the appropriate person(s) with whom they can discuss the decedent's debt. As noted earlier, Section 805 of the FDCPA

permits collectors to contact certain individuals other than the debtor, such as the executor or administrator of the decedent's estate. Thus, if the probate court has named an executor or administrator, collectors can contact that person to seek payment from the estate's assets. At present, however, few estates have a person with the official title of "executor" or "administrator." As a result, some collectors attempt to recover by cold-calling relatives, asking whether they are the "person handling the final affairs" of the decedent or are the decedent's "personal representative." In some cases, collectors ask whether the family member with whom they are speaking has been opening the decedent's mail or paid for the funeral. Some collectors treat an affirmative response to such questions as sufficient proof that these relatives are responsible for resolving the decedent's estate.

Alternatively, some collectors send letters and other written communications addressed to either "The Estate of" or "The Executor or Administrator of the Estate of" the decedent. These letters often disclose the details of the decedent's debt, including the original creditor and the amount due. The letters cause many of those who read them—who may or may not be the executor or administrator—to call collectors to discuss decedent's debts.<sup>21</sup>

Once collectors have determined that they are speaking with someone whom they have decided to treat as responsible for resolving the decedent's estate, they often proceed to discuss the decedent's debt and inquire about assets and liabilities. This frequently includes a series of questions about assets the decedent may have left behind, such as whether the decedent owned a car, a house, a bank account, a life insurance policy, or a retirement account. These assets may or may not be legally collectible to pay the decedent's debts, depending on how the assets were titled,<sup>22</sup> whether the decedent was married at the time of death and lived in a community property state, who was the designated beneficiary of the asset, and other considerations.<sup>23</sup>

Finally, in some cases, collectors ask relatives to make a "voluntary" or "family" payment. For example, some collectors state or imply that the family has a moral obligation to pay the

yet, 94 A.B.A.J. 56 (May, 2008) ("Probate can be expensive \* \* \*. Probate can tie up an estate \* \* \* even a short delay in distributing assets can hurt beneficiaries.").

<sup>12</sup> See, e.g., P. Mark Accettura, *The Michigan Estate Planning Guide*, at Ch. 7 (2d ed. 2002), available at <http://www.elderlawmi.com/the-michigan-estate-planning-guide/chapter-7/chapter-7-probate>.

<sup>13</sup> Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin. Each state that has adopted the UPC, however, has modified it, in some cases extensively.

<sup>14</sup> UPC, Article III, Part 12, General Comment (2006).

<sup>15</sup> See, e.g., UPC, Article III, General Comment (2006).

<sup>16</sup> The amount considered to be a "small estate" varies by jurisdiction. For example, in California, probate and administration is required if the amount of the estate is greater than \$100,000. Cal. Prob. Code 13100 (2009). In Alabama, however, probate and administration is required if the value of the estate exceeds \$25,000. Ala. Code 43-2-692 (2010).

<sup>17</sup> As detailed further in the proposed Statement, 75 FR 62,392, many states allow certain qualified individuals to acquire title to certain kinds of property (like a financial account) by signing an affidavit attesting, among other things, that they are entitled to the property and that all of the

decedent's debts have been satisfied. "Summary administration" is a streamlined probate process available for smaller, uncontested estates. Summary administration typically requires far less involvement from attorneys and probate courts, allowing beneficiaries to save time and money.

<sup>18</sup> See Nat'l Consumer Law Ctr. at 4 ("Probably the majority of estates are not probated.").

<sup>19</sup> See *id.* ("Decedent's creditors are permitted by state law to initiate administration of the estate if they believe it will be worthwhile and the survivors do not.").

<sup>20</sup> Barron, Newburger & Sinsley, PLLC (Dec. 1, 2010) at 3.

<sup>21</sup> See Phillips & Cohen Assocs., Ltd. at 5; West Asset Mgmt., Inc. at 4.

<sup>22</sup> For example, as described above, assets held jointly often are outside the estate and cannot be reached by collectors to pay the decedent's debts.

<sup>23</sup> See Section II.A.1, *supra*.

decendent's debt, or that the decedent would have wanted the debt to be paid.

### C. The Applicability of the FDCPA

The FDCPA covers the conduct of third-party debt collectors who seek to recover on deceased accounts. Several commenters interpreted the proposed Statement as conveying that the FTC would not enforce the FDCPA in the context of decedents' debts,<sup>24</sup> or that, once a collector was speaking to an authorized representative of the estate, the collector would be free to use deceptive, unfair, or abusive practices to induce the representative to pay the decedent's debt.<sup>25</sup> These interpretations are incorrect.

The FDCPA applies to all efforts by third-party collectors to collect on the obligations of a debtor—including a deceased debtor—to repay a debt that arose out of a transaction in which the money, property, insurance, or services that were the subject of the transaction were primarily for personal, family, or household purposes.<sup>26</sup> Accordingly, the protections and requirements of the FDCPA apply in the context of collecting on the debts of a deceased debtor.<sup>27</sup> Most significantly, Sections 806, 807, and 808 protect all persons against unfair, deceptive, and abusive practices in debt collection. Indeed, as a representative of debt collectors engaged in the collection of decedents' debts acknowledged:

The proposed statement of the FTC enforcement policy does nothing to provide cover for collectors who engage in deceptive or misleading representations. Current law

already prohibits such activities and the proposed Policy Statement specifically prohibits misleading relatives into thinking that they have an obligation to pay the decedent's debts.<sup>28</sup>

Moreover, Sections 804 and 805 limit how collectors may communicate in connection with collecting on deceased accounts.<sup>29</sup>

### III. Discussion of the Final Policy Statement

This final Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts provides guidance to consumers, debt collectors, and creditors concerning how the FTC will enforce the law in connection with the collection of the debts of deceased debtors. In particular, this Statement sets forth the types of individuals whom debt collectors may contact to collect on deceased accounts and what collectors may do to locate them, without being subject to FTC enforcement efforts. The Statement also advises collectors that certain practices in communicating with these individuals may be unfair, deceptive, or abusive in violation of the FDCPA or Section 5 of the FTC Act, and engaging in such conduct may subject them to law enforcement action.<sup>30</sup>

#### A. Permissible Individuals for Collection Communications

The proposed Statement enunciated that the Commission would not bring an

<sup>28</sup> See Barron, Newburger & Sinsley, PLLC (Dec. 1, 2010) at 2.

<sup>29</sup> One commenter argued that the term "spouse" in Section 805(d), 15 U.S.C. 1692c(d), does not cover widows or widowers because marriage terminates at the death of a spouse. See Nat'l Consumer Law Ctr. at 1–2. Therefore, the commenter maintained that collectors should not be permitted to discuss the decedent's debts with surviving spouses. This is incorrect. In 1996, Congress created an omnibus definition for "spouse" to apply "[i]n determining the meaning of any Act of Congress, or any ruling or interpretation of the various administrative bureaus and agencies of the United States." 1 U.S.C. 7. The only court to address whether a surviving spouse is a "spouse" within the omnibus definition held that a surviving spouse remains a "spouse" in determining the meaning of any Act of Congress. *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009). The court expressly rejected the government's arguments that the use of the present tense in the omnibus definition and what the government contended was the common, ordinary meaning of the term compelled the conclusion that the plaintiff ceased being a "spouse" upon her husband's death. Rather, the court stated that the traditional meaning of "spouse" includes surviving spouse and cited *Black's Law Dictionary* to note that "surviving spouse" is subsumed within the dictionary definition of "spouse." *Id.* at 24–26.

<sup>30</sup> The Commission's views in this Statement are specifically limited to the situation of the collection of a decedent's debts. As detailed throughout the Statement, these types of collections pose unique challenges in the enforcement and application of the FDCPA.

enforcement action under Section 805(b) of the FDCPA against a debt collector for communicating, for the purpose of collecting a decedent's debt, with any of the individuals specified in Section 805(d)—the decedent's spouse, parent (if the decedent was a minor at the time of death), guardian, executor, or administrator—or another person who has authority to pay the decedent's debts from the assets of the decedent's estate. The Commission has determined to retain this policy in the final Statement.

A broad spectrum of comments addressed this proposal. On one end of the spectrum, several commenters asserted that collectors should be restricted to contacting only limited types of individuals. Several commenters noted that the express language of Section 805 of the FDCPA limits the acceptable contacts to specific classes of individuals; many of these commenters recommended that the Commission limit the permissible contacts to those specific classes. Several commenters, however, appeared to suggest restrictions beyond those in the statute, *e.g.*, that creditors' and collectors' "sole remedy should be to file a claim against the estate for the estate to pay"<sup>31</sup> or that the types of persons who could be contacted be narrower than under the express language of Section 805.<sup>32</sup> Another commenter recommended that the Statement permit collectors to contact "only individuals specified by the FDCPA or otherwise identified in public probate court records as having authority to pay the decedent's debts".<sup>33</sup>

At the other end of the spectrum, other commenters contended that collectors should be allowed to contact a broad range of types of individuals.

<sup>31</sup> Andrew; see also Jerome S. Lamet, Ltd. d/b/a Debt Counsel for Seniors and the Disabled ("Current probate laws give creditors sufficient protection in that they require notification to creditors that an estate was opened and that the creditors are free to submit claims. Even in small estate resolutions, creditors are either notified that there is an estate, or an affidavit is signed stating that the creditor's claims are satisfied."). These commenters appear to be arguing that creditors and collectors not be permitted to contact anyone directly, but rather must follow probate procedures by filing a claim. As explained below, the Commission believes that forcing collectors to use the probate process would, in many instances, increase costs and inconvenience for the estate's beneficiaries or heirs.

<sup>32</sup> See, *e.g.*, Uhlmsiek ("there must first be proof that the person being contacted has authority over a minimum portion of the assets of the decedent's estate, provided by either that person or any of the previously authoritative parties listed in section 805."); AARP at 1 ("AARP strongly opposes the proposed suggestion that an unobligated survivor may be contacted by a debt collector regarding collection of a decedent's debt.").

<sup>33</sup> Privacy Rights Clearinghouse at 3.

<sup>24</sup> See, *e.g.*, Privacy Rights Clearinghouse at 5.

<sup>25</sup> See, *e.g.*, MacQuarrie; Marino; and Merrick.

<sup>26</sup> See Section 803(3), (5), and (6) of the FDCPA. 15 U.S.C. 1692a(3), (5), and (6). One law firm representing debt collectors argued in its comment that the FDCPA does not apply to any debt placed for collection after the debtor's death because it then becomes the debt of an estate and not of a "natural person" as the term is used in the definition of "consumer" in Section 803(3). See Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 2, n.1. This argument is incorrect. For purposes of the FDCPA, the critical time for determining the status of a debt is when the obligation arises, and not when the debt is placed for collection. See, *e.g.*, *Newman v. Boehm, Pearlstein, & Bright, Ltd.*, 119 F.3d 477, 481 (7th Cir. 1997) ("the obligation to pay is derived from the purchase transaction itself."); *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168–69 (3d Cir. 1987) (the transaction that creates a debt under the FDCPA occurs when "a consumer is offered or extended the right to acquire 'money, property, insurance, or services' which are 'primarily for household purposes' and to defer payment."). In the case of a deceased account, the obligation is a debt as defined in the FDCPA when the decedent undertook the obligation. At that point, the debtor was alive, and thus the debt was that of a "natural person." The debtor's subsequent death does not change that fact.

<sup>27</sup> See ACA Int'l at 4 ("the personal representative is afforded all the protections and rights available to the consumer under the Act.").

One debt collector argued that the FTC should permit collectors to discuss a decedent's debts with anyone who self-identifies as a "person handling the final affairs" or a "personal representative" of the estate. This commenter asserted that those forms of self-identification are synonymous with the terms "executor" or "administrator" in Section 805 and are not too vague for a consumer to understand.<sup>34</sup> The commenter suggested that the Statement focus instead on requiring "full disclosure and avoidance of any misrepresentation."<sup>35</sup>

Between these two ends of the spectrum, many comments from government regulators as well as the debt collection industry supported the approach proposed by the Commission. An association of state regulators and a local regulator of debt collectors commented that the proposed Statement reached a reasonable accommodation between protecting consumers and allowing legitimate debt collection activities to occur.<sup>36</sup> Debt collection industry representatives articulated similar views.<sup>37</sup> One industry representative emphasized that the FTC's proposed approach would be consistent with other provisions of Federal law.<sup>38</sup>

<sup>34</sup> West Asset Mgmt., Inc. at 3.

<sup>35</sup> *Id.*

<sup>36</sup> See N. Am. Collection Agency Regulatory Ass'n ("We believe the three basic guidelines are tailored to effectively collect these types of debts and at same time protect the grieving parties from feeling obligated to personally settle the financial affairs of their deceased loved ones."); New York City Dept. of Consumer Affairs at 1 ("the New York City Department of Consumer Affairs (DCA) supports and strongly encourages the adoption of the Federal Trade Commission's (FTC) proposed policy statement \* \* \*").

<sup>37</sup> See, e.g., ACA Int'l at 4 ("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."); Barron, Newburger & Sinsley, PLLC (Dec. 1, 2010) at 3 ("instituting probate proceedings would impose legal, accounting and other professional expenses and fees on those families, unnecessarily draining off assets that could otherwise go to the family \* \* \* The FTC's approach, unlike that suggested by the NCLC, avoids imposing an unwanted and costly probate proceeding that could delay resolution of the estate."); Reich; Vargo ("I agree with the FTC's opinion. The Personal Representative of the decedent is, in essence, the designated agent of the decedent in concluding the decedent's financial affairs. The FDCPA specifically authorizes communication with a person designated by the debtor to process the matter at issue.")

<sup>38</sup> Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 7. To implement the Credit Card Accountability Responsibility and Disclosures Act of 2009 ("CARD Act"), the staff of the Federal Reserve Board recently modified its commentary on Regulation Z under the Truth in Lending Act to provide that "the term 'administrator' of an estate means an administrator, executor, or any personal representative of an estate who is authorized to act

Based on the information received in the comments and on the Commission's law enforcement experience, the FTC has decided to retain the proposed Statement's approach in the final Statement: The Commission will forebear from taking law enforcement action against a debt collector for communicating about a decedent's debts with either the classes of individuals specified in Sections 805 (b) and (d) of the FDCPA or an individual who has the authority to pay the debts out of the assets of the decedent's estate. Individuals with the requisite 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 decedent's assets extrajudicially.

The Commission believes that this enforcement policy best ensures the protection of consumers while allowing collectors to engage in legitimate collection practices. If collectors are unable to communicate about a decedent's debts with individuals responsible for paying the estate's bills, because those individuals were not court-appointed "executors" or "administrators," collectors would have an incentive to force many estates into the probate process to collect on the debts. Typically, it is easy and inexpensive under state law for creditors and others to petition for the probate of an estate.<sup>39</sup> The actual probate process, on the other hand, can impose substantial costs and delays for heirs and beneficiaries.<sup>40</sup> Policies that result in the imposition of these costs are contrary to the goal of state probate law reforms to promote simpler and faster alternatives to probate, especially for smaller estates.

*on behalf of the estate.*" Regulation Z Commentary, 22.6.11(c)(1) (emphasis added). The Commentary allows debt collectors to contact such individuals to effectuate the timely resolution of credit card debts of decedents, a goal the comment asserted was consistent with the objectives the FTC espoused in its proposed Statement.

<sup>39</sup> The filing fee that a collector must pay to force an estate into probate varies by jurisdiction, ranging from nothing to as much as several hundred dollars. See, e.g., Ala. Code 12-19-90 (\$45 + \$3 per page over five pages); Ark. Code 16-10-305 (\$140); Nev. Rev. Stat. 19.013 (up to \$20,000, no fee; \$20,000-200,000, \$99 fee; over \$200,000, \$352); Wyo. Stat. Ann. 5-3-206 (under \$50,000, \$50 fee; \$5,000-10,000, \$55; for each \$10,000 over \$10,000, another \$5).

<sup>40</sup> 75 FR 62,389 at 62,390-62,393 (Oct. 8, 2010). See also Barron, Newburger & Sinsley, PLLC (Dec. 1, 2010) at 3; Phillips & Cohen Assocs., Ltd. at 3.

### *B. Locating Proper Individuals for Deceased Account Collection*

In instances in which collectors do not know the identity of those with the authority to pay the decedent's debts from the estate's assets, they may communicate with others to try to identify these individuals. The proposed Statement emphasized that these efforts are location communications to which Section 804 of the FDCPA applies. Section 803(7) of the FDCPA defines "location information" as "a consumer's place of abode and his telephone number at such place, or his place of employment." In addition, Section 804 requires that in communications seeking location information, a debt collector must: "(1) Identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer; [and] (2) not state that such consumer owes any debt".<sup>41</sup> The comments received in response to the proposed Statement offered views on what collectors must do in seeking to locate those with the authority to pay decedents' debts, including whether strict adherence to the literal terms of Section 804 is practical and beneficial to consumers in the context of the collection of deceased accounts.

#### 1. Identifying the Person With the Authority To Pay the Decedent's Debts

Some comments advocated that collectors should check available public records for the names and contact information of court-appointed executors and administrators before contacting other individuals.<sup>42</sup> Other comments, however, pointed out that there are significant logistical and cost barriers to conducting a thorough search of state and local probate records.<sup>43</sup> Although such challenges may exist in some jurisdictions, the FTC encourages collectors to make a good faith effort<sup>44</sup> to do record searches before contacting individuals other than executors and

<sup>41</sup> A collector thus cannot mention a specific debt during a location communication and cannot ask for payment from the third party with whom they are speaking, including asking for payment out of any "moral" obligation. To do so would violate Section 804.

<sup>42</sup> See Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 3-4.

<sup>43</sup> See Bass & Assocs., P.C. at 1-2; West Asset Mgmt., Inc. at 4 ("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.")

<sup>44</sup> A good faith effort, for example, would include checking the records of the probate court in the jurisdiction where the decedent resided, which is typically the jurisdiction where probate will occur.

administrators. In addition, once a collector has identified an executor or administrator, the collector thereafter must communicate only with that individual (or any type of individual specifically identified in Sections 805(b) and (d)) about the decedent's debts.<sup>45</sup> Limiting communications to the executor or administrator minimizes unnecessary contacts with family members and provides additional protection against unfair, deceptive, and abusive collection practices.

## 2. Information That May Be Revealed in Location Communications

In a location communication seeking the person with the authority to pay the decedent's debts from the estate, the FDCPA imposes limitations on what can be conveyed to the recipient of the communication in order to protect the privacy of the debtor. Section 804 specifically prohibits collectors from revealing that the debtor owes a debt.<sup>46</sup> In addition, Section 804(2) prohibits collectors from making statements that the debtor owes a debt, while Sections 804(4) and (5) prohibit disclosing that the debtor owes a debt when communicating by post card or through information on the outside of an envelope, respectively.

The proposed Statement suggested that a location communication in the context of a deceased debtor can 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 decedent's debts or provide any information about the specific debts at issue. The Commission has determined to retain this policy in this final Statement.

The Commission received numerous comments addressing whether strict adherence to these requirements is in the public interest in the context of the collection of decedents' debts.<sup>47</sup> On one

<sup>45</sup> See, e.g., AARP at 4 ("this protection should be extended to prohibit any contact after the collector becomes aware that the estate is represented by anyone recognized by state law."); West Asset Mgmt., Inc. at 5. Note that a collector is legally permitted to contact other individuals who are in the categories specifically listed in Sections 805(b) and (d) of the FDCPA.

<sup>46</sup> Section 805(b) generally prohibits communications with third parties unless they are location communications that satisfy the requirements of Section 804. Thus, a communication with a third party that does not meet the standards of Section 804 violates Section 805(b).

<sup>47</sup> The Commission also received a letter, dated January 18, 2011, from Congressman Walter B. Jones, representing North Carolina's third Congressional district, addressing this issue. Congressman Jones advocated that collectors should

end of the continuum, several commenters asserted that because letters addressed to either "the Estate of" or "the Executor or Administrator of the Estate of" the decedent are consistent with an effort to have individuals with the requisite authority open the letters, collectors should be permitted to inform the persons opening such letters that the decedent owed a debt and the details of such debt.<sup>48</sup> In effect, these commenters posit that a letter addressed to the estate or an unnamed "executor" or "administrator" is sufficiently targeted at a person considered to be a "consumer" under Section 805 of the FDCPA (e.g., a surviving spouse, administrator, or executor) to constitute a collection communication rather than a location communication. Because these letters are collection communications, the collectors should be permitted to mention, and seek payment on, the decedent's debts.

The Commission disagrees with this analysis. The Commission's law enforcement experience suggests that letters addressed to the estate or an unnamed administrator or executor (legal terms with which many consumers are unfamiliar) often are opened by individuals who do so in an effort to help out, but who lack the authority to pay the decedent's debts from the estate's assets.<sup>49</sup> Accordingly,

be allowed to include the creditor's name and the amount of the debt in the initial communication, because such information would facilitate the timely resolution of debts.

<sup>48</sup> See, e.g., Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 4; Weltman, Weinberg & Reis Co., LPA at 1. These commenters argued that the risk that unauthorized third parties would open such a letter is small because it is, or might be, a federal crime to open another's mail without authorization. There is no evidence, however, that persons without the requisite authority are even aware of this prohibition or, if they are, would refrain from opening the mail out of a fear of criminal prosecution. In fact, many laws protect persons who in good faith assist a person who has the authority to resolve a decedent's debts. See Uniform Probate Code 3-714. In addition, a person acting in an effort to help likely would not have the requisite scienter to have engaged in a crime. Accordingly, the Commission finds this argument unpersuasive.

<sup>49</sup> The Commission has not assessed whether some form of communication sent with the initial letter (such as a validation letter in an enclosed envelope accompanied by a cover letter warning that only the appropriately authorized party should open the envelope) would effectively prevent unauthorized third parties from viewing details about the decedent's debt. The Commission is concerned, however, that merely admonishing the recipient of, for example, a mailed letter not to open it unless he or she is authorized to pay the estate's debts might not be effective. Well-meaning family members or others, who perhaps may not be familiar with legal terminology, might open the enclosed envelope despite such an admonishment in an effort to be helpful. Ultimately, the question of whether any particular admonishment or other mechanism to avoid third-party disclosure would be effective is an empirical one and would depend on the specific circumstances.

the Commission concludes that a communication addressed to the decedent's estate, or an unnamed executor or administrator, is a location communication and must not refer to the decedent's debts or otherwise violate Section 804 of the FDCPA.<sup>50</sup>

On the other end of the continuum, comments from two consumer advocacy groups noted that just using the word "debt" (and not even providing any more specific information such as the creditor or the amount) in location communications was inconsistent with the express language of Section 804(2).<sup>51</sup> One of these groups also argued that it is not necessary for collectors to mention decedents' debts in attempting to locate the appropriate person, because "collectors can simply state that they are calling or writing to obtain the contact information of the person representing the estate of the deceased."<sup>52</sup>

In between the two ends of the continuum, ten comments, including one from an association of state regulators, had no objection to collectors mentioning outstanding obligations generally in a location communication, such as referring to "any outstanding bills of the decedent."<sup>53</sup> A debt collection trade association, noting that the purpose of the prohibition in Section 804(2) is to protect the privacy of the debtor, asserted 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."<sup>54</sup> It also pointed out that there is a substantial benefit to permitting collectors to communicate generally with third parties to locate the person who has the authority to pay the debts of the estate, because "doing so avoids litigation that otherwise draws down on the estate's assets."<sup>55</sup>

<sup>50</sup> Similar considerations arise when a letter with information about a debt is addressed to a debtor who is dead. In some circumstances, debt collectors will neither know nor have reason to know that the debtor has died; for example, a debtor could be alive when the letter is sent, but dead by the time the letter arrives. In other circumstances, debt collectors will know or should know that the debtor has died. Collectors with such knowledge should refrain from mentioning the debt in any letter addressed to the deceased debtor, because of the risk that an inappropriate third party will open the letter.

<sup>51</sup> AARP at 5; Nat'l Consumer Law Ctr. at 2.

<sup>52</sup> Nat'l Consumer Law Ctr. at 2.

<sup>53</sup> See, e.g., N. Am. Collection Agency Regulatory Ass'n at 1; Weltman, Weinberg & Reis Co., LPA at 2.

<sup>54</sup> ACA Int'l at 4.

<sup>55</sup> *Id.* Although the comment does not provide a basis for this conclusion, the commenter appears to

Based on the comments received and on its law enforcement experience, the Commission will forebear from taking enforcement action for violating Section 804(2) of the FDCPA against a debt collector who includes in location communications a general reference to paying the “outstanding bills” of the decedent out of the estate’s assets. Such a reference balances the legitimate needs of the collector with the privacy interests of the decedent. Such language should provide sufficient information for the recipient of the communication to identify the person with authority to pay the decedent’s debts out of the estate’s assets, while minimizing the harm to the decedent’s reputation that might ensue from a reference to the decedent’s debts.<sup>56</sup> The Commission, however, cautions collectors using the term “outstanding bills” that stating or implying in other ways that the decedent was delinquent on those bills would violate Section 804 of the FDCPA.

### C. Compliance in Communicating With Permitted Individuals

The FDCPA and Section 5 of the FTC Act govern a collector’s communications with a person who has the authority to pay the decedent’s debts from the estate’s assets. During such interactions, collectors must not engage in unfair, deceptive, abusive, or other unlawful conduct in violation of the FDCPA. Collectors also must not engage in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act. To underscore the nature and scope of the restrictions on collectors in this context, the Commission believes that it is useful to discuss how the FDCPA and Section 5 apply to three specific issues that arise in such interactions.

#### 1. Time of Communication

A significant issue raised in comments from individual consumers and consumer groups was whether there should be a “cooling-off period” after the debtor’s death during which collectors are prohibited from commencing communications to collect from the person who has the authority to pay the decedent’s debts from the estate’s assets, and from contacting

suggest that if collectors cannot initiate a meaningful discussion with the person who has the requisite authority, many will seek relief in probate court, or, if probate is closed, through litigation.

<sup>56</sup>Nearly all individuals leave some outstanding bills at the time they die, even if they are not delinquent on those bills. Thus, a reference in the location communication to the decedent’s “outstanding bills” is not likely to imply that the decedent was delinquent at time of death. The word “debts,” on the other hand, is more likely to imply that the decedent was delinquent at time of death.

others seeking location information concerning that person. Some comments specifically suggested that the FTC impose a 30-day or longer cooling off period.<sup>57</sup> According to the commenters, the deceased’s relatives and others are likely to be bereaved for a period of time after the death, and thus may be vulnerable to collectors’ blandishments.<sup>58</sup>

The FTC recognizes that many family members may be vulnerable emotionally and psychologically in the aftermath of a relative’s death. But the record does not indicate a significant incidence of calls by collectors immediately following the debtor’s death. Thus, the final Statement does not include a cooling-off period. Nevertheless, the Commission stresses that Section 805(a)(1) of the FDCPA prohibits collectors from contacting consumers at “any unusual time or place or at a time or place known or which should be known to be inconvenient to the consumer.”;<sup>59</sup> Depending on the circumstances, contacting survivors about a debt shortly after the debtor dies may be unusual, inconvenient, or both.<sup>60</sup> The Commission’s investigations indicate that debt collectors typically do not initiate communications regarding decedents’ debts for weeks or even

<sup>57</sup> See, e.g., Barboza; Forgie (“I feel in NO INSTANCE should a debt collector be allowed to contact either the family or friends of deceased until at least 30 days after the date of death.”); and Steinbach at 1 (“we urge the FTC to adopt an enforcement rule that communication with the family of a deceased individual within 30 days of the individual’s death is a *per se* ‘unfair’ communication under 15 U.S.C. sec. 1692f. This rule would not preclude the finding that, depending on the circumstances, such communication within 60 days or even longer could be a violation.”).

<sup>58</sup> See, e.g., AARP at 1 (“Debt collectors are keenly aware that survivors are particularly vulnerable after the death of their loved one.”), 2 (“Older people are extremely vulnerable to abuses by debt collectors.”), 2 (“Older people living alone \* \* \* may be socially isolated, particularly after the death of a spouse or loved one. They are also more easily upset by an abusive telephone call; indeed the stress from harassing tactics can actually threaten their health.”); Corcoran (“grieving families are in no frame of mind to talk about debt that belongs to the deceased.”); Atticus; Carter (“At a time when family and friends are grieving and at their most vulnerable it is particularly important to keep debt \* \* \* [collectors] at bay.”); Corley (“We are at our most vulnerable when losing a family member \* \* \*”); Hoffman; Lamet (“family and friends of recently deceased loved ones are in a very fragile emotional state and are thus more susceptible to abuse by predatory tactics of creditors.”); McGill; Nat’l Consumer Law Ctr. at 1 (“\* \* \* particular sensitivity and vulnerability of bereaved relatives and friends.”), 4, and 5; Starkey; and Steinbach at 1.

<sup>59</sup> 15 U.S.C. 1692c(a)(1).

<sup>60</sup> For example, it likely would be unusual or inconvenient to call during a wake, during a funeral, at a place of worship, or during a period of religious observance at any location.

longer after death.<sup>61</sup> The Commission emphasizes that such restraint is a key business practice in allaying concerns arising from collection of deceased accounts.

#### 2. Questions About Authority To Pay

The proposed Statement cautioned debt collectors about using leading questions when seeking to elicit information as to who is the person with the authority to pay the decedent’s debts from the estate’s assets. The proposed Statement identified several examples of problematic questions, such as asking whether the person contacted is “handling the decedent’s final affairs,” paid for the decedent’s funeral, or is opening the decedent’s mail. The proposed Statement explained that such questions are not likely to elicit sufficient evidence of authority, because relatives often undertake these types of activities to assist without assuming the general authority to pay the decedent’s debts from the estate’s assets.

One commenter, a local debt collection regulator, asserted that complaints it receives from consumers show that, in addition to dealing with the loss of a loved one, grief-stricken family members “must contend with deceptive and aggressive tactics by collectors to induce consumers to pay debts consumers may very well not be obligated to pay.”<sup>62</sup> To prevent collectors from asking “roaming questions” that may mislead consumers, this commenter therefore recommended that the final Statement give specific examples of questions that may be appropriate for a collector to ask. Another commenter, emphasizing that this is an extraordinarily complicated area of law and that unsophisticated surviving family members cannot be expected to understand the nuances of probate law, argued that limiting collectors to asking a narrowly circumscribed set of open-ended questions that may not apply to all situations may lead to confusion.<sup>63</sup> According to this commenter, collectors should have the flexibility to pose

<sup>61</sup> It typically takes a significant period of time—sometimes weeks or even months—for a creditor to learn of the debtor’s death. Often, the creditor first learns of the passing because a family member or friend contacts the creditor. It then takes time for the creditor to close the account, transfer it to either the appropriate internal department or a third-party debt collector, and then usually check the account against a database to confirm the passing. Some debt collectors who specialize in collecting on the debts of deceased debtors also search proprietary databases to check for state probate filings before first attempting to collect.

<sup>62</sup> New York City Dept. of Consumer Affairs at 3.

<sup>63</sup> Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 13.

specific questions that are more appropriate to the situation at hand.

Based on its law enforcement experience<sup>64</sup> and the comments received, the Commission believes that it is impractical to limit collectors to a prescribed list of questions that would apply to all possible situations in which a collector may need to communicate with a person to obtain location information. Thus, the Commission will not prescribe the precise language that a collector must use in such situations. Instead, a collector may ask a person clarifying questions when seeking to identify and locate the person with the authority to pay the decedent's debts from the estate's assets, but a collector should not use inappropriate leading questions<sup>65</sup> or engage in any other conduct that may cause the person contacted to assert mistakenly that he or she has the requisite authority. In most cases, questions about whether the person contacted is "handling the decedent's final affairs" or paid for the decedent's funeral are not likely to elicit sufficient evidence of authority on their own and may lead the person contacted to assert authority mistakenly. Questions about whether the person contacted is opening the decedent's mail also are unlikely to be probative of whether that person has authority to pay the decedent's debts out of the estate's assets. Debt collectors using these questions must assess whether, in the context of a specific communication, they effectively solicit useful information without misleading consumers.

### 3. Misleading Consumers About Their Personal Obligation To Pay the Decedent's Debt

The proposed Statement advised that, in communicating with persons who have the authority to pay the decedent's debts out of the estate's assets, it would violate Section 5 of the FTC Act and Section 807 of the FDCPA<sup>66</sup> for a debt collector to mislead those persons about whether they are personally liable for those debts, or about which assets a collector could legally seek to satisfy those debts. The proposed Statement specifically emphasized that:

[e]ven in the absence of any specific representations, depending on the

<sup>64</sup> During its law enforcement investigations of collectors of deceased accounts, FTC staff listened to thousands of calls between collectors and relatives, including calls in which collectors sought to ascertain the scope of the relatives' authority to pay the decedent's debts.

<sup>65</sup> An inappropriate leading question is one that instructs the person on how to answer or puts words in his or her mouth to be echoed back.

<sup>66</sup> 15 U.S.C. 1692e.

circumstances, a collector's communication with an individual might convey the misimpression that the individual is personally liable for the decedent's debts, or that the collector could seek certain assets to satisfy the debt. To avoid creating such 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.<sup>67</sup>

Commenters, including debt collectors, strongly agreed with the FTC that debt collectors have an affirmative responsibility under the law not to mislead individuals they contact about their responsibility to pay for the decedent's debts.<sup>68</sup> An association of state debt collection regulators, in particular, supported the proposed disclosure unequivocally, as a means of preventing deception.<sup>69</sup>

Other comments supported the idea of a disclosure, but suggested that collectors use different language than that suggested in the proposed Statement. Some comments argued that the proposed disclosure is too narrow, asserting that consumers need more or better information.<sup>70</sup> On the other hand, some comments argued that the proposed disclosure is too broad, emphasizing that there are circumstances in which the individual contacted in fact could be personally liable out of his or her own assets or out of assets owned jointly with the decedent.<sup>71</sup>

Based on the comments received and its law enforcement experience, the Commission concludes that the information that must be disclosed to avoid deception when collectors contact individuals with the authority to pay the decedent's debts depends on the circumstances. The proposed Statement suggested two possible disclosures: (1) That the collector 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. These disclosures generally will be sufficient to prevent deception. Nevertheless, there may be circumstances in which these disclosures are not applicable or sufficient to prevent deception.<sup>72</sup> The collector has the responsibility of tailoring the information it discloses to avoid misleading consumers.<sup>73</sup>

A collector also should not use questions about the decedent's assets to mislead the person who has the authority to pay the decedent's debts from the estate into believing incorrectly that those assets are subject to the collector's claim.<sup>74</sup> Although such questions are not necessarily deceptive, the collector may need to take precautions to prevent the person from

<sup>72</sup> Some comments claimed that the disclosures in the proposed Statement would be inaccurate because they would be used in circumstances in which individuals, in fact, are personally liable. Barron, Newburger & Sinsley, for example, suggested that the second clause of the disclosure could be improved by modifying it to read, "the individual *may* not be required to use the individual's assets \* \* \*". Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 13 (emphasis added). The Commission believes that the word "may" would not convey accurately the unlikelihood that the authorized person would have to use his or her own assets to pay the debt. In any event, collectors should be able to determine in most cases whether the person contacted is liable to pay the debts at issue from his or own assets. For example, by reviewing underlying credit contracts, collectors often can determine if the individual is jointly liable as a co-signer. By knowing the identity of original creditors, such as a hospice or hospital, and applicable state laws concerning medical debts, collectors likewise can often ascertain if the decedent incurred medical debts for which a spouse is liable. And, by reviewing applicable state laws, collectors generally can determine whether a spouse is liable under state community property laws. Collectors have an obligation to resolve these issues and disclose sufficient information to the individuals contacted so that consumers are not deceived in violation of the FDCPA and Section 5 of the FTC Act.

<sup>73</sup> It is not a *per se* violation of the law for collectors to attempt to persuade the person with the requisite authority to pay the debt out of her own assets. It is a violation, however, for a collector to: (1) Misrepresent that the person has a legal obligation to use his or her own assets to pay the debt; or (2) engage in harassing, oppressive, or abusive conduct to collect the debt.

<sup>74</sup> Many of the calls to which FTC staff listened during its investigations of collectors of deceased accounts included questions about assets. For example, collectors have, in the past, asked whether the decedent owned any cars, real property, bank accounts, life insurance policies, etc. Often, depending on the applicable laws and/or how the asset was titled, some of these assets may not be subject to creditors' claims. Consequently, consumers can easily be misled into believing that a particular asset is subject to the debt collector's claim when it is not, and that the consumer may have to use the proceeds of unreachable assets to satisfy the decedent's debts. Collectors may still ask about these assets to ascertain whether the assets are reachable or not, but should make clear to the consumer that those assets that are unreachable are, in fact, not part of the estate or otherwise subject to the collector's claim.

<sup>67</sup> 75 FR at 62,394.

<sup>68</sup> See, e.g., Phillips & Cohen Assocs., Ltd. at 4 ("collectors have an affirmative responsibility to help avoid creating the misimpression that Informal Administrators are responsible for paying the debts of the decedent in instances in which they are not."); Weltman, Weinberg & Reis Co., LPA at 3; AARP at 1; New York City Dept. of Consumer Affairs at 4.

<sup>69</sup> N. Am. Collection Agency Regulatory Ass'n at 1.

<sup>70</sup> Nat'l Consumer Law Ctr. at 3; AARP at 5; New York City Dept. of Consumer Affairs at 4-5.

<sup>71</sup> ACA Int'l at 4-5; Phillips & Cohen Assocs., Ltd. at 4-5; West Asset Mgmt., Inc. at 4-5; Bass & Assocs., P.C. at 3; Barron, Newburger & Sinsley, PLLC (Nov. 4, 2010) at 13.



being misled—for example, by disclosing that jointly-held assets are not subject to the collector's claim and that the collector is trying to determine what assets are in the estate. Once the collector has reason to believe that a particular asset is not part of the decedent's estate, the collector should stop asking questions about that particular asset or otherwise create the misimpression that the particular asset is subject to the debt.

Finally, in determining whether individuals are taking away the misimpression that they are personally liable for the decedent's debts, the Commission will consider whether the collector has obtained an acknowledgment at the time of the first payment that, if appropriate, 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.

By direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

**FDCPA Enforcement Policy Statement  
Matter No. P104806**

**Concurrence of Commissioner Julie Brill**

July 20, 2011

The Fair Debt Collection Practices Act ("FDCPA") describes, in no uncertain terms, the individuals with whom a debt collector may communicate regarding a consumer's debts: the consumer, her attorney, her spouse, her parent (if the consumer is a minor), her guardian, and a small group of other individuals.<sup>75</sup> If the consumer is deceased, the FDCPA expands this group to allow a debt collector to contact the consumer's executor or administrator.<sup>76</sup> As the FDCPA Enforcement Policy Statement ("Policy Statement") issued by the Commission today points out, state probate laws have changed significantly since the passage of the FDCPA over three decades ago. As a result of these changes, when a consumer dies, her estate will not necessarily have an "executor" or an "administrator" with whom a debt collector can communicate regarding the decedent's debt.

<sup>75</sup> Fair Debt Collection Practices Act, 15 U.S.C. 1692c (b) and (d). Subsection (b) provides that a debt collector may also communicate with "a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."

<sup>76</sup> FDCPA 15 U.S.C. 1692c (d).

The Policy Statement expands the communications in which debt collectors may engage with a decedent's friends and family members, so that debt collectors may identify the person who has "the authority to pay the decedent's outstanding bills from the decedent's estate." The Policy Statement also permits debt collectors to follow up with "clarifying questions" until the person with whom the debt collector is speaking has, to the collector's satisfaction, identified the executor, administrator, or individual with authority to pay the decedent's outstanding bills from the decedent's estate. The rationale for the Commission's action today is that Congress intended to give creditors a right to engage in limited communications in order to collect the legitimate debts of deceased debtor through the estate. Through its action, the Commission wishes to avoid a hyper-technical reading of the statute that allows contact only with statutorily required, but in reality likely non-existent administrators or executors. The Commission's action is thus designed to prevent us from elevating form over substance in a manner that defeats the intent of the statute. Without a reasonable and narrowly defined safe harbor, a debt collector's alternative may be to force the appointment of an executor or administrator, which could be costly and time consuming for decedent's relatives and the estate.

Balanced against these concerns for rational administration of estates are equally legitimate concerns that the Policy Statement will operate as a license for some debt collectors to take unfair advantage of the survivors and loved ones of recently deceased debtors. Most consumers, even in the best of times, will likely be unable to understand and respond accurately to arcane questions of law regarding the identity of "the person who has legal authority to pay outstanding bills from a decedent's estate." Allowing debt collectors to contact the survivors and loved ones of recently deceased consumers will require them to respond to these arcane questions of law at a time when they find themselves in unfamiliar and unsettling territory, trying to sort through the finances and personal affairs of the deceased, while simultaneously trying to cope with their loss. A consumer in this vulnerable condition may mistakenly identify himself as the person with whom the debt collector should be speaking. Worse still, he may end up feeling as if he has an obligation—legal, moral, or otherwise—to pay the debt from

personal funds, even though debt collectors cannot legally ask him to do so.

In view of the pitfalls of allowing debt collectors to contact family members to identify the person who has authority to pay outstanding bills from the decedent's estate, the Policy Statement is crafted to limit potential abuses. First, when contacting the family members, the debt collector must include in the statement that he is looking for the person who is responsible for paying the outstanding bills of the decedent "from the decedent's estate." Second, until such time as it is established that the debt collector is talking to the person with such authority, the collector cannot reveal that the decedent owes a debt. This should eliminate any opportunity by debt collectors to make appeals to those without authority to pay bills from the estate's assets to pay a debt out of a sense of moral obligation. Third, the Policy Statement makes clear the debt collector's general responsibility to disclose that the person with authority to pay the debts from the estate is not required to use his individual's assets to pay the decedent's debt.<sup>77</sup> Finally, if the debt collector does reach the person with authority to pay the bills from the estate of the decedent, that person stands in the shoes of the "consumer" and must be given notice that he is entitled to proof of the decedent's debt and has the right to contest it.

On balance, I concur in the issuance of the Policy Statement at this time, despite concerns that the Policy Statement may operate as a license for some debt collectors to take unfair advantage. I take this view, in large part, because staff's review of thousands of interactions between debt collectors and the family members and survivors of decedents indicates that, while some collectors were engaged in egregious conduct, the vast majority were trying to comply with a reasonable, although at times incorrect, interpretation of the requirements of the FDCPA.

Yet, in light of these strong policy reasons for protecting the survivors and loved ones of recently deceased debtors, the Commission should ensure that any forbearance of enforcement will occur only when debt collectors strictly comply with the criteria set forth in the Policy Statement, especially the four safeguards listed above. The debt collection industry should know that we will not refrain from aggressive

<sup>77</sup> There may be circumstances where the individual, in fact, is legally obligated to pay the debt himself. In those cases, the disclosure requirement would not apply. [End Lit]

enforcement when debt collectors go beyond the very limited inquiries allowed by today's action. I urge my fellow Commissioners and staff to couple today's action with strict monitoring of the industry going forward, to ensure its close adherence to the criteria set forth in the Policy Statement. If abuse becomes widespread, I would recommend withdrawal of the Policy Statement by the Commission.

The new Bureau of Consumer Financial Protection, created under the Dodd-Frank Wall Street Reform and Consumer Protection Act, will have an important role in this area as well. Dodd-Frank grants the new Bureau of Consumer Financial Protection the authority to promulgate regulations under the FDCPA, an authority that the Federal Trade Commission has not possessed. In the event that the Commission finds that the debt collection industry is not adequately adhering to the limited inquiries allowed under this Policy Statement, I hope my fellow Commissioners and staff will work closely with the new Bureau to further develop appropriate rules to be applied to the collection of the debts of decedents.

[FR Doc. 2011-18904 Filed 7-26-11; 8:45 am]

BILLING CODE 6750-01-P

## FEDERAL TRADE COMMISSION

[File No. 091 0136]

### Cardinal Health, Inc.; Analysis of Agreement Containing Consent Order to Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before August 22, 2011.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the

**SUPPLEMENTARY INFORMATION** section below. Write "Cardinal Health, File No. 091 0136" on your comment, and file your comment online at <https://ftcpublish.commentworks.com/ftc/>

*cardinalhealthconsent*, by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** William H. Efron (212-607-2827), FTC Northeast Region, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 21, 2011), on the World Wide Web, at <http://www.ftc.gov/os/actions.shtm>. A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326-2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before June 10, 2011. Write "Cardinal Health, File No. 091 0136" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does

not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>1</sup> Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublish.commentworks.com/ftc/cardinalhealthconsent> by following the instructions on the Web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that Web site.

If you file your comment on paper, write "Cardinal Health, File No. 091 0136" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or

<sup>1</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).