Division of Financial
Practices
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Attorney

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

May 23, 2002

Richard T. de Mayo, Esq.
President and Chief Executive Officer
TSYS Total Debt Management, Inc.
P.O. Box 6700
Norcross, Georgia 30091-6700

Re: Section 803(6) of the Fair Debt Collection Practices Act

Dear Mr. de Mayo:

This responds to your request for a staff opinion regarding the Fair Debt Collection Practices Act ("FDCPA"). We first issued an opinion letter in response to the request on May 1, 2000. Following discussions with members of the collection industry since that date and further consideration of the issue, we have decided to withdraw that letter and issue this revised one. The revised letter alters significantly two sections of the May 2000 letter: (1) the discussion concerning when an account goes into default, and (2) the discussion concerning when a collection agency's employees become the creditor's *de facto* employees.

You ask whether employees of a collection agency are covered by the FDCPA when they attempt to collect debts by contacting consumers under the following circumstances. The collection agency begins to collect the accounts when they are two, three, or four payments past due, but when the creditor has not yet charged the accounts off. The collection agency's employees ("agency employees") use the name of the creditor, rather than the name of the agency, when calling or writing to consumers about the accounts. The agency employees are located at the office of the agency, and the agency controls the practices and procedures that the agency's employees follow in collecting the accounts. You ask whether the FDCPA covers such agency employees (a) when the accounts being collected are "delinquent and not considered in default" by the creditor; and (b) when the accounts "are considered in default by the creditor."

Generally, the FDCPA applies only to "debt collectors." The core portion of the FDCPA's Section 803(6), 15 U.S.C. § 1692a(6), defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, *or* who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." (Emphasis added.) A person is a "debt collector" if he meets either of these two prongs. The agency employees described in your letter meet both. They have as their principal purpose the collection of debts *and* they "regularly collect[] or attempt[] to collect . . . debts owed . . . or asserted to be owed . . . another." Thus, unless they fall under one of the exceptions to the definition of "debt collector" found in a different portion of Section 803(6), they are "debt collectors" and must comply with the entire FDCPA.

The exceptions to the definition of "debt collector" are assembled in Sections 803(6)(A)-(F). In determining whether the agency employees are exempt, we first look to Section 803(6)(F)(iii),

which excludes

> any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person.

Thus, if agency employees are collecting debts that were not "in default" when the agency for which they work obtained them, they are not "debt collectors." The FDCPA does not define the term "in default," but whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state or federal law. *See, e.g., Skerry v. Mass. Higher Educ. Asst. Corp.*, 73 F. Supp. 2d 47, 53-54 (D. Mass. 1999) (applying definition of "default" in Federal Family Education Loan Program regulations to construe Section 803(6)(F)(iii)); *Jones v. InTuition, Inc.*, 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998) (same).

We believe that, in the absence of a contractual definition or conclusive state or federal law, a creditor's reasonable, written guidelines may be used to determine when an account is "in default." We note that, in evaluating guidelines to determine reasonableness, we would consider the entirety of the circumstances, including, but not limited to, whether the guidelines are applied consistently and whether they are designed for administering accounts, rather than for circumventing the FDCPA. For example, we would not consider a set of guidelines reasonable if, under those guidelines, the same account were deemed in default for one purpose, such as determining whether the creditor may accelerate the loan, but not in default for purposes of determining whether a third-party collector is a "debt collector" under the FDCPA.

You ask whether the FDCPA covers the agency employees described in your letter (a) when the accounts being collected are "delinquent and not considered in default" by the creditor and (b) when the accounts "are considered in default by the creditor." Implicit in your questions is whether a creditor's classification of a debt is significant for purposes of the FDCPA. As discussed above, our view is that the determination of this issue depends, first, on whether there is a contractual definition of the term "default" or conclusive state or federal law. If so, whether the creditor, through its guidelines, "considers" an account to be in default would not be relevant. If, however, there is neither a contractual definition nor definitive law on which to rely, we believe it would be appropriate to use the creditor's reasonable, written guidelines to determine whether accounts are in default.

If the accounts that the agency employees in your fact situation are attempting to collect were in default when they were obtained by the agency, the agency employees are not exempt from the definition of "debt collector" by virtue of Section 803(6)(F)(iii). They may be exempt, however, under Section 803(6)(A), which exempts from the definition of "debt collector" "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." The FTC Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097 (1988) (available at www.ftc.gov/os/statutes/fdcpajump.htm), stated that this exemption "includes a collection agency employee who works for a creditor to collect in the creditor's name at the creditor's office under the creditor's supervision because he has become the *de facto* employee of the creditor." *Id.* at 50,102, comment 803(6)-4(a). In an October 1, 1997 letter to Daniel P. Shapiro, Esq. (available at www.ftc.gov/os/statutes/fdcpa/letters.htm), we concluded that, because of the "extensive degree of control" that the creditor maintained over a collection agency's activities, this "*de facto*" employee exemption applied even to employees of the collection agency who collected in a creditor's name but did not work on the creditor's premises.

Nevertheless, in considering whether this *de facto* employee exemption applies, we must take heed of the plain language of Section 803(6)(A), which exempts only a creditor's "officers" and "employees." This specific language does not, therefore, encompass broader categories, such as the creditor's representatives or agents. In our view, this statutory distinction limits the *de facto* employee exemption to those collection agency employees who are treated essentially the same

as creditor employees. The more that agency employees are treated like creditor employees, the more likely it is that we would deem them *de facto* employees. Whether agency employees -- working on the creditor's premises *or* on the agency's premises -- are treated enough like creditor employees to become *de facto* employees of the creditor will depend on the degree of control and supervision exercised by the creditor over the agency employees' collection activity, and how similar that control and supervision is to that exercised by the creditor over its own employees. Relevant facts will include, for example, whether the creditor directly supervises and monitors the collection activities of the agency employees and, if so, how that supervision and monitoring is carried out; whether the creditor trains the agency employees; and whether the agency employees are subject to the same rules, procedures, and disciplinary actions that govern the collection activities of creditor employees. The agency employees you describe in your letter collect in the name of their creditor clients, but, in our view, they are not covered by the Section 803(6)(A) exemption because their collection practices and procedures are controlled by the agency.

One final point: If the agency employees you describe are "debt collectors" under the above analysis, it appears that they and their collection agency would violate Section 807(14) of the FDCPA, 15 U.S.C. § 1692e(14), if they represent to consumers that they are employees of the consumers' creditors. Section 807(14) prohibits "debt collectors" from using "any business, company, or organization name other than the true name of the debt collector's business, company, or organization." If the agency is a "debt collector," it may not use the creditor's name when communicating with consumers from whom it is attempting to collect debts; it must use its own.

I hope you find this information helpful. The views expressed in this letter represent an informal staff opinion and are not binding on the Commission.

Sincerely,

Thomas E. Kane