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

May 1, 2000

Richard T. de Mayo, Esq.
President and Chief Executive Officer
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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"). 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 are exempt from the definition of "debt collector" under a different portion of Section 803(6), they are "debt collectors" and must comply with the entire FDCPA.

The other exemptions from 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 the 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 "default." While an account may not go into default on the date the consumer misses the first payment, it is probably in default by the time the consumer falls two months behind in his monthly payments, based on the legislative history of Section 803(6)(F)(iii). The Senate Report on the bill that became the FDCPA makes clear that Congress intended the section to exempt "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." S. Rep. No. 382, 95th Cong., 1st Sess. 7, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1695, 1698. Thus, the exemption was aimed at entities such as mortgage servicers that obtain debts as soon as the debts are incurred and are primarily in the business of accepting timely payments from consumers. While some consumers whose accounts are obtained by these servicers eventually fail to make their regular payments, requiring the servicers to initiate collection procedures, collecting debts in default is not the servicers' primary function.

Whether a creditor "consider[s] a debt in default" has no bearing on whether the debt is truly in default. Similarly, the date that the creditor charges off the debt does not affect the date the debt actually goes into default. Nothing in the FDCPA indicates that Congress intended a creditor's business decisions to determine whether a consumer benefits from the statute's protections. Thus, a collector cannot avoid the FDCPA's coverage by having its creditor/client wait until after accounts have been transferred to the collector before labeling the accounts "in default" or charging the accounts off.

Because the accounts that the collection agency you describe obtains are "in default," the agency employees are not exempt under Section 803(6)(F)(iii). The employees will be "debt collectors" unless they fall within another exemption: Section 803(6)(A). That provision excludes 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." We stated in the Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097 (1988) (available at *www.ftc.gov/os/statutes/fdcpajump.htm*), 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). Accordingly, agency employees fall within this de facto employee exemption only if they both collect in the creditor's name and are supervised to a large extent by the creditor. Whether the creditor employees supervise agency employees sufficiently for the agency employees to be considered de facto employees will depend on the relevant facts.

The agency employees you describe in your letter do collect in the name of their creditor clients, but they are not covered by the exemption because their collection practices and procedures are controlled entirely by the agency. The fact that the agency employees work on the agency's premises, however, would not have prevented them from meeting the Section 803(6)(A) exemption if they had been supervised sufficiently by creditor employees. Agency employees may work on the agency's premises and still be de facto employees, as long as creditor employees also work on the agency's premises and closely supervise the agency employees'

collection efforts. Again, whether that supervision is sufficient to comply with Section 803(6)(A) will depend on the facts.

Finally, we note that, 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