Testimony

before the

SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

regarding

S. 1405

The “Financial Regulatory Relief and Economic Efficiency Act of 1997"

March 10, 1998

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Consumer Federation of America
U.S. Public Interest Research Group

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Mr. Chairman and Members of the Committee, the **National Consumer Law Center**[1] thanks you for inviting us to testify today regarding the impact of S. 1405 on consumers. We offer our testimony here today on behalf of our low income clients, as well as the **Consumer Federation of America**[2] and the **U.S. Public Interest Research Group.**[3]

There should be no misunderstanding: S. 1405 provides no benefits to consumers. Although there are many updates and improvements to federal consumer protection laws that are needed, not

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[1] The National Consumer Law Center, Inc. (NCLC) is a nonprofit Massachusetts corporation founded in 1969 at Boston College School of Law and dedicated to the interests of low-income consumers. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government and private attorneys across the country. *Cost of Credit* (NCLC 1995), *Truth in Lending* (NCLC 1996) and *Unfair and Deceptive Acts and Practices* (NCLC 1991), three of twelve practice treatises published and annually supplemented by NCLC, and our newsletter, *NCLC Reports Consumer Credit & Usury Ed.*, describe the law currently applicable to all types of consumer loan transactions. As a result of our daily contact with these practicing attorneys, we have seen examples of predatory lending to low-income people in almost every state in the union. It is from this vantage point--many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities--that we supply this testimony today. *Cost of Credit* (NCLC 1995), *Truth in Lending* (NCLC 1996) and *Unfair and Deceptive Acts and Practices* (NCLC 1997), are three of twelve practice treatises which NCLC publishes and annually supplements. These books as well as our newsletter, *NCLC Reports Consumer Credit & Usury Ed.*, describe the law currently applicable to all types of consumer loan transactions.

[2] The Consumer Federation of America is a nonprofit association of some 250 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[3] The U.S. Public Interest Research Group is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

one has been included in this bill.[4] Instead, in its present form S. 1405 would seriously undermine two of the most important federal consumer protections: the Real Estate Settlement Procedures Act and the Fair Debt Collections Practices Act:

I. **Amendment to Real Estate Settlement Procedures Act.** Section 206 would have the effect of increasing the cost of homes and home lending by allowing affinity groups to receive referral fees as a major exception to RESPA's Section 8 prohibitions against kickbacks.

II. **Fair Debt Collection Practices Act Amendments.** Section 207 would seriously reduce protections for consumers against unfair, deceptive and harassing debt collection practices. This section proposes four anti-consumer amendments which would 1) exempt any communication made under state or federal rules of civil procedure from the FDCPA; 2) exempt the collection of checks from coverage under FDCPA; 3) dismantle the protections from confusing messages regarding the consumer's right to request verification of the debt; and 4) exempt all efforts to collect loans made under the Higher Education Act of 1965 from coverage under the FDCPA.

III. **Truth in Lending Act Amendments.** Section 401 would replace the historical table on APR changes for open end variable rate home loans.

I. **<u>RESPA Amendment - Affinity Group Exception.</u>** The main problem is that allowing affinity groups to receive kickbacks for referrals and endorsements of settlement services would open the door for significant consumer abuses, and would unequivocally have the effect of *increasing the costs of settlement services for consumers.* The original purpose of RESPA was to ensure fair and open competition in the marketplace to keep the costs of settlement services as low as possible.

RESPA currently allows anyone to be paid for services that are actually rendered. RESPA's section 8 only prohibits the payment of "referral fees." Section 206 of S. 1405 would allow an affinity group to be established -- for a common purpose -- by anyone other than a settlement service provider. (Does anyone really know what an affinity group is?) Then the affinity group could make endorsements of settlement service providers *and receive payment for the endorsements* so long as disclosures are provided to consumers.

The effect of this amendment would be to allow the payment of a fee to an affinity group for something *other* than services actually rendered. As a result, endorsement fees could be paid in large sums to anyone, (including realtors) for referrals to lenders, title insurance companies, and others. While home buyers might believe that the endorsement was a true recommendation about the *value* of the services provided by the settlement service provider to whom they were referred, in fact the only reason the referral would have been made was because the referring party was receiving a kickback for making it. This was exactly the reason for the original prohibition in RESPA’s section 8.

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[4] Examples of needed updates and improvements to federal consumer protection laws include 1) the expansion of the jurisdiction limits of the Truth in Lending Act to cover extensions of credit over $25,000; 2) an increase in the statutory damages recoverable under the Truth in Lending Act to reflect the impact of inflation on the statutory amount which was established in 1968; 3) providing protections from unfair, harassing and deceptive collection activities of creditors, as the Fair Debt Collection Practices Act only covers the efforts of *debt collectors* collecting the debts of others; and 4) basic consumer protections for consumers from the high costs of credit in rent to own transactions and pay day loans.

There are a number of problems with this proposal:

1) There is no requirement that the consumer receive the benefit of, or indeed *any* benefit from the referral made as the result of the endorsement. Given this, the consumer could believe that the endorsement is made for his benefit, when the actuality of the situation could be that because of the endorsement the settlement service is *more* expensive than it would have been if the consumer had gone to the provider directly. For example, the referral could be provided by a group (such as a church, an alumni association, a trade association, an employer) -- in the guise of providing good advice to the consumer -- that a certain settlement service provider is the best one to use. Yet under the language in the amendment, if the referral were made by an affinity group, there would be nothing to prohibit the settlement service provider from *increasing* the price charged to the consumer and splitting the increased price with the affinity group.

2) There is no prohibition against affinity groups being established by affiliates, subsidiaries or parent organizations of settlement service providers. So long as that loophole exists, the limitation against settlement service providers setting up the affinity group is effectively meaningless. So for example, an affiliate of a corporate realtor which is not itself a settlement service provider could establish an affinity group. The realtor could then endorse a particular lender. Once the consumer uses that lender, at the suggestion of the realtor, the affiliate of the lender -- the affinity group -- would receive a kickback, or referral or endorsement fee. Such a system would clearly undermine the purposes for which RESPA was created: to protect consumers from unnecessarily high settlement charges and certain abusive practices (12 U.S.C. § 2601). The payment of a fee for steering should remain illegal, otherwise the referral could still be made to the detriment of the consumer.

The potential for abuse that could result from an affinity group endorsement that section 206 would allow should be contrasted with the allowable activities of affinity groups under current law. (See appendix I: article from Saturday, January 24, 1998, Washington Post.) Under current law, affinity groups make endorsements of settlement services which are generally considered to be legal. Current law allows endorsements of settlement service providers by affinity groups so long as *the consumer receives the benefit of the referral*. In the Long & Foster- Costco relationship described in the article, the consumer would have a received a rebate from the realty company as the result of the referral from the affinity group. Clearly consumers will benefit from this type of arrangement (although realtors may not). This arrangement is considered to be legal because of the exception to the definition of "required use" in 24 C.F.R. § 3500.2(b):

> However, the offering of a package (or combination of settlement services) or the *offering of discounts or rebates to consumers* for the purchase of multiple settlement services does not constitute a required use. . . . The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process. (Emphasis added.)

Given that this language is already in RESPA, and thus endorsements by affinity groups which result in a discount to the consumer are currently legal, the only reason to change the law would be to allow endorsements by affinity groups which do *not* result in a benefit to the consumer. Passing S. 206 will increase the costs of settlement services to consumers.

Additionally, the Mortgage Reform Working Group, comprised of representatives of any industry and consumer group that wants to join, has been meeting regularly and extensively for the past seven months in an effort to comprehensively draft a rewrite of RESPA, as well as the Truth in Lending Act. Section 8 protections are very much on the table in these discussions. If the Working Group is to have any real hope of accomplishing reform, it does not make sense for Congress to pass piece meal legislation amending either of these two laws at this point. For that reason alone this amendment should be rejected.

Finally, while eviscerating the major substantive protection of the Real Estate Settlement Procedures Act (RESPA) -- the prohibition against unearned referral fees -- this amendment would not even appear in the U.S. Code within the statute it amends. As such, there would be no enforcement mechanism to ensure compliance even with the minimal standards of the proposed amendment.

II. **Fair Debt Collection Practices Act Amendments.** When considering proposed changes to the Fair Debt Collections Practices Act (FDCPA), one should keep in mind that the FDCPA does *not* make it possible for consumers to avoid paying the debts that they owe. This law only stops abusive, deceptive collections practices by debt collectors. As Congress recognized when it passed the Fair Debt Collection Practices Act in 1977:

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

Further, the FDCPA only stops the bad actions of debt collectors:

> (e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692.

Section 207 of S. 1405 would make it much easier for abusive debt collection practices to occur without redress throughout the United States.

1) **Section (a) would exempt all communications made under state or federal Rules of Civil Procedure from the FDCPA.** This is overly broad, and would clearly result in abusive and deceptive collections practice.

For example, currently in § 1692(e)(15) the FDCPA makes the "false representation or implication that documents are not legal process forms or *do not require action by the consumer*" a violation. This provision prohibits a collector from misleading a consumer who has been sued into believing that the consumer need only send payments to the collector, when in fact legal inaction will result in a default judgment.

Consider why it is so important that all communications from a debt collector be covered by the FDCPA, even those made pursuant to the rules of civil procedure. In one survey of judgment debtors in Washington D.C. a finance company was found to have frequently misled consumers into believing that they need not respond formally to legal process. Consumers reported that they called the finance company or its lawyer after a receiving a summons and offered to catch up on their payments if the suit was dropped. The consumers were assured that everything would be taken care of once the back payments were received. Then, after accepting the promised post-summons payments from the consumers and assuring the consumers that their payments would obviate the need to defend the creditor's suit, the finance company took default judgments against these consumers.[5] Another survey found that this type of false advice was prevalent in the collection industry.[6] This representation by a debt collector that the consumer need not respond to a summons violates § 1692e(15). Such activity would not be illegal under the FDCPA if § 207 of S. 1405 passes.

Further, it is violation under current law for collection agencies to file suit for an inflated amount, or to include an illegal fee, or to fail to rebate unearned interest or credit insurance premiums in the requested relief.[7] This amendment would presumably make this activity perfectly legal, as well.

2) **Section 207(b) would exclude the collection of bad checks from the FDCPA.** There is no good reason for excluding the collection of bad checks from coverage under the FDCPA. Many courts have considered the issue, and have held that dishonored checks are debts covered by the Act.[8] Moreover, even if one could distinguish between a check and a debt, there is no good policy reason not to prohibit abusive practices in the collection of bad checks.

Given the high potential for abusive practices during the collection efforts for bad checks, it is particularly important that FDCPA protections apply. For example, a well known, but troublesome collection tactic is to threaten consumers with prosecution under criminal bad check statutes. Some collectors even solicit checks from financially distressed consumers, with complete indifference to the sufficiency of funds to cover the check, knowing that the possibility of a bad check prosecution provides the collector with powerful collection leverage.[9]

There are a variety of situations in which bad checks are written. They vary from the professional criminal check kiter, to the embezzling employee, to the financially desperate parent buying food without funds, to the consumer who gives a check not expecting it to be cashed, to the consumer who made an inadvertent error in balancing the checkbook and cannot immediately cover the check, to the person who expected their

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[5] H. Sterling & P. Shrag, *Default Judgments Against Consumer: Has the System Failed?* 67 Denver U.L. Rev. 357, 370-372 (1990).

[6] D. Caplovitz, Consumers In Trouble, note 3 at 205 (Free Press 1974).

[7] 15 U.S.C. § 1692e(2)(A): "The false representation of the ...the character, amount . . . or any debt."

[8] *See, e.g. Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir. 1997); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.* 111 F.3d 1322 (7th Cir. 1997); *Draper v CRA Sec. Systems, Inc.* 117 F.3d 1424 (9th Cir 1997); *Ditty v. Check Rite, Ltd.*, ___F. Supp. ___, 1997 WL 471115 (D. Utah 1997); *Johnson v. CRA Security Systems*, 1997 WL 241861 (N.D. Cal. 1997).

[9] *See e.g. United States v. Central Adjustment Bureau, Inc.*, 667 F.Supp. 370 (N.D. Tex. 1986) (collector violated 15 U.S.C. § 1692f(3) by soliciting postdated checks with the purpose of threatening criminal prosecution), *aff'd per curiam*, 823 F. 2d 880 (5th Cir. 1987); *G.C. Services Corp.*, 83 FTC 1521 (1974) (complaint alleged that collection agency solicited postdated checks and later threatened criminal prosecution if the check was dishonored.

check to be covered by a deposited check that bounced.[10] Surely, this Congress does not want to condone abusive collection tactics against all of these consumers.

Also, it is a violation of the FDCPA for a debt collector to collect "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[11] One example of a potentially illegal charge that is disallowed by this provision is a dishonored check fee. Despite the provision in the FDCPA, there are numerous cases holding collection agencies violated the law by attempting to collect illegal fees when collecting on dishonored checks.[12] Should that activity now be made legal? Consumers would be considerably harmed if this amendment passed.

3) **Section 207(c) would add language to the FDCPA specifying that collection activities and communications can continue during the 30-day period during which the consumer has the right to request verification of the debt.** This amendment is the same as was added to and then deleted from the "regulatory relief" bill introduced in 1995 (S.650) and there are still the same problems with it. The proposed language is subtle but bad for consumers.

Currently, the FDCPA provides consumers the essential right to ensure that the debt which the collector is seeking them to pay is really owed by that consumer, or has not already been paid. This right is referred to as "the right to validation." The law requires that in the initial communication with the consumer, the debt collector must provide consumers with a statement that the consumer has thirty days to notify the collector and request verification of the debt.[13] This is intended to minimize instances of mistaken identity of a debtor or mistakes over the amount or existence of a debt.

The problem arises when the information providing the consumer notice of this important right is accompanied by insistent demands for payment of the debt *within* that 30 days. In many cases, the overriding message the consumer receives is that the debt

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[10] On a nationally administered test, 99% of 17 year olds and 84% of adults were not able to correctly balance a sample checking account. National Assessment of Educational Progress, Consumer Math (GPO 1975). One percent of checks are dishonored; of those 71.2% are for insufficient funds, 2.7% drawn on uncollected funds, 4.4% drawn on closed accounts, 2.7% stop payment orders, 4.9% ,missing endorsements. and 14.1% for other reasons, including bank errors. *Statement of Preston Martin to House Banking Subcommittee*, 70 Fed. Res. Bull. 319 (1984). One of 5245 returned checks (2 or every 1 million checks written) are a loss to a bank. W. Stafeil, *The Impact of Exception Items on the Check Collection System, A Quantitative Description* (Bank Admin. Instit. 1970).

[11] 15 U.S.C. § 1692f(1).

[12] See, e.g. Newman v. Checkrite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (lawyers collecting debts for a check collection agency violated 15 U.S.C. § 1692e and 1692f by adding an $85 charge that was not authorized by the contract or state law and labeling it a "legal notice" fee and misrepresenting that the fee was legally due); West v. Costen, 558 F.Supp. 564 (W.D.Va. 1983) (imposition of $15 service charge on each bad check it collected violated 15 U.S.C. § 1692f(1) since there was no evident of contract providing for the charge and the charge was not expressly permitted by state or federal law. Attempt to collection such charges violated 15 U.S.C. § 1692e(2)); FTC Official Staff Commentary § 808(11).

[13] 15 U.S.C. § 1692g(a)(4)..

must be paid immediately, not that the consumer has 30 days in which to request verification of the debt to assure that the consumer really owes the requested amount.

In the leading case on the placement of a validation rights notice,[14] the U.S. Court of Appeals required that the validation notice "must be large enough to be easily read and sufficiently prominent to be noticed--even by the least sophisticated debtor. Furthermore, to be effective, the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency."[15]

In that case the validation rights notice failed these tests because it was dwarfed and contradicted by the dunning message. As the court said:

> The required debt validation notice is placed at the very bottom of the form in small, ordinary face type, dwarfed by a bold faced, underlined message three times the size which dominates the center of the page. More importantly, the substance of the language stands in threatening contradiction to the text of the debt validation notice.[16]

Other examples in the courts of overshadowing and misleading notices include:

The front of the form demands "IMMEDIATE FULL PAYMENT" and commands the consumer to "PHONE US TODAY," emphasized by the word "NOW" emblazoned in white letters nearly two inches tall against a red background. The message conveyed by those statements on the face of the form, flatly contradicts the information about the right to verification of the debt contained on the back.[17]

Demand for payment within the 30 day period to request verification with only a reference in smaller print to see the reverse side containing the validation notice printed in light gray ink which made it difficult to read.[18]

The validation notice was sent on the back of a demand letter which contained conflicting deadlines and which overshadowed the notice by being in larger typeface.[19]

The effect of the amendment in S. 1405 would be to overrule these cases prohibiting the overshadowing. The collection activities would proceed in such a way as to obliterate the consumers' notice of the essential right to obtain validation.

While it would clearly be preferable for there to be no amendments to this section of the FDCPA, there is, however, a compromise possible. The debt collectors want to be

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[14] *Swanson v. Southern Oregon Credit Service,* 869 F.2d 1222 (9th Cir. 1988).

[15] *Swanson* at 1225.

[16] *Swanson* at 1226.

[17] *Miller v. Payco General American Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991) .

[18] *United States v. National Financial Services, Inc.,* Clearinghouse No. 47,970 (D. Md. 1993).

[19] *United States v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996).

able to continue to collect a debt during the 30 day waiting period. Consumer advocates want to ensure that while the debt collectors are pursuing these debt collection efforts, the notice of the right to validation is not overshadowed. Both these goals can be accomplished by rewriting the new subparagraph (d) of § 1692g as follows:

> (d) <u>so long as they do not overshadow or contradict the information provided in subsection (a) of this section,</u> collection activities and communications may continue during the 30-day period.

4) **Section 207(d) would exclude from the FDCPA all communications to collect debts owed under the Higher Education Act.** This proposed amendment to the Fair Debt Collection Practices Act (FDCPA) would exclude from coverage any collection abuse relating to a student loan made pursuant to the Higher Education Act (HEA), no matter how egregious that practice and even when the abuse is perpetrated by a private for-profit collector hired by a private enterprise.

Student loan debtors in default are many types of people with many reasons for their default. Perhaps the most common category is low income consumers who went to for-profit trade schools that swindled them and then closed down, leaving the students without any of the promised job skills and thus with no financial ability to repay the loans. Other borrowers in default are those who have become disabled, lost their job, or who are otherwise financially unable to keep up with loan payments. Those financially able should repay their student loans, but no American should be subjected to illegal debt collection harassment.

Private student loan collectors generally engage in some of the worst collection abuses. Consumers from all over the country report some of the worst collection abuses by private collectors hired on a commission basis to collect on student loans. These private bill collectors can have portfolios exceeding 100,000 loans; their only interest is to recover as much money at as little cost to them as possible.

Collectors are already flaunting congressional directives. The last reauthorization of the Higher Education Act and subsequent Congressional legislation created mechanisms to reduce defaults and also provided students in default with various rights, protections, and repayment plans. Private collectors typically are the only entities providing initial information to students about these rights and repayment plans. Unfortunately, we have seen evidence that private collectors are systematically misrepresenting and concealing these basic rights -- reasonable and affordable payment plans, closed school and false certification discharges, consolidation loans, the ability to avoid garnishment and tax intercepts through repayment plans, and the like. This is not surprising because collectors make little money if a student makes small affordable payments over a period of years or if the student receives a loan discharge because the school defrauded the student. These collectors instead try to squeeze out unaffordable amounts right away.

The effect of the amendment in S. 1405 would not be to protect the Student Loan Program, only abusive private debt collectors. Already the FDCPA does not apply to federal or state agencies, and there is thus no question of the FDCPA applying to the Department of Education or a state-run guaranty agency. The only parties who would profit by this amendment would be private entities who are in the business of collecting debts in default and who violate the standards set out in the federal statute. 31 United States Code § 3718(a)(2) requires that all private collectors hired by executive or legislative agencies of the United States must be subject to all federal laws relating to debt collection. There is no reason to provide special treatment to collectors hired by the Department of Education, when private collectors hired by other federal agencies must comply with the FDCPA. In addition, all private collectors in their contracts with the

Department of Education agree to be bound by the FDCPA, and the Department has had no difficulty in finding collectors to sign such contracts. Why deprive Americans of this important protection from debt collection harassment when collectors readily agree to this liability?

There are a number of rationales offered for exempting communications made to collect loans made under the Higher Education Act, none survive close scrutiny:

a. *It is argued that guaranty agencies are never abusive in their collection activities, and therefore do not need to be covered by the FDCPA.* First of all, it is not just the collection activities of guaranty agencies which will avoid coverage, but the debt collection agencies collecting *for* these agencies will escape scrutiny as well. Secondly, governmental, non-profit guaranty agency are already exempt from the FDCPA[20] Lastly, and most importantly, guaranty agencies have committed abusive collection practices in numerous instances *such that* ***it is clear that the consumers need the protections of the FDCPA when guaranty agencies or their collection agencies are collecting these debts.*** [21] **(See Appendix II for two recent case histories of the problems with student loans.)**

b. *It is argued that the FDCPA adds no meaningful protections for debtors beyond those already provided by the Department of Education regulations on collecting student loans*. This is frankly absurd. The rules that lenders, guaranty agencies and collection agencies must follow when collecting student loans require certain numbers and types of telephone and written contacts, require threats to affect the debtors credit, require threats of and then implementation of prejudgment wage garnishment and tax refund intercept. Unlike most other debts, consumers cannot escape liability for student loans by waiting, as there is no statute of limitations. Student loan debtors also are generally prohibited from discharging student loans by filing bankruptcy. There are some defenses for debtors to payment of student loans, based for example on a school's fraudulent activity or other misdeed. There are also required notices and hearings prior to executing garnishment and tax intercept orders. However, there are no protections against abusive, or deceptive collection efforts in these regulations. The regulations provide instructions on how best to force debtors to pay their student loans. **Given the broad powers that collectors of student loans have, consumers are even *more* in need of basic protections from their abusive collection activities than the general class of consumers.**

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[20] 15 U.S.C. §1692a(6)(C) exempts "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties."

[21] *See Brannon v. United Student Aid Funds,* 94 F.3rd 1260 (9th Cir. 1996) holding that student debtor may obtain damages from a guaranty agency for abusive collection practices in violation of FDCPA. For other examples of allegations of abusive collection practices of guaranty agencies, *see Beaulieu v. American Nat'l Educ. Corp.,* CV 79-L-271, Clearinghouse No. 30892 (D. Neb. 1981); *Coppola v. Connecticut Student Loan Found.,* 1989 WL 33707 (D.Conn. 1989) (holding student loan servicing agency was not a debt collector since it obtained loan before default); *Games v. Cavazos,* 737 F. Supp. 1368 (D. Del. 1990) (U.S.A. Funds, a private federal student loan guarantee agency, exempted by §1692a(6)(C).

c. *It is argued that as the FDCPA validation notice does not provide information regarding the student loan collector's rights and obligations regarding the collection of the debt, that requiring the FDCPA notice is confusing to student loan debtors.* This is disingenuous. While the FDCPA notice may not require that the collector of student loans provide this information, there is **nothing to prohibit the collector from adding it to the required information.** [22] In fact, it especially important for student loan debtors to have the right to verification of the loan, because too often debtors are not informed what loan the collector is seeking, what school or time period the loan covered, or even whether the debtor was the student who incurred the loan.

d. *It is argued that a collector cannot comply with the communications provisions of the FDCPA and the due diligence regulations governing student loan collections.* This may indeed be true, and with the addition of only one other, very minute detail (which will be addressed below in paragraph f) is the only example of situations where the two conflict. **The appropriate response to this conflict is to address it specifically and narrowly, not to provide blanket exemptions for all student loan collections.** The regulations governing collections of student loans mandate "due diligence" on the part of the collector by requiring several written notices that must contain specific information regarding the loan and consequences of non-payment, [23] as well as several telephone contacts.[24] The FDCPA on the other hand, requires a collector to cease communications with a consumer if the consumer requests it.[25] The FDCPA requires communications to cease at the consumer's request to provide a sanctuary for consumers from the constant dunning efforts of collectors. It allows the consumers a way to say

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[22] The §1692g notice requires collectors to provide notice to the consumer of:

> (1) the amount of the debt;
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> (2) the name of the creditor to whom the debt is owed;
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> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion hereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

[23] 20 U.S.C. § 1078(c), 34 C.F.R. § 682.410(b)(5).

[24] 34 C.F.R. § 682.410(b)(6)(iii).

[25] § 1692c(c) provides:

> If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector o cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, . . .

"Enough, I've got the message." If a consumer requests that communications cease, that should end collections' communications. Nothing prevents the student loan debt collector from proceeding with the next step in the collection process: prejudgment garnishment, tax intercept or civil suit, *according to the prescribed time schedule.* The only difference is that the constant letters and telephone calls must cease in the interim. The FDCPA provides that after a cease communications' notice from the consumer the collector can still communicate to advise, among other things, that the collector "may invoke specified remedies."[26] The simplest and best way to resolve these conflicts is to provide that a collector of student loans is not required to continue the letters and phone calls after a receipt of a cease communication notice from the debtor. All other collection efforts can then proceed according to the prescribed time schedule.

e. *It is argued that the requirement in the student loan regulations to make diligent attempts to locate a consumer whose location is unknown conflicts with the prohibition in the FDCPA to contact third parties.* This is simply not true. There is a whole section in the FDCPA which allows collectors to pursue location information; it simply ensures that this activity is pursued in a manner which protects the consumer's privacy.[27]

f. *It is argued that collectors of student debts need to communicate with consumers' employers to effectuate wage garnishment, and that compliance with the FDCPA would disallow this.* This is a very minor, but possible inconsistency between the two statutes. In FDCPA § 1692c(b) communications are only permitted with third parties for specific reasons, including those necessary to effectuate a *post*judgment garnishment remedy. As collection regulations for loans made under the Higher Education Act allow *pre*judgment garnishment, conceivably communications made regarding prejudgment garnishment would violate the FDCPA (although there are no court cases or challenges of student loan collectors based on this very technical distinction). We would have no objection to amending § 1692c(b) to address this discrepancy as follows:

> (b) Communication with third parties--Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, <u>or a prejudgment administrative wage garnishment permitted under 20 U.S.C. § 1095a,</u> a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

It would be unseemly for the United States to sanction worse collector behavior when these collectors represent the United States or a state guaranty agency then when these collectors represent credit card issuers, finance companies, and banks. The United States certainly wants to recover on defaulted student loans, but it need not do so by

26 § 1692c(c).

27 § 1692b.

encouraging private entities to lie and harass America's youth and others seeking to improve themselves through education.

The FDCPA is the only federal control over private collectors collecting on student loans. The exclusion proposed in S. 1405 would provide carte blanche to these collectors. Even if the Department of Education could effectively regulate the collectors the Department hires when they collect on millions of accounts, the amendment also gives free reign to the even larger group of collectors hired by guaranty agencies, schools, and lenders.

The proposed amendment would exempt all private collectors collecting under the HEA, even those working for private entities. The exemption would insulate from liability for abusive, harassing, deceptive or unfair collection activities:

> the illegal practices of private for-profit collection agencies hired by trade schools and other schools to collect on Perkins Loans;
> the illegal practices of private for-profit collection agencies hired by lenders and other private investors to collect Family Federal Education Loans (FFEL) (the new name for guaranteed student loans) that have lost their guaranteed status because of lender impropriety;
> the illegal practices of private for-profit collection agencies that are hired by such private entities as USA Funds to collect on FFEL loans;
> the illegal practices of private for-profit collection agencies hired by state guaranty agencies and the Department of Education; and
> the illegal practices of private guaranty agencies.

III. <u>Truth in Lending Act Amendments.</u>

1) Section 401 would replace the historical table on APR for open end variable rate home loans with the rather meaningless statement that periodic payments may increase substantially. This change mirrors that which occurred for variable rate closed end home loans in S. 650 (amending TILA § 128(a)(14)) in 1996. While we have never maintained that historical information provided for an imaginary $10,000 loan was all that valuable, it does still provide some useful information to those consumers who are willing to study it. The replacement language in S. 650 and in this bill, really serves only one purpose -- to reduce creditor compliance burdens.

If one truly wanted to make the disclosure of the risks involved in variable rate open end credit secured by the home meaningful to the consumer, in addition to the change proposed in § 401 of this bill, subsection (H)(ii) of § 127A(2) would be replaced with information about the highest annual percentage rate, and the highest minimum payment based on the actual loan terms. In addition, information about how long it could take to repay the outstanding balance at the highest interest rates, as well as the total possible cost should be included. To do this, the amendment would rewrite subsection (H) as follows:

> (H) a statement of
> > (i) the maximum annual percentage rate which may be imposed under each repayment option of the plan;
> > (ii) the minimum amount of any periodic payment which may be required, based on <u>the maximum amount which can be withdrawn</u> under each such option when such maximum annual percentage rate is in effect;

(iii) the earliest date by which such maximum annual interest rate may be imposed; and
(iv) the total number of payments, and the total amount of the payments it would take to repay the outstanding credit if the maximum amount were withdrawn and the maximum annual percentage rate were applied to this amount under each such repayment option of the plan.

Thank you for your consideration of these issues on behalf of low income consumers. I would be happy to respond to any questions.

Appendix 1

Appendix 2

FDCPA Student Loan Case History #1

Borrower took out student loans to attend university. He was only able to go to school for a year, quitting in order to work and support his family. He later suffered a disability that kept him from working for a few years. During this time, he was unable to make the payments on the loan. When he was able to return to work, borrower contacted the holder of his loan, a California-based guaranty agency, and requested a reasonable and affordable payment plan. The guaranty agency refused to deal with him and referred him to a collection agency

The collection agency would only agree to a payment plan with monthly payments beyond what the borrower could afford. Even so, he tried for a number of years to make the payments, sometimes sending the full amount, sometimes a little less. This arrangement continued for a number of years. After about four years, the collection agency suddenly began a series of escalating demands and threats. Among other egregious threats, the collection agency claimed they would turn the borrower over to the local authorities and cause him public embarrassment. They contacted his wife at her employment, at times leaving messages with fellow employees about her husband's debt. They also contacted borrower at work, using threatening and insulting language, telling him he could be criminally liable if he failed to pay back the debt. The collection agency incorrectly claimed they could add over 40% of the amount of the debt as additional collection costs.

FDCPA Student Loan Case History #2

Consumer was being dunned by collection agency on behalf of a state guaranty agency. The consumer requested an application for discharge of the debt based on the school's false certification -- a right provided to student loan debtors when the vocational schools they attended falsely or fraudulently admitted them to the school. The collection agency advised the consumer that there was no such thing as a discharge for false certification and told her that she had better borrow some money from relatives to start paying off her loan. The consumer's legal services attorney then called the collector on her behalf, and indentified himself as her attorney. He was told repeatedly by the collection agency that they had never heard of the right to a discharge based on a school's false certification.

After repeated attempts to deal with the collector, the attorney was referred back to the guaranty agency. The guaranty agency finally agreed that the student loan regulations permit a loan discharge based on a school's false certification, but consistently refused even to provide her with an application. Without investigating the facts, the guaranty agency kept insisting that she was not eligible for this discharge. Eventually, because of the demands of her legal services attorney, she was allowed to apply.