



February 28, 2014

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

**Re: Docket No. CFPB-2013-0033 (Regulatory Identification Number 3170-AA41) –
Debt Collection Advanced Notice of Proposed Rulemaking¹**

Ms. Jackson:

The American Civil Liberties Union (“ACLU”) is a non-profit, non-partisan organization committed to protecting the civil rights and civil liberties guaranteed by the United States Constitution. The Brennan Center for Justice at New York University School of Law (“Brennan Center”) is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice.² Our organizations are committed to challenging racial discrimination and advancing criminal justice reform, including by combating illegal, abusive, and ineffective criminal justice debt collection practices.³ We write to respond to the Consumer Financial Protection Bureau’s Advanced Notice of Proposed Rulemaking about consumer debt collection practices (“Debt Collection ANPR”).

The Debt Collection ANPR requests information and comment on two issues of concern to the ACLU and the Brennan Center: 1) the limited statutory exemption to the Fair Debt Collection Practices Act (“FDCPA”) for certain private entities operating “pretrial diversion program[s] for alleged bad check offenders”;⁴ and 2) the need for rulemaking that would protect consumers in state debt collection litigation while respecting States’ role in court administration and without unduly burdening the debt collection process.⁵

¹ 78 Fed. Reg. 67848 (proposed Nov, 12, 2013).

² This comment does not represent the opinions of the NYU School of Law.

³ See, e.g., American Civil Liberties Union, *In for a Penny: The Rise of America’s New Debtors’ Prisons* (2010) [hereinafter “*In for a Penny*”]; Roopal Patel & Meghna Philip, Brennan Center for Justice, *Criminal Justice Debt: A Toolkit for Action* (2012); Rebekah Diller et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010).

⁴ 78 Fed. Reg. 67848, 67878 (proposed Nov. 12, 2013).

⁵ *Id.* at 67877.

We seek to draw the Bureau's attention to two sets of practices directly responsive to these inquiries: the abuse of bad-check pretrial diversion programs by private entities that use misleading and potentially abusive tactics; and the misuse of civil contempt procedures in state and local courts by debt collectors attempting to recover consumer debts.⁶ Both practices are part of a disturbing trend in which private entities enlist the power and prestige of prosecutors and courts to coerce consumers into paying for programs they do not need or making civil debt payments that they cannot afford or are not obligated to make. As explained in further detail in Sections I and II below, the Bureau should engage in fact-finding and rulemaking to address these abuses through its authorities under the FDCPA and the Dodd-Frank Act.

We also direct the Bureau's attention to the grave civil rights concerns raised by abusive debt collection more generally. These practices not only harm individual consumers; they likely deepen racial inequality. As explained in Section III, although race disparities in wealth and economic status existed in this country long before the Great Recession, the recent economic downturn has had disproportionate and devastating consequences for the wealth and indebtedness of communities of color across the country. Reflecting this broader trend, preliminary data suggests that communities of color are disproportionately targeted for abusive debt-collection practices. Abusive debt-collection practices in general, and the practices described in this Comment in particular, may thus be responsible for further deepening racial inequality. We therefore urge the Bureau to play a leadership role in identifying race disparities resulting from abusive debt collection and to use its enforcement powers under the FDCPA and the Equal Credit Opportunity Act to address these disparities where they exist.

I. The Bureau Should Ensure Adequate Regulation of Bad-Check Enforcement Programs

The Debt Collection ANPR focuses special attention on bad-check enforcement programs.⁷ Typically, such programs involve a private entity demanding payments from individuals accused by merchants of passing dishonored checks. To those targeted by such demands, however, the communications appear to come from the office of a prosecutor or law enforcement agency—an impression created by the use of those agencies' letter-head and the threat of imminent criminal prosecution. These communications often inform targets that, to

⁶ The ACLU and Brennan Center note that because the FDCPA applies only to efforts to collect consumer debt, it leaves entirely unregulated by the federal government the collection efforts of state, municipal and local governments working alone or with private companies to collect debts incurred as a result of criminal justice involvement. See 15 U.S.C. § 1692a(5). The need for regulation in this area, however, is clear. The ACLU, ACLU affiliates, the Brennan Center, and other groups have documented significant and widespread abusive practices in this area, which include the deprivation of the constitutional rights of the indigent, imprisonment of the poor for failing to pay legal debts that they can never hope to manage, the extension of criminal justice involvement with dire consequences for reentry into society, and misguided incentives introduced by the privatization of probation. See *In for a Penny*, *supra* note 3; American Civil Liberties Union of Ohio, *The Outskirts of Hope: How Ohio's Debtors' Prisons Are Ruining Lives and Costing Communities* (2013); American Civil Liberties Union of Washington & Columbia Legal Services, *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor* (2014); Diller et al., *supra* note 3; Patel & Philip, *supra* note 3; Human Rights Watch, *Profiting from Probation: America's Offender-Funded Probation Industry* (2014).

⁷ 78 Fed. Reg. 67848, 67978-79 (Proposed Nov. 12, 2013).

avoid prosecution, an individual must pay restitution for the alleged dishonored check as well as other administrative costs or fees associated with pretrial “diversion” programs—fees that, in most instances, flow to those private debt-collection entities.

The ACLU and the Brennan Center believe that these programs raise grave civil liberties concerns. Bad-check enforcement programs wield the threat of criminal prosecution as leverage to extract payment for the benefit of a private corporation operating under the banner of a public office. In some jurisdictions, prosecutors do not appear to play any meaningful role in selecting which individuals receive these demands. These practices likely violate the FDCPA except insofar as the private companies fall within the limited statutory exemption to the definition of “debt collector” for certain entities operating “a pretrial diversion program for alleged bad check offenders.”⁸ Accordingly, the question of whether these abusive practices are governed by the FDCPA will turn on the contours of that statutory exemption.

The ACLU and the Brennan Center urge the Bureau to undertake rulemaking that would clarify 15 U.S.C. § 1692p(a) (“Section 1692p”). In particular, the Bureau should ensure that bad-check enforcement programs qualify for the statutory exemption only if they are subject to meaningful oversight by a prosecutor’s office, including through an individual determination of probable cause that an alleged check-writer has committed a criminal violation. We also urge the Bureau to consider enforcement actions against entities operating these programs outside the limited exemption embodied in Section 1692p.

While we are not aware of any comprehensive national data on bad-check enforcement programs, available information indicates that they operate throughout the country and are highly susceptible to abuse. In 2012, the *New York Times* reported that more than 300 district attorneys’ offices use these programs.⁹ These programs have also been subject to litigation challenges around the country.¹⁰ To shed light on the nature of these programs, the ACLU in 2012 submitted public-records requests to 13 counties in Maryland seeking information about bad-check enforcement programs.¹¹ Taken together, these materials indicate that these programs suffer from two fundamental, interrelated problems: a lack of meaningful oversight by prosecutors, and an incentive structure that leads debt collectors to maximize their profits by intimidating alleged bad-check writers with the threat of criminal prosecution. These harms suggest the existence of widespread violations of the FDCPA as well as potential due process violations.

⁸ See 15 U.S.C. § 1692p(a)(2)(A)

⁹ Jessica Silver-Greenberg, *In Prosecutors, Debt Collectors Find a Partner*, N.Y. Times (Sept. 15, 2012), at A1 [hereinafter “*Debt Collectors Find a Partner*”].

¹⁰ See, e.g., *Landfried v. Spokane Cnty.*, 2011 WL 1584328 (E.D. Wash. Apr. 27, 2011); *Del Campo v. Am. Correctives Servs. Inc.*, 718 F. Supp. 2d 1116 (N.D. Cal. 2010); *Schwarm v. Craighead*, 552 F. Supp. 2d 1056 (E.D. Cal. 2008); *Hamilton v. Am. Corrective Counseling Servs. Inc.*, 2006 WL 3332828 (N.D. Ind. Nov. 14, 2006); *Del Campo v. Kennedy*, 491 F. Supp. 2d 891 (N.D. Cal. 2006); *Gradisher v. Cnty. of Muskegon*, 255 F. Supp. 2d 720 (W.D. Mich. 2003); *Liles v. Am. Corrective Counseling Servs., Inc.*, 131 F. Supp. 2d 1114 (S.D. Iowa 2001).

¹¹ Several of the documents obtained through those requests are referenced in this comment and included as appendices. All of the documents obtained through those public-records requests are available through the ACLU’s website, at <https://www.aclu.org/racial-justice/da-debt-collection-maryland-public-records-request>.

a) *Lack of Meaningful Oversight*

Many bad-check enforcement programs appear to operate without meaningful oversight by prosecutors. Often, debt collectors receive allegedly dishonored checks directly from merchants. The debt collectors then send a series of demands for restitution and other payments without any prosecutor or law enforcement official making individualized probable cause determinations concerning the targets of the letters, even though the demands appear to come from law enforcement or prosecutorial officials.¹² One critical question, then, is whether communications appearing to emanate from prosecutors' offices actually reflect the professional and legal standards those agencies aim to uphold.

As noted above, prosecutors' offices appear to outsource all review of individual dishonored checks to the private companies operating bad-check enforcement programs.¹³ In some instances, it appears that prosecutors endorse templates purporting to define the standard for finding probable cause under the relevant criminal statute.¹⁴ As a result, no prosecutor or law enforcement official makes an individualized probable cause determination; instead, debt-collection companies alone decide who to target, purportedly by applying generic probable cause standards. By appearing to outsource probable-cause determinations, bad-check enforcement programs allow private companies to wield the power and prestige of law enforcement agencies

¹² See, e.g., *Del Campo v. Am. Corrective Servs., Inc.*, 718 F. Supp. 2d 1116, 1134 (N.D. Cal. 2010) (“[I]t is undisputed that the Official Notices that ACCS sent to check collectors were on district attorney letterhead, were signed by a criminal investigator from the Santa Clara County District Attorney’s Office, and listed the Santa Clara County District Attorney Bad Check Restitution Program in the address for remission of payments. ... Nowhere on the official notice is there any indication that the actual source of the letter is ACCS.”); *Gradisher v. Cnty. of Muskegon*, 255 F. Supp. 2d 720, 723-24 (W.D. Mich. 2003) (describing system in which dishonored checks are forwarded directly to a private company that sends out a series of letters, on Sheriff’s Department stationary, which eventually state “*You are now in violation of criminal law.*”); *Debt Collectors Find a Partner*, *supra* note 9 (“Under the terms of five contracts between CorrectiveSolutions and district attorneys reviewed by the *New York Times*, merchants refer checks directly to the company, circumventing the prosecutors’ offices”). Among the prosecutors’ offices in Maryland that provided documents pursuant to the ACLU’s public records requests, some now appear to require a small disclaimer indicating that, though the communication is on a prosecutor’s letterhead, it was generated by a private entity. See Appendix 1, (App. 1) Washington County State’s Attorney, MD, Bad Check Restitution Program, Official Notice, Washington County 00070.

¹³ The formal agreements between prosecutors and debt-collection companies may contain recitals purporting to reserve prosecutorial authority in the prosecutors’ office. See, e.g., App. 2, Consulting and Administrative Support Agreement between American Corrective Counseling Services, Inc. and the State’s Attorney of Prince George’s County, MD, , Recitals ¶ (iv)(a), Prince George County 00270, (“The State’s Attorney retains full prosecutorial discretion and does not delegate to ACCS any aspect of the exercise of prosecutorial discretion.”). These bare recitals, however, appear to be contradicted by the widespread evidence that, in practice, prosecutors do not review individual files before the private companies send communications, on the prosecutor’s letterhead, demanding payment as a means to avoid criminal prosecution.

¹⁴ See, e.g., App. 3, Washington County State’s Attorney, MD, Bad Check Restitution Intake Criteria, Washington County 00063-64. Among the Maryland counties who provided documents to the ACLU, it appears that a form document reciting this general probable cause standard is in common use. See, e.g., Howard County State’s Attorney, MD, Bad Check Restitution Intake Criteria, Howard County 00031-32; Prince George County State’s Attorney, MD, Bad Check Restitution Intake Criteria, Prince George County 00302-307. This commonality suggests that these templates are generated by the private company and then endorsed by State’s Attorneys.

without ensuring the kind of oversight that a responsible police agency or prosecutors' office would apply.

b) Perverse Incentives

Allowing private debt collection companies to threaten criminal prosecution without sufficient oversight is especially dangerous because those companies have incentives to maximize the fees associated with the “diversion” programs they operate.¹⁵ Together, inadequate oversight and perverse incentives lead to abusive debt-collection practices.

Typically, a debt-collection company sends a demand to a check-writer seeking restitution for a dishonored check, a \$25.00 collection fee and, most significantly, a “diversion class fee” of well over \$100.¹⁶ Imposing fees on debt-collection targets is the primary or sole revenue stream for these companies.¹⁷ This profit structure creates a perverse incentive for debt-collection companies to maximize the number of individuals who enroll in “debtors’ seminars.”

Those incentives, in turn, heighten the risk that private companies will abuse the threat of prosecutorial action. Indeed, profit-making incentives appear to have driven at least some collection companies to exert pressure on targets specifically for the purpose of maximizing program fees. For example, one prominent company offering bad-check diversion programs circulated guidance to its “recovery agents” outlining the tactics to use in phone calls to targets. It advised them to “[e]xplain you are trying to hold their case back from prosecution review, and the only way you can do that is with money.”¹⁸ The same document instructed agents to “[m]ake sure you add all failure to comply fees. . . . This is not discretionary. This money belongs to the company, and will **DRASTICALLY** change your numbers.”¹⁹ In such circumstances, the potential for abuse is clear: private companies generate profit by collecting costly program fees, and they aggressively and inappropriately wield the threat of criminal prosecution against targets to maximize the fees they collect.

¹⁵ In a different context, our organizations have documented how financial incentives produce perverse results in the criminal justice system. See *In for a Penny*, *supra* note 3 at 60-61 (private probation); Inimai Chettiar, Lauren-Brooke Eisen & Nicole Fortier, Brennan Center for Justice, *Reforming Funding to Reduce Mass Incarceration*, 9-12 (2013) (prosecution, probation, and incarceration).

¹⁶ See, e.g., App. 4, Anne Arundel County Policy and Procedure Manual, Ch. 9, Section H, AA00010. These do not include additional fees imposed on targets, such as rescheduling fees and late payment fees. See, e.g., App. 2, Consulting and Administrative Support Agreement between American Corrective Counseling Services, Inc. and the State’s Attorney of Prince George’s County, MD, Schedule I, Prince George County 00270.

¹⁷ See, e.g., *Id.* at ¶ 6, Prince George County 00273 (“ACCS is to be compensated solely from the proceeds of the Seminar Fees charged to Participants, plus the incidental expenses charged to Participants for scheduling the Seminars, monitoring restitution and seminar payment arrangements, and any other incidental costs authorized by law and the State’s Attorney.”); see also App. 5, Decl. of Michael L. Wilhelms, *In re SCH Corp.*, No. 09 -10198 (Bankr. Del. 2009), ¶ 10, Washington County 00101, (stating that the “primary compensation for [ACCS’s] services stems from the fees paid by Participants to enroll in the Debtors’ seminars.”).

¹⁸ App. 6, Attention New Recovery Agent: Tips for Success, Washington County 00141.

¹⁹ *Id.* (emphasis in original).

c) *Regulating “Bad Check” Collection Programs Under the FDCPA*

These potentially abusive practices raise serious questions under the FDCPA.²⁰ As noted earlier, the statute does carve out a conditional exception for certain bad-check enforcement programs.²¹ But the precise contours of that exemption are critical, because the collection practices of companies operating these programs appear to implicate core FDCPA provisions.²² To the extent that communications from private companies create the false or misleading impression that they emanate from a prosecutor’s office or other state agency, they violate 15 U.S.C. § 1692e(1) or (9). Similarly, to the extent that such communications falsely represent that they have been sent by an attorney, or that nonpayment of the debt will result in arrest or imprisonment, they violate 15 U.S.C. § 1692e(3)-(5).

In light of the significant potential for abuse inherent in these programs, the Bureau should exercise its rulemaking authority under the FDCPA to ensure the maximum protection for consumers available under the statute. As set out in Section 1692p, private entities that provide administrative support services relating to pretrial diversion programs for alleged bad-check offenders are “excluded from the definition of debt collector” if they meet certain conditions.²³ The Bureau should elaborate and clarify those statutory conditions. Without attempting to comment on the full scope of such rulemaking, the ACLU and the Brennan Center urge the Bureau to apply the following principles:

First, the Bureau should issue rules clarifying Section 1692p(a)(2)(C)(iv)(I), which provides that exempt entities may contact alleged offenders “only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate.” Specifically, the Bureau should clarify that a “determination” of probable cause by the prosecutor requires an *individual* probable cause finding regarding a particular alleged check-writer. A prosecutor’s simple endorsement of generic criteria for assessing probable cause should not trigger the FDCPA’s limited exemption. By importing the probable cause standard, the statute requires a determination that the facts surrounding an individual case give rise to the requisite level of suspicion under the applicable criminal

²⁰ Although the Debt Collection ANPR called for comments specifically relating to the Bureau’s authorities under the FDCPA and the Dodd-Frank Act, we note that these programs also raise grave due process concerns under the U.S. Constitution. In effect, a private party is able to enlist the prestige and power of prosecutors’ offices to coerce individuals into choosing between surrendering property or putting their liberty in jeopardy. By lending its authority to a private entity seeking to extract these payments, the state actors who authorize the programs may violate the due process rights of collection targets. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1 (1991); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

²¹ 15 U.S.C. § 1692p.

²² Some district courts have found that debt collectors operating bad check diversion programs not subject to the § 1692p exemption—*e.g.*, programs operating before the exemption took effect in 2006—violated the FDCPA. *See, e.g., Del Campo*, 718 F. Supp. 2d at 1133-36; *Schwarm*, 552 F. Supp. 2d at 1074-82.

²³ *See* 15 U.S.C. § 1692p(a)(2)(B).

law.²⁴ Just as a neutral magistrate would not be making probable cause determinations if she simply endorsed a set of “probable cause criteria” for the police to apply prospectively, without further oversight, a prosecutor’s office has not reached a “determination . . . that probable cause of a bad check violation under State penal law exists” by endorsing a bare statement of the statute’s elements. The Bureau should therefore issue rules giving content to this important statutory safeguard.²⁵

Second, the Bureau should give content to the requirement that an exempt entity “operates under the direction, supervision, and control” of the prosecutors’ office.²⁶ Rulemaking should clarify that merely entering into a contract with the prosecutor’s office is not sufficient, even if that contract contains recitals purporting to maintain the prosecutor’s ultimate authority. If a contract containing boilerplate language were sufficient, that would nullify as mere surplusage the separate provision requiring conformity with any “contract and directives” of the prosecutor’s office.²⁷ Moreover, the requirement that a prosecutor’s office exercise “supervision” implies more than formal contractual control. The Bureau should clarify that the exemption only applies where there is substantial, operational oversight and control.

To qualify for the statutory exemption, a private entity should be subject to the active direction, supervision, and control of the prosecutor’s office. This should include, among other things: direct control over the selection of individuals targeted for communications about diversion programs to ensure that only those for whom there is probable cause are targeted; supervision of private companies’ communications with alleged check-writers (written and telephonic) to ensure that they do not improperly intimidate alleged check-writers with the threat of criminal prosecution; and clear direction that individuals who would not actually face the possibility of prosecution may not be sent communications threatening prosecution if they decline to participate in a diversion program.

Third, the Bureau should also address Section 1692p(b), which excludes certain checks from the statutory exemption (e.g., checks involving stop payments issued in good faith with reasonable cause, or issued by a person who was not competent or of legal age to enter a contract). Specifically, the Bureau should issue rules addressing the steps that an entity must take *before* initiating correspondence to a targeted individual, to determine whether an excluded check is involved. On its face, the statute plainly provides that *ex post* efforts are necessary but not sufficient: a check is excluded “if the check involves, *or is subsequently found to involve*”

²⁴ *Cf. Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.”) (internal quotations omitted).

²⁵ Similar principles should apply to § 1692p(a)(2)(C)(v)(III), which requires a “conspicuous statement” that, in the event of a subsequently disputed allegation, a prosecutor will make “a determination that there is probable cause to believe that a crime has been committed” before undertaking further restitution efforts.

²⁶ 15 U.S.C. § 1692p(a)(2)(B).

²⁷ *See id.* § 1692p(a)(2)(C)(ii).

certain characteristics.²⁸ In other words, the statute plainly contemplates that certain checks would be found to be exempted before the debt collector contacts a targeted individual. The Bureau should clarify the affirmative duty to determine whether a prospective target used a check that is excluded from the statutory exemption, and the Bureau should outline the steps that an entity must take to satisfy that duty.

II. The Bureau Should Prohibit the Misuse of “Civil Contempt” as a Debt Collection Tool

For nearly two centuries, debtors’ prisons—institutions for indefinitely incarcerating indebted individuals until they pay off their debt—have been considered unlawful throughout the United States.²⁹ Yet in a modern twist on a banned practice, debt collectors are increasingly turning to civil contempt procedures that lack appropriate procedural safeguards to threaten alleged debtors with possible jail time. While people are ostensibly arrested and imprisoned for failing to abide by a court order to appear or disclose information, they are released only after making a payment directly transferred to the debt collector. In this process, private entities effectively hijack judicial authority intended to enforce compliance with court orders to extract payments from debtors and their families. This misuse of civil contempt falls squarely within areas of concern to the Bureau, which include information relating to the protection of consumers in debt collection litigation, the prevalence of litigation practices that harm consumers, and how the Bureau should address these practices “in a manner that complements and that is not inconsistent with State law.”³⁰

The ACLU and the Brennan Center believe that debt collectors’ use of civil contempt procedures to secure the arrest and imprisonment of debtors—particularly indigent debtors—raises grave civil liberties and civil rights concerns. There is no question that incarceration constitutes a severe deprivation of liberty and imposes serious, negative, collateral consequences on an individual’s family relationships, employment, and housing.³¹ Available information shows that many defendants are not properly notified of debt collection lawsuits filed against them, and therefore do not receive appropriate notification of subsequent court orders to appear at proceedings or to disclose information.³² Failure to obey such orders, however, has led to the

²⁸ *Id.* § 1692p(b) (emphasis added).

²⁹ In 1833, imprisonment for debt was abolished at the federal level. Charles Jordan Tabb, *The History of Bankruptcy Law in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 16 (1995). Federal statute currently provides that no federal court may imprison a person for debt in any state in which imprisonment for debt is impermissible. 28 U.S.C. § 2007(a). Every state in the country currently prohibits imprisonment for civil debts whether by constitutional provision or statute. Michael M. Conway, Note, *Imprisonment for Debt: In the Military Tradition*, 80 Yale L. J. 1679, 1679 n.1 (1971); see, e.g., G.A. Const. art. 1, § 1, ¶ XXIII; M.C.L. Const. art. I, § 21; O.H. Const. art. I, § 15.

³⁰ 78 Fed. Reg. 67848, 67877–78 (proposed Nov. 12, 2013).

³¹ See *In for a Penny*, *supra* note 3, at 6.

³² Consumer advocates have well documented deficiencies in serving defendants in debt collection litigation. See The Legal Aid Society, Neighborhood Economic Development Advocacy Project, MFY Legal Services, Inc. & Urban Justice Center, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, 9 (2010) (determining that 71% of collection suit defendants who called a New York City legal hotline

arrest and jailing of people without adequate assurance that they received proper notice, and with the effect of eliciting payments to satisfy debt collectors. Debt collectors thus use courts, police, and jails to pressure poor people into making payments they cannot afford—may not even be obligated to make—through procedures that may violate their due process rights.

a) *The Misuse of Civil Contempt for Consumer Debt Collection*

Debt collectors are increasingly turning to small claims and other low-level courts nationwide to secure judgments against alleged debtors for unpaid debts.³³ These courts are generally authorized to exercise their civil contempt authority to enforce compliance with their orders, including orders to appear at court proceedings or asset examinations, or to disclose information.³⁴ Courts across the country are using this authority to order the arrest and jailing of alleged debtors who fail to obey court orders to appear or participate in discovery.³⁵ The specific

“were either not served or served improperly, and more than half received no notice of the lawsuit at all”) [hereinafter “*Debt Deception*”]; MFY Legal Services, Inc., *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, 1, 11 (2008) (estimating that “nine out [of] ten New Yorkers who are sued in the Civil Court of the City of New York are being denied their right to be heard because of possibly illegal process serving practices” based on study of 91 debt collection lawsuits); Appleseed, *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases*, 12 (2010) (“Consumer debt litigants, court personnel, and judges all confirm that the number of default judgments entered because the defendant was not actually served is unacceptably high.”). Some defendants receive notice of debt collection litigation only after the entry of default judgment against them and the garnishment of their wages or bank accounts. See Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* [hereinafter “FTC Report”], 9 n.23 (2010); MFY Legal Services, Inc., *supra* at 6.

³³ See *Debt Deception*, *supra* note 35, at 6; National Consumer Law Center, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, 15–16 (2010). In 2010, the Federal Trade Commission recognized the recent increase in debt collection lawsuits, and noted that collectors may “employ litigation more quickly than in the past” because debt purchasers “often use collection law firms as their primary tool of recovery.” FTC Report *supra* note 35, at 5.

³⁴ Lea Shepard, *Creditor’s Contempt*, 2011 B.Y.U.L. Rev. 1509, 1544 (2011). In contrast, only approximately one-third of all states authorize courts to exercise their civil contempt authority to sanction a debtor who can pay, but fails to comply with a court order to turn over money or property to a debt collector. *Id.* at 1543; Jessica Silver-Greenberg, *Welcome to Debtors’ Prison, 2011 Edition*, Wall St. J., Mar. 16, 2011, available at <http://online.wsj.com/news/articles/SB10001424052748704396504576204553811636610> [hereinafter “*Welcome to Debtors’ Prison*”].

³⁵ Alan Sherter, *Jailed for \$280: The Return of Debtors’ Prisons*, CBS, Apr. 23, 2014, available at <http://finance.yahoo.com/news/jailed-for--280--the-return-of-debtors--prisons.html>; see, e.g., Steve Inskeep, *Unpaid Bills Land Some Debtors Behind Bars*, NPR Dec. 12, 2011, available at <http://www.npr.org/2011/12/12/143274773/unpaid-bills-land-some-debtors-behind-bars> (describing issuance of arrest warrants for debtors who fail to appear in court); Jim Gallagher, *Payday Lenders Use Courts to Create Modern Debtors’ Prison*, St. Louis Post Dispatch, Aug. 19, 2012, available at http://www.stltoday.com/business/local/payday-lenders-use-courts-to-create-modern-debtors-prison/article_f56ca6aa-e880-11e1-b154-0019bb30f31a.html (same for failure to appear at a civil court examination); Harris Meyer, *State Legislature Moves to Limit ‘Modern Debtors’ Prison*, Crosscut, Apr. 15, 2011, available at <http://crosscut.com/2011/04/15/washington-legislature/20825/State-legislature-moves-limit-modern-debtors-priso/> (describing jailing of debtors in Washington state for failure to appear at court hearings or asset examinations in debt collection lawsuits); Chris Serres, *Is Jailing Debtors the Same as Debtors Jail?*, StarTribune,

procedural mechanisms by which civil contempt is used to imprison debtors for the purpose of eliciting debt payments differ across jurisdictions. But the practice follows a basic pattern.

Typically, a creditor sells its debt to a third-party collection company, which then files a lawsuit against the alleged debtor in small claims court. However, due to deficiencies in service, the alleged debtor may never receive notice of the commencement of the suit.³⁶ When the court later requires the alleged debtor to appear at a court proceeding or asset examination, or to provide financial disclosures, the alleged debtor is unaware and does not comply. Even if the alleged debtor is properly served notice of the lawsuit, her lack of access to legal representation and the complexity and incomprehensibility of court orders may contribute to her failure to comply with orders to appear or disclose information.³⁷ In either scenario, the court holds the alleged debtor in contempt and issues an arrest warrant. The alleged debtor is eventually arrested and jailed until she can pay bail or a bond set in the amount of the alleged debt and paid either directly to the debt collector or to the clerk of court for transfer to the debt collector.³⁸ In a variation of this practice, alleged debtors are arrested and jailed for failure to appear or answer post-judgment interrogatories in proceedings to collect a default judgment issued in an underlying suit that may have suffered from procedural deficiencies, including lack of proper service of the summons and complaint on the alleged debtor.³⁹ In either situation, civil contempt

Mar. 17, 2011, available at <http://www.startribune.com/investigators/95693219.html> (describing use of civil contempt procedures to arrest and jail debtors); Shepard, *supra* note 38, at 1511-12 (same).

³⁶ See *supra* note 35. A major cause of service deficiencies is the well-documented practice of “sewer service,” in which process servers fail to serve court papers and subsequently file false affidavits of service with courts. *Debt Deception*, *supra* note 35, at 6; Appleseed, *supra* note 35, at 12. Sewer service has proven to be a serious problem with the drastic consequence of preventing alleged debtors from defending themselves in debt collection litigation. In 2009, the New York Attorney General brought civil and criminal charges against entities involved in sewer service. See Press Release, Attorney General Eric T. Schneiderman, The New York State Attorney General Andrew M. Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court (Apr. 14, 2009), available at <http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-arrest-long-island-business>. As a result, the owner of American Legal Process, Inc. pled guilty to charges of engaging in a scheme to defraud. Press Release, Attorney General Eric T. Schneiderman, The New York Attorney General Andrew M. Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010), available at <http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-guilty-plea-process-server>. Civil charges against more than three dozen debt collectors were settled in 2010. See *Pfau v. Forster & Garbus*, Index No. 2009-8236 (Supreme Court of the State of New York, County of Erie) (Docket Notes). In 2012, a federal district court certified a class action challenging a debt-buying company, law firm, process serving company, and others engaged in a scheme to fraudulently obtain default judgments against more than 100,000 New Yorkers through sewer service. See Opinion, *Sykes v. Mel S. Harris and Assocs. LLC*, No. 09 Civ. 8486, (S.D.N.Y., Sept. 24, 2012), ECF No. 123. That decision is currently pending appeal before the U.S. Court of Appeals for the Second Circuit. See True Copy of Order of USCA, *Sykes v. Mel S. Harris and Associates LLC*, No. 09 Civ. 8486, (S.D.N.Y. July 19, 2013), ECF No. 184.

³⁷ See FTC Report, *supra* note 35, at 7, 12. Appleseed, *supra* note 35, at 1 (alleged debtors “are virtually never represented by counsel.”).

³⁸ See Inskeep, *supra* note 38; Gallagher, *supra* note 38; Serres, *supra* note 38; Sherter, *supra* note 38; Shepard, *supra* note 37.

³⁹ See FTC Report, *supra* note 35, at 9 n.23 (describing reports of alleged debtors receiving notice of debt collection litigation against them only following entry of default and garnishment wages or bank accounts); MFY Legal Services, Inc., *supra* note 35, at 6 (same).

procedures operate as thinly disguised debt collection devices, far afield from their intended purpose to foster compliance with court orders to appear or disclose information.

Neither the ACLU nor the Brennan Center are aware of any nationwide study that has documented how frequently civil contempt proceedings result in the jailing of alleged debtors to facilitate debt payments rather than to enforce court orders.⁴⁰ Available information, however, suggests that this practice has increased in recent years, even as its scope may vary across jurisdictions. In 2011, the Wall Street Journal reported an increase in the number of alleged debtors threatened with arrest since the onset of the financial crisis based on interviews with twenty judges across the country.⁴¹ It found that in nine counties with a total population of 13.6 million people, judges issued more than 5,000 warrants for the arrest of civil debtors through contempt proceedings between 2010 and the first quarter of 2011.⁴² Debtors have been jailed in Arkansas, Arizona, Illinois, Indiana and Washington.⁴³ In certain jurisdictions, the numbers are staggering. In 2009, Minnesota courts issued 845 arrest warrants against debtors.⁴⁴ Court proceedings in one Oklahoma county resulted in the issuance of approximately 1500 debt-related arrest warrants in 2010—almost double the number issued in the previous year.⁴⁵ However, the frequency of the practice appears to vary between, and even within, jurisdictions.⁴⁶

These reports do not disaggregate the number of arrest warrants issued to enforce compliance with court orders to appear or to disclose information from those issued to sanction debtors for failure to make court-ordered debt payments.⁴⁷ However, media reports confirm that debt collectors are intentionally misusing civil contempt proceedings to secure the arrest and imprisonment of alleged debtors as a debt collection tool. When civil contempt is properly used

⁴⁰ See *Welcome to Debtors' Prison*, *supra* note 37 (“Nationwide figures aren’t known because many courts don’t keep track of warrants by alleged offense.”).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, Minneapolis Star Tribune, Mar. 17, 2011, available at <http://www.startribune.com/investigators/95692619.html>.

⁴⁴ *Id.*

⁴⁵ *Welcome to Debtors' Prison*, *supra* note 37.

⁴⁶ See Gallagher, *supra* note 38 (“Lawyers and court observers say that judges differ in their approaches to body attachments in private debt cases. Some issue them liberally, and other don’t.”). Although the Federal Trade Commission began scrutinizing the use of arrest warrants in debt collection litigation in July 2011, as of March 2011, the FTC declined to comment on whether the agency formally investigated these practices. *Welcome to Debtors' Prison*, *supra* note 37.

⁴⁷ In certain states, courts may hold an alleged debtor who can pay in contempt of court for failure to comply with an order to pay or turn property over to a debt collector. See Shepard, *supra* note 37 at 1543. The exercise of judicial civil contempt authority to sanction a debtor for non-payment is different, however, from a court’s use of that same authority to sanction a litigant for failure to appear at a court proceeding or to comply with a discovery order. See *Id.* at 1544; *Welcome to Debtors' Prison*, *supra* note 37 (recognizing arrest for nonpayment as well as for failure to appear).

to pressure alleged debtors to appear in court or provide information about assets in order to help resolve debt collection claims, “[a] debtor may purge herself of nonappearance contempt by physically appearing at the courthouse and truthfully answering questions about her property.”⁴⁸ In practice, however, courts fail to make this clear.⁴⁹ And in documented cases, bond or bail payments are set in the amount of the debt owed and, when paid, are directly transferred to debt collectors.⁵⁰

The ACLU and its affiliates in Colorado and Wisconsin have received reports that confirm the misuse of civil contempt proceedings for the purpose of securing debt payments, rather than compliance with court orders. In 2012, a pregnant woman in Colorado was arrested and jailed after being pulled over for a traffic violation, due to an outstanding arrest warrant for contempt of court for failure to enter interrogatories in a proceeding to collect a default judgment for unpaid credit card debt.⁵¹ Her bond was set at \$5,806—the exact amount of the default judgment against her plus interest.⁵² The ACLU also received a report that in Wisconsin, debt collectors use informal debt collection proceedings to secure “orders to appear” requiring alleged debtors to participate in special asset examination proceedings.⁵³ The failure to appear can trigger the issuance of contempt order and jailing. Because the examinations themselves take place without any written record, the collection agency can also improperly represent to a small claims court that the alleged debtor failed to comply with the examination, and seek a contempt ruling and the issuance of a bench warrant. Jailed debtors are typically released upon the payment of a bond directly to the collection agency to service the debt.

The arrest and jailing of alleged debtors is an inherently coercive debt collection tool. Arrest and jailing inflict psychological stress and have serious, adverse consequences on an individual’s family, employment, housing, and financial well-being.⁵⁴ Using civil contempt

⁴⁸ See Shepard, *supra* note 37, at 1545.

⁴⁹ *Id.*, at 1547 (“In practice, a court that threatens to imprison a ‘no show’ debtor is not merely enforcing discovery obligations.”)

⁵⁰ See, e.g., Gallagher, *supra* note 38 (“A review of several debt cases found lawyers suggesting bonds in the amount of the debt as they request body attachments, and judges setting those bond amounts.”); Inskeep, *supra* note 38; Meyer, *supra* note 37; Serres, *supra* note 38. The Federal Trade Commission previously urged Congress to prohibit judges from ordering that bail money be paid directly to collection agencies as debt payments from incarcerated alleged debtors because the practice “makes the court look like an arm of the collection agency.” Meyer, *supra* note 38.

⁵¹ Notes on file with ACLU, Racial Justice Program.

⁵² After the woman spent a night in jail, she was presented before a court and released on a personal recognizance bond. *Id.*

⁵³ Notes on file with ACLU, Racial Justice Program.

⁵⁴ See *In for a Penny*, *supra* note 3, at 6 (describing how incarceration jeopardizes family relationships, employment, and housing); Shepard, *supra* note 37 at 1540 (explaining that arrest and incarceration “inflict psychological stress,” “increase the risk of creditor coercion,” and place financial stress on alleged debtors); see also *id.* at 1541 (describing debtor who suffered recurring panic attacks following arrest for failure to appear at an asset examination).

proceedings to achieve debt collection by threatening or carrying out arrest and jailing distorts judicial authority established for an entirely different purpose—to secure compliance with court orders. The abusive nature of this practice is exacerbated when due process deficiencies plague civil contempt proceedings or the underlying debt collection litigation for which civil contempt procedures are invoked.⁵⁵ Moreover, misuse of civil contempt may also permit debt collectors to skirt limitations on the use of state court debt litigation to recover unpaid debts.⁵⁶

b) Regulating the Misuse of Civil Contempt under the FDCPA

The ACLU and the Brennan Center call on the Bureau to engage in fact-finding, including through field hearings, into the nature and extent of the practices by which debt collectors misuse and abuse civil contempt procedures to have debtors arrested and jailed. In particular, we urge the Bureau to investigate: 1) the frequency with which debt collectors request that courts issue warrants to arrest alleged debtors for failure to comply with court orders to appear or disclose information; 2) the frequency with which bail or bond is set at the amount of the alleged debt, or a portion thereof, rather than an amount appropriate to secure compliance with the applicable court order to appear or disclose information; and 3) the extent to which due process deficiencies in civil contempt proceedings and/or underlying state court debt collection litigation results in lack of notice to alleged debtors who subsequently are targeted for failure to comply with a court order in civil contempt proceedings.

We also urge the Bureau to engage in rulemaking to preclude debt collectors from seeking the arrest or jailing of alleged debtors in pursuit of payments toward civil debts. For example, the Bureau should promulgate rules clarifying that the delivery of bond or bail paid by jailed civil debtors directly to debt collectors for the satisfaction of civil debts constitutes “abuse”

⁵⁵ See discussion *supra* note 35, 39; see, e.g., *Welcome to Debtors’ Prison*, *supra* note 37 (describing 2009 arrest of a man for alleged default on car loan despite lack of notice of the summons and two orders to appear in court). The FTC reported in 2010 that it was “not aware of any reliable, nationwide empirical data on the prevalence of service of process problems [in debt collection litigation], including whether the problems found in some jurisdictions are present throughout the country.” FTC Report, *supra* note 35 at 9–10. It nevertheless recognized the seriousness of the problem by making specific recommendations to state and local governments to improve service of process in debt collection litigation. *Id.* at 10. Moreover, some default judgments may result from the failure to provide *any* notice to alleged debtors at all. See Chris Serres & Glenn Howatt, *Justice Denied as Debt Seizures Soar*, StarTribune, March 24, 2011, available at <http://www.startribune.com/business/101723868.html> (describing initiation of debt collection litigation in Minnesota without filing of a complaint in court or any notice to alleged debtors). Yet the recourse available to alleged debtors ensnared in procedurally-deficient, civil contempt in state court is limited. These procedures may not be challenged for violating constitutional rights in federal court under Section 1983. See *Juidice v. Vail*, 430 U.S. 327 (1977) (applying principles of abstention to dismiss federal lawsuit by judgment debtor challenging under Fourteenth Amendment his arrest following civil contempt proceedings in state court).

⁵⁶ Meyer, *supra* note 38 (“Using bail money to satisfy judgments allows collectors to sidestep rules that block them from seizing exempt assets such as Social Security payments.”). The threat of arrest for non-appearance or failure to comply with court discovery orders also increases the risk that an alleged debtor will pay the underlying debt without exercising “her right to claim exemptions or contest the underlying debt.” Shepard, *supra* note 37, at 1547. This risk is further heightened “due to information asymmetries between the debtor and the creditor, the debtor’s poor se status, a lack of court oversight, and the debtor’s lack of sophistication.” *Id.*

or an “unfair” practice prohibited by the FDCPA.⁵⁷ Such rulemaking would protect consumers in debt collection litigation while respecting “the traditional role of the States in overseeing the administration and operation of their court systems.”⁵⁸ Based on what is discovered through fact-finding, it may ultimately be necessary for the Bureau to seek new statutory authorities to address the abuse of civil contempt procedures for debt collection, and we urge the Bureau to present Congress with any factual information necessary to determine whether new authorities are warranted.⁵⁹

III. The Bureau Should Engage in Fact-Finding and Enforcement to Address the Racial Disparities Resulting from Abusive Debt Collection Practices

The debt-collection practices at issue in the Debt Collection ANPR are intimately linked to broader economic currents that have had disproportionate and devastating consequences for communities of color. Such patterns grew out of the impact of the Great Recession on these communities—an impact reflected in an unprecedented racial wealth gap, and caused by pervasive race discrimination in subprime lending during the lead-up to the foreclosure crisis. We therefore urge the Bureau to play a leadership role in identifying race disparities in this area before they metastasize. To the extent that the Bureau identifies such disparities, it should undertake aggressive enforcement against abusive debt-collection practices that result in a discriminatory effect.

While broad national data on the racial impact of abusive debt-collection practices does not exist, available studies show that some of the most ripe-for-abuse practices are disproportionately used against blacks and Latinos. For example, the Legal Aid Society of New York, along with other legal services organizations, found stark racial disparities after analyzing 2008 caller data from a legal hotline for people sued by a creditor or debt buyer. The study found that 69% of people sued by debt buyers were black or Latino, and that 66% of meritless cases were brought against black or Latino clients.⁶⁰ Using more recent data, the New Economy Project found similar disparities in New York State. Data from debt collection lawsuits filed in New York in 2011 shows that the ten New York zip codes with the highest concentrations of default judgments all occurred in neighborhoods in which the population was at least 75% non-

⁵⁷ See 15 U.S.C. § 1692d (prohibiting “abuse” and “harassment” of debtors); *id.* § 1692f (prohibiting “unfair” debt collection practices).

⁵⁸ 78 Fed. Reg. 67848, 67877.

⁵⁹ In 2010, Senator Al Franken introduced legislation proposing to amend the FDCPA to, among other things, prohibit a debt collector from seeking a warrant for an alleged debtor’s arrest from a court or any law enforcement agency. S. 3888, 111th Cong. §§ 2-3 (2010). The bill was reintroduced in 2012 and remains pending before the U.S. Senate Committee on Banking, Housing, and Urban Affairs. S. 3350, 112nd Cong. § 6 (2012); Bill Summary and Status of S. 3350, 112nd Cong. (June 27, 2012). If passed, this legislation would place needed constraints on debt collectors. However, because it explicitly “shall not be construed to limit the inherent authority of a court to hold a debtor in civil contempt,” the legislation would not address all instances of abuse or misuse of civil contempt procedures to collect civil debts. S. 3350, 112nd Cong. § 6(b).

⁶⁰ *Debt Deception*, *supra* note 35 at 2.

white.⁶¹ Moreover, in six of these ten zip codes, over 90% of residents were non-white.⁶² Further, a recent national study on moderate-income households carrying credit card debt found that 71% of African-American households had been called by bill collectors, compared to 50% of white households.⁶³ In other words, aggressive debt-collection practices appear to disproportionately target minorities. While those bare statistics do not indicate whether debt-collectors intentionally discriminate or otherwise maintain unlawfully discriminatory policies, they do highlight the need for careful scrutiny of the potentially discriminatory effects of debt-collection practices.

The fact that this preliminary evidence suggests that abusive debt collection disproportionately impacts communities of color likely reflects the broader economic harm these communities have experienced in recent years. A study conducted by the Pew Research Center in 2011 found that the median wealth of white households has grown to 20 times that of black households and 18 times that of Hispanic households.⁶⁴ This is the largest racial wealth gap since such data collection started over a century ago.⁶⁵ It reflects the disparate impact of the recent financial crisis on communities of color. While white household wealth declined by 16 percent between 2005 and 2009, black households lost 53 percent of their wealth and the wealth of Hispanic households dropped by 66 percent.⁶⁶ Among other things, this racial disparity reflects the disparate impact of foreclosures, which have hit minority households with disproportionate force.⁶⁷

Racial inequality in wealth, in turn, flows directly from racial discrimination in the subprime lending market during the last decade. During that period, “borrowers in minority groups were much more likely to receive loans with product features associated with higher rates of foreclosure,” *i.e.*, loans with higher interests rates or with risky terms, like ballooning interest rates.⁶⁸ Such disparities persist even after controlling for credit score. *Id.* In effect, a “dual mortgage market” took root, in which different communities were offered “a different mix of products and by different types of lenders,” and subprime lenders “disproportionately target[ed]

⁶¹ The New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality*, 5 (2013).

⁶² *Id.*

⁶³ Catherine Ruetschlin & Dedrick Asante-Muhammad, *The Challenge of Credit Card Debt for the African American Middle Class*, 2 (2013).

⁶⁴ Pew Research Center, *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, 1 (2011).

⁶⁵ *Id.* at 1.

⁶⁶ *Id.*

⁶⁷ See, Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, 10 (2011).

⁶⁸ *Id.* at 21.

minority, especially African American, borrowers and communities, resulting in a noticeable lack of prime loans among even the highest-income minority borrowers.”⁶⁹

Race discrimination, in other words, set the stage for the current economic circumstances in many communities. Discrimination in lending had a cascading effect, exposing communities of color to higher rates of foreclosure and immense wealth loss.⁷⁰ Abusive debt-collection practices may be only the most recent ripple effect of the economic harm unleashed in the lead up to the financial crisis. These practices therefore have the potential to deepen the racially disparate consequences of the wider economic fallout.

Accordingly, the ACLU and the Brennan Center call on the Bureau to play an active and expansive role in collecting and publishing data necessary to identify abusive debt-collection practices that impose a disproportionate burden on racial minorities. The Bureau should address this need for richer data through all means at its disposal, including field hearings, statistical and geo-locational analysis of existing data on debt-collection practices, and if necessary, requests to Congress for additional data-collection authorities.⁷¹

If further fact-finding or data analysis reveals that certain debt-collection practices have a racially disparate and adverse effect, the Bureau should aggressively pursue enforcement actions using its authorities under the Equal Credit Opportunity Act (“ECOA”). Among other things, ECOA prohibits race discrimination “with respect to any aspect of a credit transaction.”⁷² A credit transaction, in turn, is defined by regulation to encompass “every aspect of an applicant’s dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, . . . collection procedures).”⁷³ The Bureau has recognized that ECOA applies to certain debt collectors.⁷⁴ ECOA, moreover, prohibits facially neutral policies

⁶⁹ Allegra Calder & William C. Apgar, Harvard University Joint Center for Housing Studies, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, 2 (2005).

⁷⁰ See, e.g., Nat’l Fair Housing Alliance, *The Banks Are Back – Our Neighborhoods Are Not: Discrimination in the Maintenance and Marketing of REO Property*, 11-14 (2011). (finding racial disparities in the maintenance of foreclosed properties depending on neighborhood racial composition).

⁷¹ The Dodd-Frank Act directs the Bureau to engage in active monitoring to identify risks to consumers. 12 U.S.C. § 5512(c)(1). “In allocating its resources to perform the monitoring required by [the Dodd-Frank Act], the Bureau may consider, among other factors . . . the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers.” *Id.* at § 5512(c)(2)(E).

⁷² 15 U.S.C. § 1691(a)(1).

⁷³ 12 C.F.R. § 202.2(m).

⁷⁴ See CFPB, *Examination Procedures: Debt Collection*, Procedure 27 (Oct. 24, 2012), available at <http://www.consumerfinance.gov/guidance/supervision/manual/>. In order to be subject to the ECOA, a debt-collector would need to be a “creditor” within the statute’s terms, which “means any person who regularly extends, renews, or continues credit . . . or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.” 15 U.S.C. § 1691a(e). “The term creditor includes a creditor’s assignee, transferee, or subrogee who [regularly] participates” in a credit decision. 12 C.F.R. § 1002.2(1). Accordingly, any entity that collects debt on credit it issued in the first instance would fall within the ECOA’s scope. Other debt-collectors – including debt-buyers – would be regulated by the ECOA so long as they “regularly participate” in decisions to extend credit.

or practices that result in disparate impact on racial minorities unless they can be justified by a business necessity and there is no less discriminatory alternative.⁷⁵ Accordingly, debt-collection practices may be subject to enforcement under the ECOA if, upon further fact finding, the Bureau determines that those practices yield discriminatory effects.

IV. Conclusion

We applaud the Bureau for seeking public comment on the important questions outlined in the Debt Collection ANPR, which identifies a set of issues where the mandate to protect consumers intersects with core civil rights and civil liberties imperatives. We believe that fact-finding and rulemaking in this area presents the Bureau with a tremendous opportunity to be a leader in safeguarding the rights of all individuals and communities who may experience devastating harms if abusive debt-collection practices are not aggressively targeted.

Please contact Nusrat Choudhury, Staff Attorney in the ACLU Racial Justice Program at nchoudhury@aclu.org or (212) 519-7876, Larry Schwartztol, Staff Attorney in the ACLU Racial Justice Program at lschwartztol@aclu.org or (212) 519-7849, or Jessica Eaglin, Counsel in the Brennan Center's Justice Program at jessica.eaglin@nyu.edu, with any questions.

Sincerely,

Nusrat Choudhury
Staff Attorney
ACLU Racial Justice Program

Larry Schwartztol
Staff Attorney
ACLU Racial Justice Program

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ACLU Washington Legislative Office

Jessica Eaglin
Counsel, Justice Program
Brennan Center for Justice at NYU School of Law

⁷⁵ See, e.g., *Coleman v. General Motors Acceptance Corp.*, 196 F.R.D. 315, 325–26 (M.D.Tenn.2000), *modified on other grounds*, 296 F.3d 443 (6th Cir.2002) (“[T]here is abundant support indicating that a disparate impact theory can be used in ECOA cases.”); 12 C.F.R. § 202.6(a) at *n.2; 12 C.F.R. Part 202, Supp. I, §202.6(a)(2); *see also* CFPB Bulletin 2012-04, Fair Lending (Apr. 18, 2012), at 1 (“[T]he CFPB reaffirms that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the ECOA and [its implementing regulations]”).

APPENDIX 1



Washington County State's Attorney
 Bad Check Restitution Program
 PO Box 1098
 Hagerstown, MD 21741-1098

Charles P. Strong, Jr.
 State's Attorney



082ID92

OFFICIAL NOTICE - IMMEDIATE ATTENTION REQUIRED

 4000002362 01.0000.0000 897/1



JOHN Q. PUBLIC
 PO BOX 1234
 HAGERSTOWN, MD 21745-1234

Office Hours: 9:00 a.m. - 5:00 p.m.
 Phone: (866)434-1441
 Date of Notice: 11/30/2012
 Case #: [REDACTED]
 Balance Due: \$573.28
 Page: 1

You have been accused of violating Maryland Criminal Law, Section 8-103, entitled "Obtaining property or services by bad check". A conviction for a check less than \$500 is classified as a misdemeanor and is punishable by up to eighteen (18) months imprisonment. A conviction for a bad check for more than \$500 is classified as a felony and is punishable by up to fifteen (15) years imprisonment. See page 5 for details on the party(s) initiating this allegation.

My office has established a Bad Check Restitution Program. This Bad Check Restitution Program is a pre-charge program designed to allow people accused of having violated the above-referenced statute to avoid the possibility of further action against the accused by the State's Attorney's Office. Participation in the Bad Check Restitution Program is voluntary. The Bad Check Restitution Program has two steps:

1. Pay all restitution on all reported checks, plus any administrative, returned item, and program fees.
2. Attend a Financial Accountability class.

Washington County State's Attorney Bad Check Restitution Program

TOTAL BALANCE DUE: \$573.28

You have the right to dispute this matter, as set forth on page 2 of this notice. In order to participate in the Bad Check Restitution Program you must pay in full and schedule class within THIRTY (30) DAYS from the date of this Notice.

PLEASE CALL (866)434-1441 or visit www.checkprogram.com

TO MAKE PAYMENT/SCHEDULE CLASS

Please have your case number ready: [REDACTED] and Password: 99999999

PAYMENTS ACCEPTED: CREDIT & DEBIT CARDS, WESTERN UNION, MONEY ORDERS, OR CASHIER'S CHECK

If you choose to participate in the Bad Check Restitution Program, and if you successfully complete the program's two steps above, my office will consider this matter resolved. The Bad Check Restitution Program is administered by a private entity under contract with the Washington County State's Attorney.

For additional information or if you believe you received this Notice in error, please see the reverse side.

Sincerely,

State's Attorney's Office

See reverse side →

This notice has been printed and mailed on behalf of my office by a third party administrator of the Bad Check Restitution Program at no cost to the taxpayer.

WASHINGTON COUNTY 00070

APPENDIX 2

**CONSULTING
AND
ADMINISTRATIVE SUPPORT SERVICES
AGREEMENT**

This Consulting And Administrative Support Services Agreement (the "Agreement") is effective 8/1, 2003 by and between American Corrective Counseling Services, Inc., a California corporation ("ACCS") and the State's Attorney of Prince George's County, State of Maryland:

Recitals

- (i) The principal business activity of ACCS is the provision of educational seminars, consulting, and administrative support services to State and County prosecutor's offices that have adopted pre-trial misdemeanor bad check diversion programs ("Diversion Programs"). These programs typically allow first time offenders (the "Participant") to avoid the prospect of criminal prosecution, provided the Participant attends an educational seminar ("Seminar") mandated by the prosecutorial authority addressing the causes and the prevention of bad check writing, pays a fee for the Seminar, and pays restitution to the victim of the bad check.
- (ii) ACCS has extensive experience providing consulting, administrative support, and Seminars for Diversion Programs. More specifically, ACCS has developed proprietary Seminar materials for the conduct of the Seminars, has extensive experience in staffing Diversion Program Seminars, and has acquired substantial know-how with respect to the administrative and record management procedures necessary to operate an effective Diversion Program.
- (iii) The Prince George's State's Attorney desires to retain ACCS to provide consulting services, to staff and to operate its Diversion Program Seminars, and to provide administrative support services as reasonably required by the State's Attorney in the conduct of the Diversion Program. ACCS desires to perform these services for the Prince George's State's Attorney as specified herein.
- (iv) The State's Attorney and ACCS acknowledge that the Diversion Program will be operated under Prince George's State's Attorney's name, authority and control. It is specifically understood that:
 - (a) The State's Attorney retains full prosecutorial discretion and does not delegate to ACCS any aspect of the exercise of prosecutorial discretion;
 - (b) the content, duration and frequency of the Seminars are to be approved by State's Attorney prior to the conduct of Seminars;

- (c) Prerequisites for participation in the Diversion Program, including any requirement of payment of restitution to the victim, shall be established by the State's Attorney and not by ACCS.
- (d) the State's Attorney retains authority to contractually set or modify the Seminar fees and terms of payment from Participants;
- (e) the format, content, and frequency of any oral or written communication with Participants concerning the payment of restitution or Seminar fees is to be approved in advance by the State's Attorney;
- (f) the mailing of all written communications to Participants concerning the payment of restitution or Seminar fees is to be approved by the State's Attorney prior to the mailing, and any such written communication will be either generated or mailed by State's Attorney personnel, or by a mailing service or similar clerical service, and;
- (g) the mailing address to which Participants are directed to respond will either be the Prince George's State's Attorney's mailing address, or a post office box held in the State's Attorney's name.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. **Retention of Services.** The Prince George's State's Attorney retains the services of ACCS as described herein, and ACCS agrees to perform in accordance with this Agreement.
2. **Term.** The term of this Agreement is three years, commencing on the effective date below, and unless sooner terminated as provided herein, shall renew in successive one- year increments at the end of the initial three-year term.
3. **Services to Be Provided by ACCS.**
 - (a) **Seminars.** ACCS will conduct all Diversion Program Seminars. In that regard, ACCS will provide qualified instructors to conduct the Seminars, provide its proprietary Seminar materials to class Participants, lease the required facilities to conduct the Seminars, monitor the attendance at the Seminars, and communicate directly with Seminar Participants regarding scheduling, attendance, and related administrative details. Classes shall be scheduled in convenient locations within or near the jurisdiction and will normally be held on Saturdays, 8:00 a.m. to 4:30 p.m. Instructors will typically hold advanced degrees in a counseling related field (e.g. psychology or social work). ACCS will continue to develop and refine its class curriculum and educational materials, and will conduct ongoing training and evaluation of all ACCS instructors. ACCS will provide its "Checks & Balances" Class as the Seminar for Participants. The class is designed to remove many of the behavioral rationalizations surrounding the writing of bad checks, as

well as focus on deficiencies in the areas of personal finance, communication, and stress management. Class sizes will average from 12 to 25 Participants.

(b) Consulting Services. ACCS will provide the State's Attorney with *pro forma* administrative forms and proposed procedural guidelines for the operation of the Diversion Program, which are to be reviewed, modified and approved by the State's Attorney. ACCS will make its administrative personnel available to assist the State's Attorney in the development of administrative procedures to be followed for the daily clerical and accounting functions of the Diversion Program. These procedures include the State's Attorney's written communications to Participants, the mechanics of sorting the mail, depositing and accounting for Seminar fees and restitution payments from Participants, disbursement of restitution payments to victims, and financial reporting.

(c) Administrative Support. ACCS shall provide clerical personnel for administrative, accounting, and reporting aspects of the Diversion Program, subject at all times to the managerial authority of the State's Attorney. More specifically, ACCS shall:

- (i) maintain thorough records to enable the generation of reports detailing the compliance and the disposition status on each Diversion Program Participant's case,
- (ii) maintain a detailed current accounting record of all receipts and disbursements of the Diversion Program,
- (iii) open and sort correspondence related to the Diversion Program and deposit Seminar Fees and restitution payments in a trust account to be held by the State's Attorney with ACCS as a signatory,
- (iv) prepare monthly reports which shall provide a summary of all transactions and Program activity for the period,
- (v) maintain all physical files, computer files, and facilities required for performance under this Agreement, and provide the necessary computers, printers, software, communication systems, and office supplies to enable the State's Attorney to operate the Diversion Program.

4. Responsibilities of the Prince George's State's Attorney. The State's Attorney shall establish the policies and procedures of the Diversion Program and instruct ACCS regarding the administrative requirements necessary for effective Program operation. The State's Attorney shall establish eligibility criteria for all Participants in the Diversion Program, including specific Diversion Program completion criteria, and procedures regarding the management of cases for those individuals who fail to comply with Diversion Program requirements, including the payment of restitution and Seminar fees.

5. Designation of State's Attorney's "Communications Liaison Officer". The Prince George's State's Attorney's office shall designate one of its properly authorized employees as the Communications Liaison Officer (the "Communications Officer"). The Communications Officer shall be charged with final approval, signature, and

coordination of all written communications to Participants concerning the Diversion Program, except for those communications relating exclusively to the conduct and scheduling of Seminars, which is the primary responsibility of ACCS. Furthermore, the Communications Officer shall authorize and supervise all communications with Participants concerning the terms and conditions of the Diversion Program, eligibility, the payment of restitution, or the consequences of failing to enroll in or completion of the Diversion Program. ACCS shall be responsible for all communications with Participants regarding the conduct of the Seminars, attendance, location, rescheduling of Seminars, or other Seminar related matters. ACCS personnel shall direct any questions within the responsibility of the Communications Officer to the Communications Officer, and not discuss these issues with Participants.

6. Compensation to ACCS. ACCS is to be compensated solely from the proceeds of the Seminar Fees charged to the Participants, plus the incidental expenses charged to Participants for rescheduling the Seminars, monitoring restitution and seminar payment arrangements, and any other incidental costs authorized by law and the State's Attorney. The authorized Seminar Fees and incidental expenses are set forth on Schedule 1 attached hereto.

7. Funds and Disbursements. Participants in the Diversion Program shall be instructed to remit payments to a post office box maintained by the State's Attorney, after which monies shall be deposited in a State's Attorney maintained trust account held in a federally-insured financial institution within the state. Disbursements from the trust account shall be made on a regular monthly cycle with the assistance of ACCS. A summary of all trust accounting transactions shall be reported on a monthly basis, with supporting documentation made available for inspection upon request.

8. Records Subject to Audit. The Diversion Program books of accounts, records, and source documents shall be kept and made available at the request of the State's Attorney with the cost of such presentation borne by ACCS. The State's Attorney shall have the right to examine and audit the Diversion Program books and records and supporting source documents at any and all times. The cost of the audit shall be borne by ACCS if the audit shows an understatement of annual gross income of more than five (5) percent of the annual gross income determined on audit, or the audit demonstrates a material failure of ACCS to maintain accurate and complete books, records, accounts, and supporting documentation. All Diversion Program physical and electronic records shall be retained for a period of not less than (3) three years, with records relating to any litigation, or settlement of claims arising out of performance of this contract being retained for a period of not less than (4) four years.

9. Termination. Either party may terminate this Agreement for cause upon thirty days prior written notice. Proper cause shall be any material breach of the contract

that is not cured by the breaching party within (30) thirty days of written notice of the breach. Proper cause shall also include any reduction in the amount of the Seminar Fee and related minimum charges for program operation set forth on Schedule 1 attached hereto and incorporated by reference.

10. Confidentiality. ACCS acknowledges and agrees to implement reasonable safeguards to protect the confidentiality of information obtained in the course of the Diversion Program, including the identity and personal information of Participants, the identity of persons who file bad check crime reports with the State's Attorney, and the operations of the State's Attorney. The State's Attorney agrees to protect all proprietary information ACCS provides in connection with the performance of this Agreement, including ACCS teaching materials, instructional guidelines, financial condition, business plans, customer identities and technical information. The parties agree on termination of this Agreement to return and refrain from using any proprietary or confidential information or materials.

11. Insurance. ACCS will maintain Comprehensive General Liability Insurance including premises liability, bodily injury, and product/completed operations coverage with a combined single limit of \$1,000,000.00 per occurrence, with a \$2,000,000.00 aggregate, and non-owned/hired automobile liability in the amount of \$1,000,000.00 in aggregate. ACCS shall name the Prince George's State's Attorney as an additional insured. ACCS shall also maintain a Fidelity/Honesty Bond covering all ACCS employees throughout the contract term, along with any statutory required levels of worker's compensation insurance. In reference to insurance coverage maintained by ACCS, such policies shall not be canceled, limited in scope, or non-renewed until after thirty (30) days written notice has been given to the office of the State's Attorney. Certificates of Insurance evidencing the above coverages and clauses shall be supplied to the State's Attorney's office within ten (10) days of approval of this agreement. All insurance required herewith shall be with companies rated "A", Class XIII, or better in Best's Insurance Guide. Acceptance or approval of insurance shall in no way modify or change the indemnity or hold harmless clauses in this agreement which shall continue in full force and effect.

12. Status of ACCS Personnel. ACCS employees are and shall remain the employees of ACCS, not the State's Attorney. ACCS shall maintain all necessary licenses, permits, certificates, and approvals required by the laws of the United States, Maryland, and all other appropriate governmental agencies. Evidence of such licenses, permits, and approvals shall be provided to the State's Attorney within ten (10) days of approval of this Agreement, and at any time thereafter immediately upon demand. ACCS certifies that all policies regarding employment and participation in the Program are in writing and shall be made available to the State's Attorney and members of the public upon request. The foregoing notwithstanding, ACCS employees, when performing the administrative support requirements of this Agreement, shall be subject to the managerial control of the State's Attorney at all times with respect to any communications ACCS

employees may have with Participants. To the extent that ACCS employees have any interaction with Participants other than with respect to Seminar-related activities, ACCS employees shall exercise only ministerial, non-discretionary duties, at all times subject to the management and control of the State's Attorney.

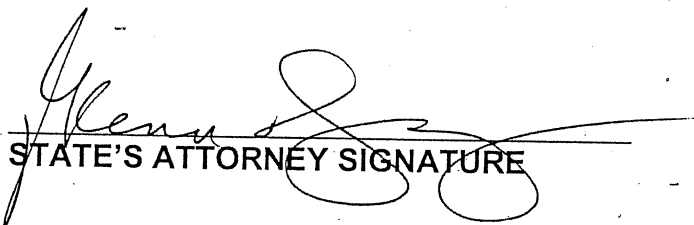
13. Entire Agreement. This Agreement supersedes any and all other agreements, either oral or written, between the parties hereto with respect to the subject matter hereof, and contains all of the agreements between the parties with respect to said matter. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, oral or otherwise, have been made by either party which are not embodied herein, and that no other agreements, statements, or promises not contained within this Agreement shall be valid or binding. The laws of the State of Maryland and the United States of America shall govern all provisions contained within this Agreement.

14. Notice. Any notice to be given hereunder by any party to the other, shall be in writing and may be effected by personal delivery, or by registered mail, return receipt requested, addressed to the proper party, at the following addresses:

**Paul Fischer, President
ACCS**
180 Avenida La Pata Suite 200
San Clemente, CA 92673

**The Honorable Glenn Ivey
Prince George's State's Attorney**
349 M, Co Courthouse, Marbury
Upper Marlboro, MD 20772

IN WITNESS THEREOF, the parties hereunto, acting by and through their duly authorized officers, have caused this Agreement to be executed on the dates shown.


STATE'S ATTORNEY SIGNATURE

8/1/03
DATE

ACCS PRESIDENT SIGNATURE

DATE

SCHEDULE 1

RESTITUTION: The victim's total loss associated with the face value of all bad checks, plus a thirty five (\$35.00) fee per Art 27-144-3 of the Annotated Code of Maryland.

PROGRAM FEE: The Diversion Program shall require eligible participants to pay a \$150 enrollment fee to enroll in the program. This fee includes attendance in the special eight (8) hour educational class. The Diversion Program will allow a \$25 deduction from the enrollment fee for timely payment of full restitution and program fees (payment postmarked within 30 days from date of the first program notice to the check writer).

RESCHEDULING FEE: Participants who fail to appear at their scheduled class will be required to pay a \$25 rescheduling fee.

LATE PAYMENT FEE: The Diversion Program shall require all participants who have enrolled in a payment plan and miss their scheduled payment date (payment is postmarked more than five days from the scheduled date) to pay a \$10 late fee to cover the additional administrative expense resulting from the failure to comply with the initial scheduled payment.

PROGRAM COSTS: All direct costs to the District Attorney resulting from mail services, banking fees, postal box rental and related mail costs, shall be charged against and paid from Diversion Program fee revenues. ACCS shall bear all costs related to its personnel, supplies and expenses.

COMPENSATION: The State's Attorney's office shall receive 8% and ACCS shall receive 92% of all program fees after direct program costs have been deducted. ACCS shall receive 100% of all payment plan, late payment and class rescheduling fees.

PAYMENT DISBURSEMENT SCHEDULE: Victim restitution shall be disbursed by check to the victim no later than 32 days following receipt of payment. ACCS fees shall be disbursed weekly to ACCS. Bills for mail costs and postal box rentals shall be paid according to vendor terms. The balance of the fees owed to the District Attorney shall be disbursed by the 20th day of each month for the prior month's receipts.

COLLECTION AND PAYMENT DISTRIBUTION: Lump sum payments shall be distributed in their entirety according to the payment disbursement schedule. When partial payments are received, the following distribution priority shall be used: 50% of the partial payment is applied to the victim restitution balance (until satisfied). The remaining portion of the payment is applied first to the program fee and secondly to the assessment fees (if any). In cases where there are multiple victims, payments will be applied on a first-in first-out basis with respect to the crime report filing date.

APPENDIX 3



Washington County State's Attorney

Bad Check Restitution Program

Intake Criteria

As the State's Attorney of Washington County, Maryland, vested with the authority to establish a bad check pre-trial diversion Program (Program) and as per the Financial Services Regulatory Relief Act of 2006 (Act), the Administrative Support Services Agreement (Agreement), and applicable state and federal laws, I hereby authorize and direct the Program with this communication to follow certain criteria in the administration of the Program and in determining Program eligibility as outlined below:

Further, it is my determination that probable cause of a bad check violation shall be defined under Maryland Article Criminal Law Title 8 section 104 and/or any other applicable statutes per my authority and discretion, as a check that has not been repaid after the victim has provided the check writer with reasonable notice of the dishonored check. This determination shall apply to each eligible check and be followed by the Program.

Check eligibility criteria:

The following types of checks are eligible for the Program:

- Checks that remain unpaid after 10 days of the victim taking reasonable steps to provide notice to the check writer.

The following types of checks are ineligible for the Program:

- Fraud—lost/stolen/forged and identity theft
- Two-party checks—including payroll
- Checks not passed within this jurisdiction
- Credit card checks

In accordance with the Act, the following types of checks are also ineligible for the Program:

- Checks partially repaid to the victim
- Post dated checks; including payday loans or checks where the victim agreed to hold
- Stop payment checks where the issuer acted in good faith and with reasonable cause in stopping payment
- Checks issued by someone not competent or of legal age
- Checks dishonored due to bank error or failure to notify the check writer of bank adjustment
- Checks issued to pay an obligation arising from an illegal transaction

The following types of checks are excluded from the Program (as checked below, if any):

- Payments on account
- Real estate (residential and commercial) rentals or leases *OR SALES.*
- Equipment rentals or leases
- Other rentals or leases _____

The following are additional directives for Program and eligibility intake (as checked below, if any):

- Other: _____
- Other: _____
- Other: _____


Check limits:

Checks are eligible for the Program up to \$ 7500 .00.

Ineligible checks submitted to the Program will be returned to the victim.

I hereby authorize and direct ACCS as the Program's administrator per the Agreement to contact all check writers with my approved letters and through other reasonable means of contact, including oral and written communication, to encourage compliance with the Program and confirm such checks meet the above definition of probable cause and are not clearly excluded by the criteria listed above (allowing for contact with check writers about certain checks that can only be determined ineligible after contact and upon receipt of relevant documentation).

I affirm and attest the above instructions are issued under my authority and direction as per the Agreement and in compliance with all applicable state and federal laws on this date 8-10 20 07.



Signature

Steven C. Kessel

Name

Deputy State Attorney

Title

APPENDIX 4

Bad Check Unit

1. In General

a. The Bad Check Unit attempts to resolve as many bad check complaints as possible without the need for court action. The procedures outlined below are basically designed to afford the bad check writer the opportunity to make the check good before criminal charges are approved. Certainly there are many reasons why a check may be returned for insufficient funds, and the Bad Check Unit procedure permits the negligent check writer the opportunity to correct his mistake without further difficulty.

b. A major ingredient of the Bad Check Unit administrator's job is to keep a record of every complaint made. This information is necessary so that frequent bad check writers can be identified and treated accordingly. Because the procedures utilized by the Bad Check Unit are not statutorily required, if an individual is a frequent offender, the procedures may be foregone and charges instituted immediately. Further, many times the checks are paid after the issuance of a warrant and in cases where restitution is made by a previous offender, the warrant will not necessarily be stricken as may be done in other cases.

c. The basic policy of the Bad Check Unit is that if a warrant has been issued, but the restitution is received before service of the warrant, absent special circumstances (i.e., past history), the matter will be closed. Once the warrant has been served and a trial date set, the charges will not be dismissed unless there are special circumstances.

d. American Corrective Counseling Service Information (ACCS)

(1) ACCS has taken over the responsibility for new cases as of March, 2000. They are tasked with notifying the check writer, making collections of the check amounts, \$25.00 collection fees, and \$125.00 diversion class fees.

(2) Merchants must contact ACCS directly if they have not received restitution in order to obtain a status of their case. In the old program, a notification was mailed to each merchant stating that we had received their complaint and were working on it.

(3) Schedules check writers for the diversion class.

(4) Keeps statistics via computer as to repeat offenders, monies collected, number of cases, etc.

(5) Return files on cases which fail the program to existing Bad Check Unit with diskette of case information to finish preparing charging documents as mentioned above.

APPENDIX 5

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

-----X
In re: : Chapter 11
SCH Corp., et al.,¹ : Case No. 09-10198 (BLS)
Debtors. : (Jointly Administered)
-----X

**DECLARATION OF MICHAEL L. WILHELMS,
CHIEF FINANCIAL OFFICER OF THE DEBTORS,
IN SUPPORT OF FIRST DAY MOTIONS**

I, Michael L. Wilhelms, hereby declare that the following is true to the best of my knowledge, information and belief:

1. I am the Chief Financial Officer of American Corrective Counseling Services, Inc. (“American Counseling”). I have been the Chief Financial Officer of American Counseling since November 3, 2008.² The two other above-captioned debtors in this case

2. My current duties for American Counseling include general supervision of, and responsibility for, American Counseling’s business and financial affairs and activities and reviewing, formulating and assisting with American Counseling’s business plans and strategies. Under the direction of American Counseling’s Chief Executive Officer, I am authorized to make decisions with respect to the operation of American Counseling’s business including

¹ The Debtors in these cases, along with each Debtor’s federal tax identification number, are: SCH Corp. (20-1829454); American Corrective Counseling Services, Inc. (33-0656885); and ACCS Corp. (20-1829485). For purposes of these chapter 11 cases, the address for all Debtors is: 180 Avenida LaPata, San Clemente, CA 92673.

² SCH Corp. and ACCS Corp. are the other debtors in the above-captioned cases (collectively, with American Counseling, the “Debtors”). SCH Corp. and ACCS Corp. are holding companies with no operations. I am familiar with the business and financial affairs of all of the Debtors.

organization, human resources, logistics, finance, and administration.. In my capacities with the American Counseling, I have general knowledge of the books and records of the Debtors, and am familiar with the Debtors' financial and operational affairs.

3. I submit this Declaration in support of the "first day" motions of the Debtors (described further below and which are referred to collectively herein as the "First Day Motions"). Except as otherwise indicated, all statements in this Declaration are based upon my personal knowledge, my review of the Debtors' books and records, relevant documents and other information prepared, collected or provided by the Debtors' employees, or my opinion based on my experience with the Debtors' operations and financial conditions. If I were called to testify as a witness in this matter, I could and would competently testify to each of the facts set forth herein based upon my personal knowledge, review of documents or information, or opinion. I am authorized to submit this Declaration on behalf of the Debtors.

4. Based on my personal knowledge, and through my review of the Debtor's books, records and other information, I believe that the relief sought by the Debtors in the First Day Motions is necessary to enable the Debtors to continue to operate as debtors in possession during the course of their respective bankruptcy cases.

5. Part I of this Declaration describes the business of the Debtors and the developments that led to the filing of their chapter 11 petitions. Part II sets forth the relevant facts in support of the First Day Motions. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the First Day Motions.

PART I

Overview of Debtors' Businesses

6. The Debtors' principal business activity consists of providing educational seminars and administrative support services in connection with bad check diversion programs (the "Diversion Programs") adopted by state and local prosecutors' offices. The Diversion Programs typically allow individuals who have issued dishonored or "bad" checks (the "Participants") to avoid the prospect of criminal prosecution provided the Participant makes restitution to the victim of the bad check and attends an educational seminar. The Diversion Program seminars are designed to eliminate or modify many of the behavioral rationalizations surrounding the writing of bad checks and focus on deficiencies in the areas of personal finance, communication, and stress management. Each Participant must pay a fee for the seminar and make full restitution to the victim of the bad check.

7. In the course of their business, the Debtors have contracted with hundreds of state and local prosecutors' offices throughout the country to conduct seminars and provide administrative support in connection with the Diversion Programs adopted by such offices (the "Support Agreements").

8. Under the Support Agreements, the Debtors, among other things, (i) provide qualified instructors to conduct Diversion Program seminars, (ii) provide their proprietary seminar materials developed by the Debtors in conducting these seminars and for distribution to Participants, (iii) lease the facilities used to conduct the seminars at various locations within the jurisdiction of the applicable prosecutors' office, (iv) monitor attendance of

the seminars, and (v) communicate directly with Participants regarding scheduling, attendance, and related administrative details.

9. The Support Agreements also require the Debtors to provide assistance in developing administrative procedures to be followed with respect to the clerical and accounting functions of the applicable Diversion Program. Such procedures include, among other things: (i) maintaining thorough records to enable the generation of reports detailing the compliance and the disposition status of each Participant; (ii) maintaining a detailed current accounting record of all receipts and disbursements of the applicable Diversion Program; (iii) opening and sorting correspondence related to the Diversion Program; (iv) preparing monthly reports providing a summary of transactions and Diversion Program activity for the period; (v) maintaining physical files, computer files, and facilities required for performance under the agreements; (vi) depositing restitution payments and Diversion Program Fees in a federally insured account opened by the Debtors; and (vii) disbursing, on behalf of the applicable prosecutors' office, restitution payments owing to the victims of the bad checks. In addition, under the Support Agreements, the Debtors typically are required to implement and perform these functions.

10. The Debtors' primary compensation for their services stems from the fees paid by Participants to enroll in the Debtors' seminars. In essence, when a Participant opts to enter into the Diversion Program in lieu of risking criminal prosecution and other penalties, the Debtors and each Participant enter into an implied contractual relationship under which the Debtors are required to provide educational services in exchange for the payment of a program fee.

Overview of Debtors' Capital Structure and Outstanding Indebtedness

11. The Debtors' business is conducted through American Counseling.

American Counseling was formed on December 21, 1994 as a California corporation. American Counseling is wholly-owned by ACCS Corp., a Delaware Corporation ("ACCS"). ACCS, in turn, is wholly owned by SCH Corp., a Delaware Corporation ("SCH").

12. Prior to November 10, 2004, all of the issued and outstanding stock of American Counseling was owned by (i) Donald Mealing, individually, (ii) Donald Mealing, as trustee of the Mealing Family Trust u/t/d 8/23/95 (collectively, "Mealing"), and (iii) Lynn Hasney ("Hasney"). Additionally, Nicholas Wallner ("Wallner", and together with Mealing and Hasney, the "Owners") held an option to purchase 30% of American Counseling's outstanding stock from Mealing and Hasney (such option, together with the outstanding stock of Target held by Mealing and Hasney, the "Securities"). Also at this time, certain of the assets (the "Assets") necessary to conduct American Counseling's business were owned by Fulfillment Unlimited, Inc., ACCS Administration, Inc. and Fundamental Performance Strategies (collectively, the "Selling Companies", and together with the Owners, the "Selling Parties").

13. On September 21, 2004, the Selling Parties and Equity Pacific Advisors, LLC ("EPA") entered into a Stock, Options and Asset Purchase Agreement (the "Old Acquisition Agreement"), pursuant to which EPA agreed to purchase all of the Securities from the Owners, and to purchase the Assets from the Selling Companies. EPA subsequently established Debtor SCH and Debtor ACCS (collectively, the "Buyers") to carry out EPA's obligations under the Old Acquisition Agreement. On November 10, 2004, the Selling Parties

and the Buyers entered into an Amended and Restated Stock, Options and Asset Purchase Agreement (the “New Acquisition Agreement”), which is governed by California law.

14. The consideration paid by the Buyers to the Owners and the Selling Companies under the New Acquisition Agreement was as follows:

- To the Owners:
 - a. \$25,212,667 in immediately due and payable demand notes were issued by ACCS;
 - b. \$2,500,000 in subordinated promissory notes were issued by SCH (the “Seller Notes”).
 - c. 10,000 shares of Series B Common Stock of SCH were issued to the Owners, as follows: (i) 6,000 shares to Mealing, (ii) 1,000 shares to Hasney and (iii) 3,000 shares to Wallner.
 - d. \$1,350,000 was paid into escrow in consideration for Owners non-compete agreements and to serve as a holdback for potential claims by Buyers against Owners for indemnification under the New Acquisition Agreement.

- To the Selling Companies:
 - a. \$812,333 in cash.

15. The New Acquisition Agreement contains a standard indemnification obligation for breaches by the Owners. In addition, the Owners were required to indemnify the Buyers against all losses incurred by them in connection with certain covered litigation (“Covered Litigation Losses”). The Owners’ indemnification obligations with respect to Covered Litigation Losses were subject to a \$125,000 basket and a diminishing cap (the “Cap”)

that started at \$5,000,000. When the Buyers subsequently made a claim against the Owners for Covered Litigation Losses (i.e., when Buyers' insurance coverage for Covered Litigation Losses expired), the Cap was approximately \$2,500,000, or the amount of the Seller Notes. It is the Debtors' belief that the Cap has been exhausted by a reduction to zero, or the amount of the Seller Notes, which, based on the Debtors' understanding, are no longer outstanding, and the Owners' indemnification obligations have been completely fulfilled. Pursuant to release agreements entered into between Owners and Buyers, the indemnification obligations have now shifted such that ACCS and SCH, as Buyers, are responsible for indemnifying the Owners for their Covered Litigation Losses to the extent not covered by insurance.³

16. In order to consummate its acquisition of American Counseling, Buyers obtained financing from Levine Leichtman Capital Partners III, L.P. ("LLCP"), and Buyers, American Counseling and LLCP entered into a Securities Purchase Agreement, dated as of November 10, 2004 (as amended from time to time, the "SPA"). The SPA is governed by California law. Pursuant to the SPA, LLCP provided Buyers (i.e., ACCS and SCH) with \$27,900,000, and in exchange received the following securities⁴:

- Secured Senior Term A Discount Note Due 2009 in the aggregate principal face amount of \$21,949,091, issued by ACCS (as amended from time to time, the "Term A Note")
- Secured Senior Term B Discount Note Due 2009 in the aggregate principal face amount of \$5,487,273, issued by ACCS (as amended from

³ Defenses to any such indemnification obligations may exist and nothing herein is intended to waive any defenses or validate any claims for indemnity.

⁴ LLCP subsequently sold a 3.5842% participation interest in the following securities to Paul J. Isaac.

time to time, the “Term B Note”, and together with the Term A Note, the “Original Notes”).

- Warrant to purchase 35,000 shares of Series A Common Stock of SCH, exercisable until November 10, 2014 (the “LLCP Warrant”); and
- 30,000 Series A Preferred Shares of SCH (including all shares issued as PIK dividends in respect thereof, the “Preferred Shares”).

17. The annual interest rate on the Original Notes, which is payable monthly in arrears, is (i) 16.33% until April 1, 2007, (ii) 14.333% until April 29, 2008 and (iii) 15.833% thereafter (subject, in each case, to increase in the event of default). A portion of the interest is payable in kind as follows: (i) up to 3% until October 31, 2006, (ii) up to 2% from November 1, 2006 until the Libra Fee (defined below) is fully paid, and (iii) up to 1.5% thereafter. The Original Notes mature on October 31, 2009 and contain acceleration provisions in the event of default.

18. The LLCP Warrant gave LLCP the right to put the warrant (and/or any shares issued pursuant thereto) to ACCS under certain circumstances (including on the maturity date of the Notes). The Preferred Shares are now owned by ACCS, which purchased them from LLCP on January 9, 2008, in consideration for \$2,000,000 in cash and a Secured Senior Term C Note in the aggregate principal face amount of \$2,808,029.42 (the “Term C Note”). The Term C Note bears interest as follows: (i) 14.333% until April 28, 2008, (ii) 15.833% from April 29, 2008 until December 31, 2008 and (iii) assuming no refinancing has occurred by December 31, 2008, 14.333% thereafter. Otherwise, the Term C Note has substantially the same terms as the Original Notes.

19. The obligations of ACCS and SCH , to LLCP in their capacity as Buyers under the SPA and related documents are secured throughout the Debtors' ownership structure, including as follows:

- General and continuing guaranties (the "Guarantees") were entered into by each of SCH (a downstream guaranty) and American Counseling (an upstream guaranty) in favor of LLCP, guaranteeing all of the obligations (including payment of loans and indebtedness) of ACCS and American Counseling (as applicable) under the SPA and related documents.
- Security agreements (the "Security Agreements") were entered into by each of SCH, ACCS, and American Counseling, securing their obligations to LLCP under the SPA and related documents. These Security Agreements granted LLCP a security interest in certain of the assets of SCH, ACCS, and American Counseling (including, accounts, equipment, inventory and general intangibles).
- Pledge agreements (the "Pledge Agreements") were entered into by each of SCH, ACCS, Libra (as defined below), and EPA, pursuant to which all of the stock of each of American Counseling and ACCS, and all of the stock of SCH held by EPA and Libra, was pledged to LLCP (as is all other stock held by EPA or the Buyers in any other person).
- Security interest in certain intellectual property were entered into by each of SCH, ACCS, and American Counseling in favor of LLCP.

- Deposit account control agreements were entered into by each of SCH, ACCS, and American Counseling, granting LLCP control over their respective accounts at Union Bank of California.

20. For the transactions described above, EPA hired Libra Securities, LLC (“Libra”). As compensation for its services, Libra was issued a warrant to purchase 10,150 shares of Series B Common Stock of SCH, exercisable until November 10, 2014. The warrant, which has since been assigned to Libra FE, LP, gave Libra the right to put the warrant (and/or any shares issued pursuant thereto) to SCH under certain circumstances. SCH’s obligations to Libra have been subordinated to SCH’s obligations to LLCP pursuant to a Subordination Agreement dated as of November 10, 2004. Libra has entered into a pledge agreement in favor of LLCP, pledging its rights in the warrant to secure the Buyer’s obligations under the SPA and related documents.

21. On October 31, 2005, LLCP made a \$700,000 bridge loan to ACCS and received a 16.333% Secured Senior Bridge Note. The bridge loan matured on July 31, 2006 and has since been repaid in full. Also on October 31, 2005, ACCS issued 7% Unsecured Subordinated Promissory Notes to three of its executives and SCH issued a similar note to one of its executives (who are all employees of EPA) in the aggregate amount of approximately \$28,500, in satisfaction of the fee for their services for October 2005. Each of ACCS and SCH was entitled to issue similar notes (collectively with the October notes, the “Management Notes”) to these executives for the pay periods ending on November 2, 2005, January 11, 2006, February 8, 2006 and March 10, 2006. The Management Notes were subordinated to the 16.333% Secured Senior Bridge Note and the other obligations of ACCS to LLCP.

22. The current ownership structure of SCH as a result of the transactions described above as well as the outstanding amounts due to LLC as of December 31, 2008 are reflected in the following tables:

Current Ownership

Name	Type of Security Owned	Number of Shares Held	Ownership Percentage (Fully Diluted)
Equity Pacific Advisors, LLC	Series A Common Stock	44,850	41.26%
Levine Leichtman Capital Partners III, L.P.	Warrant to purchase Series A Common Stock	35,000 (assumes full exercise of warrant)	32.20%
Libra FE, LP	Warrant to Purchase Series B Common Stock	10,150 (assumes full exercise of warrant)	9.34%
Employee Stock Option Pool	Series B Common Stock	8,700	8.00%
Mealing	Series B Common Stock	6,000	5.52%
Wallner	Series B Common Stock	3,000	2.76%
Hasney	Series B Common Stock	1,000	0.92%

Current Debt Outstanding to LLC

Type of Obligation	Approximate Amount Outstanding at 12/31/08⁵
Secured Senior Term Notes ⁶	\$32,132,008.08

⁵ All debt amounts stated herein are subject to reconciliation.

⁶ This total represents the amount claimed to be owed by LLC, which total the Debtors dispute. As noted above the maker of the Secured Senior Term Notes are ACCS, The Secured Senior Term Notes are guaranteed by SCH

Legal Fees and Expenses ⁷	\$71,505.47
Total	\$32,203,513.55

Events Leading to the Chapter 11 Filings

23. Although the Debtors believe that their businesses are fundamentally sound and healthy, unresolved litigation, certain defaults under the SPA, and actions taken by LLCPC have led the Debtors to file these chapter 11 cases.

A. Class Action Litigation

24. The Debtors are defendants in various federal class action suits (the “Class Actions”) which are summarized below. The Class Actions relate, in part, to how business was conducted by the Selling Parties before the Buyers acquired the business and made operational changes to it. The Debtors believe that the Class Actions have no merit, but the expense of defending this litigation has financially drained the Debtors.

25. In Del Campo v. American Corrective Counseling Services, Case No. 01-21151-JW (N.D. Cal.), plaintiffs allege that the Diversion Programs operated by the Debtors for various California District Attorneys violate the Fair Debt Collection Practices Act (the “FDCPA”), 15 U.S.C. §1692 et seq., as well as California's unfair trade practices act. Plaintiffs

and American Counseling. Nothing herein is intended to validate the debt owing under the Secured Senior Term Notes or the perfection of any alleged security interests with respect thereto, and the Debtors reserve all rights, claims, and objections to the debt, any alleged security, and as against LLCPC.

⁷ Incurred by LLCPC in enforcing its rights under the SPA and related documents, and payable by American pursuant to Section 8.6 of the SPA. This amount is as of November 30, 2008. The Debtors reserve the right to contest the reasonableness of these fees.

contend that the Debtors unlawfully mail "collection letters" on district attorneys' letterhead and falsely threaten check writers with criminal prosecution unless the check writers pay certain fees and attend a financial accountability class. ACCS contends that the Diversion Programs are law enforcement programs wherein the local prosecutor offers bad check offenders the opportunity to be diverted from criminal prosecution and, therefore, that the programs are not governed by or subject to the FDCPA. In December 2008, the court certified a class of approximately 900,000 California residents who were contacted by the Debtors in connection with Diversion Programs.

26. In Rosario v. American Corrective Counseling Services, Case No. 2:01-CV-221-FtM-29DNF, (M.D. Florida), plaintiffs allege that the Diversion Programs operated by the Debtors for various Florida District Attorneys violate the FDCPA, as well as Florida's consumer collection practices act. Plaintiffs contend that the Debtors unlawfully mail "collection letters" on the district attorneys' letterhead and falsely threaten check writers with criminal prosecution unless the check writers pay certain fees and attend a financial accountability class. The Debtors contend that the bad check diversion programs are law enforcement programs wherein the local prosecutor offers bad check offenders the opportunity to be diverted from criminal prosecution and, therefore, that the programs are not governed by or subject to the FDCPA.

27. Cross-motions for summary judgment were filed in early 2008 and are scheduled to be heard on January 20, 2009. The district court also indicated that it intends to hold a pretrial conference that same day, and set a tentative trial date of March 2, 2009. Class certification was briefed in November 2005 but has never been decided, and it is unclear whether the district court will require the parties to supplement the class certification briefing.

28. In Hamilton v. American Corrective Counseling Services, Case No. 3:05-CV-434 (N.D. Indiana), plaintiffs allege that the Diversion Programs operated by the Debtors for various Indiana District Attorneys violate the FDCPA, as well as Indiana common law. Plaintiffs contend that the Debtors unlawfully mail "collection letters" on district attorneys' letterhead and falsely threatens check writers with criminal prosecution unless the check writers pay certain fees and attend a financial accountability class. The Debtors contend that the Diversion Programs are law enforcement programs wherein the local prosecutor offers bad check offenders the opportunity to be diverted from criminal prosecution and, therefore, that the programs are not governed by or subject to the FDCPA.

29. In 2007, the district court certified a class of approximately 40,000 Indiana residents who were contacted by the Debtors in connection with Diversion Programs. Cross-motions for summary judgment have been fully briefed and pending before the court for over a year.

30. In Cataquet v. American Corrective Counseling Services, Case No. 3:08-CV-1175 (M.D. Penn.), plaintiffs allege that the Diversion Programs operated by the Debtors for various Pennsylvania District Attorneys violate the FDCPA, as well as Pennsylvania's unfair trade practices act. Plaintiffs contend that the Debtors unlawfully mail "collection letters" on district attorneys' letterhead and falsely threaten check writers with criminal prosecution unless the check writers pay certain fees and attend a financial accountability class. The Debtors contend that the Diversion Programs are law enforcement programs wherein the local prosecutor offers bad check offenders the opportunity to be diverted from criminal prosecution and, therefore, that the programs are not governed by or subject to the FDCPA.

31. The case is in the early pleadings stage, and an initial case management conference with the district court is scheduled for January 27, 2009.

B. Declarations of Default under SPA and Other Actions of LLCP

32. On August 12, 2008, September 2, 2008, October 22, 2008, November 3, 2008, December 2, 2008, and January 5, 2009, LLCP informed the Debtors in writing that the Debtors were in default under the SPA (the "Default Notices"). The Default Notices related to, inter alia, alleged violations of the "Minimum EBITDA" and "Minimum Fixed Charge Coverage Ratio" covenants contained in the SPA. On January 12, 2009, LLCP provided the Debtors with an additional default notice and demanded the immediate payment in full of \$32,203,513.55 under the SPA. Also on January 12, 2009, LLCP provided the Debtors with written notice of its intent to foreclose on the stock of American Counseling pledged as collateral in connection with the SPA (the "Pledged Stock") on January 19, 2009 (the "Foreclosure Notice").

33. Prior to sending the Foreclosure Notice, LLCP informed that Debtors that unless the Debtors voluntarily sought bankruptcy protection by January 19, 2009, LLCP would accelerate the indebtedness under the SPA and foreclose on the Pledged Stock. During these communications, LLCP cited its increasing concerns with the Debtors' potential liability with respect to the Class Actions. Specifically, LLCP expressed its unwillingness to risk an adverse ruling being entered against the Debtors at a Class Action summary judgment hearing scheduled on January 20, 2009. Although the Debtors vigorously attempted to reach a resolution with LLCP and to address their concerns, LLCP refused to rescind the Foreclosure Notice. Faced with an impending foreclosure of the Pledged Stock and an attendant loss of control of their businesses, the Debtors filed these cases.

PART II

First Day Motions

34. In connection with the filing of these cases, the Debtors have requested certain relief through the First Day Motions. The relevant facts in support of the First Day Motions follow below.

Employee Motion

35. The Debtors have filed a motion for entry of an order, pursuant to Bankruptcy Code sections 105(a), 363, and 507(a), authorizing the Debtors to: (i) pay prepetition wages, salaries, commissions, employee benefits and other compensation; (ii) remit withholding obligations; (iii) maintain employee benefits programs and pay related administrative obligations; and (iv) authorize the Debtors' banks and other financial institutions to receive, process, honor and pay certain checks presented for payment and to honor certain fund transfer requests related to the foregoing (the "Employee Motion").

A. Wages, Salaries and Other Compensation

36. In the ordinary course of their businesses, the Debtors incur payroll and various other obligations and provide other benefits to their employees for the performance of services. The Debtors currently employ approximately 292 full-time and part-time employees in hourly, salaried, exempt, non-exempt, supervisory, management and administrative positions to perform the functions necessary to effectively and efficiently operate the Debtors' business. Of these employees, approximately 57 are salaried employees and approximately 235 are hourly employees. The Debtors also currently utilize approximately 2 temporary employees (together

with the hourly and salaried employees, collectively, the “Employees”).⁸ American Corrective Counseling Services, Inc. (“American Counseling”) is the Debtor entity which employs the Employees.

37. In addition, American Counseling’s Chairman, Chief Executive Officer, and Chief Operating Officer, are employed by non-Debtor Equity Pacific Advisors, LLC (“EPA”) (collectively the “EPA Employees”). The Debtors pay EPA a monthly management fee (the “Management Fee”), equaling the aggregate amount of the monthly wages paid to the foregoing employees of EPA and EPA, in turn, uses the Management Fee to pay the monthly wages of the EPA Employees. The Debtors also utilize the services of an independent contractor to provide accounting services (the “Independent Contractor”) to whom the Debtors pay weekly wages (the “Independent Contractor Wages”).

38. The Debtors have costs and obligations in respect of the Employees, the EPA Employees, and the Independent Contractor relating to the period prior to the Petition Date. In certain instances, these costs and obligations are outstanding and due and payable, and in other instances these costs and obligations will become due and payable in the ordinary course of the Debtors’ businesses on and after the Petition Date.

39. American Counseling pays the Employees on a bi-weekly basis, one week in arrears. The bi-weekly payroll for all Employees (other than temporary employees who are provided by temporary agencies) is approximately \$237,585.42. American Counseling funds

⁸ Temporary employees are provided through one or more temporary agencies. The applicable Debtor pays the applicable agency who, in turn, pays the temporary employee provided by such agency. As indicated, for purposes of this Motion, temporary employees are included within the definition of “Employees.” Consequently, the Debtors seek authority to pay the temporary agencies for work done by the temporary employees prior to the Petition Date.

approximately 70% of its Employee payroll obligations on the Thursday immediately preceding the Friday on which Employees are paid. Approximately 25% of the payroll obligations (pertaining to payroll taxes) are funded on the Friday on which Employees are paid. The remaining 5% of the Debtors' Employee payroll obligations (pertaining to the withholdings for the Debtors' 401(k) plan) are funded on the Monday following the Friday on which Employees are paid.

40. The Debtors pay their part-time and full-time Employees on either an hourly wage or salaried basis. Hourly employees (other than temporary employees) are paid on a bi-weekly basis, one week in arrears. American Counseling's average bi-weekly gross payroll for all of its hourly employees is approximately \$106,238.60 (the "Hourly Wages"). Hourly employees were last compensated on January 9, 2009 (the "Last Pay Date") for the pay period beginning on December 21, 2008 and ended January 3, 2009. The most recent pay period for all hourly employees terminated on January 17, 2009, covering the period from January 4, 2009 through January 17, 2009, with payment scheduled for January 23, 2009. This entire pay period occurred before the Petition Date. The Debtors therefore estimate that they have accrued and unpaid Hourly Wages in respect of the period prior to the Petition Date aggregating approximately \$120,163.67 (the "Unpaid Hourly Wages").

41. American Counseling's average bi-weekly gross payroll for all of its salaried employees (excluding temporary employees) is approximately \$131,346.83 (the "Salaried Wages" and, together with the Hourly Wages, the "Wages"). Salaried employees of the Debtors are paid bi-weekly, with the most recent payment occurring on the Last Pay Date (*i.e.* January 9, 2009) for the pay period beginning on December 21, 2008 and ended January 3,

2009. The most recent pay period for all salaried Employees terminated on January 17, 2009, covering the period from January 4 through January 17, with payment scheduled for January 23, 2009. This entire pay period occurred before the Petition Date. American Counseling estimates that its accrued and unpaid Salaried Wages for the period prior to the Petition Date aggregates approximately \$131,346.83 (the “Unpaid Salaried Wages” and, together with the Unpaid Hourly Wages, the “Unpaid Wages”). This amount reflects the gross obligation and includes Trust Fund Taxes (as such term is defined herein) that must be remitted to the applicable taxing authorities. American Counseling seeks authority to pay the Unpaid Wages and remit Trust Fund Taxes in the ordinary course of business.

42. All of American Counseling’s employees are eligible to earn performance bonuses (the “Bonuses”). Employees within the “Recovery Department,” are eligible to receive Bonuses based on, among other factors, the amount of money recovered through the bad check diversion programs administered by the Debtors in cooperation with state and local prosecutors’ offices in the preceding year. Such Employees, however, must remain employed with the Debtors as of January 16, 2009, to qualify for these Bonuses. Employees within the Debtors’ Sales Department are eligible to receive Bonuses based on targets related to sales growth. Employees performing instructional services in connection with the Debtors’ bad check diversion seminars are eligible to receive Bonuses based on, among other factors, the seminar class size and the location of seminars. Employees within the Debtors’ “New Diversion” department, which engages in product development, are eligible to receive Bonuses based on, among things, the achievement of certain performance goals. As of the Petition Date, the Debtors estimate that the amount of accrued but unpaid Bonuses earned during the 180 days

prior to the Petition Date aggregates approximately \$30,800. The Bonuses are due to be paid by the Debtors on January 23, 2009.

43. As of the Petition Date, the Debtors estimate that their Unpaid Wages and Bonuses aggregate approximately \$282,310.50. No Employee has a claim for his or her Unpaid Wages and Bonus in excess of the \$10,950 priority limit set forth in Bankruptcy Code section 507(a)(4).

44. The monthly Management Fee paid to EPA on behalf of the EPA Employees totals approximately \$60,800. As of the Petition Date, the Debtors estimate that they have no unpaid Management Fees.

45. The weekly Independent Contractor Wages paid by the Debtor total approximately \$450. The Debtors estimate that the unpaid Independent Contractor Wages aggregate approximately \$900 (the "Unpaid Independent Contractor Wages").

46. The Debtors maintain two payroll Bank Accounts. The only active payroll accounts for Employees is maintained at Bank of America.⁹ American Counseling issues payroll to its Employees every other Friday. All Employees are paid through direct deposit or by paper check. The Debtors estimate that the aggregate amount of the outstanding checks is \$2,426 and that, when the amount due to any Employee for prior checks is added to the payroll that will be made on January 23, 2009, no single Employee who has an outstanding check is owed more than \$10,950 for salary or wages earned prior to the Petition Date.

47. American Counseling employs temporary employees, provided through temporary agencies, at certain of its facilities. Generally, American Counseling receives weekly

⁹ There is a payroll Bank Account maintained at Union Bank, but it is inactive.

invoices from the temporary agencies, and, upon receipt of payment from American Counseling, the temporary agencies in turn pay the temporary employees they provide. American Counseling believes that it is necessary to pay all obligations to the temporary agencies (the “Temporary Agency Obligations”) so that these agencies will continue to provide adequate staffing for American Counseling. As stated above, American Counseling currently utilizes two temporary employees. American Counseling estimates that the total accrued and unpaid Temporary Agency Obligations as of the Petition Date aggregate approximately \$11,826 (the “Unpaid Temporary Agency Obligations”).

48. American Counseling’s payroll is administered by Paychex, Inc. (“Paychex”). As of the Petition Date, American Counseling does not believe it owes Paychex any unpaid fees with respect to Paychex’s processing of American Counseling’s payroll and administration of Withholding Obligations (defined below).

B. Withholding Obligations

49. In the ordinary course of business, American Counseling routinely withhold from Wages certain amounts that American Counseling is required to transmit to third parties for such purposes as Social Security and Medicare, federal and state or local income taxes, contributions to the Debtors’ Health and Welfare Plans (defined below), 401(k) contributions, garnishment, child support, or other similar obligations pursuant to court order (collectively, the “Withholding Obligations”). Paychex administers certain Withholding Obligations for the Employees while American Counseling administers other Withholding Obligations, such as 401(k) contributions and matches and charitable contributions by Employees.

50. Paychex provides the scheduled Withholding Obligations to American Counseling on a bi-weekly basis. American Counseling funds the Withholding Obligations (i) in part on the Thursday immediately preceding the day on which Employees are paid, (ii) in part on the Friday on which Employees are paid, and (iii) in part on the Monday following the Friday on which Employees are paid, by depositing the required funds into the payroll account. Promptly following the deposit of the Withholding Obligations, the Withholding Obligations administered by Paychex are remitted to the appropriate recipients. The Withholding Obligations to be administered by Paychex with respect to (and that are included within) the gross amount of Unpaid Wages covered by this Motion aggregate approximately \$46,091.70. Separate from the Withholding Obligations administered by Paychex, the 401(k) Withholding Obligations administered by American Counseling are transferred by American Counseling to the administrator of American Counseling 401(k) plan on the Monday following each Friday on which Employees are paid.

51. American Counseling believes that funds withheld on behalf of their Employees that remain in the Debtors' possession are not property of the Debtors' estates. Following the Petition Date, American Counseling will be holding Withholding Obligations for the benefit of its Employees. These Withholding Obligations will include, among other items, (i) approximately \$9,000 in Employee 401(k) contributions (excluding matching contributions), for the January 23, 2009 payroll, and (ii) Withholding Obligations for taxes and other items described in paragraph 23 above in the estimated amount of \$46,091.70, of which approximately \$26,566.04 are for taxes that will be deposited with Paychex and that relate to the January 23, 2009 payroll.

C. Business Expense Reimbursements

52. American Counseling customarily reimburses Employees who incur business expenses in the ordinary course of performing their duties on behalf of the Debtors. Such expenses typically include, but are not limited to, business-related travel expenses, including hotel and meal charges, relocation expenses, and business telephone calls (the “Reimbursement Obligations”). It is difficult for American Counseling to determine the exact amounts of Reimbursement Obligations that are due and owing for any particular time period since the expenses incurred by Employees on behalf of American Counseling throughout the year vary on a monthly basis and because there may be some delay between when an Employee incurs an expense and submits the corresponding expense report for processing. As of the Petition Date, American Counseling estimates that it owes approximately \$35,000 of Reimbursement Obligations for all Employees.

D. Health and Welfare Benefits for Employees

53. American Counseling provides several health and welfare benefit plans (the “Health and Welfare Plans”) to full-time salaried and hourly Employees (other than temporary employees).¹⁰

Medical, Dental and Prescription Drug Benefits

54. American Counseling provides Employees with medical and dental benefits. Regularly scheduled full-time Employees who have completed 90 days of continuous service with American Counseling are eligible to enroll in group health and dental coverage on a

¹⁰ For purposes of the following discussion of Health and Welfare Plans, the term “Employees” excludes temporary employees.

pre-tax basis. Single and family coverage is offered by American Counseling. Coverage becomes effective the first day of the first month following the 90 days of continuous service. Employees are responsible for a portion of the cost of insurance, while American Counseling pays a significant portion of the cost.

55. Employees of American Counseling participate in a medical and prescription drug care plan sponsored by Aetna Life Insurance Company (the “Aetna Plan”), which is a fixed premium health plan. Each pay period, eligible Employees make contributions for the Aetna Plan for themselves and/or their dependents. Employees incur average monthly costs aggregating \$15,000. American Counseling incurs average monthly costs of \$19,560.99 per month with respect to premium payments pursuant to the Aetna Plan, which amount is paid in advance. American Counseling is current on all payments under the Aetna Plan. American Counseling requests authority to continue this policy in the ordinary course of business subject to the terms thereof.

56. American Counseling’s Employees participate in a dental care plan sponsored by Aetna Life Insurance Company (the “Dental Plan”), which is a fixed premium plan. Each pay period, eligible Employees make contributions for the Dental Plan for themselves and/or their dependents. Employees incur average monthly costs aggregating \$1,948.18. American Counseling incurs average monthly costs of \$2,582.48 per month with respect to premium payments pursuant to the Dental Plan, which amount is paid in advance. American Counseling is current on all payments under the Dental Plan.

57. Employees participate in a vision care plan sponsored by VSP (the “Vision Plan”), which is a fixed premium plan. Each pay period, eligible Employees make

contributions for the Vision Plan for themselves and/or their dependents. Employees incur average monthly costs aggregating \$336.58. American Counseling incurs average monthly costs of \$446.17 per month with respect to premium payments pursuant to the Vision Plan, which amount is paid in advance. American Counseling is current on all payments under the Vision Plan.

Disability, Life and Accidental Death and Dismemberment Insurance

58. American Counseling offers Employees life insurance (“Life Insurance”) and accidental death and dismemberment coverage (“ADD Coverage”) through Aetna Life Insurance Company (“Aetna”).

59. Full-time Employees are eligible for Life Insurance and ADD Coverage. American Counseling pays monthly premiums equal to \$2.85 per enrolled full-time Employee in respect of the Life Insurance and ADD Coverage. American Counseling currently provides approximately 117 Employees with Life Insurance and ADD Coverage. The monthly premium cost due to Aetna in respect of these policies is approximately \$312.51 per month. American Counseling is current on all payments for Life Insurance and ADD Coverage.

E. Paid Time Off

60. American Counseling offers paid time off (“PTO”) to Employees (other than temporary employees), consisting of, among other things, vacation time, paid holiday, sick days and personal days.

61. Vacation Time. Following 90 days of continuous service, full-time Employees accrue paid vacation time at a rate of 4.44 hours per month for the fourth through the twelfth month of service. Upon completion of the first full year of continuous employment, full-

time Employees accrue paid vacation time at a rate of 6 2/3 hours per month. Upon completion of five full years of continuous service, full-time Employees accrue paid vacation time at a rate of 10 hours per month. Following 90 days of continuous service, part-time Employees who work a minimum of 30 hours per week accrue paid vacation time at a rate of 3 1/3 hours per month. Certain key employees accrue vacation time at a rate of 10 hours per month regardless of their length of service.

62. Paid Holidays. Hourly and Salaried Employees receive ten paid holidays per fiscal year.

63. Choice Time. All full-time Employees are eligible for paid sick or personal days (“Choice Time”). Full-time Employees accrue Choice Time at a rate of 3.33 hours per month beginning on the fourth month of continuous employment. The maximum amount of Choice Time Employees are allowed to accrue is five days..

F. 401k Plan

64. American Counseling offers a 401(k) retirement plan (the “401(k) Plan”) to Employees. The 401(k) Plan offered by American Counseling allows for participation by Employees (other than temporary employees) after one hour of service. Enrollment into the 401(k) Plan takes place on a quarterly basis. The Debtors make matching contributions of 50% of Employee contributions (of up to 6% of the Employees’ earnings). Employees are vested in company matching contributions at a rate of 20% per year.

65. American Counseling’s monthly contribution to the 401(k) Plan, including matching contributions, is approximately \$22,000, which is an average of approximately \$354.84 per Employee participating in the 401(k) Plan. The average monthly matching contribution is

\$5,000. For the 2009 calendar year, American Counseling estimates that it will be required to transfer approximately \$204,000 in contributions for participating Employees to the 401(k) Plan and approximately \$60,000 in matching contributions made by American Counseling. American Counseling estimates that its Withholding Obligations for contributions for participating Employees are current as of the Petition Date. The estimated matching obligation as of the Petition Date is also.

G. Flexible Spending Accounts

66. American Counseling offers Employees (other than temporary employees) flexible spending accounts (“FSAs”) to put aside money tax-free to pay for eligible medical and dependent care costs. An eligible Employee’s FSA deduction is taken out of his or her paycheck each pay period and put in an account to be used for eligible expenses through the year. The FSA program is administered by Conexis and under applicable IRS guidelines and regulations. American Counseling incurs costs of approximately \$300 to \$500 per month with respect to processing and administering claims with respect to the FSAs.

H. Workers’ Compensation Insurance

67. Under the laws of various states, American Counseling is required to maintain workers’ compensation insurance to provide its Employees with coverage for claims arising from or related to their employment with the Debtors. A medical leave of absence may be granted to eligible Employees who are unable to work due to work-related disability. Payment for medical leave of absence is governed by the Employee’s state of employment under that state’s Workers Compensation Laws.

68. American Counseling maintains a workers' compensation program (the "Workers' Compensation Program") with Everest Insurance Company at an annual cost of \$44,836.69, which is paid in periodic installments. The Workers' Compensation Program is renewed on May 1 of each year and runs through April 30 of the following year. American Counseling estimates that as of the Petition Date, it owes \$4,132.32 on account of premiums for the Workers Compensation Program (the "Unpaid Workers Compensation Premium").

Cash Management Motion

69. The Debtors have filed a motion for entry of an order (A) authorizing (i) the maintenance of existing bank accounts (the "Bank Accounts"), including the authority to pay routine prepetition banking fees owed to financial institutions, (ii) the continued use of existing business forms, and (iii) the continued use of the existing cash management system for the Debtors, (B) providing administrative priority to postpetition intercompany claims, and (C) waiving Bankruptcy Code section 345(b) deposit and investment guidelines (the "Cash Management Motion").

A. The Cash Management System

70. The Debtors' cash management system (the "Cash Management System") is an integrated network of Bank Accounts that facilitates the timely and efficient collection, management and disbursement of funds used in the Debtors' business. Participants make restitution to the victims through the Debtors who collect and remit those payments on behalf of the victims -- in effect functioning as agent of the applicable prosecutors' office. Thus, much of the funds handled by the Debtors are in the nature of trust funds. Because of the nature of the Debtors' business and the disruption to the business that

would result if they were forced to close these accounts, it is critical that the existing Cash Management System remain in place.

71. The Debtors maintain two types of Bank Accounts: (A) Jurisdiction Accounts (defined below) and (B) Operating Accounts (defined below). As noted above, the Support Agreements require the Debtors to establish federally insured Bank Accounts to receive payments from Participants in the Diversion Programs (the "Participant Payments"). For each Support Agreement, the Debtors maintain a jurisdiction account within the geographical jurisdiction of the relevant prosecutors' office (the "Jurisdiction Accounts"). The Debtors receive Participant Payments from Participants on a daily basis and those payments are deposited into the Jurisdiction Accounts where they are held until disbursed in accordance with the procedures described below. The Participant Payments are received electronically through credit cards, automatic clearing houses ("ACH"), and Western Union. The Participant Payments are also received manually via money order, cashiers check, and personal check converted into an ACH transfer. Approximately 70% of Participant Payments are received electronically, while the remaining 30% are received manually.

72. The Participant Payments include the following: (i) restitution payments owing to the victims of the Participants' bad checks (the "Restitution Payments"), (ii) fees for enrollment in the seminars provided by the Debtors under the Diversion Programs (the "Seminar Fees"); (iii) convenience fees charged by the Debtors for certain services (the "Convenience Fees"); and (iv) administrative fees a portion of which is owed to the applicable prosecutors' office and a portion of which is owed to the Debtors (the "Administrative Fees").

73. The Jurisdiction Accounts and Operating Accounts are more fully described below.

B. Jurisdiction Accounts

74. As indicated on Exhibit A of the Cash Management Motion, 157 Jurisdiction Accounts are maintained with Bank of America, two are maintained with the Bank of Hawaii, and one Jurisdiction Account is maintained with each of First Commonwealth Bank, JPMorgan Chase, and Wells Fargo.

75. Whether received electronically or manually, all Participant Payments are logged into the Debtors' proprietary bank account management system (the "Super System"). Reports generated by the Super System are utilized to manage the Jurisdiction Accounts. All electronic payments are first cleared daily through the Debtors' Bank of America Instant Payment Account (account number 000747940652), described below and transferred the same day into the appropriate Jurisdiction Account. All manual payments are deposited directly into the appropriate Jurisdiction Account.

76. As noted above, Participant Payments include Restitution Payments owed to the Debtors, to victims of bad checks (the "Merchants"), and Administrative Fees owed to prosecutors' offices. Reports generated by the Super System indicate the amounts owed to the Debtors -- as distinct from the Merchants and prosecutors' offices -- under the Support Agreements. At least once per week, the Debtors transfer their earned portion of Participant Payments from the Jurisdiction Accounts to the Debtors' General Checking Account maintained with Bank of America (account number 00074714104), described below.

77. Reports generated by the Super System also indicate the amount of Restitution Payments owing to Merchants. With respect to large Merchants, the Debtors remit the Restitution Payments owing to such Merchant's on a weekly basis. To effect such transfers, the Restitution Payments are first transferred from the applicable Jurisdiction Account to the Debtors' Merchant account maintained with Bank of America (account number 000747561821), described below. From this account, the Restitution Payments are then transferred to the Merchant via wire payment or manual check. With respect to smaller Merchants, the Debtors remit the Restitution Payments on a monthly basis, usually on the fifth business day following the end of each month. These Merchants' Restitution Payments are sent via manual check drawn directly from the applicable Jurisdiction Account.

78. Generally, the Debtors remit payments of Administrative Fees owing to prosecutors' offices, the Debtors remit such payments on a monthly basis.¹¹ All Administrative Fees owing to prosecutors' offices are paid via manual check drawn directly from the respective Jurisdiction Account.

79. The Debtors' do not consider the Restitution Payments owing to Merchants or the Administrative Fees owing to prosecutors' offices to be the Debtors' property. Rather, these monies are in the nature of trust funds that the Debtors hold on behalf of the Merchants and prosecutors' offices until remitted. It is essential to the survival of the Debtors' business that the flow of funds owing to the Debtors, the Merchants, and prosecutors' offices not be interrupted.

¹¹ Certain prosecutors' offices have elected to receive their Administrative Fees less frequently while others have elected to donate their Administrative Fees to charities of their choice. In such instances, the Debtors remit the donations directly to the respective charities.

C. Operating Accounts

80. In addition to the Jurisdiction Accounts, the Debtors maintain 18 operating accounts (the “Operating Accounts”). The Operating Accounts are maintained with Bank of America and Union Bank. Although Union Bank was the Debtors’ primary banking institution until 2008, the Debtors have since transferred substantially all of their operational banking activity to Bank of America. Each of the Debtors’ Operating Accounts is described below.

Bank of America – General Checking (00074714104) – California

81. The Bank of America General Checking Account currently serves as the primary source of cash flow for the Debtor American Corrective Counseling Services, Inc. (“American Counseling”). This account serves the following functions: (i) receiving cash in-flow from the Jurisdiction Accounts; (ii) funding operations with transfers to other Bank of America accounts for items such as payroll, bank fees, and ACH payments; (iii) distributing weekly accounts payable checks; (iv) making ACH transfers for certain recurring operating expenditures such as postage expense. Current check volume from this account is approximately fifty checks per week.

Bank of America – Libor Premium Money Market Savings (457003741171) – California

82. The Bank of America Libor Premium Money Market Savings Account serves as a vehicle to increase the value of American Counseling’s surplus cash. This account is currently inactive with a zero balance. The Debtors’ management is analyzing the usefulness of this account and is considering closing the account during 2009.

Bank of America – Merchant (000747561821) – California

83. The Bank of America Merchant Account is a zero balance account used by American Counseling solely for the distribution of Restitution Payments to large Merchants on a weekly basis. Funds are transferred to this account from the Jurisdiction Accounts. There are approximately fifteen large Merchants paid through this account on a weekly basis.

Bank of America – ACCS General (000747367800) – California

84. The Bank of America ACCS General Account is referred to by the Debtors as the “ZBA Account.” This is a zero balance account previously used by American Counseling to fund the payroll, chargeback, and caps-postage accounts using the zero balance service. As described below, American Counseling’s payroll, chargeback, and caps postage accounts are now funded directly from the Bank of America General Checking Account. The ZBA Account continues to serve as American Counseling’s source for ACH and wire transfers outside of Bank of America to fund such items as expense reimbursements to employees and management fees. Funding for this account originates from transfers out of the Bank of America General Checking Account. Cash out-flows from this account occur via automatic zero balance transfers.

Bank of America – Payroll (000747940591) – California

85. The Bank of America Payroll Account is used for the funding of American Counseling’s bi-weekly payroll. Every other week, American Counseling’s payroll provider (Paychex, Inc.) debits the Bank of America Payroll Account for American Counseling’s payroll and related taxes on Thursday and Friday respectively. In addition to the standard bi-weekly payroll expenses, this account is also used to periodically pay for

items such as payroll corrections, advances, and termination pay checks. The Bank of America Payroll Account is funded from the Bank of America General Checking Account.

Bank of America – Instant Payments (000747940652) – California

86. The Bank of America Instant Payments Account is used by American Counseling for receiving electronic payment settlements from Diversion Program Participants via ACH, credit card (other than Discover), and Western Union. Settlements received in this account are transferred to the Jurisdiction Accounts once or twice per week. Transfers to the Jurisdiction Accounts are completed by the accounting department and reconciled to the Super System reports. No other cash out-flow or in-flow activity occurs in the Bank of America Instant Payment Account.

Bank of America – Chargeback (000747140651) – California

87. The Bank of America Chargeback Account is a zero balance account used by American Counseling solely for the funding of ACH and credit card fees charged for the processing of ACH and credit card payments. These charges are directly related to the settlements received in the Bank of America Instant Payments Account. On a weekly basis, American Counseling transfers funds directly from the Bank of America General Checking Account to the Chargeback Account to fund these ACH and credit card fees.

Bank of America – Caps-Postage (000747961824) – California

88. The Bank of America Caps-Postage Account is a zero balance account used by American Counseling solely for the funding of postage expense charged by the United States Postal Service. On a weekly basis, the Debtors transfer funds directly from the Bank of America General Checking Account to fund these expenses.

Bank of America – BIX (000747669275) – California

89. The Bank of America BIX Account originally served as a vehicle to increase the value of American Counseling's surplus cash. This account is currently inactive with a zero balance. The Debtors' management is analyzing the usefulness of this account and is considering closing the account during 2009.

Bank of America – ACCS Corp General (000747961881) – California

90. The Bank of America ACCS Corp. General Account serves as the primary source of cash flow for Debtor ACCS Corp. The primary functions of this account include sending wire payments to third parties for interest payments and management fees as they become payable.

Bank of America – SCH Corp General (000747061833) – California

91. The Bank of America general account for SCH Corp. serves as the primary source of cash flow for Debtor SCH Corp. The main functions of this account include sending wire payments to a third party for management fees. All transfers to the SCH Corp. general account are initiated by the accounting supervisor or controller, and are authorized by the Debtors' CFO and CEO.

Union Bank – Special Deposit Account (0480014847) – California

92. The Union Bank Special Deposit Account is referred to by the Debtors as their "Union Bank General Account." This account historically served as the primary source of cash flow for the Debtors. This account receives zero balance transfers from the Debtors' Union Bank instant payments account related to Participant Payments made through Discover credit cards. On a periodic basis, the Debtors transfer the funds in this account to

the applicable Jurisdiction Accounts via the Debtors' general account maintained with Bank of America. Due to control agreements with the Debtors' investment group, the Debtors have left this account open. As of the Petition Date, the Union Bank General Account is active with minimal activity.

Union Bank – ZBA Account (0480031318) – California

93. The Union Bank ZBA account is referred to by the Debtors as the “Union Bank Instant Payments Account.” This account is used for receiving electronic payment settlements from Diversion Program Participants via ACH, credit card, and Western Union wire. Settlements received in the Instant Payments Account are automatically transferred to other Operating Accounts on a daily basis using the zero balance transfer service. The funds are then transferred to the appropriate Jurisdiction Accounts. No other cash out-flow or in-flow activity occurs in the Union Bank Instant Payments Accounts. As of the Petition Date, the Union Bank Instant Payments Account has minimal activity.

Dormant Union Bank Accounts

94. The Debtors also maintains the following dormant accounts with Union Bank: (i) Union Bank – Special Deposit Account (0480029623) – California (maintained by American Counseling); (ii) Union Bank – Fees Account (0480031296) – California (maintained by American Counseling); (iii) Union Bank – Liles Settlement Account (0480035305) – California (maintained by American Counseling); (iv) Union Bank – ACCS Corp. Special Deposit Account FBO LLC (0480029593) – California (maintained by ACCS Corp.); and (v) Union Bank – SCH Corp. Special Deposit Account FBO LLC (0480029593) – California (maintained by SCH Corp.) (collectively the “Dormant

Accounts”). The Dormant Accounts have zero balances and remain open because they are subject to certain control agreements with the Debtors’ lenders. Because these accounts are dormant and unfunded, the Debtors propose to close them.

95. Maintenance of the forgoing Bank Accounts is absolutely critical to the successful operation of the Debtors’ business because it is essential that the prosecutors’ offices that have Support Agreements with the Debtors and Merchants who expect Restitution Payments from the Debtors have confidence that funds will not be delayed or misdirected. Any interruption in payment could jeopardize the Debtors’ relationships with the prosecutors’ offices and shake the confidence of those who rely upon the integrity of the Debtors’ procedures. In this regard, as discussed above, the Debtors have developed a seamless method of transferring Restitution Payments owing to Merchants and Administrative Fees owing to prosecutors’ offices through the Jurisdiction Accounts. The Jurisdiction Accounts are such a specialized system of cash management that they can be managed only via the Debtors’ own proprietary Super System. Disruption of this complex system of over 150 accounts would threaten the timely remittance of Merchant funds and thus the lifeblood of the Debtors’ business.

96. In addition, maintenance of the Bank Accounts will greatly facilitate the Debtors’ operations in chapter 11. As discussed above, all electronic payments from the Diversion Plan Participants are deposited into one of the Debtors’ Operating Accounts. Electronic transfers account for 70% of the Participant Payments received by the Debtors. If the Operating Accounts were closed, the Debtors would have to open new accounts and then attempt to arrange alternative payment procedures with Participants, which would completely

disrupt the flow of the Debtors' receipt of revenues and the Debtors' payment of debts incurred postpetition. Such a disruption would severely impact and could irreparably harm the Debtors' ability to operate their business.

97. As noted above, American Counseling's Chairman, Chief Executive Officer, and Chief Operating Officer who are employed by non-Debtor Equity Pacific Advisors, LLC ("EPA") (collectively the "EPA Employees"). The Debtors pay EPA a monthly management fee (the "Management Fee"), equaling the aggregate amount of the EPA Employees' monthly wages. EPA, in turn, uses the Management Fee to pay the monthly wages of the EPA Employees. The monthly Management Fee is approximately \$60,800.

98. Prior to the Petition Date, the Debtors engaged in intercompany financial transactions between and among the Debtors related to the monthly payment of the Management Fee in the ordinary course of the Debtors' business (the "Intercompany Transactions").

Cash Collateral Motion

99. The Debtors have filed a motion for (I) entry of interim and final orders (A) authorizing the use of cash collateral, (B) granting adequate protection to prepetition secured parties and (C) granting related relief, and (II) scheduling a final hearing (the "Cash Collateral Motion").

100. The Debtors have an immediate need for the use of cash in light of the immediate and irreparable harm that will be suffered by the Debtors' estates if they do not have access to the cash necessary to sustain their business as a going concern. The Debtors have an

urgent need to use cash for, among other things, continuing the operation of their business in an orderly manner, maintaining business relationships with prosecutors' offices and Merchants, paying employees, and satisfying other working capital and operational needs -- all of which are vital to preserving and maintaining the Debtors' going-concern value and, ultimately, effectuating a successful reorganization for the benefit of all parties in interest.

101. I believe that the continued operation of the Debtors' business will preserve the Debtors' going-concern value, enable the Debtors to capitalize on that value through a reorganization, and ultimately enable the Debtors to confirm a chapter 11 plan. However, if the Debtors are not allowed to use Cash Collateral, I believe the Debtors' revenues will decline and their Debtors' business will deteriorate in value to the detriment of LLCP (as well as all of their other stakeholders).

Critical Vendor Motion

102. The Debtors have filed a motion (the "Critical Vendor Motion") authorizing them (i) to pay, in the reasonable exercise of their business judgment and in their sole discretion, the prepetition fixed, liquidated and undisputed claims (the "Critical Vendor Claims") of certain critical printers with whom the Debtors continue to do business and whose dealings are essential to the Debtors' operations (the "Critical Vendors"); and (ii) to allow such Critical Vendors to apply postpetition payments by the Debtors to unpaid prepetition invoices.

103. The Debtors estimate that the maximum aggregate amount of Critical Vendor Claims that may be paid directly pursuant to the Critical Vendor Motion is approximately \$150,000. The Critical Vendors function as an extension of the Debtors' "back office" and the Critical Vendors and Debtors routinely exchange electronic information to enable

the Critical Vendors to promptly and correctly send out repayment proposal letters to individuals who are eligible for the Diversion Program.

104. The Debtors believe that many of their vendors will continue to do business with the Debtors after commencement of these cases because doing so simply makes good business sense. In some cases, however, the Debtors anticipate that certain vendors, the Critical Vendors, may limit their dealing with the Debtors.

105. The Debtors' ability to use the printers to process and mail the repayment proposal letters is the cornerstone of their ongoing operations and success, and without such continued ability, the Debtors' business would be significantly harmed. Payment of Critical Vendor Claims is vital to the Debtors' reorganization efforts because the Critical Vendors process and mail approximately 200,000 repayment proposal letters per month for the Debtors. These letters, sent on behalf of the applicable district attorney, provide the bad check writer with the option to make restitution payments to the injured Merchant and take American Counseling's education seminar in lieu of risking prosecution or other penalties that might be imposed. Fees paid by individuals who elect to take American Counseling's education seminars are the primary source of revenue for the Debtors. The Debtors believe that the failure to pay the Critical Vendor Claims may very likely result in the Critical Vendors refusing to print and mail the letters on behalf of the Debtors. This, in turn, would deprive the Debtors of their only source of revenue. Because of their long-standing relationships with the Critical Vendors, the Debtors know the printers can adroitly handle the large volume of correspondence sent to bad check writers under the Diversion Programs. Any breakdown in the prompt dissemination of these

letters will harm the flow of revenue into the Debtors. The Debtors believe the printers cannot be expeditiously or seamlessly replaced.

106. In addition, I believe the relief granted by the Critical Vendor Motion would likely avert the filing of suits, liens and motions by Critical Vendors seeking payment of or priority for their claims on a variety of grounds. Avoiding the time, distraction and considerable expense of litigating the merits of such claims would benefit the Debtors, their estates and creditors while facilitating the orderly administration of these cases.

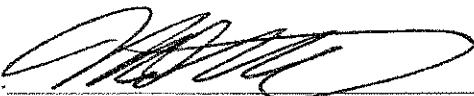
Conclusion

107. For all of the foregoing reasons, I respectfully request that the Court grant the relief requested in each of the First Day Motions and applications filed concurrently herewith.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th of January 2009 at _____, _____.

AMERICAN CORRECTIVE COUNSELING
SERVICES, INC.

By: 

Michael L. Wilhelms
Chief Financial Officer

APPENDIX 6

**ATTENTION NEW RECOVERY AGENTS:
TIPS FOR SUCCESS**

Now that you have been on the phones for several weeks or months, there are several things you should begin to focus on to get on the path towards being a top producer. Being open to constructive criticism, tips, and suggestions is *critical*.

- Work on your **SPEED**. Set goals for yourself, and try to reduce call length over the next 2 weeks. Realize that no matter how much the conversation may draw you in, you have to cut it short. Do not sacrifice quality, simply remain personally removed, give brief answers followed by closed ended questions, and avoid over-explaining. Consider all parts of the call, and realize that leading puts you in control, and makes the suspect feel more comfortable. People are calling you to lead them through the process, take charge. **DON'T GET PULLED INTO THE DRAMA**.
- Likewise, be confident. Be assured that what you are saying is correct. By now, you have had experience with enough cases to know that cases all fall into a certain category. Get to the **BOTTOM LINE**. Even if the information you give the suspect is not what they want to hear, you must look beyond all sorts of external things the suspect may be saying, and stay firm on your answer. The program is extremely black and white, but while hearing all sorts of stories, you may lose sight of this. Rather than seek a supervisor or engage someone else while they are working, stick to what you know. The answer the supervisor or neighbor gives you is probably already what you would have said, but maybe it's unpleasant and you dread passing that information on to the suspect. You must start to look at that about yourself and realize you have some goal setting to do. Your goal? Gain confidence. You can do it, guys!
- Do not let the suspect control how payments are made. You know what is policy, and what is discretionary. Work on urgency, and start trying to get payments in **NOW**. The only way to do this is just to do it – start today. Strongly advise a western union on every case that is in failure to comply. Explain you are trying to hold their case back from prosecution review, and the only way you can do that is with money. Not a note in the case, not a call from the suspect, the only way you have control over stopping it is by receiving payment. They say they can't? State that you are sorry, you wish there was something you could do for them, and they can call you back if their situation changes, and you will see if their case is still here to pay. Explain that you may also make future calls to them to continue to offer the program each time the case progresses farther. I promise you will be very surprised by the results of this!
- Make sure you add all failure to comply fees, and note that you do this. This is not discretionary. This money belongs to the company, and will **DRASTICALLY** change your numbers.
- Keep **FOCUSED**. Avoid chatting with your neighbors, stay on task, seek out work, always trying to go more quickly. This can make the difference between a \$4,000 week and an \$8,000 week – it's that important. When I decided that I wanted higher numbers, I focused on 1) speed. 2) professional distance rather than personal involvement. 3) adding all failure to comply fees. 4) increasing prosecution review warnings but doing so with a **SOFT, SOOTHING TONE**. 5) creating urgency. 6) seeking out work every spare second I had. It was hard work, but it paid off big. I more than doubled my numbers in 2 to 3 weeks. My hard work = money. You will see this too. I was motivated – I wanted to buy a new computer. That was the mental image I held every time I felt myself slip back into old patterns. What is your mental picture of? A car? Furniture? A trip? You have the same job as the top producer – you can do this, guys! It will even be fun! More tips? See me. Scott

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