

Comments

to the

Bureau of Consumer Financial Protection

12 CFR Part 1006

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Advance Notice of Proposed Rulemaking Regarding Debt Collection

Submitted by the

National Consumer Law Center

**on behalf of its low-income clients and the
following national advocates for consumers:**

Americans for Financial Reform

Consumer Action

Consumer Federation of America

Consumers Union

National Association of Consumer Advocates

New Economy Project

U.S. Public Interest Research Group

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Part I. Introduction and Summary of Recommendations

I.A. Introduction

We applaud the Consumer Financial Protection Bureau (“CFPB”) for initiating this comprehensive and long overdue analysis of the adequacy of the current laws protecting consumers from abusive debt collection activities. Significant change is needed to protect consumers adequately from the growing problems with debt collection in the 21st Century.

I.A.1. Contributors

These comments are written by attorneys from the **National Consumer Law Center**¹ on behalf of its low-income clients and **Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, New Economy Project and the U.S. Public Interest Research Group.**²

NCLC staff have long and extensive experience representing consumer debtors. We also work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states, who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen examples of abusive practices against low-income people in almost every state in the union. It is from this vantage point – formed from many years of dealing with the abusive debt collection faced by the less sophisticated and less powerful in our communities – that we submit these comments. In addition, NCLC published the 1045-page treatise, *Fair Debt Collection* (7th Ed. 2011), which is a comprehensive analysis of the Fair Debt Collection Practices Act. As a result of all of this work, we are constantly aware of the frustrating inadequacy of the current legal scheme to stop collection abuses. Every day we see the effects of debt collection abuses on people – the stress, the threat to employment, the fear, the lost funds, the frustration, the embarrassment, the raw emotional toll.

In addition to NCLC staff, private and legal services attorneys who are experts on these issues as the result of representing consumers in debt collection litigation have made important contributions to these comments.³ Most of the private and legal services attorneys also contribute to NCLC’s *Fair Debt Collection* treatise. Cumulatively, the NCLC and non-NCLC attorneys contributing to these comments have easily in excess of several hundred years of experience in representing consumers in debt collection matters. Many aspects of these comments are also based on surveys conducted by NCLC of attorneys representing debtors.

¹ The **National Consumer Law Center** (www.nclc.org) is a nonprofit organization specializing in consumer issues affecting of low-income and elderly people. NCLC publishes twenty practice treatises, most of which are updated annually and which describe the law currently applicable to all types of consumer transactions. These comments are filed on behalf of our low-income clients and written by NCLC attorneys Carolyn Carter, Bob Hobbs, Lauren Saunders, Margot Saunders, David Seligman Chi Chi Wu, and Persis Yu.

² Descriptions of these groups, which are co-signors of these comments are filed, are included in Appendix 1.

³ Several attorneys with extensive experience representing consumers in debt collection actions provided important and substantive contributions to these comments. These include David Philipps of Palos Hills, Illinois; Joanne Faulkner, of New Haven, Connecticut; Paul Arons, an expert in check diversion programs from Friday Harbor, Washington; and Claudia Wilner of the New Economy Project of New York, New York. Sections of these comments addressing military issues include contributions by Dwain Alexander, II, CAPT, JAGC USN (Retired).

I.A.2 Summary of Comments

In these comments, we have endeavored to provide comprehensive responses to the many questions asked in the ANPRM, and we appreciate the thoughtfulness and care the Bureau put into developing such a comprehensive document. While we respond to all of the questions in the ANPRM, some of our recommendations relate to additional concerns not raised in that document.

The Bureau's enforcement efforts, though essential and powerful, cannot efficiently and cost-effectively police an increasingly complex and predatory industry. **Nonetheless, the CFPB has the authority to improve protections for consumers and debtors. Through its rulemaking powers, the Bureau can and must ensure that consumers have the weapons and information to protect themselves from abuses and deter misconduct, and that the Bureau's regulations create incentives for industry to comply with the law.**

The increase in the number of actions filed by consumers against debt collectors should not be viewed as a problem to be addressed – as advocated by the debt collectors – but rather as an indication of the high and rising levels of abuses suffered by consumers. As the CFPB has acknowledged “the continued number of such actions filed each year demonstrates that a significant number of consumers allege that debt collectors are violating the FDCPA.”⁴ Consumers do not go to the trouble of seeking and hiring an attorney unless they feel abused or harassed and in need of protection from the tactics of a debt collector.⁵

We are recommending that the CFPB impose new and substantively stronger obligations on debt collectors, as well as on creditors (pursuant to the Bureau's authority under the Dodd-Frank Act). These obligations should be framed to create sufficient incentives for industry compliance. The best model for such a regulatory framework is the imposition of almost complete liability on the creditor for unauthorized credit card transactions under the Truth in Lending Act (“TILA”).⁶ By placing the risk of loss for unauthorized transactions almost completely on the creditor, TILA has provided sufficient incentives for the industry to create and require substantial safety precautions. As a result, the industry has established a robust loss-prevention methodology.

Similarly, we propose that the CFPB recognize that incentives drive behavior, and that the regulations governing the debt collection industry have been insufficient to ensure appropriate behavior towards consumers. Our proposed regulations are intended to create incentives for all players in the industry to improve the accuracy and legality of collection efforts, and to eliminate the harassment and abuse of consumers.

One of our overarching proposals is that the CFPB should substantially increase the requirements

⁴ CFPB, ANPRM on Debt Collection, 78 Fed. Reg. 67847, 67851 (Nov. 12, 2013)

⁵ For multiple examples of the illegal, harassing and abusive activities of debt collectors, see, e.g., Susan Shin & Claudia Wilner, New Econ. Project, *The Debt Collection Racket in New York* (2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>; Rachel Terp & Lauren Bowne, East Bay Consumers Union, Commtty. Law Ctr., *PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now* (2011), available at http://www.defendyourdollars.org/pdf/Past_Due_Report_2011.pdf; Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts* (2010), available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>.

⁶ NCLC, *Truth in Lending* § 7.10 (8th Ed. 2012).

for documentation at every stage of the collection process. Creditors should be required to obtain and retain much more information and pass along much more information to their collectors and purchasers of their debts. The Bureau should also require creditors, collectors, and subsequent collectors to record information obtained during the debt collection process and transmit it whenever the debts are sold. Furthermore, strict limits should be placed on reports to the credit reporting agencies, and collection of time-barred debt should be prohibited altogether, as no other approach can effectively deal with the problem of collecting undocumented debts long after memories about the debts have faded.

The CFPB can achieve these important ends by issuing rules pursuant to its rulemaking powers under the FDCPA and the Dodd Frank Act. In broad strokes, in these comments we provide factual and legal support for our recommendations that the CFPB issue regulations to –

- 1. Clarify remedies to enable consumers to stop ongoing abusive debt collection.** The CFPB should clarify, among other things, that under the FDCPA courts may award injunctive relief to private civil litigants and multiple statutory damages in cases arising from multiple statutory violations.
- 2. Require collectors to have substantially better information about debts before collecting and suing – and more information about all previous collection efforts on those debts.** Collectors must be responsible for having all the pertinent information about the debt itself, the consumer, previous communications and collection attempts, and the collector's ownership of the debt -- before they initiate collection or suit.
- 3. Stop abuses by payday lenders, credit card companies and other creditors.** Current rules only cover third-party debt collectors. All creditors should be required to follow rules preventing abusive collection practices.
- 4. Stop telephone harassment.** Repeat calls to consumers at their homes and workplaces cause enormous stress and can even jeopardize their jobs. The CFPB should limit calls to three per week and actual contact to once a week. Calls that are more frequent can have no purpose other than harassment.
- 5. Ensure that consumers know about and can avail themselves of the right to ask collectors to stop communicating with them.** Collectors should be required to inform consumers during each contact that the consumer has the right to stop these communications. Consumers' verbal requests to stop communications should be honored.
- 6. Protect consumers when collecting old debts.** The CFPB should issue rules making clear that collection of time-barred debt is prohibited, and should also prohibit other efforts to collect these debts. If collection is not barred altogether, oral collection efforts and reports to credit bureaus should be forbidden; all written collection efforts must be accompanied by a clear statement that the consumer cannot be sued; and a time-barred debt should not be revived by the consumer's payment or acknowledgement in response to a collection effort.
- 7. Prevent credit reporting abuses.** The CFPB should mandate that collectors (a) report disputes to the credit reporting agencies if the debt was reported, and (b) clearly inform consumers that paying debts will *not* remove the negative report from the credit report.

8. **Require meaningful investigation of disputes.** Collectors should be required to respond substantively to a dispute about a debt and to give the consumer the information that the collector is required to have about the debt.
9. **Provide needed protections for vulnerable consumers who have particular difficulty protecting themselves from abuse, either because of their status – *i.e.*, because they are servicemembers – or because of the type of debt, medical debt and student loans being particularly problematic.** Among other things, the CFPB should flatly prohibit collectors from communicating with servicemembers' commanding officers. Medical debt and student loans pose immense problems and unique issues that the CFPB should address with targeted rules.
10. **Prohibit forced arbitration.** Debt collectors, debt buyers and creditors should be barred from depriving consumers of their day in court by compelling arbitration of consumer claims relating to collection abuses.

Our comments are divided into the following Parts. As described above, some of these Parts include recommendations that respond directly to questions or concerns raised in the ANPRM. Others make recommendations related to issues brought to our attention by advocates and consumers.

- **Part I** provides an introduction and a list of our recommendations
- **Part II** contains general background on the issues surrounding debt collections against consumers.
- **Part III** sets out the CFPB's authority to clarify remedies available to private civil litigants under the FDCPA, specifically multiple damages, injunctive relief, recovery of payments made as actual damages, and the award of costs. This Part -- although addressing issues of critical importance to consumers -- is not tied to any of the specific questions in the ANPRM.
- **Part IV** addresses special considerations related to collection of medical debt, and makes recommendations regarding steps the CFPB should take. Some of the issues discussed in this Part concern questions raised in the ANPRM, and we therefore discuss similar themes in later Parts that respond to the ANPRM's questions
- **Part V** addresses special considerations relating to collection of student loan debt. This Part includes a discussion of student loan issues in response to several of the ANPR's questions, all of which are also discussed in later Parts of these comments.
- **Part VI** is our responses to Questions 1-15 posed by the ANPRM, regarding transfer and accessibility of information upon the sale or placement of debts.
- **Part VII** is our responses to Questions 16-53, regarding validation notices, disputes, and verifications.

- **Part VIII** is our response to Questions 54-91, regarding debt collection communications.
- **Part IX** is our response to Questions 92-132, regarding unfair, deceptive, and abusive acts and practices.
- **Part X** is our response to Questions 132-142, regarding time-barred debts.
- **Part XI** is our response to Questions 142-162, regarding debt collection litigation practices.

I.B. Recommendations

Set out below are the recommendations made throughout these comments:

Recommendations in Part III regarding Clarification of Remedies under the FDCPA

The CFPB should issue a regulation (or at least a guidance) that 1) clarifies that injunctive relief is available against defendants in FDCPA actions; 2) clarifies that multiple statutory damages can be awarded for multiple violations of the FDCPA; 3) clarifies that payments made by consumers in response to illegal collection activities be considered actual damages under the FDCPA; and 4) encourages the courts to exercise their discretion in cases of financially distressed consumers.

Recommendations in Part IV regarding Medical Debt Collectors

The CFPB should include in its scope of supervision those larger participant debt collectors that focus exclusively or primarily on medical debt, by including medical debt in the \$10 million threshold under 12 C.F.R. § 1090.105(a)(3)(v).

The CFPB should prohibit the practice of “parking.”

The CFPB should require a certain period of time — 120 days -- between the sending of a medical bill and when it can be reported on a credit report by a collector or health care provider.

The CFPB should provide protections when consumers dispute medical debt resulting from billing errors or insurance disputes.

The CFPB should prohibit collectors from dunning for chargemaster prices if the consumer is low-income or qualifies for charity care/financial assistance.

The CFPB should explicitly state that debt collectors must comply with the HIPAA Privacy Rule, and failure to do so constitutes an FDCPA violation.

Recommendations in Part V regarding Student Loan Debt

The CFPB should require notices for private student loans at the time the verification notice is provided that clearly state that the collection agency is not collecting a federal loan and that federal consequences (administrative wage garnishment, tax and federal benefit offset) do not apply.

Conversely, if it is a federal debt, the notice should state that there might be options, other than repayment, for addressing the debt such as total and permanent disability, false certification, and unpaid refund discharges.

The CFPB should investigate the commission system for student loan collections and provide public information about it, including the Department of Education's informal guidelines to collectors.

The CFPB should prohibit a creditor from assigning an account to a new collection agency after the consumer sends a cease contact letter to a prior collection agency unless the new agency is hired to pursue legal remedies.

The CFPB should require lenders and debt collectors to pass documents such as financial hardship requests, financial documents to be used to calculate reasonable and affordable payments, and discharge applications on to successive debt collection agencies, and to forward any information received from borrowers after the account has been returned to the lender.

The CFPB should work with other government agencies to ensure that data on federal student loans (e.g. the amounts collected, programs accessed by borrowers, success rates of rehabilitation plans, complaints against collection agencies, etc.) is collected and made public.

The CFPB should require debt collectors to provide the promissory note and a full accounting when a student loan borrower disputes a debt or otherwise requests the information.

The CFPB should include in its regulations that failing to properly advise borrowers of their rights and options under the Higher Education Act is a material omission and thus deceptive under the FDCPA. In addition, the CFPB should state exercise its UDAAP authority and rule that this failure is unfair, deceptive, and abusive.

The CFPB should adopt a rule stating that it is deceptive for a collector, when collecting a private student loan debt, to fail to inform the consumer that federal remedies such as administrative wage garnishment and tax and federal benefit offsets are not available.

Recommendations in Part V regarding Transfer and Accessibility of Information Upon Sale and Placement of Debt

Q3 Recommendation. The CFPB should issue regulations pursuant to the FDCPA and its UDAAP authority, requiring that before commencing collection activity on a debt, a collector or creditor must have in its possession or have accessed correct information about the debt and determined that the debt is legally owed and that the person the collector intends to pursue is in fact the debtor. Our comments include a list of the information the CFPB should require. The CFPB should prohibit the sale of debt, by originators and buyers, unless the required information is included in the sale, and the seller determines that the potential buyer has ensured the security of the borrowers' Social Security numbers and other confidential information.

Q5 Recommendation: The CFPB should require that, when a debt is sold or reassigned, not only information about the debt but also information obtained during the collection process, such as cease-communication requests, settlements, and military status, be transferred.

Q7 Recommendation: The CFPB should issue a regulation requiring that any party initiating suit for the collection of a consumer debt must have in its possession all of the records required in response to Q5 and Q7, and attach to the complaint when filed, a copy of the original contract or other document and one of a specified list of documents to show that the party filing the claim owns the debt.

Q12 Recommendation. The CFPB should clearly state that a centralized repository that stores and shares documents and information about debts is an entity covered by the consumer protections of both the FCRA and the FDCPA.

Q13 Recommendation: Debt sellers should be required to notify the consumer of the sale of a debt and the buyer's name and contact information. The assignment should be void until the notice is received by the consumer.

Recommendations in Part VII regarding Validation Notices, Disputes, and Verifications

Q16 Recommendation: The CFPB should require validation notices to disclose the name and contact information of the current owner of the debt.

Q17 Recommendation: The CFPB should require that collectors and creditors provide an itemization of the principal, interest and fees charged on the account in response to a request for verification of the debt.

Q19 Recommendation: The CFPB should require collection notices to include a clear and conspicuous disclosure of the consumer's right to dispute a debt and to request that the collector cease communication. In these comments we provide recommended language.

Q20 Recommendation: The consumer's right to request the collector to cease communication should be disclosed in every communication between the collector and the consumer. Additionally, the consumer should be able to exercise this right by making a request through the collector's website, by email, or orally.

Q25 Recommendation: If the original transaction that lead to the debt was conducted in a language other than English, the communications from the debt collector should all be in the other language as well.

Q27 Recommendation: Debt collectors should be allowed to send validation notices to consumers electronically, but only if the consumer has given consent in accord with E-Sign to the collector, not to some prior collector or owner of the debt.

Q31 Recommendations: The CFPB should adopt a regulation codifying the rule that the consumer is not required to use sophisticated methods or any special language to exercise the right to dispute a debt or request verification and providing that a lawyer may raise a dispute or request verification on behalf of a consumer. The CFPB should also make it clear that oral disputes and disputes made outside the 30-day period must be reported when the collector reports a debt to a creditor or credit reporting agency. The CFPB should also adopt a rule stating that it is a deceptive practice for a collector to represent that it will verify a debt and then fail to do so, and that a

collector may not charge the consumer any fee in connection with responding to a dispute or verifying a debt.

Q33 Recommendation: The CFPB should adopt a regulation rejecting the view that verification of a debt merely requires confirmation that the amount being demanded is what the creditor claims is owed, and requiring a meaningful and robust response to consumer disputes and requests for verification.

Q34 Response and Recommendation: The CFPB should clarify that any question from the consumer about the account must be treated as a dispute that requires a response from the collector.

Q35 Recommendation: The CFPB should adopt a rule stating that a consumer cannot be required to submit documentation or other information to trigger the investigation requirement under the FDCPA. The rule should also provide that the collector can ask the consumer for clarification of a dispute, and must respond to any specific dispute or information that the consumer raises, but cannot condition its duty to respond to the dispute upon the consumer's provision of any particular information or documentation.

Q37 Recommendation: The CFPB should adopt a rule requiring collectors to respond to disputes that consumers make after the 30-day period has expired, and should point out the potential liability under the FDCPA that collectors face if they continue to pursue a debt that the consumer does not owe.

Q38 Recommendation: The CFPB should not set a time limit for collectors to respond to consumer disputes, but it should reiterate in regulations that –

- no collection activities, including the sale of the debt or suit on it, can proceed until the dispute has been satisfactorily resolved;
- if an unverified debt is returned to the creditor, the creditor must verify it before taking any efforts to sell or otherwise collect on the debt;
- the collector must cease collection activities on the date it receives the request for verification, and will be held liable if it continues to collect the debt before it provides an appropriate verification.
- The collector may not resume collection activities, including affirmative steps in a debt collection suit, until it mails verification to the consumer.

Q41 Recommendation: The CFPB should adopt a rule requiring the collector to investigate and respond to the consumer's specific dispute.

Q42 Recommendations:

1) The CFPB should issue guidance reminding debt collectors and debt buyers that merely comparing personal identifiers (name, SSN, DOB, address) does not constitute a reasonable investigation under the FCRA. Debt collectors and debt buyers should be required to have in their possession or obtain underlying account documents and review these documents in a credit reporting dispute and to contact the original creditor or other parties with relevant information as needed to resolve a dispute.

2) The CFPB should examine larger participant debt collectors under its supervision to ensure they are engaging in substantive, meaningful investigations of credit reporting disputes. The CFPB should take enforcement action against those debt collectors and debt buyers that are engaged in perfunctory, unreasonable investigations.

3) Any debt that is disputed pursuant to a federal consumer law, including the provisions of the Consumer Credit Protection Act, must be marked as disputed and cannot be considered in the consumer's credit score. Lenders should be prohibited from taking adverse action based on the fact that a debt is disputed, including denying credit or referring the application to any process that makes it more probable the consumer will be denied credit.

4) When a disputed debt is sold or re-sold, the seller should be required to inform the buyer that the debt is disputed. The buyer in turn should be required to report these debts as disputed, and such tradelines must also be excluded from the consumer's credit score.

5) Debt collectors should be prohibited from "parking" their claims in a consumer's credit report without providing a § 1692g verification notice. The CFPB should make it clear that credit reporting is debt collection and that making report to a NCRA is a communication that triggers § 1692g.

6) Once a consumer disputes a debt, the debt collector should be required to update any report that it made to a credit reporting agency by informing the CRA of the dispute.

Q45 Recommendation: The CFPB should require that fully responsive documentation, specifically addressing the details of the consumer's dispute, be provided to the consumer by the collector.

Q52 Recommendation: The CFPB should prohibit creditors from selling, collecting, or suing on unverified debts.

Q53 Recommendation: The CFPB should prohibit creditors from reporting a debt to a credit reporting agency during the 30-day period for the consumer to dispute the debt or request verification.

Recommendations in Part VIII regarding Debt Collection Communications

Q55 Recommendation: The CFPB should clarify that the E-Sign consent requirement applies to all electronic communications that are used to replace writing requirements, and that the Telephone Consumer Protection Act applies to text messages – prohibiting both text messages and calls to cell phones that are initiated by autodialers, without prior express consent from the consumer.

Q56 Recommendation: The use of social media for debt collection activities should be flatly prohibited.

Q62 Recommendation: The CFPB should specify that § 1692b(5) applies to email messages, text messages, and faxes. In addition, it should prohibit collectors from sending faxes to a third party's workplace to seek location information about a debtor.

Q65 Recommendation: Text messages and emails should be treated as telephone calls – and allowable times should be governed by the statutory restrictions in 15 U.S.C. § 1692c(a)(1). Debt collectors should ask consumers if nighttime is a convenient time to receive an email or text message before sending one.

Q68 Recommendation: In addition to complying with the requirement not to conceal the true purpose of the call and all TCPA requirements, debt collectors should be required, after verifying that they have reached the consumer on a cell phone, to preface the call with both the section 1692e(11) disclosure and an inquiry whether it is convenient for the consumer to talk at that time.

Q70 Recommendation: The CFPB should adopt a rule that bans collection communications to consumers at their workplaces unless the consumer has specifically consented to receive such communications there. In the alternative, the CFPB should codify a number of other protections against unwanted workplace calls.

Q73 Recommendation: The CFPB should issue a rule or interpretation clarifying that 1) collectors may not require additional documentation that a consumer is represented by an attorney, beyond the consumer's statement; and 2) unfair, deceptive, or abusive statements communicated through the consumer's attorney violate the FDCPA.

Q75 Recommendation: Debt collectors should be prohibited from contacting a servicemember's command except to obtain location information.

Q77 Recommendation: The CFPB should adopt a rule stating that debt collectors may contact spouses of deceased debtors, along with other relatives, friends and employers of the deceased, only for the purpose of obtaining information about the formal administrator of the estate.

Q78 Recommendation: The CFPB should issue regulations clearly stating that collectors should not be permitted to contact a consumer's spouse when the collector has been informed or has reason to know that the couple is estranged or that one spouse has obtained a restraining order against the other.

Q79 Recommendation: The CFPB should require collectors to inform the executor or administrator of a deceased debtor's estate of any dispute about the debt that the debtor had raised.

Q81 Recommendation: Collectors and creditors should not be allowed to seek payments from people who did not take responsibility when the credit was extended.

Q84 Recommendation: The CFPB should not adopt any rules purporting to undermine the *Foti* decision or to allow waiver of FDCPA protections.

Q85 Recommendation: The CFPB should adopt a rule specifying that it is a deceptive practice for a collector to spoof a caller ID.

Q86 Recommendation: Debt collectors should be prohibited from blocking or altering the telephone number of identification information transmitted when making a telephone call.

Q87 Recommendation: The CFPB should bar collectors from sending collection emails to a

consumer's employment email address without explicit consent.

Q90 Recommendation: The CFPB should issue regulations under RESPA, TILA and the FDCPA clarifying that after a consumer has provided a cease communication notice, servicer notices required under RESPA and TILA (Reg. X § 1024.39 and Reg. Z § 1026.20(c) respectively) should continue to be provided.

Q91 Response and Recommendation: Debt collectors should always be required to provide contact information to consumers, and a live individual should be available to respond to questions, disputes, and complaints.

Recommendations in Part IX regarding Unfair, Deceptive, and Abusive Acts

Q92 Recommendation: Both creditors and collectors should be prohibited from engaging in the types of harassing conduct listed in FDCPA § 806. In addition, they should be subject to specific and strict limits on telephone communications, as follows:

- The collector should not be permitted to call the consumer (i.e. let the telephone ring) more than three times per week (subject to additional limits below). Consumers often do not answer the phone because they do not want to talk to the collector. Even hearing the phone ring constantly is stressful, and it can be a special problem when collectors call cell phones that consumers have in their cars and workplaces.
- Voicemail messages, if otherwise permissible, should be left no more than once per week.
- Unless the consumer consents, collectors should not be permitted to call back within seven days of actually speaking with the consumer.

Additionally, we recommend that all communications other than letters sent by postal mail count toward the numerical limits on contacts. We recommend that letters sent by postal mail be allowed without limit as a fallback method that collectors may use to communicate with debtors

Q93 Recommendation: The CFPB should adopt a rule stating that the acts that are defined as abusive by § 1692d are unfair and deceptive when committed by first-party debt collectors. It should also adopt a rule stating that debt buyers are subject to the FDCPA.

Q99 Recommendation: The CFPB should adopt rules regarding abandoned calls that mirror those in the FTC's Telemarketing Sales Rule.

Q100 Recommendations: The CFPB should issue clarifying regulations pursuant to section 1692e that –

1. Ensures that no collection letter can be signed by an attorney or sent on law firm letterhead without a meaningful review to determine probable liability by that attorney or firm supporting the demands in the letter;
2. Ensures that the least sophisticated consumer standard is always applicable.

3. Clarifies that the FDCPA is violated if a collector threatens to take an illegal action, including action for which the collector should have but does not have a license, even if the collector then takes the illegal action.
4. Clarifies that all false statements made to collect a debt are actionable under the FDCPA, whether directed at consumers or at third parties, and that false statements made in state court—even if never seen by the consumer—are actionable if they are made as part of an attempt to collect a debt.
5. Require that attorneys filing collection lawsuits must conduct a meaningful review of the file before initiating a collection lawsuit.
6. Clarify that the practice of filing lawsuits without having the intent or ability ever to prove the debt violates § 1692e and e(10) of the FDCPA.

Q101 Recommendations: The CFPB should adopt rules 1) requiring creditors and collectors to determine whether a debtor is in the military service before beginning collection activity on a debt; 2) requiring them to stay all collection activity as to a debtor who has been deployed or is on active duty; and 3) stating that a creditor or collector commits an unfair and deceptive act by obtaining or invoking a waiver of rights that is illegal under the SCRA.

Q104 Recommendation: The CFPB should adopt a rule stating that 1) the restrictions on contact with unobligated third parties apply to an authorized user of a credit card who is not liable on the card; and 2) in cases where the FDCPA allows a collector to contact the authorized user, any misrepresentation of the authorized user's liability violates the FDCPA.

Q106 Recommendation: The disclosure that a communication is from a debt collector must be in every communication and must not be presented by way of a link or attachment.

Q111 Recommendations: The CFPB should work with the Federal Reserve Board to ban remotely created checks (RCCs) and remotely created payment orders (RCPOs) for consumer transactions. Until a ban can be implemented, the CFPB should clarify that Regulation E covers RCCs and RCPOs. The CFPB should also prohibit debt collectors and creditors who are collecting a debt from using back-up payment devices in the event that one fails. Regulation E should be amended to prohibit use of an electronic fund transfer after a check, RCC or RCPO fails (either for stop payment, challenge to authorization or lack of funds) and to codify the recent NACHA proposals in this area. Similarly, the CFPB should address the reverse situation, and ban as unfair, deceptive and abusive the use of an RCC or RCPO to obtain payment from a consumer after an EFT is stopped or fails.

Q112 Recommendation: The CFPB should 1) codify the rule that the prohibition of unfair practices in section 808 is not limited by the examples in the statute; 2) specify that the least sophisticated consumer standard applies to claims of unfair practices; and 3) identify a number of specific practices as unfair.

Q113 Recommendation: The CFPB should issue regulations under its UDAAP authority holding creditors to the same standards regarding unfair or unconscionable debt collection methods to which third-party debt collectors are held.

Q114 Recommendation: The CFPB should clarify the full meaning of § 1692f to apply to any situation in which a collector claims the right to collect an amount to which it is not entitled.

Q119 Recommendation: The CFPB should adopt a rule prohibiting debt collectors from sending hand-dialed calls or text messages to consumers where the consumer will incur a charge for the call, unless the consumer has provided prior express consent. The consumer should have the explicit right to revoke consent. The CFPB should also limit such calls, whether answered or unanswered, to one per week.

Q120 Recommendation: The CFPB should require collectors who are collecting several debts from the same consumer to follow the consumer's instructions about the debt or debts to which a payment should be applied.

Q122 Recommendation: The CFPB should require debt collectors to provide receipts for payments.

Q127 Recommendation: The CFPB should require debt collectors to make specific disclosures about the limited or non-existence improvement in a consumer's credit score that will result from payment of an obsolete debt.

Recommendations in Part X regarding Time-Barred Debts

Q133 Recommendation: The CFPB should prohibit all efforts to collect time-barred debts. It should prohibit collectors from treating acknowledgment of or payment on a time-barred debt as reviving it. In addition, if a creditor or debt collector is seeking to collect a debt that cannot be reported because it is obsolete as defined by the FCRA, the CFPB should require the creditor or collector to disclose this fact in simple language.

Recommendations in Part XI regarding Debt Collection Litigation Practices

Q150 Recommendation: If the CFPB adopts a rule on this subject, it should provide that the term "communication" does not exclude any type debt collection activity, pleadings, or litigation.

Q151 Recommendation on Mandatory Arbitration: The CFPB should prohibit debt collectors and debt buyers from invoking mandatory, pre-dispute arbitration clauses in cases involving disputes arising out of their debt collection activities.

Q151 Recommendation on credit reporting practices and the re-aging of debt:

1) The CFPB should examine larger participant debt collectors, large banks and others furnishers under its supervision to ensure they are reporting correct dates of first delinquency to the NCRAs. For furnishers that are original creditors, the CFPB should also ensure that they are providing the correct date to the debt collector or buyer when they sell a debt or place it for collection. The CFPB should take enforcement action against those furnishers that are not providing correct dates to the NCRAs.

2) Debt collectors and buyers should be explicitly required to comply with the Metro 2 standards concerning determining and reporting the Date of First Delinquency. The CFPB should prohibit the furnishing of any collection item that fails to include the correct DOFD.

3) All of the NCRAs should be required to provide a clear, easy-to-understand disclosure of when an adverse item will be removed from a credit report due to the FCRA obsolescence periods.

Recommendations in Part XII regarding State and Local Debt Collection Systems

Q154 Recommendation: The Bureau need not issue any clarifying regulations. As explained, the programs have little to do with the contractual provisions. More enforcement would be helpful, however.

Q156 Recommendation: If the Bureau takes any action relating to this aspect of the statute, it should simply be to issue a rule that strict compliance with all provisions of 15 U.S.C. § 1692p is required for the exemption to be effective.

Q157 Response and Recommendation: No, absolutely not. There should be no exemption for these entities from any consumer protections. The privately-operated “check diversion” industry is rife with predatory and abusive practices. As explained above, this is essentially debt collection, not law enforcement. These companies use a realistic, but false, threat of prosecution to extract hundreds of dollars in fees. In one extreme example, the consumer paid \$441.00 in fees on a \$3.87 check, where there was never any possibility of prosecution.

Q158 Recommendations: The CFPB should

- Prohibit the use of pre-dispute mandatory arbitration clauses involving check diversion companies’ contracts.
- Clarify and enforce compliance with the section 1692 exemption.
- Require prosecutor involvement in the process in order for the exemption to be applicable.

Q159 Recommendation: Everyone engaging in collection activities against consumers should be required to be included in a CFPB database, including creditors, debt buyers, and collectors. Full contact information for the collector, and the collector’s employer, should be a prerequisite to engaging in collection activities covered by the CFPB’s regulations.

Recommendations in Part XIII regarding Recordkeeping, Monitoring, and Compliance Requirements

Q162 Recommendation: The CFPB should specifically provide by regulation that a debt collector cannot report a debt to a CRA unless the collector has documentation that substantiates the debt, and that, if a collector reports accounts to the credit bureaus, it must keep the records of those accounts for the entire time the account is reported. If it does not report accounts, records should be kept for seven years.

Part II. Background on Debt Collection Issues Affecting Consumers

II.A. Consumer Credit in the U.S.

II.A.1 Extent of Debt and Delinquency

Outstanding consumer debt in the United States exceeded \$2.5 trillion in 2009, having more than doubled in less than twelve years. As consumer debt has grown, collection and speculation on consumer obligations have become big businesses in their own right, as has the business of extending unaffordable, fee-laden credit products to the unsophisticated and unwary.

Delinquency and charge off rates generally follow unemployment rates and fraudulent and imprudent lending practices, and as a result vary greatly among credit extenders. In 2005, before the full onset of the recent financial crisis, the aggregate charge-off rate for consumer credit was 2.05%, rising to 5.87% in 2010, and the charge-off rate for residential loans was 1.49%, rising to 10.84% in 2010.⁷ While the proportion of debt that is delinquent at any point in time is small, the amount of consumer debt is so large that billions of dollars are delinquent at any given time.⁸

II.A.2 Financially Distressed Consumers

Studies have shown – and executives in the credit industry have repeatedly admitted -- that the major causes of serious consumer delinquency are unemployment, illness, and marital problems. Moreover, the credit industry’s overextension of credit, particularly high-cost credit, greatly inhibits debtors’ ability to repay.

When Congress wrote the federal Fair Debt Collection Practices Act it explicitly recognized that most delinquency is not intentional. Just the opposite is the case. Most overdue debts are not the fault of the consumer:

One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are “deadbeats.” In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of “deadbeat.” This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.

The Commission’s findings are echoed in all major studies: *the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.* (Emphasis added.)⁹

The FDCPA, as well as other laws protecting debtors from abuse and harassment, is based on this

⁷ U.S. Census Bureau, Table 1195. Delinquency Rates and Charge-Off Rates on Loans at Insured Commercial Banks: 1990 to 2010, <http://www.census.gov/compendia/statab/2012/tables/12s1195.pdf>.

⁸ See Federal Reserve Bank of N.Y., Quarterly Report on Household Debt and Credit.

⁹ Senate Report No. 95-382 on the Fair Debt Collection Practices Act, Report of the Committee on Banking, Housing and Urban Affairs U.S. Senate Aug. 2, 1977.

recognition, rather than on the myth that draconian collection tactics are justified by the existence of substantial numbers of debtors who sought out credit without the intention or wherewithal to repay.¹⁰

There are clear, objective, widely recognized causes of delinquency and default on consumer debt. Unemployment is widely recognized as the leading cause of the failure to pay credit card debt.¹¹ Excessive medical debt is also widely seen as cause for the non-payment of other bills.¹²

These basic facts should undergird the CFPB's regulation of debt collection. Collectors are not generally dealing with people who are choosing not to pay something they can pay. Rather they are dealing with people who are already struggling to pay their debts, for whom choosing to pay one debt will often mean other debts or necessities will go unmet. This is why debt collection regulation should not permit abuse, harassment or unfair or deceptive practices.

II.B The Debt Collection Process and the Players

II.B.1 The Debt Collection Process

Pre-suit collection practices. Debt collection often begins with a series of form letters and then graduates to phone calls from collection employees. The industry's technological capabilities, along with the perverse incentives it provides its employees, ensure that these calls are frequent and often abusive. In particular, the collection employee is often eligible for salary incentives based on the amount he or she collects. Collectors often use automated dialing systems that will place a million calls per day.

A recent case brought against CashCall, an Internet-based high-cost installment loan lender, illustrates the profitable and abusive nature of creditors' collection tactics. The court found that there were a total of 292 CashCall borrowers in West Virginia – some of whom were never in default on their loans. Yet CashCall made 84,371 calls to these borrowers.¹³ Some excerpts from the Court's opinion on CashCall's collection practices include:

- All of the State's representative consumer witnesses testified that CashCall contacted them repeatedly and continuously at home, at work, on their cell phones, and at times or places that CashCall knew, or should have known, were inconvenient. The Court notes with particular concern that CashCall continued to contact the consumers at work after they unequivocally asked CashCall to stop.¹⁴
- The total number of calls to consumers at all places, including their homes and places of employment, is so voluminous as to defy description and would be difficult to believe if not confirmed by the records produced by CashCall to the State during discovery. . . .¹⁵

¹⁰ Caplovitz, *Consumers in Trouble*, Chapter 11 (1974). See also *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*. Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook. Oxford University Press, New York, 1989).

¹¹ Sumit Agarwal and Chunlin Liu, *Determinants of Credit Card Delinquency and Bankruptcy: Macroeconomic Factors*, 27 *Journal of Economics and Finance*, 1, Spring 2003.

¹² See e.g. Theresa Tamkins, *Medical Bills Prompt More than 60% of Bankruptcies*, CNN Original Series, June 5, 2009.

¹³ *State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. CashCall, Inc. and J. Paul Reddam*, in his capacity as president and CEO of CashCall, Inc. Final Order on Phase I of Trial: The State's Debt Collection Claims, Sept. 10, 2012, at ¶¶ 24 (number of calls) and 49 (number of consumers).

¹⁴ *Id.* at ¶ 43. A number of callers received over 1,000 calls from CashCall attempting to collect from them.

¹⁵ *Id.* at ¶ 44.

- CashCall admitted that 10-20 calls per day, and 1,000 calls over several months, were not unusual or unreasonable.¹⁶

As is indicated by the many complaints about CashCall's collection activities, many people find it enormously stressful to receive multiple collection calls every day.¹⁷ The calls are highly intrusive. They cause great distress and trigger difficulties in marriages. Multiple collection calls interfere with daily life. The calls themselves, the dread of future calls, and the fear of the dissemination of personal, embarrassing information to friends, neighbors, co-workers and employers permeate the lives of consumers. Indeed, in some cases, aggressive collection efforts have caused such significant emotional distress as to cause physical illness.¹⁸

A Third Circuit decision describes the appalling debt collections tactics of a medical debt collection attorney:

[W]hen (defendant) could not locate a bank account, he often engaged in a phone "survey" in which he called the debtor, offered him or her a free gift for completing his survey, and then asked questions until he obtained enough information to identify the account . . . One former employee stated that he quit in disgust after [defendant] and his sister celebrated how they saved up a list of debtors until just before Christmas so that they could freeze their bank accounts in time for the holidays . . . Two examples illustrate [defendant's] practices. [A consumer] had a disputed \$6,000 debt with the physician treating his terminally ill wife. The physician explicitly instructed [defendant] not to pursue the money, but nonetheless seized \$6,000 from [the consumer's] account. [The consumer] called to beg for the money. He explained that his wife was dying, his son had recently died, and he had no money to pay for food or funeral expenses. [Defendant] laughed at him, kept the money, and never turned it over to the doctor. [Another consumer] was two days late on a payment to her dentist for a procedure that she said she never authorized. [Defendant] filed a judgment, used his phone "survey" to trick her into divulging the location of her bank account, and then froze the account. When she called to explain that her husband was sick and that she could not afford the payment, informed her that he "had high hopes that she had life insurance on her husband." Distraught, she agreed to make the payment.¹⁹

Collection suits. Some but not all consumer debts are referred to a collection attorney for suit if other collection efforts have failed. By obtaining a small claims default judgment or an arbitration award,

¹⁶ *Id.* at ¶ 50.

¹⁷ Courts have found that even fewer calls than those admitted by CashCall can state a claim for harassment. See, e.g., *Meadows v. Franklin Collection Serv., Inc.*, 414 Fed. Appx. 230 (11th Cir. 2011) (200-300 calls); *Rucker v. Nationwide Credit, Inc.*, 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (approximately 80 phone calls in one year); *Krapf v. Nationwide Credit, Inc.*, 2010 WL 2025323 (C.D. Cal. May 21, 2010) (four to eight calls daily for two months); *Turman v. Central Billing Bureau, Inc.*, 568 P.2d 1382 (Or. 1977) (at least four calls over nine days).

¹⁸ See, e.g., *Margita v. Diamond Mortgage Corp.*, 406 N.W.2d 268 (Mich. Ct. App. 1987) (stress from telephone collection efforts including phone calls aggravated paroxysmal atrial tachycardia); *Turman v. Central Billing Bureau, Inc.*, 568 P.2d 1382 (Or. 1977) (affirming tort verdict; blind consumer rehospitalized with anxiety and glaucoma complications after repeated collection calls); *GreenPoint Credit Corp. v. Perez*, 75 S.W.3d 40 (Tex. App. 2002) (affirming jury verdict of \$5 million in compensatory damages against debt collector; elderly consumer suffered severe shingles-related sores, anxiety, nausea, and elevated blood pressure due to repeated telephone and in-person harassment over a debt she did not owe).

¹⁹ *United States v. Zats*, 298 F.3d 182, 184 (3d Cir. 2002).

or transferring the debt to a new credit card account, a collector or debt buyer no longer has to worry about consumer defenses that would weaken its claim if it were scrutinized. The collector or debt buyer can proceed with obtaining a payment order, attachment or garnishment that forces the consumer to pay its claim whether it was originally valid or not.

Almost all of the millions of collection suits filed against consumers each year are ineffectively contested and result in default judgments against the consumer. The industry would say that is because the consumers owe the debt. But studies suggest numerous additional reasons, including lack of notice (e.g., sewer service), misunderstanding of the requirements to file a legally proper written response, confusion from the complex, abstruse language in the summons, ignorance of the legal system, and inability to respond because of illness, lack of education, or inability to take time off from work.²⁰ Frequently, consumers may be instructed to call the collection lawyer's office and wrongly believe that their agreement to pay on the debt will stop the entry of a default judgment.²¹ Sewer service and completely inadequate legal substantiation is the general rule for default judgments, which are obtained in the huge majority of cases filed by debt buyers (with percentages of default judgments ranging from 73% to 96% in communities of color).²² If a lawyer shows up on behalf of the consumer, debt buyers almost always dismiss the case rather than have the claim scrutinized by the court or arbitrator. In Boston, of 100 small claims cases brought by debt buyers that were defended by clinical law students, 100 resulted in dismissal, usually with prejudice.

After judgment and depending on the state remedies, the creditor will seize wages, other income, bank accounts, or other assets. It may threaten to seize the debtor's household goods and may seize a car. Judgment creditors have often seized exempt income or property, asserting that they did not know it was exempt or that the burden of asserting the exemption lies with the consumer.²³ The creditor may file a lien on the home or place negative information on the consumer's credit report and sit back until the consumer needs to sell the home or needs good credit to buy a car or take out a loan. At that point the consumer may pay off the old debt to complete the sale or loan. In addition, the judgment creditor may continue to pursue the debtor with aggressive phone calls and letters.

²⁰ See David Caplovitz, *Consumers in Trouble* Ch. 11 (1974).

²¹ This type of behavior is an age-old illustration of abusive debt collection. The problem was an initial reason for the passage of the FDCPA. See D. Caplovitz, *Consumers in Trouble*, n.3 at 205 (Free Press 1974). It was reported again after a survey of judgment debtors in Washington, D.C. indicated that one finance company and its lawyer frequently misled consumers on this point. Consumers reported that they called the finance company or its lawyer after receiving a summons and offered to catch up on their payments if the suit was dropped. The consumers were assured that everything would be taken care of once the back payments were received. Then the finance company took default judgments even after accepting the promised post-summons payments from the consumers and assuring the consumers that their payments would obviate the need to defend the creditor's suit. H. Sterling & P. Shrag, *Default Judgments Against Consumers: Has The System Failed?* 67 *Denver U. L. Rev.* 357, 370–372 (1990). Half of the surveyed customers of the finance company reported this deception. *Id.* at 363, 370. This study indicates that things have not changed, as an older consumer survey (using a larger sample) also indicated that this type of false advice was prevalent.

²² New Economy Project, *The Debt Collection Racket in New York*, June, 2013. Chart 2 at 5. Available at <http://nedap.org/documents/DebtCollectionRacketUpdated.pdf>.

²³ Compare *Beler v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C.*, 480 F.3d 470 (7th Cir. 2007) (collection lawyer's post-judgment attachment of a bank account containing exempt Social Security funds was not an unfair practice) with *Hogue v. Palisades Collection, L.L.C.*, 494 F. Supp. 2d 1043 (S.D. Iowa 2007) (garnishing a bank account after receiving an affidavit from the consumer that the account contained only exempt Social Security funds violated the FDCPA and state consumer protection laws and was a tortious abuse of process.).

II.B.2 Debt Buyers

II.B.2.a Debt Buying and Selling Are Changing the Debt Collection Landscape

In recent years, hundreds of collection agencies have sprung up that purchase consumer debts, most often banks' credit card debts that have been written off by the originator. The debt buyer usually pays only pennies on the dollar for the debt, but seeks to collect the full amount from the debtor.²⁴

The debt buying industry has grown at an astonishing rate. According to one source, sales of consumer debts amounted to about \$5 billion in 1993 and rose over twenty-fold to \$120 billion in 2005, then fell during the recession.²⁵ As the CFPB noted in this ANPRM, the market is quite concentrated, with approximately 10 firms buying more than half of the debt that is sold.²⁶

The central problem with this new business is that debt buyers are more persistent in seeking payments on very old debts, for which they have little information.²⁷ The consumer involved may likewise have no information about the claim or its source. Debt buyers may buy claims and then bring thousands of lawsuits seeking to convert those claims into long-lasting and effectively incontestable judgments. Debt buyers may flip consumers into new credit accounts, or simply put

²⁴ See, e.g., *Gonzales v. Arrow Financial Services, LLC*, 660 F.3d 1055, 1059 (9th Cir. 2011) (most debt buyers acquire the debts for a fraction of the balance, but then attempt to collect the entire debt); *Scally v. Hilco Receivables, L.L.C.*, 392 F. Supp. 2d 1036 (N.D. Ill. 2005) (debt buyer paid ten cents on the dollar for bank credit accounts), *on remand at* 483 F. Supp. 2d 631 (N.D. Ill. 2007); *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F. Supp. 2d 644 (S.D. Ohio 2002) (offer to buy dishonored check portfolio for \$4 per \$100); H. Roberts, *N.Y. Firm Buys CAMCO Portfolio for \$6.8*, *Rockford Register Star* (Jan. 21, 2005), available at www.rstar.com/apps/pbcs.dll/article?aid=/20050121/business07/501210320sara (Camco's purchased debt portfolio of \$1.75 billion sold for \$6.8 million or less than \$0.01 on the dollar); Patrick Lunsford, *CAMCO Debt Auction Spectacle Nets Good Results*, www.collectionindustry.com (Jan. 20, 2005) (high bid on four pools of CAMCO's debts ranged from less than a penny on the dollar for time-barred debts to \$0.12 on the dollar for debts with current cash flow). See also Andrew Martin, *Old Debts That Won't Die*, *NY Times*, July 31, 2010, at B1 (out-of-statute debt is readily available on various websites that cater to collections industry; for instance a Minn. company called Credit Card Reseller is offering \$8 million portfolio of Bank of America credit card accounts, which on average have balance of \$4981 and were written off by the bank in 2003; the expected asking price is \$16,000, or two-tenths of a cent for every dollar owed); Jake Halpern, *Pay Up, A Debt Collector Struggles to Stay Out of Debt*, *The New Yorker*, Oct. 11, 2010, at 60 (gritty story of ex-con struggling to provide for his family and build community business buying and collecting payday loans across the country); Hunt, Robert M., *Collecting Consumer Debt in America*, Fed. Res. Bank of Philadelphia Bus. Rev. 15 (Second Quarter 2007) (estimating the average price for the purchase of old debt at \$0.045 per dollar).

²⁵ Hunt, Robert M., *Understanding the Model: The Life Cycle of a Debt* p. 19 (June 6, 2013). See also S. Hwang, *Once Ignored Debts Are the Focus of Booming Industry*, *Wall St. J.* A1, Oct. 25, 2004, available at 2004 WLNR 3352902. See also Hunt, Robert M., *Collecting Consumer Debt in America*, Fed. Res. Bank of Philadelphia Bus. Rev. 15 (Second Quarter 2007) (estimating debt purchasing growth from about \$8 billion in 1995 to \$128 billion in 2005). See also Comments of ACA International Regarding the Debt Collection Workshop, FTC File P074805, at 40 (filed June 6, 2007) (stating that face value of receivables--mostly credit card accounts--purchased by debt buyers was \$110 billion in 2005, up from \$6 billion in 1993).

²⁶ Robert Hunt, Fed. Reserve Bank of Pa., *Understanding the Model: The Life Cycle of a Debt* at 18 (2013), available at <http://www.ftc.gov/bcp/workshops/lifeofadebt/UnderstandingTheModel.pdf> (presented at the FTC- CFPB Roundtable).

²⁷ Asset Acceptance Capital Corp. Annual Report on Form 10-K for 2004, at 2, 29 (reports show millions of dollars of consumer payments in 2004 on debt purchased more than five years before with some payments going back to debts purchased in 1993). See also *Johnson v. Midland Credit Mgmt. Inc.*, 2006 WL 2473004 (N.D. Ohio Aug. 24, 2006) (debt buyer collecting on twenty-year-old defective watch account and fourteen-year-old Sears account); Portfolio on Recovery Assoc., Quarterly Report to the SEC for September 30, 2006, available at www.sec.gov/Archives/edgar/data/1185348/000095013306004617/w26372e10vq.htm (showing significant collection for ten years).

purchased debts on consumers' credit reports as delinquent debts, ruining their credit ratings.²⁸ When debt buyers collect these old debts, consumers have less to spend on current necessities. That depresses the financial outlook of households and diminishes the consumer sector of the local economy.

II.B.2.b Debt Buyers Have Little Information about the Debt and Often Pursue Claims That Are Not Valid

Debt buyers typically obtain very little information about the consumer debts they buy. An industry spokesman recently "acknowledged that it is common for a debt buyer to receive only a computerized summary of the creditor's business records when it purchases a portfolio."²⁹ The debt buyer may have no more than an electronic file listing the claimed balance due and partial information about the alleged debtor, without any information about the history of charges and payments to the account. Debt buyers often do not have a copy of a signed contract, the charge slips, the application for the credit card, or a written assignment of the claim.³⁰ The account sales agreement with the credit originator may provide that the creditor will provide those documents for a specific portion of the accounts without payment and for the rest with a specified payment. Some of those agreements provide a limitation on the number of accounts for which documents may be provided in a given month and do not guarantee the availability of any account documents.

Given the inadequate information they have about the debts they pursue, it is not surprising that debt buyers frequently pursue flawed claims. After a recent workshop, the FTC concluded that "the information received by debt collectors is often inadequate and results in attempts to collect from the wrong consumer or to collect the wrong amount."³¹ Some claims go into collection when they have already been settled³² or paid in full, others were someone else's debt,³³ and some were created

²⁸ See *Farren v. RJM Acquisition Funding, L.L.C.*, 2005 WL 1799413 (E.D. Pa. July 26, 2005) (\$61 purchase erroneously listed on credit report, apparently without other collection activity).

²⁹ Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report*, at 22 (Feb. 2009).

³⁰ See, e.g., *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 609 (6th Cir. 2009) ("With each sale [from Providian to a debt buyer], certain electronic information was transmitted, including the account number, name of the debtor, address, city, state, zip, phone, current balance, charge off date, charge off amount, last payment amount, last payment date, Social Security number, APR, account opening date, and an issuer flag for each account."); *Debt Buyers' Ass'n v. Snow*, 481 F. Supp. 2d 1 (D.D.C. 2006) (plaintiff bad debt buyers failed to enjoin IRS from enforcing its requirement that debt buyers file Form 1099-C; debt buyers claim that they are incapable of distinguishing between interest and principal when they receive assignment of gross amount of debt and that compliance with IRS rules would effectively force them to violate the FDCPA by necessarily misrepresenting those components; court noted that information could be obtained in future); *Atlantic Credit & Fin., Inc. v. Giulana*, 829 A.2d 340 (Pa. Super. Ct. 2003); *Asset Acceptance Corp. v. Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 2004).

³¹ Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report*, at 24 (Feb. 2009).

³² See *Bodur v. Palisades Collection, L.L.C.*, 826 F. Supp. 2d 246 (S.D.N.Y. 2011) (after a collection lawyer confirmed that the plaintiff was not the judgment debtor (who had a similar name), it sent collection letters to him threatening to seize his assets and demanding payment); *Arvie v. Dodeka, L.L.C.*, 2011 WL 2223844 (S.D. Tex. June 7, 2011); *Healey v. Trans Union L.L.C.*, 2011 WL 1900149 (W.D. Wash. May 18, 2011) (denying debt buyer's motion for summary judgment; debt buyer, after providing § 1692g(b) validation to identify theft victim, misrepresented in duns to her and in reports to credit bureaus that she owed the debt when in fact she did not); *Batchelor v. Profile Recovery Group, L.L.C.*, 2011 WL 766389 (E.D. Mo. Feb. 25, 2011); *Diaz v. G. Reynold Sims & Assocs., P.C.*, 2011 WL 17620 (E.D. Mich. Jan. 4, 2011); *Narog v. Certegy Check Servs., Inc.*, 759 F. Supp. 2d 1189 (N.D. Cal. 2011); *Burke v. Messerli & Kramer P.A.*, 2010 WL 3167403 (D. Minn. Aug. 9, 2010) (collection lawyer representing Capital One requested consumer pay debt

by an identity thief. Debt buyers may pursue debts that are beyond the statute of limitations, were discharged by the consumer in bankruptcy, or were disputed with the original credit card company years before by the consumer for fraud, nonperformance, or another problem.³⁴ Parents, children and ex-spouses are sued to pay the other's debt when they are not responsible under state contract law for the debt.³⁵ Debt buyers' claims are sometimes inflated with interest and fees³⁶ compounding monthly over a great number of years without any accounting for that huge growth in the balance.³⁷ Debt buyers may not be able to show what charges and credits have been made to the account.³⁸ Two debt buyers, CAMCO and National Check Control, were shut down by the FTC for their harassing and often mistaken collection practices.³⁹

Four advocacy groups recently issued a report, *Debt Deception*, on debt buyers' abusive collection lawsuits in New York City. A key finding was that 35% of debt buyer lawsuits were clearly meritless. Other findings included:

- Debt buyers prevailed in 94.3% of lawsuits, usually by obtaining default judgments.
- At least 71% of people sued were either not served or served improperly.
- 95% of debt buyer default judgments involved consumers residing in low- or moderate-income neighborhoods, and 56% involved those living in predominantly African-American or Latino neighborhoods.
- 69% of those sued by debt buyers were African American or Latino.
- Only 1% of people sued by debt buyers are represented by counsel.
- Only 10% of people sued answered the summons and complaint.
- In 64.1% of cases, the debt buyers were represented by one of five law firms known for their high volume of debt collection cases.

II.B.3 Abysmal Documentation of Who Owns a Debt

Another issue with debt buyers is their abysmal documentation that they actually own the debts they pursue.⁴⁰ The failure of debt buyers to maintain adequate documentation that they own the debts

settled with Capital One and requested proof that consumer had paid debt); *Fetters v. Paragon Way, Inc.*, 2010 WL 5174989 (M.D. Pa. Dec. 15, 2010).

³³ See *Velazquez v. NCO Fin. Sys. Inc.*, 2011 WL 2135633 (E.D. Pa. May 31, 2011) (demanding payment from wrong individual may give rise to a claim under FDCPA).

³⁴ See David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, Oct. 31, 2010.

³⁵ See *Stuart v. AR Res., Inc.*, 2011 WL 904167 (E.D. Pa. Mar. 16, 2011) (by alleging that defendants attempted to collect a debt from plaintiff that a relative owed but she did not owe, plaintiff raised a reasonable inference that defendants used a false representation as a means of debt collection in violation of § 1692e(10)).

³⁶ See *Seeger v. AFNI, Inc.*, 2006 WL 2290763 (E.D. Wis. Aug. 9, 2006) (FDCPA and Wisconsin Consumer Act case against debt buyer for adding a 15% fee to Cingular bills was certified as class action).

³⁷ See *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643 (7th Cir. 2009) (because of interest and late fees, purchase of less than \$70 ballooned to over \$1000 by time bad debt buyer purchased it).

³⁸ See, e.g., *Asset Acceptance Corp. v. Proctor*, 804 N.E.2d 975 (Ohio Ct. App. Jan. 21, 2004).

³⁹ See FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers Do Not Owe* (Dec. 8, 2004), available at www.ftc.gov/opa/2004/12/camco.htm.

⁴⁰ See *Norfolk Fin. Corp. v. Mazard*, 2009 Mass. App. Div. 255 (Mass. App. Ct. 2009) (debt buyer failed to prove it was real party in interest despite introducing ten bills of sale for debt). Cf. *Reyes v. Kenosian & Miele, L.L.P.*, 619 F. Supp. 2d 796 (N.D. Cal. 2008) (Unifund failed to submit credible evidence that it was assigned the debt or that it was the proper party in its state collection case; however, its collection attorneys defeated the FDCPA claim that they misrepresented Unifund's ownership when they submitted evidence of ownership in the later FDCPA suit).

they pursue leads them to abuse the court system by filing debt claims that they know they cannot prove unless they present false or robo-signed affidavits of ownership. It also subjects consumers to the risk of suit by entities that do not in fact own their debts.

The profound inadequacy of debt buyers' records of ownership is illustrated by a case that reached the U.S. Court of Appeals for the Seventh Circuit.⁴¹ The successor company to Providian assigned a debt to Vision Management Services, which then assigned it three days later to Great Seneca Financial Corp., which a month later assigned it to Account Management Services. Four months later, Account Management Services (which shortly thereafter changed its name) assigned the account to Madison Street Investments, which then assigned the account five months later to Jackson Capital which, on that same day, assigned the account to Centurion Capital. Three weeks later Centurion hired Wolpoff and Abramson as their attorneys to collect on the debt. After the transfer to Jackson Capital, but before the transfer to Centurion Capital, the consumer was sued on the account by Melville Acquisitions Group (which appears nowhere in the above chain of ownership).

The problems caused by multiple sales of the same debt are compounded by the fact that debt buyers often purchase large portfolios of accounts from creditors and then subdivide the portfolios into smaller segments and sell off those segments to different debt buyers. The same segment of a portfolio may be fraudulently sold to multiple buyers, or a debt buyer may purport to sell a portfolio that it does not actually own.⁴² The sale to the debt buyer may be evidenced by no more than a computer tape that can be easily duplicated and sold by an entity that does not own the debt.

The status of ownership is even more complex when debts are securitized. For example, to oversimplify, when credit card debt is securitized, the card issuer sells the right to receivables from a portfolio of credit card accounts. After changing hands a number of times, ownership of those receivables will reside in a trust that can issue securities in the assets held by the trust. The card issuer continues to "own" the account less the right to the receivables, and thus remains the party with the contractual relationship with the cardholder. The card issuer may also service the account.⁴³

Given these complexities, it is obvious that debt buyers and sellers should maintain and exchange scrupulous documentation of ownership of debts. Yet the opposite is true. Rarely do debt buyers have the documentation to establish that they own the debts they pursue.

To resolve this problem, the CFPB should issue a regulation that requires debt owners, debt buyers, and collectors to obtain and exchange full information about a debt whenever it is sold or placed for collection. Debt buyers and debt collectors should be prohibited from initiating collection activity unless and until they have acquired the basic information necessary to demonstrate that a debt is owed by a certain person in a certain amount. In addition, before filing suit, debt buyers and debt

⁴¹ See *Miller v. Wolpoff & Abramson, L.L.P.*, 2007 WL 2694607 (N.D. Ind. Sept. 7, 2007), *aff'd*, 309 Fed. Appx. 40 (7th Cir. 2009).

⁴² See *United States v. Goldberg* (S.D. Fla. Mar. 5, 2009), *available at* www.consumerlaw.org/unreported (debt buyer obtained accounts without paying for them and then resold them, even though original seller had voided sale because of nonpayment); *Wood v. M & J Recovery L.L.C.*, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007) (at least three different entities claim ownership of a consumer debt). See also *Miller v. Wolpoff & Abramson, L.L.P.*, 2008 U.S. Dist. LEXIS 12283 (N.D. Ind. Feb. 19, 2008) (consumer obligated on debt even though another debt buyer is suing consumer on same debt), *aff'd*, 309 Fed. Appx. 40 (7th Cir. 2009).

⁴³ See *Tostado v. Citibank*, 2010 WL 55976 (W.D. Tex. Jan. 4, 2010).

collectors should be required to have records demonstrating ownership of the debt. These proposals are spelled out in detail in Section VI of these comments.

Part III. The CFPB Should Clarify and Improve Remedies under the FDCPA

Although the ANPRM does not address the issue, we request that the CFPB issue regulations, or at least a guidance, clarifying consumer remedies under the FDCPA.

The number of actions filed by consumers against debt collectors has increased dramatically, along with the number of complaints made to state and federal agencies about violations of the law. These are strong indications that the FDCPA is not nearly as effective as it could be. The threat of public enforcement plus private lawsuits under the current FDCPA scheme has clearly not been sufficient to keep the rogue players in line.

At its core, the problem with the current private remedies scheme is that it provides insufficient deterrence to offset the incentives debt collectors have to increase the likelihood of recovering a debt by violating the law. For example, one badly worded notice to a consumer will precipitate the same amount of statutory damages under the FDCPA as a multiplicity of harassing and abusive collection efforts. Debt collectors who are deliberately and routinely violating the law do not have sufficient incentives to comply with legal requirements. Furthermore, where a debt collector recovers debt by violating the law, the financial benefit of recovery is greater than the financial costs imposed by the FDCPA's remedies scheme, thus incentivizing debt collectors to violate the law. Injunctive relief might fill this gap, but many courts have mistakenly held that consumers cannot obtain injunctive relief against illegal practices.

This all needs to change. And the CFPB has the authority to make it change.

The CFPB should issue rules or guidance clarifying 1) that injunctive relief is available for violations under the FDCPA; 2) that multiple statutory damages are available for multiple violations of the Act; and 3) that payments made by consumers in response to collection activities by collectors violating the FDCPA are actual damages that may be recovered by the consumer. We also ask the CFPB to issue a regulation or a guidance encouraging courts to exercise their discretion not to tax costs against financially distressed consumers who file unsuccessful FDCPA claims in good faith.

III.A. The Purposes of the FDCPA Counsel in Favor of the Proposed Rules.

We begin with a discussion of the policies undergirding these recommendations. Not only does the CFPB have the authority to issue the rules proposed here (as explained in the next section, *infra*), but by issuing the proposed rules, the Bureau would effectuate the purposes of the FDCPA and ensure the Act's continued vitality.

The existence of a robust enforcement mechanism is central to the FDCPA scheme. The Senate Committee Report accompanying the FDCPA reflects that “[t]he committee view[ed] this legislation as primarily self-enforcing; consumers who have been subject to collection abuses will be enforcing

compliance.”⁴⁴ To implement this Congressional purpose, consumers need more powerful tools to enforce the FDCPA and deter misconduct. Clarifying the remedies available to private civil litigants (and ensuring that low-income debtors are not discouraged from bringing suit by the threat of a costs award to the defendant debt collector) would be important steps in this direction. Indeed, the Bureau already understands the importance of private enforcement, particularly in light of the limited resources available for public enforcement and the ever-increasing number of debt-collection abuses. In an *amicus* brief to the United States Supreme Court, the Bureau and the FTC described the limitations of public enforcement:

Federal agencies cannot, as a practical matter, police the debt collection industry by themselves. Debt collectors contact millions of consumers each year. In recent years, consumers have lodged more complaints with the FTC about debt collectors than about any other industry. In 2011 alone, the FTC received a total of 117,374 complaints about third-party debt collectors (who are subject to the FDCPA), representing 22.3% of the total complaints the FTC received about all industries combined.

Although that figure is only a rough proxy for FDCPA violations . . . , it demonstrates that the potential need for enforcement exceeds federal-agency capacity by several orders of magnitude. Most agencies have authority to enforce the FDCPA only in very limited circumstances. The FTC and CFPB have broader authority, but they lack the resources to investigate any substantial percentage of the complaints they receive, let alone to pursue litigation to remedy all of the FDCPA violations such investigations might uncover.⁴⁵

Because federal-agency enforcement efforts cannot realistically address the full scope of the problem, the FDCPA provides statutory incentives to encourage self-enforcement through private enforcement actions that do not require government intervention. *The Act’s private-enforcement provision, 15 U.S.C. § 1692k, reflects Congress’s effort to make consumer enforcement economically feasible by authorizing statutory damages as well as actual damages, and by compensating prevailing consumers for their attorney’s fees and costs.* (Emphasis added).⁴⁶

These legal principles and practical concerns not only support the general notion that the CFPB should use its rulemaking powers to broaden the availability and force of private enforcement, but specifically counsel in favor of each of the rules that we propose here.

First, in light of the increasing number of small, judgment-proof debt collectors, it is essential that courts presiding over private FDCPA litigation have the authority to deter future misconduct by issuing injunctions to compel debt collectors to abide by the FDCPA under penalty of civil or criminal contempt. For a number of debt collectors, the threat of damages does not serve as a sufficient deterrent to abusive practices because the collector cannot pay out any substantial

⁴⁴ Sen. Comm. Rep. No. 95-382 at 5 (Aug. 2, 1977).

⁴⁵ CFPB’s Brief for the United States as *Amicus Curiae* Supporting Petitioner at 22-23, *Olivea Marx v. Gen. Rev. Corp.*, No. 11-1175, 133 S. Ct. 1136 (2013)(citations omitted). The brief goes on to explain how the statutory damages scheme encourages private enforcement of the Act.

⁴⁶ *Id.* at 23 (citation and quotation marks omitted).

damages award. Rogue collectors may even structure their companies so that the entity violating the FDCPA has no assets and can use illegal collection tactics without fear of consumer suits. Because many of these debt collectors are so small, they are unlikely to be targeted by public enforcement agencies, which, as the Bureau recognizes,⁴⁷ generally only take on the largest and most egregious cases. Authorizing consumers to pursue these rogue collectors by seeking injunctive relief will help close a serious gap in FDCPA enforcement.

Second, the view that the statutory damages cap applies to each action and not to each violation of the Act undermines the statutory damages scheme to such an extent that it fails to serve as a sufficient deterrent to debt collectors or incentive to potential plaintiffs to bring suit. Even if a \$1000 cap per incident was sufficient when the Act was enacted in 1977, that amount is certainly insufficient today. Accounting for inflation, \$1000 in 1977 is the equivalent of almost \$4000 today.⁴⁸ Moreover, in many of the most appalling FDCPA cases,⁴⁹ the debtor is subject to serious and ongoing abuse.⁵⁰ By clarifying that numerous violations yield an increased statutory damages cap, the Bureau would deter debt collectors from committing multiple violations within the same course of wrongful conduct.

Third, a rule allowing courts to award as actual damages amounts paid by debtors in response to FDCPA violations would rectify an increasingly severe imbalance in the incentives provided by the FDCPA damages scheme. As debtors face increasingly serious financial troubles, and are thus more susceptible to paying debts (whether valid or not) in response to FDCPA violations, abusive debt collectors have a greater incentive to violate the Act and internalize possible statutory damages as a cost of doing business as a successful debt-collection agency. The CFPB can counteract this trend.

And, finally, consistent with the congressional intent to encourage low-income debtors to sue to protect their rights, the CFPB should do everything in its power to encourage courts to award fees and costs to prevailing debt collector-defendants only in cases where the debtor-plaintiff has brought suit in bad faith.

III.B The CFPB Has Statutory Authority under Dodd Frank to Clarify Remedies Available to Private Litigants under the FDCPA.

The CFPB's rulemaking authority to clarify the FDCPA's remedies derives from two statutory sources:

1. 12 U.S.C. § 5512(b)(1) provides “[g]eneral authority” to the “Director^[51] [to] prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent

⁴⁷ *Id.*

⁴⁸ See CPI Inflation Calculator, Bureau of Labor Statistics, available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

⁴⁹ See, e.g., *Chiverton v. Fed. Fin. Grp.*, 399 F. Supp. 2d 96 (D. Conn. 2005) (describing serious, ongoing, and repeated violations).

⁵⁰ Some courts may award actual distress damages for such ongoing misconduct, but it is difficult for plaintiffs to establish emotional damages, *id.*, and the slim possibility that a court will award such damages does not, on its own, deter misconduct or incentivize private enforcement.

⁵¹ ANPRM, 78 Fed. Reg. 67847, 67853 (Nov. 12, 2013) (stating that the “Bureau” has the authority to prescribe rules pursuant to § 5512(b)(1)).

evasions thereof.”⁵²

2. The FDCPA, which had not previously extended rulemaking authority to any agency,⁵³ now allows the “Bureau [to] prescribe rules with respect to the collection of debts by debt collectors, as defined by [the FDCPA].” 15 U.S.C. § 1692(d).

Each of these provisions supplies the Bureau with authority to promulgate regulations clarifying the remedies courts may award private civil litigants under the FDCPA.

III.B.1 Authority under the Bureau’s “General Authority”

The Bureau’s general grant of rulemaking authority contains language that directly supports the Bureau’s issuance of rules to support the private enforcement of any of the consumer protection laws Dodd Frank charges it with implementing.⁵⁴ The provision provides that the Bureau may prescribe rules that are “necessary or appropriate” (1) “to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws”; and (2) “to prevent evasions thereof.”

A Congressional grant of authority to make rules “necessary or appropriate” to carry out a specific purpose provides patently broad powers.⁵⁵ But the statutory language narrows this broad grant to two specific ends. First, it allows the Bureau to implement rules that “enable the Bureau to administer and carry out” both the letter and the purposes of the consumer financial laws. Second, it allows the Bureau to promulgate rules that “prevent evasions” of the consumer financial protection laws.

The language and structure of this statutory provision suggest that, with the clause “to prevent evasions thereof,” Congress intended to authorize the CFPB to promulgate rules that deter parties from violating consumer protection laws, including rules that concern *private* – as opposed to merely public – enforcement of the statutes.

This conclusion is supported, first, by the plain meaning of the phrase “to prevent evasions thereof.” This language permits the Bureau to promulgate rules deterring debt collectors from violating the FDCPA. Indeed, courts have interpreted exactly this same language in other statutes to authorize agencies to promulgate rules that ensure that private actors cannot avoid liability for

⁵² The FDCPA is among the “Federal consumer financial laws,” as defined by Dodd Frank. *Id.* at § 5481(12).

⁵³ When enacted, the FDCPA provided one exception to this general principle. 12 U.S.C. § 1692(o) required the FTC to promulgate regulations exempting from the requirements of the FDCPA any class of debt collection practices within any State if, among other things, under state law that class of debt collection practices was subject to requirements substantially similar to those imposed by the FDCPA.

⁵⁴ The provision is a freestanding grant of authority and is not swallowed up by the other grants of rulemaking authority in Dodd Frank. Indeed, 12 U.S.C. § 5512(b)’s grant of authority is relatively narrow in some regards. Unlike some of the other grants of authority in Dodd Frank, it does not allow the Bureau to promulgate rules that are not tied to an express provision of one of the consumer financial protection laws. In addition, the rules—whether they involve substantive protections or enforcement remedies—must relate to administering or carrying out the purposes of those laws and preventing evasions.

⁵⁵ *See* Pub. Serv. Comm’n of State of N.Y. v. F.E.R.C., 866 F.2d 487, 490 (1989) (Observing that a provision providing FERC with the authority to promulgate rules “necessary or appropriate” to carry out the provisions of the Natural Gas Act was a “broad grant of authority ancillary to FERC’s basic powers,” but that it did not authorize FERC to act in contravention of the statute.).

violating the law.⁵⁶

Second, the relationship between the two express sources of authority within this provision— (1) “to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws”; and (2) “to prevent evasions thereof” – suggests that the latter concerns regulations related to private enforcement of the statute. One of the Congressional purposes for the FDCPA was that it be primarily self-enforcing. Congress not only created a new private remedy, but also stated that the private remedy was intended to be the “primary” enforcement mechanism.⁵⁷ The language providing the Bureau with the authority to promulgate any rule necessary or appropriate to enable the Bureau to “administer and carry out the purposes” of the consumer protection laws would presumably cover any CFPB regulation that prevents evasions of the statute by directly or indirectly bolstering the Bureau’s enforcement capabilities (for example, a regulation clarifying the conduct that violates one of the enumerated laws). To give independent meaning to the second provision, then, the Bureau should interpret it to authorize rulemaking to “prevent evasions” of the laws without regard to whether the rule at issue concerns the CFPB’s enforcement capabilities. Thus, to give meaning to Congress’s provision of two separate fonts of rulemaking authority under this same subsection, the second clause should be interpreted to allow the CFPB to promulgate rules relating to *private* enforcement of the consumer protection laws.

Furthermore, the rules we propose would directly and forcefully “prevent evasions” of the Act. First, by implementing a rule clarifying that courts can issue injunctions to private FDCPA litigants, the Bureau would ensure that repeat bad actors can be forced to comply with the Act or face criminal or civil contempt proceedings. Second, by clarifying that the FDCPA allows for statutory damages for each violation of the statute, the CFPB would deter debt collectors from committing multiple statutory violations within the same course of illegal conduct. And, third, by clarifying that consumers can recover payments they make in response to collectors’ illegal tactics, the CFPB would greatly reduce collectors’ incentives to evade or violate the FDCPA’s protections. Finally, reducing the deterrent effect of a potential cost award would help ensure that private enforcement of the FDCPA continues.

III.B.2 Rulemaking Authority under the FDCPA

When Congress enacted the FDCPA, it expressly prohibited the FTC from promulgating rules related to the Act.⁵⁸ With the Dodd Frank Act, Congress amended this policy, not only authorizing the CFPB to make rules “necessary and appropriate” to its ability to enforce the FDCPA and “to prevent evasions” thereof, but expressly authorizing the Bureau to issue “rules with respect to the collection of debts by debt collectors.”⁵⁹ This provision provides a second independent authorization for the Bureau to issue the rules that we propose here.

⁵⁶ See *Wilshire Oil Co. of Tex. v. Bd. of Governors of the Fed. Reserve Sys.*, 668 F.2d 732, 739 (3rd Cir. 1981) (interpreting language in the Bank Holding Company Act); cf. *Arthur v. Fox*, 108 U.S. 125, 127 (1993) (concluding that the Federal Reserve Board acted under its authority to “prevent evasions” of the BHC Act by enforcing the statute against an entity that, though perhaps in literal compliance with the law, was clearly defying the law’s purpose).

⁵⁷ See National Consumer Law Center, *Fair Debt Collection* § 6.1 (7th ed. 2011 and Supp.).

⁵⁸ See S. Conf. Rep. No. 95-382 at 6 (1977) (“Because the committee regards this as comprehensive legislation which fully addresses the problem of collection abuses, the administrative agencies charged with enforcement are specifically prohibited from issuing additional rules or regulations applicable to persons covered by this legislation.”).

⁵⁹ 15 U.S.C. § 1692(d).

The phrase “with respect to the collection of debts” could be interpreted narrowly, authorizing the Bureau to issue regulations related only to debt collectors’ actual practices and not to the enforcement of the FDCPA. But this interpretation would comport neither with the plain meaning of the statutory language nor its placement within the regulatory scheme.

First, courts have construed the term “with respect to” extraordinarily broadly, comparing it with the term “in connection with.”⁶⁰ Particularly in the context of an Act delineating illegal debt collection practices and setting out their remedies, rules clarifying the remedies available to private civil litigants certainly seem to be “with respect to” the collection of debt.

Second, Congress’s use of this precise language does not reflect any intent to limit the CFPB’s authority under the FDCPA – in fact, just the opposite. The provision’s language derives from a prior version of 15 U.S.C. § 1692l, which set out that “[n]either the [FTC] nor any other agency . . . may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors.”⁶¹ Understood in this light, the CFPB’s rulemaking authority under the FDCPA was neither tailored nor circumscribed. Rather, it is more likely that Congress intended to provide the CFPB with all of the rulemaking power of which the FTC had been deprived. Just as the prior provision had been read to drastically restrict the FTC’s rulemaking power under the FDCPA,⁶² and would almost certainly be read to deprive the FTC of the power to make rules concerning the remedies for violations of the FDCPA, the new provision should be read to provide the CFPB with precisely this authority.

III.C The Rules Proposed Here Correctly Interpret the FDCPA

Having established that the Bureau has substantial statutory authority to promulgate the proposed rules, we now explain how these rules (1) would clarify statutory ambiguities; and (2) are correctly interpret the FDCPA in light of its broad remedial purposes.⁶³

III.C.1 Injunctive Relief to Private Civil Litigants

The FDCPA’s remedy provisions are entirely silent as to the question of whether courts may award injunctive relief to private civil litigants. The majority of courts discussing the availability of FDCPA injunctive relief have found it to be unavailable.⁶⁴ But this view is by no means universal. A handful of courts have suggested or directly held that such relief is available.⁶⁵ And a recent decision of the U.S. Court of Appeals for the Sixth Circuit reiterated that the issue is still open.⁶⁶

⁶⁰ Pace v. Bidzos, 2007 WL 2908283 (N.D. Cal. Oct. 3, 2007).

⁶¹ See Blackwell v. Prof. Bus. Servs. of Ga., Inc., 526 F. Supp. 535, 538 (N.D. Ga. 1981).

⁶² See *id.*

⁶³ Chevron U.S., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

⁶⁴ See, e.g., Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004); National Consumer Law Center, Fair Debt Collection § 6.7 (7th ed. 2011 and Supp.).

⁶⁵ See, e.g., See Gravina v. Client Servs., Inc., 2009 U.S. Dist. LEXIS 78204 (E.D.N.Y. Aug. 25, 2009); Anderson v. Nationwide Credit Inc., 2009 U.S. Dist. LEXIS 57157 (E.D.N.Y. June 25, 2009); Wilson v. Transworld Sys., Inc., 2002 U.S. Dist. LEXIS 10891

(M.D. Fla. Mar. 29, 2002); Piper v. Portnoff Law Assocs., 262 F. Supp. 2d 520 (E.D. Pa. 2003); Klewer v. Cavalry Invs., L.L.C., 2002 U.S. Dist. LEXIS 3378 (W.D. Wis. Feb. 21, 2002); Ballard v. Equifax Check Servs., 27 F. Supp. 2d 1201 (E.D. Cal. 1998); Valderrama v. Nat’l Revenue Corp., 1981 U.S. Dist. LEXIS 18627 (D. Neb. Sept. 28, 1981). See also, Liles v. Del Campo, 350 F.3d 742 (8th Cir. 2003)..

⁶⁶ Hrivnak v. NCO Portfolio Mgmt., Inc., 719 F.3d 564, 569-70 (6th Cir. 2013).

Consistent with federal courts' general power to craft equitable remedies, the statute's silence with regard to the question of the availability of injunctive relief should be interpreted as allowing courts to award such relief to private litigants. Article III of the United States Constitution merged within our single federal judicial system the jurisdiction to hear cases in law and in equity, U.S. Const. Art. III § 2, and early congressional enactments clarified that federal courts have inherent jurisdiction to award injunctive relief in any case where there is federal subject matter jurisdiction.⁶⁷ In recognition of this inherent power, the Supreme Court has held that “[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.”⁶⁸ The FDCPA does not include any congressional command, let alone a clear one, prohibiting courts from awarding injunctive relief to private civil litigants. Indeed, the Act grants courts wide discretion to consider appropriate monetary damages, and nowhere suggests that the courts' discretion is limited to awarding actual and statutory damages.

Courts concluding that they lack the authority to award injunctive relief to private civil litigants base their analyses on the slimmest of statutory reeds. Because 15 U.S.C. § 1692l, governing “[a]dministrative enforcement of the Act,” provides that the FTC may rely on “[a]ll of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act” to enforce the FDCPA, while § 1692k, governing “civil liability,” only expressly refers to the “amount” a court may award a private civil litigant, these courts reason that Congress must have intentionally excluded the possibility of injunctive relief from the latter section.⁶⁹ This argument might be more persuasive if § 1692l actually referred to the availability or importance of injunctive relief, or if § 1692k actually set out any limits on courts' power to award injunctive relief. Instead, the provision allowing the FTC to use all of its enforcement powers available under the FTC Act merely codifies the Commission's authority to act pursuant to its usual authority when enforcing the FDCPA. And with regard to § 1692k, Congress enacted that section against the background legal principle that equitable, injunctive relief is always available unless otherwise provided.

III.C.2 Multiple Statutory Damages for Multiple Violations in a Case

The FDCPA provision allowing remedies to private litigants, 15 U.S.C. § 1692k(a)(2), provides that in addition to actual damages sustained as a result of a violation of the FDCPA, courts may award statutory damages up to the following limits:

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

- (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or
- (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector;

⁶⁷ 28 U.S.C. § 1651, the “All Writs” Act.

⁶⁸ *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

⁶⁹ *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

The interpretation of this provision has been contested in cases where the defendant commits multiple FDCPA violations in connection with the collection of the same debt. While the majority of courts hold that a collector's liability to a consumer for statutory damages is capped at \$1,000, no matter how many violations are joined in the lawsuit,⁷⁰ the better reasoned decisions allow multiple statutory damages awards where there are multiple FDCPA violations.⁷¹

First, the plain language and structure of the statute counsel such an interpretation. Section 1692k(a) begins by setting out that “any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to” the sum of actual damages and statutory damages. Of course, had Congress intended to limit the statutory damages cap to each case – as opposed to each violation – it could have said so expressly. Or it could have specified that “any debt collector who fails to comply with any one or more provisions,” was liable for statutory damages up to the cap, thus suggesting that the same statutory damages cap applied to debt collectors that commit a single violation and those that commit multiple violations. Instead, the section's reference to a debt collector who “fails to comply with any provision” with the statute places emphasis on the debt collector's violation and suggests that damages should be based on the defendant's failures to comply with the statute.

Second, the history and origin of the statutory language “in the case of any action by an individual” in section 1692k(a)(2)(A) support the interpretation that the statutory damages caps should correspond to the number of violations, and not that the \$1000 cap applies to each “action by an individual.” The FDCPA provision is patterned after a similar Truth in Lending Act (TILA) provision. The TILA provision originally did not have a separate subsection for class actions, and it capped statutory damages at \$1000. When a cap for class actions was added in 1974, the “in the case of an action by an individual” language was also added to distinguish the class action cap from the individual action cap.⁷² The FDCPA simply borrowed those words (“any action by an individual”) from the TILA to distinguish between the class action and individual action caps. This language, therefore, does not bear on the statutory question at issue here.

Furthermore, it is important to note that TILA limits multiple statutory damages for multiple *disclosure* violations, but does so through an entirely separate and express provision – section 1640(g). Congress, therefore, believing that a limitation for multiple disclosure violations was appropriate in TILA, did not rely on the language in section 1640(a)(2)(A) – “in the case of an individual action” – to achieve this limitation. In line with this history, many cases have held that multiple statutory damages are appropriate remedies when the creditor has committed multiple violations under TILA – whether they are substantive violations, or substantive violations plus disclosure violations.⁷³ Thus the words “in any action” in TILA have no bearing on whether multiple statutory damages are available per suit, and because the FDCPA borrowed this language from TILA, the same language in the FDCPA does not suggest any limitation on the availability of statutory damages per *action*.

The idea that Congress did not intend to prohibit multiple statutory damages for multiple violations in the same action is further supported by what was clearly a deliberate congressional decision *not* to

⁷⁰ See, e.g., *Wright v. Fin. Servs. Inc.*, 22 F.3d 647 (6th Cir. 1994).

⁷¹ See, e.g., *Kachak v. Raritan Valley Collection Agency*, 1989 WL 255498 (D.N.J. May 23, 1989); NCLC, *Fair Debt Collection* §6.4.5.3 (7th Ed. 2011).

⁷² Pub. L. No. 93-495, § 408, 88 stat 1500 (1974) *reprinted in* 1974 U.S.C.C.A.N 1724, 1746.

⁷³ See National Consumer Law Center, *Truth in Lending* § 11.6.4 (8th ed. 2012)...

prohibit the award of multiple statutory damages in the same case. The original version of the House bill on the FDCPA⁷⁴ contained language modeled after section 1640(g) of TILA, prohibiting the award of multiple statutory damages in cases involving a failure to disclose. But in the FDCPA bill this language was stripped out and did not appear in any of the many subsequent bills leading to the adoption of the FDCPA.⁷⁵

In sum, although Congress knew how to expressly exclude the possibility of multiple statutory damages, as it did in TILA by proscribing the award of multiple damages for failure to disclose, Congress declined to include such a provision in the FDCPA and instead relied on TILA's general language regarding damages, which, on its own, does not preclude the award of multiple statutory damages.

Finally, it is important to take note that courts' authority to award multiple statutory damages for multiple violations creates no risk of excessive awards, and is entirely consistent with the broad discretion given to judges to award appropriate damages that redress the harm caused to the plaintiff and deter future misconduct. As one district court judge has aptly explained,

Since the court can adjust the size of each individual award to avoid injustice and limitation by incident might permit wrongful behavior to go unpunished when one single incident included a number of particularly egregious violations, I conclude that the limit applies to each violation. The number of incidents, however is relevant to the amount of damages to be levied.⁷⁶

III.C.3 Recovery of Payments Made in Response to Conduct Violating the FDCPA as Actual Damages

The difficulty of deterring FDCPA violations is exacerbated by the belief among some bad actors within the industry that engaging in harassing, deceptive, and unfair practices increases collections, which in turn results in higher bonuses for collectors. The CFPB could mitigate the harm caused by these perverse incentives by promulgating a rule permitting consumers to recover as actual damages payments they make in response to collection activities that violate the FDCPA, such as a false threat of arrest or an abusive phone call. The rule should provide that those payments are presumed to be caused by the activity violating the FDCPA absent rebuttal evidence by the debt collector that the violation was not what caused the consumer to make payments.

An illustration of this approach is found in *Hamid v. Stock & Grimes, L.L.P.*, where the trial court concluded that the consumer –

may present evidence to the jury of all the actual damages she sustained, including the amount of money she paid to Discover Bank to settle the state court collection action: debtors may recover the amount paid to settle a debt, if the debt collector violated the FDCPA in making the collection, as occurred here. Hamid paid some or all of the money she owed to Discover Bank only as a result of the untimely lawsuit filed by S & G on behalf of the Bank. If her payment was not a proper element of

⁷⁴ H.R. 11969, 94th Cong. § 812(f) (1976).

⁷⁵ 122 Cong. Rec. H7789 (daily ed. Sept. 21, 1976).

⁷⁶ *Kachak v. Raritan Valley Collection Agency*, No. 88-3763, 1989 WL 255498 at *10 (D.N.J. May 23, 1989).

actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected.⁷⁷

The plain language of the FDCPA, allowing for the award of “actual damages,” clearly supports such an approach, and a rule like this would restore some of the consumer’s control over which business obtains her money first: the priorities most important to her family, such as rent, heat, or food, or the collector that illegally threatens, harasses, and intimidates her to recover funds that she may or may not owe.

III.C.4 Awards of Court Costs to Collector-Defendants Prevailing in FDCPA Suits

Finally, the Bureau should address the question whether a court may award costs to a collector-defendant without a finding that the plaintiff-consumer brought suit “in bad faith and for the purpose of harassment.” In February 2013, in a split 7-2 decision, the Supreme Court held, despite the clear language of the FDCPA, that generally-applicable rules allowing courts, within their discretion, to award costs and fees to prevailing parties allowed courts to award costs and fees to defendant-debtors even where the plaintiff-consumer had not acted “in bad faith and for the purpose of harassment.” In *Marx v. General Revenue Corp.*,⁷⁸ the Court interpreted the last sentence of 15 U.S.C. § 1692k(a)(3), which states:

On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

The majority opinion by Justice Thomas rejected the consumer's and *amicus* government's arguments as well as a Ninth Circuit opinion,⁷⁹ the prevailing practice over 30 years, and numerous lower court decisions,⁸⁰ and affirmed the split decision of the Tenth Circuit. The majority held 1) that, pursuant to section 1692(a) of the FDCPA, the debt collector may recover its attorney’s fees if it establishes the FDCPA suit was brought “in bad faith and for the purpose of harassment,” but 2) that the Federal Rule of Civil Procedure 54(d)(1) *also* applied in such a case given the absence of a “contrary” rule in the FDCPA. Rule 54(d)(1) provides the court with the discretion to award costs to a prevailing party, whether or not the losing party acted in good faith. The crux of the Court’s analysis was that the last sentence of section 1692(a) set out one of the conditions in which a court may award attorney’s fees and costs to a prevailing debt-collector, but it did not set out the sole condition. Instead, pursuant to Rule 54(d)(1), a court could also award fees and costs to a debt collector-defendant in any number of other contexts pursuant to the court’s discretion.

In arriving at this conclusion, the Court had to contend with the argument that Congress clearly intended the FDCPA to be primarily self-enforcing by private actions and that applying Rule 54(d) in the case of a prevailing defendant would significantly deter private enforcement because most

⁷⁷ *Hamid v. Stock & Grimes, L.L.P.*, 876 F. Supp. 2d 500, 503 (E.D. Pa. 2012). *See also*, National Consumer Law Center, *Fair Debt Collection* Ch.2 n.368 (7th ed. 2011 and Supp.).

⁷⁸ 2013 WL 673254 (U.S. Feb. 26, 2013).

⁷⁹ *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010).

⁸⁰ *See* National Consumer Law Center, *Fair Debt Collection* § 7.7.1 (7th ed. 2011 and 2012 Supp.).

consumers involved with debt collectors are in financial distress and cannot take on the risk that they will be saddled with the fees and costs of the debt collector-defendant.

In footnote 9 of its opinion, the majority explained that courts could avoid this problem and exercise their discretion over cost awards, by, for example, denying a prevailing debt collector costs because of the debtor's indigency:

Rule 54(d)(1) does not require courts to award costs to prevailing defendants. District courts may appropriately consider an FDCPA plaintiff's indigency in deciding whether to award costs. (Citations omitted.) ("[I]t is within the discretion of the district court to consider a plaintiff's indigency in denying costs under Rule 54(d)").

The dissent authored by Justice Sotomayor, and joined by Justice Kagan, concluded that the plain language of the section 1692(k)(3) required reversal.

We recommend that the CFPB take action to ensure that the *Marx* decision does not undermine private actions by financially distressed consumers. The Bureau should promulgate a rule, or issue guidance, expressly encouraging courts to exercise their discretion not to award prevailing defendants with fees and costs in cases brought by financially distressed consumers acting in good faith.

III.D Recommendations regarding clarifications of remedies under the FDCPA

The CFPB should issue a regulation (or at least a guidance) that 1) clarifies that injunctive relief is available against defendants in FDCPA actions; 2) clarifies that multiple statutory damages can be awarded for multiple violations of the FDCPA; 3) clarifies that payments made by consumers in response to illegal collection activities be considered actual damages under the FDCPA; and 4) encourages the courts to exercise their discretion in cases of financially distressed consumers.

Part IV. Medical Debt.

IV.A. Background on Medical Debt

The collective scope and impact on consumers from medical debt is enormous and cannot be overstated. According to the Commonwealth Fund, nearly 75 million working age adults (or about 41%) experienced problems with medical bills in 2012.⁸¹ In addition, 41 million adults were contacted by a collection agency for unpaid medical bills.⁸² Many of these consumers were likely to have their credit reports damaged by the negative existence of a debt collection account on their reports.

⁸¹ Sara R. Collins, et al., The Commonwealth Fund, *Insuring the Future: Current Trends in Health Coverage and the Effects of Implementing the Affordable Care Act*, April 2013, at 6, available at http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2013/Apr/1681_Collins_insuring_future_biennial_survey_2012_FINAL.pdf (hereinafter "*Commonwealth Fund 2012 Biennial Report*").

⁸² *Id.*

Medical debt represents an enormous portion of debt collected by debt collectors. A number of studies indicate that the amount of medical debt that ends up in the hands of collectors -- and in turn is reported to the national consumer reporting agencies (NCRAs) - is stunning:

- A 2003 Federal Reserve study found that over **half** of entries (52%) on credit reports for collection items are for medical debts.⁸³
- An Ernst & Young study published in 2012 confirmed the Federal Reserve's study, finding that medical debts constituted more than **half** (52.2%) of the debt collected by debt collection agencies in 2010 – more than twice as much as credit card and other financial debt.⁸⁴
- A study by Federal Reserve researchers found that that “health-care providers represented the most important group of customers [for debt collectors], accounting for more than a quarter of all revenues.”⁸⁵
- The Federal Trade Commission's report on debt buyers found that one-third of debt purchased by debt buyers from original creditors (*i.e.*, excluding resales) is medical debt.⁸⁶

The vast amount of medical debt in the hands of debt collectors raises troubling issues. Unlike collections for credit accounts, medical bills result from services that are frequently involuntary, unplanned, and unpredictable, and for which prices quotes are rarely provided. There is a good argument that medical debt collection items are not an accurate reflection of the creditworthiness of the consumer. The unique nature of medical debt raises the need for additional protections, both in its collection and in its inclusion on credit reports.

Aspects of medical debt that make it a unique form of debt are:

- The presence of a third party payor, *i.e.*, the insurance company. Medical bills often end up in collections because of the complex interactions between insurers, providers and consumers. A medical bill may end up in the hands of a debt collector as a result of a bill being unpaid due to: (1) a dispute between the insurance company and provider; (2) a provider's failure to properly bill the insurer;⁸⁷ or (3) the insurer's failure to properly reimburse the provider. Even when errors are eventually fixed, they result in long delays in payments to providers, during which bills may be sent to debt collectors. According to the Commonwealth Fund, an estimated seven million Americans reported that their medical bills had been sent to a debt collector because of a billing mistake.⁸⁸
- Consumer confusion over the complexities of health insurance and medical billing. Many consumers are simply confused about who has responsibility for paying a medical bill. They are

⁸³ Robert Avery, Paul Calem, Glenn Canner, & Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Fed. Reserve Bulletin, at 69 (Feb. 2003).

⁸⁴ Ernst & Young, *The Impact of Third-Party Debt Collection on the National and State Economies*, Feb. 2012, at 8, available at www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf.

⁸⁵ Robert M. Hunt, Fed. Reserve Bank of Philadelphia, *Collecting Consumer Debt in America*, Bus. Rev., at 13 (2d Quarter 2007), available at www.philadelphiafed.org/files/br/2007/q2/hunt_collecting-consumer-debt.pdf.

⁸⁶ Federal Trade Comm'n, *Structure of Practices of the Debt Buying Industry*, at T-4, T-7 (Jan. 2013), available at www.ftc.gov/os/2013/01/debtbuyingreport.pdf.

⁸⁷ The American Medical Association has estimated that one in five claims is processed inaccurately. American Medical Association, 2010 National Health Insurer Report Card, available at www.ama-assn.org/ama/pub/news/news/2010-report-card.page.

⁸⁸ *Commonwealth Fund 2012 Biennial Report* at 6.

often uncertain about the Explanation of Benefits form, unclear of the descriptions of the procedures they have received, and unsure of whether they should pay the healthcare provider or insurer. One study found that nearly 40 percent of Americans do not understand their medical bills.⁸⁹ Some of these consumers will let a medical bill go to a collection agency because of this confusion, or they believe that their insurer will pay it.

- The availability of insurance coverage or charity care for low-income consumers. Another complication of medical debt, especially for low-income consumers, is that these consumers are sometimes eligible for programs to pay their bills, including government insurance programs (Medicaid, CHIP, worker's compensation) or charity care. In fact, the Affordable Care Act (ACA) contains important debt collection protections, discussed further below, that specifically prohibit non-profit hospitals from engaging in "extraordinary collection actions" before they make a reasonable effort to determine whether a patient qualifies for the hospital's financial assistance policy.⁹⁰
- Discriminatory or variable pricing. One of the most ironic aspects of medical debt is that the poorest, most vulnerable patients – the uninsured and underinsured – are often charged the most: significantly higher prices than the prices charged to private and government insurers. This disparity arises because healthcare providers have a "chargemaster" list which sets forth extremely high prices for services, but then they give enormous discounts from these prices to government and private insurers – *i.e.*, every payor except the uninsured. The result is that uninsured patients pay several times more than private and government insurers,⁹¹ and several times more than the hospital's actual cost of services.⁹²
- Vulnerability of consumers with medical debt. For obvious reasons, consumers who owe medical debt may be sick, elderly, or disabled, or they may be caring for a sick family member who received services. Thus, it is important for the CFPB to be especially vigilant from a supervision and enforcement perspective regarding repeated dunning calls, harassment, and third party contacts in the collection of medical debt. There have been numerous examples of abusive debt collection against medical debtors,⁹³ include the example of Accretive Health, which demanded payment for past bills from patients seeking emergency room services and dunned pregnant women at delivery.⁹⁴

⁸⁹ Press Release, *Intuit Financial Healthcare Check-Up Shows Americans Confused about Medical Statements*, Apr. 27, 2010, at http://about.intuit.com/about_intuit/press_room/press_release/articles/2010/AmericansConfusedAboutMedicalStatements.html.

⁹⁰ 26 U.S.C. § 501(r)(6).

⁹¹ See Steven Brill, *Bitter Pill: Why Medical Bills are Killing Us*, Time, Feb. 20, 2013, available at www.time.com/time/magazine/article/0,9171,2136864,00.html. See generally, National Consumer Law Center, Collection Actions § 9.1.3 (2d ed. 2011 and Supp.).

⁹² Gerard F. Anderson, *From "Soak the Rich" to "Soak the Poor": Recent Trends In Hospital Pricing*, 26:3 Health Affairs 780-89 (2007) (giving examples of markups and noting that rates charged to many uninsured patients are often two-and-a-half times what most insurers actually paid and more than three times costs allowed by Medicare). Dr. Anderson also provides a history of how discriminatory pricing developed. *A Review of Hospital Billing and Collection Practices Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 108th Cong. (2004) (statement of Gerard Anderson, Professor, Bloomberg Sch. of Pub. Health, Johns Hopkins Univ.).

⁹³ National Consumer Law Center, Collection Actions § 9.2.2 (2d ed. 2011 and Supp.)(collecting examples).

⁹⁴ Minnesota Attorney General's Office, *Violations of Federal and State Debt Collection Laws, 5 Compliance Review of Fairview Health Services' Management Contracts with Accretive Health, Inc.* (Apr. 2012), available at www.ag.state.mn.us/PDF/PressReleases/ComplianceReview/Vol.5.pdf.

IV.B. Dealing with Medical Debt

Most of the harm that medical debt causes to consumers' financial lives is due to the activities of debt collectors. For example, the vast majority of medical debt on credit reports is furnished by debt collectors, not the original creditors (the healthcare providers). Thus, even though the CFPB has limited authority over healthcare providers, it can address many of the problems that arise from collection of medical debt by regulating debt collectors. In addition, it has authority under the FCRA to regulate medical providers in their role as furnishers of information to credit reporting agencies.

We have a number of recommendations to the CFPB on the issue of medical debt and its collection. These recommendations fall into three categories: (1) supervision of medical debt collectors; (2) credit reporting-related issues for medical debt collection; and (3) protections for low-income consumers eligible for insurance coverage or charity care.

IV.B.1. Supervision of Medical Debt Collectors

The CFPB has expansive authority over debt collectors, and debt collectors cause the most significant impacts to a consumer's financial life from medical debt.

Specifically, the CFPB should protect consumers from unfair practices related to medical debt by supervising medical debt collectors. Currently, the CFPB's rule on supervising larger participant debt collectors excludes medical debt from its \$10 million threshold.⁹⁵ This means that a debt collector that only collects medical debts, or has just a few non-medical debt accounts, escapes all CFPB supervision. As we have previously advocated, the CFPB should include medical debt collectors in its scope of supervision for larger participant collectors. Medical debt collectors have an enormous impact on the ability of consumers to access credit and other financial services, because the negative information that they furnish to the NCRAs has an enormous impact on credit reports.

Recommendation on Supervision of Medical Debt Collectors: The CFPB should include in its scope of supervision those larger participant debt collectors that focus exclusively or primarily on medical debt, by including medical debt in the \$10 million threshold under 12 C.F.R. § 1090.105(a)(3)(v).

IV.B.2. Credit reporting and Medical Debt

As discussed in detail in our Responses to Q42 and Q43, *infra*, credit reporting is a powerful tool used by collectors to facilitate their collection of all debts. Debt collectors furnish the vast majority of medical debt information that appears in credit reports; healthcare providers are seldom furnishers of information to the NCRAs.

We have several recommendations regarding the specific practices used by debt collectors when furnishing medical debts to the NCRAs. These requirements could be adopted as regulations implementing the FDCA, the FCRA or the CFPB's authority to ban unfair, deceptive or abusive acts under 12 U.S.C. § 5531.

⁹⁵ 12 C.F.R. § 1090.105(a)(3)(v).

“Parking.” Many times a debt collector will furnish information about a medical debt collection on a credit report without engaging in any dunning activity, then wait to collect the debt when the consumer needs to get a mortgage or other credit, a practice sometimes referred to as “parking” a debt. The CFPB should require that the consumer actually receive a debt collection notice from a collector before a negative item is placed on a credit report. For example, Colorado has a law that medical providers must give written notice to a consumer who has health insurance before turning an account over to a debt collector or reporting the debt to a credit reporting agency.⁹⁶

Recommendation: The CFPB should prohibit the practice of “parking.”

Minimum Time Period. The CFPB should require a certain period of time between the sending of a medical bill and when the debt can be reported on a credit report by a collector or health care provider. The time period should be similar to the length of time set by the banking regulators as to when a mortgage or credit card account should be considered “charged off.” The CFPB has the authority to establish this requirement given its ability to regulate both debt collectors under the FDCPA and other furnishers of information (even healthcare providers) to the CRAs under the FCRA.

Providing a charge-off like time period between transmission of a bill and reporting the bill to a CRA is important for several reasons. For consumers with insurance, it enables them to deal with any billing problems, including any appeals to be processed. For low-income consumers without insurance, it permits time for them to apply for government insurance programs (such as Medicaid or CHIP) or charity care from a non-profit hospital that might cover the bill (charity care might also be available to underinsured consumers with high deductibles and co-pays).

There is already precedent for such “charge-off”-like time periods. For example, California requires that hospitals provide 150 days between sending the initial bill and sending the account to a debt collector or reporting to a CRA.⁹⁷ Proposed IRS regulations issued to implement the Affordable Care Act’s (ACA) debt collection protections provide a 120 day time period, *i.e.*, they prohibit nonprofit hospitals and their debt collectors from reporting negative information to a CRA for the first 120 days after the first bill is sent.⁹⁸ However, these proposed IRS regulations would only apply to nonprofit hospitals, and do not apply to other healthcare providers, such as physicians (who are often not employed by the hospital) and ambulance services.

The CFPB should adopt a requirement similar to the IRS’s proposal that would provide a 120 day period before a medical bill can be reported to a CRA. This requirement should apply to medical debt from all types of healthcare providers, not just non-profit hospitals. Alternatively, the CFPB could reinforce any requirements issued by the IRS by prohibiting debt collectors from collecting on a medical debt for the first 120 days (or corresponding amount of time) after a bill is sent.

Recommendation: The CFPB should require a minimum period between when a medical bill is first sent to a consumer and when it can be reported to a CRA.

⁹⁶ Colo. Rev. Stat. § 6-20-202.

⁹⁷ Cal. Health & Safety Code § 127425(d).

⁹⁸ 77 Fed. Reg. 38,148 (June 26, 2012)

Disputes. As discussed above, many times a medical bill will be sent to a debt collector as a result of a billing error or an insurance dispute. The debt collector in turn will automatically send the information to a nationwide CRA. This will severely and negatively impact a consumer’s credit report and score, even though the medical bill was not paid due to an error by the provider in billing (wrong code, inadequate documentation) or an insurance dispute over coverage. These types of debt collection items really say nothing about the consumer’s creditworthiness.

Thus, we recommend that, if a consumer disputes a collection item on his or her credit report because it is the result of a billing error or insurance dispute, that debt should be specially marked as such with a specific code of “insurance/medical billing dispute.” Furthermore, the CFPB should require that such debts be excluded from any credit score and should not be considered by lenders. The CFPB has authority to adopt these rules under its authority to issue regulations to implement the FCRA, most notably 15 USC § 1681b(g)(2). This FCRA provision prohibits creditors from using medical information in considering a consumer’s eligibility for credit unless permitted by Regulation V, which implements the FCRA. Currently, Regulation V (as previously written by the banking regulators) permits the consideration of medical debt. However, the CFPB has the authority to amend Regulation V, and to exclude consideration of medical debt that is the subject of provider-insurer billing errors and disputes. After all, insurance billing errors and dispute issues only arise in the context of medical debt. Thus, to permit the consideration of this type of disputed debt is to use the existence of a medical condition adversely in considering a consumer’s eligibility for credit.

Recommendation on Disputes: The CFPB should provide protections when consumers dispute medical debt resulting from billing errors or insurance disputes.

IV.B.3. Protecting Low-Income Consumers from Excessive Charges.

The CFPB should adopt measures to protect low-income consumers from being harmed by the impact of discriminatory or variable pricing, *i.e.*, the fact that uninsured and underinsured consumers are charged “chargemaster” prices for services, which are many times what insurers and government payors (Medicare, Medicaid) pay. It is unfair, if not downright unconscionable, for a provider or collector to dun a consumer who is low-income or qualifies for charity care/financial assistance for an amount that is several times what a private insurer or government agency pays. Indeed, a few courts have even held discriminatory pricing to be actionable under state consumer protection laws, although the case law is mixed.⁹⁹ A few states prohibit the imposition of chargemaster prices, and limit charges in general, for low- and moderate-income consumers.¹⁰⁰ Similarly, the ACA prohibits hospitals from imposing chargemaster prices on consumers, and requires them to charge the same amount as generally billed to insured consumers.¹⁰¹ However, this provision only protects patients of non-profit hospitals, and the IRS has interpreted this provision to apply only to patients who qualify for financial assistance under the hospital’s own policy.

While the CFPB might not have the authority to regulate what a healthcare provider charges a low- or moderate-income patient, it can protect such patients from unfair debt collection based on such charges. The CFPB should use its authority to ban unfair or abusive practices under 12 U.S.C. §

⁹⁹ See National Consumer Law Center, Collection Actions § 9.4.2.2 (2d ed. 2011 and Supp.).

¹⁰⁰ *Id.* at § 9.4.3 (summaries of states laws protecting medical debtors).

¹⁰¹ 26 U.S.C. § 501(r)(5)(A) and (B).

5531, and prohibit debt collectors from seeking chargemaster prices from consumers who are low-income or eligible for charity care/financial assistance.

Recommendation on Protecting Low-Income Consumers from Excessive Charges: Prohibit collectors from dunning for chargemaster prices if the consumer is low-income or qualifies for charity care/financial assistance.

In order to implement this recommendation, the CFPB must require that medical debt collectors inform consumers of the ability to apply for financial assistance, or to obtain discounts if they are low-income. The CFPB must establish rules and guidelines for the inquiry that a collector will need to engage in if the consumer does indeed claim s/he is low-income or eligible for assistance. Such rules and guidelines must also ensure that collectors treat as private the information that they receive from the consumer for this inquiry, and not use it for collection purposes.

IV.C. Privacy of Medical Information

In order to implement some of the recommendations above, as well as for the reasons discussed in responses to numerous questions in the ANPRM (see for example, #s 5, 6, 7), there will be a need for debt collectors and buyers to obtain adequate documentation, which may contain medical information. Whenever medical information is involved, there is a heightened need for privacy.

There are a number of existing protections for the privacy of medical information, such as the Privacy Rule issued by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act (HIPAA).¹⁰² Debt collectors and healthcare providers are already subject to the requirements of the HIPAA Privacy Rule, but consumers are unable to enforce it.¹⁰³ Furthermore, there have been documented violations of the HIPAA Privacy Rule by debt collectors, such as Accretive Health's use of confidential medical information to collect past-due debts from patients.¹⁰⁴ The CFPB should explicitly provide that a debt collector who violates the HIPAA Privacy Rule has violated the FDCPA.

Recommendation Regarding Privacy of Medical Records: The CFPB should explicitly state that debt collectors must comply with the HIPAA Privacy Rule, and failure to do so constitutes an FDCPA violation.

There are also protections in the FCRA, 15 U.S.C. § 1681c(a)(6), for medical information in credit reports. These provisions prohibit a CRA from including the name, address, or telephone number of medical information furnishers unless the CRA formats the information so that it does not disclose either the specific provider or the nature of the medical services. Finally, the CFPB may want to consult the SAFER Guides issued by the Office of the National Coordinator for Health Information Technology.¹⁰⁵

¹⁰² 45 C.F.R. parts 160 and 164.

¹⁰³ National Consumer Law Center, Collection Actions § 9.3.4 (2d ed. 2011 and Supp.).

¹⁰⁴ Minnesota Attorney General's Office, *Privacy Violations, 4 Compliance Review of Fairview Health Services' Management Contracts with Accretive Health, Inc.* (Apr. 2012), available at www.ag.state.mn.us/PDF/PressReleases/ComplianceReview/Vol.%204.pdf.

¹⁰⁵ www.healthit.gov/policy-researchers-implementers/safer.

Part V. Student Loan Collection Issues

The widespread use of private collection agencies to pursue student loan defaulters, combined with significant expansions in the government's arsenal of collection tools, has serious consequences for student loan borrowers. With federal student loans, debt collection abuses are especially heinous because they can deprive borrowers of their rights under the Higher Education Act and have serious long-term consequences.

NCLC's Student Loan Borrower Assistance Project provides information about student rights and responsibilities for borrowers and advocates and provides direct legal representation to student loan borrowers. Most of the clients we represent are low-income borrowers living in Massachusetts. We work with other advocates across the country representing low-income clients. We also seek to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.¹⁰⁶ In addition, NCLC publishes *Student Loan Law* (4th ed. 2010 and Supp.), a unique and comprehensive treatise on all aspects of student loan law, supplemented annually. These comments are based on our extensive experience representing student loan borrowers, our daily contacts with advocates around the country, our own research and investigation, and other contacts with borrowers such as through the comment function of the website of NCLC's Student Loan Borrower Assistance Project.

This section of our comments on student loan debt begins by providing background information on student loan collections. It then addresses several of the questions posed in the ANPRM, pointing out unique issues that arise in the student loan collection context. All of those questions are also discussed with respect to collection of other types of debts in Parts VI through XI of these comments.

V.A. Background on Student Loan Collections

The Department of Education refers every eligible debt to one of 22 collection agencies. According to industry insiders, the Department of Education contract is “[t]he most sought after contract within this industry” because:

- There is so much debt;
- Student loans are very difficult to discharge in bankruptcy; and
- The business volume of federal student loan collections will grow as the government takes over originating student loans and as students take on ever-increasing debt loads to go to college.¹⁰⁷

Much of the collector-related problems for federal student loans stem from the government's collector compensation system, which gives collectors an incentive to steer borrowers toward the most lucrative options for the collection agency. In the process, the agency may violate the FDCPA and other laws by misrepresenting borrower rights or otherwise providing inaccurate information. Private student lenders, guaranty agencies, and schools also contract with private collection agencies.

¹⁰⁶ See the Project's web site at www.studentloanborrowerassistance.org.

¹⁰⁷ See Mark Russell, “*Student Loans: The ARM Industry's New Oil Well?*”, Inside ARM (Oct. 20, 2011).

Student loan debt collection contacts involve a remarkable amount of deceptive, unfair, and illegal conduct. There are several reasons for the extent of these abusive collection actions:

- Millions of student loan obligations are being handled on a “wholesale” basis, with little or no attention being paid to the facts of the individual borrower being dunned.
- Remedies available to collect on student loans are often both unique and misunderstood (for example, income-based repayment, disability discharges, and loan rehabilitation to get out of default), and collectors often misrepresent the exact nature of these remedies when they send collection letters. By all reports, collectors provide a great deal of false information.
- The complexity of the student loan programs leads to much confusion about who is collecting on a debt and makes it easy for an independent collector to misrepresent itself as the government.¹⁰⁸ The complexity also allows collectors of private student loan debt to insinuate that they can invoke collection remedies that are actually available only for federal loans.
- The Education Department delegates to private collection agencies the responsibility for determining the size of a reasonable and affordable payment plan for loan rehabilitation. In addition, these collection agencies help determine if students have defenses to wage garnishments and tax refund offsets, even though the collection agencies’ financial incentive is not to offer reasonable and affordable plans or to acknowledge defenses.¹⁰⁹

The special rules governing student loan collections lead to a number of collection abuses. For example, collectors have misrepresented a borrower’s ability to obtain a closed-school, unpaid-refund, or false-certification discharge. There is considerable confusion as well with respect to offsets of student loan debt against federal benefits. For example, borrowers have reported numerous instances of collectors threatening to offset benefits even if the borrower receives SSI payments only. In fact, SSI benefits are completely exempt from offset. In addition, collection agencies frequently mislead borrowers with respect to repayment options. In particular, agencies are often very aggressive in steering borrowers into loan consolidation or loan rehabilitation programs. These repayment strategies benefit many, but not all, borrowers.

Ultimately, private collection agencies collecting federal student loans do not have a financial interest in ensuring that borrowers understand or pursue their rights under the Higher Education Act (HEA). This has dire consequences for the most vulnerable borrowers, whose rights the HEA seeks to protect.

Recommendation (related to question 18): The CFPB should require notices for private student loans at the time the verification notice is provided that clearly state that the collection agency is not collecting a federal loan and that federal consequences (administrative wage garnishment, tax and

¹⁰⁸ See *Peter v. GC Serv., L.P.*, 310 F.3d 344 (5th Cir. 2002) (debt collector’s use of a Department of Education return address on a student loan collection letter violated the Fair Debt Collection Practices Act); *Bridger v. Nationwide Credit*, 1998 WL 729747 (N.D. Ill. June 24, 1998) (denying motion to dismiss of collector whose collection letter had large bold heading “U.S. Department of Education”).

¹⁰⁹ See, e.g., *Arroyo v. Solomon & Solomon*, 2001 WL 1590520 (E.D.N.Y. Nov. 16, 2001) (denying defendant’s summary judgment motion in case alleging, among other FDCPA violations, that defendants demanded payments in amount more than borrower could reasonably afford).

federal benefit offset) do not apply. Conversely, if it is a federal debt, the notice should state that there might be options, other than repayment, for addressing the debt such as total and permanent disability, false certification, and unpaid refund discharges.

Recommendation: The commission system drives collection agency behavior. This means that collectors generally put their own profits above borrower interests. We urge the CFPB to investigate the commission system and provide public information about it, including the Department of Education’s informal guidelines to collectors. By investigating and examining the commissions systems, we hope the CFPB will be able to identify the abuses that the incentive system is likely to foster and target additional protections and enforcement activities accordingly.

V.B. The quantity and quality of information in the debt collection system

Response to Q1 (Student Loan Debt). The lack of public information regarding student loans is a big concern for advocates for student loans borrowers. More data is needed for consumers to make informed policy recommendations in this area.

In our experience, few (if any) federal student loans are sold to debt buyers. They are, however, routinely placed with third-party debt collectors. Particularly in the private loan market, we have seen increasing evidence of entities filing collection actions on the debts without having proper assignments or issues related to ownership of the debts. These problems are similar to the “robo-signing” issues that have been widespread in the mortgage industry.

Little information is available about what documents and information are transferred to the debt collectors for either federal loans or private student loans. Some debt collectors have given borrowers copies of the promissory note, but rarely is more specific account information available. In many cases, particularly those that are in litigation, the entities seeking to sue on the loans are unable to produce promissory notes or other loan agreements.

Access to promissory notes is very important as it is helpful for verifying the existence of a debt. It is also helpful as a means of determining which school the debt is associated with. However, it is insufficient for many of the disputes that arise. Therefore, in addition to the promissory note, the CFPB should require the collector to obtain and give to the borrower a full accounting of the loan.

V.C The transfer of information and access to information upon sale or placement of debts

Uncollected debts change hands frequently. As soon as a debt collection agency determines that it will be unsuccessful in collecting an account, it typically returns the account to the lender or guarantor. Unfortunately, rarely (if ever) is information passed from one debt collector to the next.

Response to Q5 (Student Loan Debt). Q5 asks whether debt owners transfer information about consumer disputes, inconvenient times to reach the consumer, cease communication requests, and attorney representation information to collectors and debt buyers. In the student loan context, the failure to transfer information is especially true of cease communication letters. In our experience, as soon as a collector receives the cease communication letter, the file is transferred back to the lender who then assigns it to another collector who begins contacting the borrower again. In this way, lenders and collectors evade the spirit (if not the letter) of the FDCPA by continuing to harass

borrowers. Where a borrower has sent a cease communication letter, sending the account to another collection agency only serves to harass a borrower.

Q5 Recommendation (Student Loan Debt). We recommend that the CFPB prohibit a creditor from assigning an account to a new collection agency after the consumer sends a cease contact letter to a prior collection agency unless the new agency is hired to pursue legal remedies.

Response to Q7 (Student Loan Debt). Q7 asks whether other information should be transferred when a debt is sold or placed for collection. Federal student loan borrowers often attempt to access their rights under the Higher Education Act by sending documents to the debt collectors. Examples include financial hardship requests, financial documents to be used to calculate reasonable and affordable payments, discharge applications, and the like. When the lender assigns the account back to another collection agency, the borrower is often required to start the process again.

Q7 Recommendation (Student Loan Debt). The CFPB should require lenders and debt collectors to pass these documents on to successive debt collection agencies. Furthermore, debt collectors should be required to forward any information received from borrowers after the account has been returned to the lender.

Response to Q12 (Student Loan Debt). Q12 asks about sharing information about debts through a centralized repository. For federal loans held by the Department of Education, the private collection agencies have access to a database that contains some borrower documents.¹¹⁰ We do not know the full extent of this database. The Department's Manual to its debt collectors only describes accessing promissory notes. It is possible, however, that collectors are able to access other documents.

Additionally, the Department maintains the National Student Loan Database System (www.nsls.ed.gov). This database is available to borrowers, schools, and servicers. We do not know whether collection agencies are able to access NSLDS. This database does not provide accounting or interest rate information, but does include a history of the loan, the type of loan, the servicer, the lender, and the guaranty agency (if applicable). Borrowers are able to access this database directly. It is one of the most useful and important tools student loan borrowers have available to them.

Response to Qs 13-15 (Student Loan Debt). These questions ask whether consumers should be notified when a debt has been sold. Generally, student loan borrowers are rarely notified that their accounts have been placed with a specific debt collector prior to receiving dunning notices. Federal loan borrowers who are in default may access some information about their loan on myedebt.com. This website attempts to provide borrowers with the name and contact information of the debt collector assigned to the account. However, few borrowers are aware of this website. Furthermore, the information on the website is not always up to date.

Providing a notice to a borrower that an account is being sent to a new debt collection agency may provide some limited benefit to student loan borrowers. However, many borrowers may not receive

¹¹⁰ U.S. Dep't. of Educ., PCA Procedures Manual: 2009 ED Collections Contract v 1.2 (July 12, 2012). Since July 2012, this Manual has subsequently been revised. However, the Dept. of Education is no longer making this document publically available.

the notices due to changes in address, or they may not understand the notice due to language or literacy issues. Therefore, providing meaningful substantive protections is much more important.

V.D. Whether sample validation notices, and other notices relating to disputes, investigations, and verifications of disputes should be provided, and what they should include

Response to Q18 (Student Loan Debt). Q18 asks about information that should be included in the validation notice. One of the greatest sources of confusion for student loan borrowers with accounts in collections is which loan is being collected. For some loans, indicating the creditor and account number is insufficient. For example, some servicers handle both federal and private loans. Sallie Mae, for example, assigns account numbers by borrower and not by loan. Therefore, a borrower's private loans and federal loans will have the same account number, even though one loan may be in good standing while the other is in default. While there may be some information that distinguishes the federal from private loans (e.g., different interest rates, different departments, names of loans, etc.), few borrowers truly understand the difference between these loans.

Validation notices need to be very clear about which specific debt the collection agency is attempting to collect and whether the debt is a private loan or a federal loan. Moreover, the notice should be clear about the borrower's rights.

Response to Q33 (Student Loan Debt). Q33 asks for data about how disputed debts are resolved. Very little data is available to consumer groups regarding the dispute process (or any other debt collection practice) with regard to student loan collection. NCLC has requested data from the Department of Education regarding debt collection practices through multiple Freedom of Information Act requests. However, we were told that much of this data does not exist or is not subject to disclosure. There is general data available from the Department of Treasury about the different collection powers and how much debt each collects. We do not know if the Department of Education collects collection agency complaint information and if so, if this is publicly available. Problems with the Department of Education complaint system are documented in NCLC's 2012 report and 2013 update, *Borrowers on Hold: Student Loan Collection Agency Complaint Systems Need Massive Improvement*. The Federal Trade Commission keeps records of complaints against collection agencies, but it does not segregate the data by type of debt. The paucity of publicly available data is a serious problem that the CFPB should address.

Q33 Recommendation. The CFPB should work with other government agencies to ensure that data on federal student loans (e.g. the amounts collected, programs accessed by borrowers, success rates of rehabilitation plans, complaints against collection agencies, etc.) is collected and made public.

Response to Qs39-41 (Student Loan Debt). These questions ask about how disputed debts are and should be investigated. In some cases, federal student loan debt collectors provide a copy of the promissory note in response to a borrower's dispute if they have it. It is rarely straightforward to obtain this information either because the agency claims not to have it or because the account has been transferred so many times that it is unclear which agency has the information. In at least one case, instead of providing the promissory note from the debt it was attempting to collect, the collector provided the consolidation application the client had sent to the Department of Education AFTER she received dunning notices.

In many cases, a promissory note is not sufficient to validate a debt. Because federal student loans have no statute of limitations, many of these debts are decades old; and, in some cases, the borrower has had no contact on the loans for many years. Some borrowers believe that they have paid off loans or that they were otherwise disposed of. In these cases, the dispute is not about the original existence of the debt, which is the only information that a promissory note can validate. Rather, in these cases, a full accounting of the loan is needed. Repayment is often the issue of contention and in those cases a full accounting is critical.

Unfortunately, these problems are largely due to the fact that there is no law like the Fair Credit Billing Act that gives consumers the right to obtain information about their student loans, whether federal or private. Although the Higher Education Act (HEA) does require servicers to provide some consumer disclosures, these are minimal, and it is nearly impossible for consumers to enforce the HEA because there is no private right of action. For private loans, TILA servicing requirements do not apply. Unlike mortgages, which have some servicing standards such as RESPA, there are no comparable laws for student loans.

Q39-41 Recommendation (Student Loan Debt). We recommend that the CFPB require debt collectors to provide the promissory note and a full accounting when a borrower disputes a debt or otherwise requests the information.

V.D. Deceptive Conduct

Responses Q 100, 127 (Student Loan Debt). For federal student loans, the Department of Education pays the highest commissions when borrowers rehabilitate their loans. Under the contract expected to start in 2014, when a borrower consolidates a student loan, the debt collection agency will receive 2.75 percent of the total loan balance. For loan cancellations, the collector is paid a small administrative resolution fee, \$150.¹¹¹ In contrast, when the borrower rehabilitates a student loan, the collection agency gets paid approximately 13 percent of the total loan balance.¹¹² This means that borrowers are often steered into rehabilitation plans instead of other programs. Although the commission system for collection agencies collecting FFEL loans is not publically available, similar abuses are found in that program as well. Attempts by advocates to persuade the lenders, including the federal government, to take accounts from the debt collection agencies so that the debtor can access the full range of options are rarely successful.

Collection agencies use a variety of tactics to get borrowers into rehabilitation. One such tactic is to falsely state that a borrower does not qualify for other programs such as consolidation. However, more often borrowers never know that other options exist. We consider this to be an omission that is likely to mislead a borrower.

In one such case, prior to seeking NCLC's help, a borrower had been advised by the debt collection agency that she needed to rehabilitate her loans. This borrower agreed to pay \$200 per month despite the fact that the borrower received only \$750 in SSI and SSDI benefits per month. This

¹¹¹ U.S. Dep't of Educ., Combined Synopsis/Solicitation, Default Collection Services, Solicitation Number: ED-FSA-13-R-0010 (July 3, 2013), *available at* www.fbo.gov/index?s=opportunity&mode=form&id=7931bad01d08e019a226d47cbc52b95b&tab=core&_cview=1.

¹¹² Michael Tarkan, Compass Point Research & Trading, LLC, Education Services: ED Collection Contract Solicitation Released (July 5, 2013).

borrower made thousands of dollars in payments on this loan but was never successful in rehabilitating her loan because the payments were more than she could afford. The debt collection agency failed to tell the borrower that she was entitled to a reasonable and affordable rehabilitation payment based upon her financial circumstances. More importantly, the collection agency failed to tell her that she might qualify for a complete discharge of her loans based upon her disability. With the assistance of legal counsel, she applied for a discharge of her loans and her loan balance was forgiven. Because of these omissions, this borrower living well below the federal poverty line, lost thousands of dollars that she could have used on food, medication, and housing.

In addition, collection agencies uniformly oversell the benefits of rehabilitation. Though rehabilitation does result in a removal of the default notation from the borrower's credit report, it does not remove the account or the negative payment history. Yet, collection agencies uniformly tell borrowers that rehabilitating their loans will clean up their credit. In fact, it is unclear to what extent removing the default notation actually improves the borrower's credit at all. Most of the borrowers we work with at NCLC, when properly counseled on the credit benefit, decide that the credit benefit is not worth the administrative hassles of rehabilitation over other options for getting out of default.

Q100, 127 Recommendation (Student Loan Debt). Collection agencies are often the only point of contact student loan borrowers have for their student loans. **Therefore, we recommend that the CFPB include in its regulations that failing to properly advise borrowers of their rights and options under the Higher Education Act is a material omission and thus deceptive under the FDCPA.** In addition, the CFPB should state exercise its UDAAP authority and rule that this failure is unfair, deceptive, and abusive.

With regard to private loans, as mentioned above, due to the complex nature of student loans, many borrowers think federal loan consequences apply to private loans. Collection agencies for private loans should not be allowed to benefit from this confusion. The CFPB should adopt a rule stating that it is deceptive for a collector, when collecting a private student loan debt, to fail to inform the consumer that federal remedies such as administrative wage garnishment and tax and federal benefit offsets are not available.

V.E. Time-Barred Student Loan Debt

Federal student loans have no statute of limitations, so issues relating to time-barred debts do not apply. However, private loans are subject to a statute of limitations. As discussed before, this is a source of confusion for borrowers because the two types of loans are often conflated. Therefore, it is very important to have protections in place for borrowers with private loans nearing the statute of limitations. This is also a concern if Congress passes legislation to allow private loan borrowers to "swap" private student loans into federal student loans. Private loan borrowers holding loans with expired statutes of limitations should receive full cancellation of these loans rather than converting to a federal loan where there is no statute of limitations. There is no "swap" program in effect at this time, but Congress has considered various proposals to allow this over the years.

Furthermore, we are seeing an increase in collection activity by a number of debt collectors attempting to collect institutional loans made by for-profit schools. As documented in NCLC's

2011 report, *Piling It On: The Growth Of Proprietary School Loans and the Consequences For Students*,¹¹³ institutional loans are a subset of private loans made by the schools themselves, but often with third-party funding or guarantees. Many institutional loans carry predatory lending terms, high interest rates, shocking default rates (some companies report default rates over 50 percent), and harsh consequences for borrowers. The documentation on these loans is terrible if it exists at all. In fact, in some cases, the borrower's financial aid records from the school contradict dunning notices from collection agencies. In prior years, we rarely saw schools make any attempt to collect on these loans. However, that appears to be changing. Now, a number of the schools are just now starting to collect on very old debts that are time-barred.

Part VI. Transfer and Accessibility of Information Upon Sale and Placement of Debts (Qs 1-15)

The CFPB's ANPRM lists fifteen questions that relate to the information about a debt that is transferred between creditors, debt buyers, and collectors as debts are bought and sold. We commend the CFPB for addressing these critical issues. The explosive growth of the debt buying industry has dramatically changed the debt collection landscape. Our basic recommendation with respect to all of the questions is that the CFPB should require much fuller exchange of information when debts are sold or assigned, and should prohibit collection activity unless the collector has information documenting the existence and amount of the obligation, the identity of the obligor, and the ownership of the debt.

Our overarching recommendation on all of the questions asked in the ANPRM is that **all parties involved in the collection or sale of a debt should be responsible for ensuring that complete information is passed on to the next party.** Rules should require the original creditor and any debt buyer to pass on the information to the next buyer, and subject them to CFPB enforcement if they do not. Any debt collector should also be responsible for having and using all relevant information, before beginning to collect, to determine whether and how the debt is collectable. *Whether or not a prior party actually passed on the information*, it should be a violation of the FDCPA for any debt collector or debt buyer to collect a debt in a manner that is improper. Imposing potential liability on both the debt seller and the subsequent debt collector is important to ensure that the information is actually transmitted. Debt collectors and buyers can protect themselves through indemnity agreements with creditors and debt sellers.

For example, under this rule, if the consumer exercised her right to cease communication with a debt collector, then the creditor or debt collector would have to pass that information on to the next collector or debt buyer. It would then be an unfair debt collection practice for the next collector to call the consumer. If the subsequent debt collector did not know about the consumer's prior request, the collector would still be responsible for violating the FDCPA, but the collector could seek indemnity from the creditor for failing to pass on required information.

Q1. What data are available regarding the information that is transferred during a sale of debt or the placement of debt with a third-party collector and does the information transferred vary by type of debt (e.g., credit card, mortgage, student loan)? What data are available

¹¹³ Available at <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/proprietary-schools-loans.pdf>.

regarding the information that third-party debt collectors acquire during their collection activities and provide to debt owners?

Response to Q1: As the CFPB is aware, the amount of data that is currently available varies widely depending upon the type of debt and the relationship between the creditor and the debt collector. The prologue to this question in the ANPRM contains an excellent summary of the failures of the current system regarding transfer of data relating to the debt itself.¹¹⁴ The greatest problem is that the credit card companies do not guarantee the accuracy of the scant data points that they transfer in spreadsheet rows about the debt to the first debt buyer, but nevertheless, debt buyers tend to represent that information as entirely correct and accurate.¹¹⁵ The second greatest problem is that there is no guarantee that there are any business records or transactional documents to establish a legal obligation for any particular account as the that is not guaranteed by the credit card companies' sales contracts.¹¹⁶ In addition, the information obtained during collection efforts by debt buyers, such as disputes about the debt (not owed, has been paid, wrong person, etc.), the activities and results of prior collection efforts, or information that the consumer is represented by counsel, is not typically passed along to the next buyer.¹¹⁷

The fact that this data is not currently transferred does not mean that it cannot and should not be. As is apparent from the Best Practices recently issued by the OCC,¹¹⁸ that federal regulator believes that substantially better information relating to both the collection of the debt and the process of collecting the debt can be – and indeed should be – provided between the original creditor and subsequent debt collectors. The Best Practices document mandates that the information exchanged include such matters as whether the consumer has an attorney, has disputed the debt, or has informed the collector that calls at work are prohibited. Presumably this would also require information about whether the consumer has requested the debt collector to cease contacts, has denied that the debt is hers, or has indicated that it is already paid.

Q2. Does the cost of a debt that is sold vary based on the information provided with the debt by the seller? Are there certain types of debts that are not sold, such as debts a consumer has disputed, decedent debt, or other categories of debt?

Response to Q2: We have learned in litigation by and against debt collectors and debt buyers that consumer debt is priced based upon its perceived collectability, which includes, but is not limited to, the average balance, geographic location/concentration of the debtors, date of last payment and the media (documentation, if any) that comes with the debt or can be obtained after purchase. All types of consumer debts are packaged and sold, including disputed, decedent, bankrupt and time-barred debts. The only difference is that the price per dollar may go from the usual few cents per dollar to fractions of a cent per dollar.

¹¹⁴ ANPRM at 26.

¹¹⁵ See FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013), available at <http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Statement of the Office of the Comptroller of the Currency, Provided to the Subcommittee on Financial Institutions and Consumer Protection, Senate Committee on Banking, Housing, and Urban Affairs: “Shining a Light on the Consumer Debt Industry,” July 17, 2013 at Appendix 1, available at <http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf>.

Q3. The OCC recently released a statement of best practices in debt sales which recommends that national banks monitor debt buyers after sales are completed “to help control and limit legal and reputation risks.” What monitoring or oversight of debt buyers do creditors currently undertake or should they undertake after debt sales are completed or after debts are placed with third parties for collection?

Response to Q3: This question focuses on the level of monitoring of debt buyers that creditors should be required to take. We think creditors should be required to monitor the future collection efforts on their debts. Further, if they have seen problems, they should be responsible for ensuring that future debts are not sold to the same buyers. However, we think that by itself, this is not a sufficient remedy for the problems presented by the inadequate documentation provided by sellers of debts to debt buyers.

As discussed in section II.B of these comments, debt buyers almost never have any proof that the debtor owes the amount claimed—or even that the debt buyer actually owns the debt. Some debts are sold many times, often within a short time period, so that untangling the web of ownership is exceedingly complex but critical to insure against multiple creditor claiming the right to collect the same debt. . Very, very few consumers have the wherewithal, even when they have good attorneys representing them (a very rare occurrence for consumers defending against debt collection lawsuits) to present their defenses and put the debt buyer to its proof, much less to parse through the question of whether the plaintiff in the lawsuit truly has the legal right to bring the action.

To remedy this huge problem of substantiation of the right to collect and the right to sue, the CFPB should ensure that the onus is always on the collector (including the debt buyer) to have in its possession – or have ready access to – sufficient information about each debt before beginning collection activity. In addition, as discussed in response to Q3 ,5 & 7, *infra*, a debt buyer or collector should be required to have additional items of information, documents, and accurate business records before filing suit on a debt.

Q3 Recommendation. We recommend that the CFPB issue clear and strong, privately enforceable, regulations under the FDCPA and its authority under Dodd Frank, as applicable to creditors, requiring that before commencing collection activity on a debt, the collector must have in its possession or have accessed correct information about the debt and determined that the debt is legally owed and that the person the collector intends to pursue is in fact the debtor.

The CFPB should require that the following information about the debt always be made available to the transferee or assignee whenever a debt is transferred or assigned for collection:

Necessary information relating to the debt before collection activities can begin:

1. A legible copy of the original contract, including the name of the original creditor, or signed application, or other documents that provide evidence of the consumer’s liability.
2. The name, address history, phone numbers, and social security number of the consumer
3. The amount owed on the debt, itemized between principal, interest and fees assessed (see our Recommendations in Response to Q17 for an example of how this would be accomplished for open end credit).

4. A) For credit card accounts and other open end credit, copies of all or the last 12 (whichever is fewer) account statement; B) for closed end credit, including medical debt and student loan debt, the records proving the extension of credit. In addition, the consumer should be entitled upon request to the original creditor to an accounting of the charges and payments since the a account last had a zero balance.
5. All account numbers ever used by the transferor and its predecessor(s), if any, to identify the account. These should include the consumer's last account number prior to charge-off, the current account number, and any other account or reference numbers that the transferor or any predecessor used to identify the account.
6. A document that provides the name of the credit originator as originally conveyed to the consumer, the brand (or store) name, if any, the date and amount of the last payment before default, the balance at the time of the last payment, and the date of default, and, if applicable, the date of charge-off and the amount owed at charge-off.
7. Information regarding any outstanding or unresolved disputes and fraud claims, as well as any disputes and fraud claims from the 6 months prior to default.
8. The date, type, source, and amount of the most recent payment.
9. The chain of title for the debt if it has been sold.

This is one of the most important changes in the rules governing the collection of all debts that the CFPB can make. Given the ease in which information is accumulated and transferred in this electronic age, full data points on all of the following should be required before creditors are permitted to transfer debts to debt buyers or to third party debt collectors. The same should be required before a debt collector or debt buyer can transfer a debt to a subsequent party.

The CFPB should prohibit the sale of debt, by originators and buyers, unless the required information is included in the sale, and the seller determines that the potential buyer has ensured the security of the borrowers' Social Security numbers and other confidential information.

An essential point here is that the CFPB's regulations should create incentives for the industry to police itself. The rules should apply to both the person selling the debt and the collector collecting the debt (whether a debt buyer, a third party collector, or even the original creditor), the whole industry will establish protocols and precautions to ensure that each player has the information needed before collection efforts begin. If the rules establish that the collector collecting the debt is responsible for ensuring that it has the necessary information before initiating collection activities, the rules will in effect become self-enforcing. If a collector does not receive sufficient information to collect on the debt, then the collector will know it cannot collect on the debt – and no collection activities will be initiated.

Q4. If debt buyers resell debts, do purchasers typically receive or have access to the same information as the reseller? Do purchasers from resellers typically receive or have access to information or documentation from the reseller or from the resellers or from the original creditor? Do conditions or limitations on purchasers from resellers obtaining information from the resellers or the original creditors raise any problems or concerns?

Response to Q4: Typically, downstream buyers have even less access to information than their predecessors. We have even seen contracts that forbid the subsequent purchaser from contacting

the original creditor. Information obtained during collection efforts, such as disputes about the debt (not owed, has been paid, wrong person, etc.), the activities and results of prior collection efforts, or information that the consumer is represented by counsel, is not typically passed along to the buyer.¹¹⁹

Q5. To what extent do debt owners transfer or make available to debt buyers or third-party collectors information relating to: disputes (e.g., that a debt had been disputed, the nature of the dispute, whether the debt had or had not been verified, the manner in which it was verified, and any information or documentation provided by the consumer with the dispute); unusual or inconvenient places or times for communications with the consumer (e.g., at the consumer's place of employment); cease communications requests; or attorney representation? What would be the benefits and costs of debt buyers and third-party collectors obtaining or obtaining access to this information upon sale or placement of the debt? To what extent do third-party debt collectors provide this information to debt owners? What would be the costs and benefits of third-party collectors providing this information to debt owners?

Response to Q5: Debt owners do not transfer this information, or even make it available to subsequent purchasers. Yet, the cost to provide this information would be negligible, as debt owners could easily transfer it along with the rest of the data that we propose they be required to provide to debt collectors.

Q5 Recommendation: Along with the authentic, bona fide records relating to the debt itself, as explained in response to Q3 and Q7, the CFPB should require the following information about the collection process itself be transferred.

Necessary information relating to the *collection* of the debt:

1. Requests and responses to validation requests or disputes.
2. Any requests by the consumer to cease communication.
3. Settlements concerning the debt.
4. The status of the debt in relation to the statute of limitations.
5. Representation of the consumer by an attorney and the attorney's contact information;
6. Information regarding inconvenient times or places for communication.
7. Discharge of the debt or listing of the debt in a bankruptcy filing.
8. Illness or disability claimed by the consumer or known to the collector.
9. Known or claimed violation of the FDCPA to date.
10. Whether the consumer is a member of the military.
11. Whether the source of the consumer's income is exclusively federally exempt funds, such as Social Security, SSI, or VA benefits.
12. Information relating to the primary language spoken by the consumer, and/or the language used in the agreement of the primary transaction.
13. Whether the consumer is deceased.
14. Other information relevant to the collection of the debt.

¹¹⁹ See FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013), available at <http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>.

Given the ease in which information is accumulated and transferred in this electronic age, full data points on all of the above should be required before creditors and debt buyers are permitted to transfer debts to debt buyers or to third party debt collectors. The enforcement of this requirement will occur best by making both the creditor and the collector responsible for ensuring that the debt collector has all of the necessary information.

Q6. To what extent do debt owners transfer or make available to debt buyers or third-party collectors information relating to: the consumer's understanding of other languages (if the consumer has limited English proficiency); the consumer's status as a servicemember; the consumer's income source; or the fact that a consumer is deceased? What would be the benefits and costs of debt buyers and third-party collectors obtaining access to this information upon sale or placement of the debt? To what extent do third-party debt collectors provide this information to debt owners? What would be the costs and benefits of third-party collectors providing this information to debt owners?

Response to Q6: Currently, this information is not regularly transferred, nor made available. In our survey of attorneys for consumers, the uniform response to this question was that none of this information was transferred to the subsequent collector or debt buyer. The cost to provide this information is negligible as it is just additional data that could be transferred along with the data that aids in collection. Transfer of such data would aid debt buyers and debt collectors in complying with collection laws, and end collection activity on debts that will not, should not, or cannot be paid.

In addition the purchaser, should be required to determine from the data providers if the consumer has died or the military or bankruptcy status has changed.

Q7. Is there other information that has not yet been mentioned that should be required to be transferred or made available with a debt when it is sold or placed for collection with a third-party collector? What would be the costs and benefits of debt buyers and third-party collectors obtaining or obtaining access to this information upon the sale or placement of a debt?

Response to Q7: In addition to the information listed in our responses to Q3 and Q5, the CFPB should require a collector to have in its possession, prior to filing suit on a debt, information demonstrating that it is the owner of the debt or has the right to sue on it. The signed account application, or the promissory note in the case of student loan, all terms and conditions, account statements, correspondence and communications about the account, including disputes, prior collection actions and the results of same, should be transferred. In the case of a student loan, a full accounting should be made available. In addition, as we articulated in Section II.B.3, to deal with the complex issues relating to the right of the parties bringing the collection, we have the following recommendation:

Q7 Recommendation: The CFPB should issue a regulation requiring that any party initiating suit for the collection of a consumer debt must have in its possession all of the records required in response to Q5 and Q7, and attach to the complaint when filed, copies of the following documents:

1. A copy of the original contract or other document evidencing the consumer's liability for the debt.
2. If the collector is collecting on behalf of the original creditor, a document from the original creditor authorizing the collector to sue on the specific account on behalf of the original creditor; or

3. If the collector is claiming ownership of the debt, a copy of the assignment or chain of assignments of that specific account from the original creditor to the collector, or
4. If the collector is collecting on behalf of a debt buyer, a document from the debt buyer authorizing the collector to sue and a copy of the assignment or chain of assignments of that specific account from the original creditor to the debt buyer suing on the debt.

The party initiating the collection action must have these documents in a form that will meet all evidentiary requirements in the jurisdiction in which the action is filed. This regulation should be applicable even in those jurisdictions that may not require these records.

Q8 Please describe debt collectors' access rights to documentation such as account statements, terms and conditions, account applications, payment history documents, etc. What restrictions are most commonly placed on these access rights? Do these restrictions prevent or hinder debt collectors from accessing documentation?

Response to Q8: We have learned in extensive litigation by and against debt collectors and debt buyers that they rarely have any such documentation. They have limited rights to obtain and/or purchase such information from the original creditor, and then only for limited time periods. The CFPB can and should establish that it is a violation of the FDCPA to sell a debt or collect on a debt without these essential documents.

Q9. Part III.A below solicits comment on whether the last periodic statement or billing statement provided by the original creditor or mortgage servicer should be provided to consumers in connection with the validation notice. If these documents are not required in connection with the validation notice, what would be the costs and benefits of debt buyers and third-party collectors obtaining or obtaining access to this documentation when the debt is sold or placed for collection?

Response Q9: In all collections by all collectors, including debt buyers, a copy of the actual last twelve statements with account activity (purchases, not just late fees and over limit fees), should be required to be available to be accessed and to be reviewed by the collector, and then the consumer on request – if not within the physical possession of the collector -- before collection efforts can legally be initiated consumers. See Response to Q3 for more detail.

Q10. Are there other types of documents that would be useful for debt buyers and third-party collectors in their interactions with consumers? What types of documentation would it be most beneficial to consumers for debt buyers to have or have access to? For instance, would it be beneficial to consumers for debt buyers to have: (1) a contract or other statement evidencing the original transaction; (2) a statement showing all charges and credits after the last payment or charge-off; or (3) a charge-off statement? What would be the costs and benefits of debt buyers and third-party collectors obtaining or obtaining access to each of these types of documentation when a debt is sold or placed for collection?

Response to Q10: Please see our responses to Q3, Q5 and Q7. In addition, please see our specific recommendations in relation to medical debt in Section IV and our specific recommendations on collections for student loan debt in Section V.

Q11. What privacy and data security concerns should the Bureau consider when owners of debts provide or debt buyers and third-party collectors obtain or obtain access to documentation and information when a debt is sold or placed for collection?

Response to Q11: Identity theft should be a paramount concern. The CFPB should prohibit owners of consumer credit from selling it or related data, including the consumer's social security number, medical information, and account numbers for active accounts, without verifying that the purchaser of the account or data has an up-to-date, effective system for insuring the security of that information from theft and hacking. Moreover, uniform requirements for the input of that data must be adopted. Debt collectors should be educated about the right of identity theft victims to obtain as much information as is available regarding the perpetrator of the identity theft instead of telling the victim that the law protects the perpetrator's privacy.

Q12. Would sharing documentation and information about debts through a centralized repository be useful and cost effective for industry participants? If repositories are used, what would be the costs and benefits of allowing consumers access to the documentation and information about their debts in the repository and of creating unique identifiers for each debt to assist in the process of tracking information related to a debt? What privacy and data security concerns would be raised by the use of data repositories and by permitting consumer and debt collector access? Would such concerns be mitigated by requiring that repositories meet certain privacy and security standards or register with the CFPB? What measures, if any, should the Bureau consider taking in proposed rules or otherwise to facilitate the debt collection industry's use of repositories? What rights, if any, should consumers have to see, dispute, and obtain correction of information in such a repository?

Response Q12: Because of the substantial concerns regarding central repositories (discussed below), the primary answer to the multiple questions embedded in Q12 is that central repositories would NOT be helpful. If repositories are used, consumers must have access to the information on their debts, or else there would be no way for consumers to register complaints, and seek to correct errors. The concerns would not be mitigated by requiring standards or registering with the CFPB.

While the CFPB cannot prohibit or ban these repositories, it can clarify the existing laws that clearly apply to them: both the Fair Credit Reporting Act and the Fair Debt Collection Practices Act would apply to repositories of information about consumer debt (see explanation below).

As we understand the proposals, the repositories would store the information about a debt that is provided to them by the original creditor, verify that certain data bits (original creditor, last payment, etc.) are included in that information, and then "certify" it in the system. The repositories do not propose to do any independent verification of the data points included in the system. As the debt buyers or collectors use that information to collect the debt, their experiences are supposed to be recorded in the repository's database relating to that debt. The repository would require that the information be recorded in a certain way, and regarding certain points (dates of contact, requests for verification, etc.), but the repository will not make any independent evaluations of the reliability of the information, nor will they retain the key documents necessary to substantiate a debt.

While we fully support the universal consensus for the need to improve the information related to the initial debt and its subsequent transfer(s), there is no reason to believe that these repositories will actually accomplish this goal. What assurances do they offer that their handling of the information

will be superior to that of the original creditors or the debt collectors? Indeed, since the repository by definition is comprised of the data supplied by the original creditors and the debt collectors, such a repository would necessarily be plagued at least by the same level of errors and unreliability that these entities already provide in their own systems. Adding an additional layer of organization cannot change the quality of the underlying data [“garbage in, garbage out”] and instead provides yet another opportunity for error.

It is quite significant that debt registries which hold themselves out as the repositories of information relating to individual consumer debts are consumer reporting agencies under the Fair Credit Reporting Act (“FCRA”), with the limitations and obligations imposed on those agencies under the FCRA. Under 15 USC § 1681a(f) a “consumer reporting agency” means any person which, for monetary fees . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.” A “consumer report” in turn is defined in § 1681a(d)(1) by reference to the permissible purposes of consumer reports in § 1681b(a). Under § 1681b(a)(3)(A), one permissible purpose is precisely the role that such a repository would play here: the furnishing of information “[t]o a person which [the consumer reporting agency] has reason to believe . . . intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the collection of an account of the consumer.” (Emphasis added).

As consumer reporting agencies, these repositories will have the “grave responsibility” of maintaining the integrity of their systems as required by the FCRA. As the “gatekeepers” of all of the information relating to the collection of debts maintained by them, they are responsible for the accuracy and completeness of that information and in addition are charged with deleting any information that they cannot verify. However, these repositories will have no first-hand information about the data they are vouching for, just like other consumer reporting agencies which now provide information for credit and employment purposes. The information furnished to them by creditors and collectors will be no more reliable than that furnished to traditional consumer reporting agencies, but with the further complication that multiple parties will be furnishing information regarding the same debt. If these repositories are to exist, every effort must be made to assure their compliance with the FCRA, both as to the duty under 15 U.S.C. § 1681e(b) to assure maximum possible accuracy of any information communicated by the repository for collection purposes and as to the requirement under 15 U.S.C. § 1681i(a) to reinvestigate disputed information and correct or delete it as necessary.

These repositories are also clearly debt collectors under the FDCPA since they are servicers of debts whose involvement with the accounts only begins post-default. They fall exactly within the general definition of a debt collector in the first sentence of 15 U.S.C. § 1692a(6). Their compliance with the FDCPA is essential.

Apparently these repositories anticipate that the information held by them will be used in the courts and in fact will be certified by the repositories as part of the collection litigation process. This prospect illustrates that the repositories will actually exacerbate the existing problems with certifications to courts about the validity of information that is not necessarily correct. The repositories will have insufficient independent information to be able to reliably and lawfully certify the verifiability of their records. They will start with the information from the creditor (Ms. S owes

\$2,000), and add additional updates received from subsequent debt buyers. They will not and cannot independently verify any of this information, including by consulting original records. Thus this information is hearsay, and nothing the registry can do without that independent verification takes it out of the hearsay range. The representatives of the repositories who will be signing collection affidavits would thus be in the same, inappropriate and illegal situations as the notorious “robo-signers” who have falsely and unlawfully attested to the reliability of information without any legal basis to verify the information’s accuracy.¹²⁰

Q12 Recommendation. The CFPB should clearly state that repositories are entities covered by the consumer protections of both the FCRA and the FDCPA.

Q13. Do debt owners, buyers of debt, or third-party collectors currently notify consumers upon sale or placement of a debt, other than through statutorily required validation notices or through required mortgage transfer notices?

Response Q13: Currently none of these entities provide notice – a new entity just begins demanding payment of the debt. In fact, third party collectors frequently fail to inform the consumer effectively of the name of the new entity that allegedly owns the debt.¹²¹ However, information about the transfer of the debt would be appropriate and very helpful.

In the mortgage area, this information is currently required. RESPA requires that homeowners be notified when the servicer of their home mortgage is changed.¹²² TILA also requires that homeowners be notified when their home mortgage loans are sold to new owners.¹²³ The presence of these statutes requiring that this information be provided to consumers is indicative of how this information empowers consumers to better protect themselves.

Debt sellers should be required to notify the consumer of the sale of a debt and the identity of the buyer before the sale may be effective. Otherwise, a consumer has no way to verify the bona fides of a debt buyer who claims ownership of the debt, and the collection industry opens itself up to imposters defrauding consumers.

Q13 Recommendation: Debt sellers must notify the consumer of the sale of a debt and the buyer’s name and contact information. The assignment should be void until the notice is *received* by the consumer.

Q14. What would be the costs and benefits of requiring notification to a consumer when a debt has been sold or placed with a third party collection? If such a notice were required, what additional information should be provided to the consumer and what would be the costs and benefits of providing such additional information?

¹²⁰ See, National Consumer Law Center, *Fair Debt Collection* § 1.5.4.4 (7th ed. 2011 and Supp.) (Information received by debt buyers’ often inaccurate.).

¹²¹ See, e.g., *Braatz v. Leading Edge Recovery Solutions, LLC, et al.*, 2011 U.S. Dist. LEXIS 123118 (N.D. Ill. 2011); and *Walls v. United Collection Bureau, et al.*, 2012 U.S. Dist. LEXIS 68079 (N.D. Ill. 2012).

¹²² 12 U.S.C. §2605.

¹²³ 15 U.S.C. § 1641(g).

Response Q14: Some of the benefits would be that consumers might be able to recognize the debt and thus better able to determine whether they owe it, or refrain from making payments to the wrong owner of a debt. Please see our responses and recommendations in relation to Q3, Q5 Q7, and Q13 for more information on this issue.

Q15. What would be the respective costs and benefits of requiring a debt buyer or a debt owner to provide notice that a debt has been sold? What would be the respective costs and benefits of requiring that a third-party collector or a debt owner provide notice that a debt has been placed with a third party for collection?

Response Q15: The costs should be the same whether the notice of the sale of the debt is provided by the seller or by the buyer. In our view, the seller of the debt should be required to assure the delivery of the notice of the sale to the consumer, as this will provide far superior protection against imposters and fraudulent and mistaken sales.

Part VII. Validation Notices, Disputes, and Verifications (Qs 16-53)

The current system for requesting validation of a debt, for disputing a debt, for verifying a debt, and for investigating these disputes is completely broken. The notice provided to consumers is overly complicated and does not adequately apprise consumers of what they need to know. Collectors provide non-responsive and unhelpful information in response to consumer requests, and conduct meaningless investigations, which fail to ascertain whether the consumer's dispute could be valid. The CFPB require meaningful and transparent procedures to make these rights a reality.

- The notice of the right to request validation must be significantly simplified.
- Collectors must be required to provide meaningful and responsive information in response to these requests.
- Disputes by a consumer of the debt should trigger investigations which are meaningful and responsive to the nature of the consumer's concerns.
- Oral disputes and disputes that arise after the 30 days should still be responded to by collectors and addressed.

Q16: Where the current owner of the debt is not the original creditor, should additional information about the current owner, such as the current owner's address, telephone number or other contact information, be disclosed in the validation notice or upon request? Would this information be helpful to consumers so that they may contact the current owner directly about the debt, or about the conduct of its third-party collector?

Response Q16: Absolutely, yes. Information about the current owner of the debt, including the address, telephone number and other contact information is essential to the proper enforcement of the FDCPA, the integrity of the payments system, and other consumer rights.

This information is currently required to be provided in home mortgages. TILA requires that homeowners be provided exactly this information when their home mortgage loans are sold to new

owners.¹²⁴ Going forward, there should be complete transparency regarding the ownership and transfer of non-mortgage consumer debts as well.

The CFPB should require validation notices to disclose the name and contact information of the current owner of the debt. This information should be included on all validation notices, rather than being given only to consumers who make a special request.

Q16 Recommendation: The CFPB should require validation notices to disclose the name and contact information of the current owner of the debt.

Q17: Are there other approaches to itemization of the total amount of debt on validation notices that the Bureau should consider, and if so, for what type of debts should this itemization apply? For example, the Bureau recognizes that the three alternatives described above [three itemizations with alternate levels of detail] might work best for credit-based debt. Are there other approaches that might work better for other types of debts? Are there advantages to consistency in itemization across different types of debt or would it be more helpful, for consumers and collectors alike, to require different itemizations standards depending on the type of debt? Or could a standard set of information be required, with certain augmentation for specific types of debt?

Response Q17: As Congress intended the consumer to be able to dispute “any portion of” the debt, the different parts of the debt must be itemized to facilitate this.¹²⁵ There are several issues here, each which must be addressed separately.

1. Whether creditors should be required to keep records in such a way that will allow an itemization of the debt between principal, interest and fees to be easily provided when the debt goes to collection.
2. Whether debt collectors should separately itemize the principal and interest and fees that are added to the debt after the debt has gone to collection.
3. What information from these different types of itemization should be provided a) in the initial notice to the consumer about the right to request verification of the debt, and b) in response for a request for verification.

First, we think creditors (especially creditors of open end credit, where the itemization of this information can be more complex) should be affirmatively required by the CFPB to keep specific records on how payments have been applied to principal interest and fees, so that – when requested by a consumer who is seeking verification of the debt – the breakdowns between principal and interest can be provided. We detail below how this can be quite easily accomplished.

Secondly, collectors should be required to have the itemization of the debt on hand when they initiate collection activities, and in the initial notice of the right to request verification, the following separate components:

- The total amount of the debt that is owed for principal, extended by the creditor;

¹²⁴ 15 U.S.C. § 1641(g).

¹²⁵ 15 U.S.C. § 1692g(a)(4) requires the debt collector to send the consumer a written notice containing (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt”

- The sum of the interest and fees imposed by the creditor;
- The sum of the additional interest and fees, if any, imposed by the collector.

Thirdly, once the consumer has requested verification, the collector should be able to provide a complete breakdown of the debt, providing a specific itemization of all the draws of principal and application of payments to principal, interest and fees while the debt was still controlled by the creditor. An illustration of how this can be accomplished is provided below.

The itemization of principal, interest and fees for consumers is important for several reasons:

- First, it is basic information that consumers deserve to know about debts that they are alleged to owe. The information about the dates, amounts and uses of the credit helps consumers identify the debt as theirs – or not.
- Second, in this age of electronic collection and storage of data, requiring it to be stored for debts incurred in the future would not be onerous on the industry, and once stored, it would not be difficult for the collector to provide it on request to the consumer.
- Third, under the IRS Code, a cancelled debt is considered income. When a loan is made, the principal is not included in the consumer's income and is not taxed because the consumer is required to repay it. That changes when the debt is cancelled. Then the principal becomes income and the consumer must pay taxes on it. But forgiven interest and fees may or may not be taxable, depending on the precise nature of the forgiven interest and fees,¹²⁶ and consumers must have the precise breakdown of the forgiven debt in order to be able to prepare their taxes accurately.
- Fourth, everyone involved in the process should be able to see the distinction between the amount lent to the consumer and the amount still considered owed. As at least one court has found, when the consumer has repaid many multiples of the amount received, but most of the payments have been allocated to interest and fees, and there remains a substantial amount due, the credit transaction may be unconscionable.¹²⁷ The itemization may also reveal other defenses. For example, in the mortgage context, RESPA requires a mortgage servicer to provide an

¹²⁶ Unpaid interest may be included in the 1099 received by the consumer, but is not necessarily properly included in the income upon which taxes are due. *See*, IRS Publication on Cancelled Debt, *available at* <http://www.irs.gov/publications/p4681/ch01.html>.

¹²⁷ Consider the classic case of Ruth Owens, a consumer from Cleveland, Ohio who did try to repay her debt, but was driven hopelessly into default by her credit card lender. In May 1997, Ms. Owens stopped using her credit card, made no further purchases or cash advances, and tried to pay off her debt to her credit card lender. At that time, she owed \$1,963. From May 1997 until her account was sent for collection in May 2003, not one penny of Ms. Owens' \$3,492 in payments went to reduce her balance. Instead, the credit card lender charged Ms. Owens various fees that consumed all of her payments and caused her debt to grow even larger:

Over-limit Fees \$1,518.00

Late Fees \$1,160.00

Credit Insurance \$369.62

Interest and Other Fees \$6,008.66

Total \$9,056.28

Despite having received substantial payments for six years, the lender claimed that Ms. Owens still owed \$5,564 when it filed a collection lawsuit against her. In other words, after having paid \$3,492 on a \$1,963 debt, Ms. Owens' balance grew to \$5,564. *Discover Bank v. Owens*, 822 N.E.2d 869 (Ohio Mun. Ct. 2004). *See also* *Klewer v. Cavalry Investments, LLC.*, 2002 WL 2018830 (W.D.Wis. 2002) (describing case in which debt buyer bought a credit card account where the last payment was in 1993, it had been charged off in 1995 for \$2,538.96, and the debt buyer stated in 2001 that the balance was \$12,446.14.).

itemization upon the homeowner's request, and this itemization often reveals illegal changes and defenses to foreclosure.

- Fifth, in many states a usurious loan is considered uncollectable in part or fully. If there is no breakdown of the amount of the debt, these defenses will not be available to consumers as it would be impossible to see what is charged.
- Sixth, all of the reasons cited above support a breakdown between principal, interest and fees *prior* to the charge-off. These reasons also support the necessity of an additional itemization after charge-off to ensure that the debt-buyer and/or collector does not illegally pad the amount due with illegal charges.¹²⁸

The breakdown between principal, interest and fees is simple for closed end credit, as the CFPB has already articulated in this discussion in the ANPRM.¹²⁹ So there is no reason not to require it for all closed end credit. Regarding open end credit, none of the alternatives would clearly require that creditors of this type of credit be required to separately itemize the application of payments to illustrate how the portion of the balance due is split between principal and interest. Regarding this point, it is important that the CFPB impose a new rule on creditors of open end credit, requiring these creditors to keep track of the balance, so that the part owed for principal can be distinguished from the amount owed for interest and fees.

In this day of electronic records and electronic spreadsheets, there is no reason that open-end creditors cannot provide a breakdown of the amount of principal that has been charged on an account, and repaid, as well as the interest and fees that have been assessed against the account. Creditors as well as subsequent owners and collectors of the debt should be required to include these itemizations, with the dates that the principal is advanced for all open end credit. The disclosure and itemization of the principal, along with the interest and fees need not change the way the interest is calculated on the balance, or the way that the payments are applied to principal, interest and fees. Most open-end contracts require payments to be applied first to fees, then to interest, and only then to principal.

We are *not* advocating that the CFPB change the rules governing the allocation of payments. We are simply advocating that the *disclosure* about these different elements of the total due be made available to consumers upon request. Additionally, we are *not* asking that the specific purchases be required to be disclosed in this itemization. If they could be itemized, that would be preferable, but it is not mandatory. The copies of the last 12 statements for the credit before default should be provided as well. They that detail (although it will not provide that detail when more than 12 months had passed during which the consumer had made no new charges).

This itemization disclosure requires the creditor to have kept records that will allow the collector to calculate the amounts due for principal, interest and fees.

The collector should then separately disclose the amounts it has imposed for interest and fees.

¹²⁸ See, e.g. McDonald v. Asset Acceptance L.L.C., 2013 WL 4028947 (E.D. Mich. Aug. 7, 2013) (denying summary judgment on debt buyer's bona fide error defense for having unlawfully added to its purchased accounts interest that the original creditors had waived, because it relied merely on its insufficient argument that it was not aware the original creditors waived the right to collect interest and that it did not intend to violate the FDCPA.).

¹²⁹ See ANPRM at 35.

Q17 Recommendation: The CFPB should require that collectors and creditors provide an itemization of the principal, interest and fees charged on the account in response to a request for verification of the debt. The disclosure provided to the consumer for open-end credit should look something like this:

Date of Transaction	Goods or Services Purchased	Amount of Purchase	Fee Applied	Interest Applied	Payment	Balance Due	Total Due for Goods & Services
8/5/12	Walgreens	\$45.00					
8/15/12	Kroger	\$95.00					\$140.00
8/30/12				\$0.00		\$140.00	
9/3/12					\$140.00	\$0.00	\$0.00
9/14/12	Best Buy	\$200.00				\$200.00	\$200.00
9/20/12	Walgreens	\$45.00				\$245.00	\$245.00
9/30/12				\$3.68		\$248.68	
10/10/12					\$200.00	\$48.68	\$45.00
10/30/12				\$0.73		\$49.41	
11/5/12					\$10.00	\$39.41	
11/30/12				\$0.59		\$40.00	\$45.00
12/5/12					\$10.00	\$30.00	
12/30/12				\$0.45		\$30.45	\$45.00
1/30/13			\$35.00	\$0.98		\$66.43	\$45.00
2/28/13			\$35.00	\$1.52		\$102.95	\$45.00
3/30/13			\$35.00	\$2.07		\$140.02	\$45.00
4/30/13			\$35.00	\$2.63		\$177.64	\$45.00
5/30/13			\$35.00	\$3.19		\$215.83	\$45.00
6/30/13			\$35.00	\$3.76		\$254.60	\$45.00
Total Balance Now Due				\$254.60			
Part of Balance for Goods & Services				\$45.00			
Part of Balance Due for interest & Fees				\$209.60			

Q18: What additional information should be included in the validation notice to help consumers recognize whether the debts being collected are owed by them or respond to collection activity? For example, which of the following pieces of information would be most useful to consumers? (balance of question omitted for space reasons).

Response Q18: The consumer’s right to dispute the debt and to require the collector to cease contact should be clearly and separately disclosed (see our sample notice in Response to Q19). In addition, the initial communication should include the name of the original and the most recent

creditor, any affinity name of the lender (like an AARP card or a US Air credit card), the date of the original contract, and the date of the last payment.

If the debt is for a medical debt, the initial contact should indicate it is a medical debt, the dates of service, and the name of the doctor or other provider, along with the original amount billed. The collector should disclose that specifics of the procedures performed will be supplied on request to the medical provider. This is important because of the frequency of errors in medical bills and the involvement of so many entities in the billing.

For privacy and security reasons, Social Security numbers should not be included in the initial communication, although the collector should be required to have these before initiating the collection process. Similarly, collectors should provide the names of joint obligors in response to a request for verification, but need not supply this information in the initial communication.

Q19: Are the statements currently provided to consumers regarding these FDCPA rights understandable to consumers? If consumers do not understand the statements that collectors currently include on validation notices as to their FDCPA rights, please provide suggested language for how these statements should be changed to make them easier to understand.

Response Q19. No. The statements are most definitely not readily understandable to consumers. The language of most validation notices is at a reading level much too high for most consumers to understand.

Q19 Recommendation: The notice should convey the information mandated by Congress in plain language, in large type, on the front page, set off by typography, margins, or in a boxed area:

You can dispute this debt at any time, either orally or in writing.

If you write to us within thirty days of when you get this letter, regarding:

- (1) A question or a dispute about all or any part of the debt, or
 - (2) A request for the name and address of the original creditor
- we will stop collecting until we mail you our response.

Also, we will stop calling and writing you if you tell us (in writing)¹³⁰ that you refuse to pay or want us to stop calling and writing.

This disclosure is at 6th grade reading level. The second subparagraph can be omitted if the original creditor's identity is disclosed elsewhere.

In addition to requiring better disclosure of the right to request that a collector cease communications, the CFPB should address several substantive issues about this right.¹³¹ First, we

¹³⁰ As noted later in our response to this question, we recommend that the CFPB require debt collectors to cease communications when the request is made orally as well. Requests made on the collector's website or transmitted to the collector by email should be required to be honored as well.

recommend that the CFPB require collectors to disclose this right in every communication with the debtor.

Second, the CFPB should require debt collectors to cease communications when the request to cease communication is made on the collector's website or transmitted to the collector by email. The CFPB should require collectors to treat requests communicated in these ways as written requests.

Third, the debt collection industry has publicly said that responsible debt collectors will not contact consumers after receiving a verbal request to stop contact.¹³² Their point was that the continued attempts to collect, after a consumer has said to stop, would be a violation of 15 U.S.C. § 1692d, because it would be considered harassment or abuse. The CFPB should codify this position by adopting a rule requiring collectors to cease communication in response to an oral request from the consumer. At the very least, the CFPB should require collectors, when a consumer makes an oral request that communication cease, to inform the consumer of the exact procedure for making a written request.

Q20: Should consumers be informed in the validation notice that, if they send a timely written dispute or request for verification, the debt collector must suspend collection efforts until it has provided the verification in writing? Would any other information be useful to consumers in understanding this right? Should consumers be informed in the validation notice of their right to request that debt collectors cease communication with them?

Response Q20: Yes, as explained in the response to Q19. The information should be clear and simple. Too much information can obfuscate the primary message.

Q20 Recommendations: The cease communication information should be included in every communication between the collector and the consumer. Additionally, the consumer should be able to exercise this right by making a request through the collector's website, by email, or orally.

Q21: Are there any other rights provided in the FDCPA that should be described in the validation notices? For example, would it be helpful to consumers for the validation notice to state that the consumer has the right to refer the debt collector to the consumer's attorney, to inform a debt collector about inconvenient times to be contacted, or to advise the collector that the consumer's employer prohibits the consumer from receiving communications at work? If so, please identify the costs and benefits of including each right that should be included in the validation notices.

Response Q21: The notice of the right to verification should be kept short and simple. Too much information will cloud the importance of the notice. The one additional notice that should be added to this notice – *and required in every communication between the collector and the consumer* – is that the consumer has the right to tell the debt collector to cease all contact. The response to Q19 illustrates

¹³¹ The ANPRM does not include any questions asking about ways to improve implementation of the right to request that a collector cease communications. We are addressing these issues here because this question touches at least tangentially on this right.

¹³² This point was stated repeatedly by several representatives of the debt collection industry at a meeting attended by NCLC attorney Margot Saunders, other consumer representatives, as well as staff of the CFPB in Washington D.C. on January 24, 2014.

how this should be done. However, as noted in our response to Q22, a separate written summary of FDCPA rights should be included with the validation notice and all other communications.

Q22: What would be the costs and benefits of disclosing FDCPA rights in the validation notice itself, as opposed to the Bureau developing a separate “summary of rights” document that debt collectors would include with validation notices?

Response Q22: The notice regarding the consumer’s right to cease communications should be included in every communication. Other rights consumers have under the FDCPA should be in a simply written separate statement that should accompany every written communication to consumer, including electronic ones. The availability of these statements should be offered in all verbal communications as well.

Q23: What additional information do debt collectors typically include on or with validation notices beyond the mandatory disclosures? Do debt collectors typically include State law disclosures on the validation notices? If so, do debt collectors typically use a validation notice that contains the State law disclosures from multiple States, or do debt collectors typically tailor validation notices for each State?

Response Q23: Too often the validation notices are crowded with extraneous information, making the actual information in the notice required by the FDCPA harder to see and appreciate. There should be a clear requirement for the validation notice to be separate and clear and conspicuous – perhaps on the upper fold of the first page of the communication, by itself.

State law disclosures are usually on the reverse side, and are rarely tailored to the recipient’s state. They should be tailored to the consumer’s state, as this would not be difficult in today’s sophisticated technological world.

Q24: How common is it for collectors to communicate with consumers or provide validation notices in languages other than English?

Response Q24: In our survey of attorneys for consumers, the uniform response was that validation notices were very occasionally provided in Spanish, but none of our respondents had ever seen anything other than a Spanish translation on the back of the notice. This was even the case when the original transaction had been conducted in other languages. A notice in the language of the consumer should be required.

Q25: If collectors were sometimes required to provide validation notices in languages other than English, what should trigger that obligation? For example, should it be triggered by the request of the consumer, by information from the original creditor indicating that the consumer communicated in a language other than English, by the language used in the original credit contract, or by information gathered by the collector during the course of its dealing with the consumer? What would be the costs of requiring validation notices in languages other than English using each of these triggers?

Response Q25: The answer to the second question in this series is yes. If the original discussions with the creditor were conducted in another language, all of the subsequent correspondence about

the debt should be in the other language. A number of state laws already require that certain documents be translated into the language in which a consumer transaction was conducted.¹³³

Q25 Recommendation: If the original transaction that led to the debt was conducted in a language other than English, the communications from the debt collector should all be in the other language as well.

Q26: Do collectors currently provide validation notices to consumers electronically? If so, in what circumstances, by what electronic media, and in what format (e.g., PDF, HTML, plain text)?

Response Q26: Neither we, nor any of the lawyers responding to our survey, have ever seen collectors provide validation notices electronically.

Q27: Does the consent regime under the E-Sign Act work well for electronic delivery of validation notices? If a consumer consents to electronic disclosures pursuant to the E-Sign Act prior to the account being moved to collection, are debt collectors currently requiring E-Sign consent again when the account moves into collection? When the account is sold or placed with a new collector, is the new collector currently requiring a new E-Sign consent? If a consumer consents to electronic correspondence, what process do debt collectors currently require to revoke this consent?

Response Q27: E-Sign is a comprehensive law that explicitly sets out the terms under which a consumer can be deemed to have consented to receive electronic records instead of paper writings. 15 U.S.C. § 7001(c) is quite clear. Each person who seeks to replace an electronic record for a writing must obtain separate consent from the consumer. The consent provision in § 7001(c) requires that the consumer consent to “such use and has not revoked such consent; . . .” This language easily permits writing requirements in the law, including the FDCPA, to be satisfied with the provision of electronic records to consumers – so long as the consumer has consented according to the requirements of § (c).

Regarding the issue of whether a collector can provide the § 1692g validation notice electronically, when that notice is required by the FDCPA to be in writing, the question becomes whether the consumer has previously consented to receive electronic records from the collector. Conceivably this could be done. It would mean that within five days of the first communication from the collector, the consumer had been given the opportunity to consent electronically to receive electronic records instead of paper writings, pursuant to E-Sign’s § 7001(c), and that the consumer had consented electronically in compliance with that subsection, and that the collector had provided the validation notice electronically in compliance with both E-Sign and the FDCPA.

Original Creditor’s Electronic Transaction Consent Not Relevant. We think it is illegal for a collector to send a validation notice electronically in reliance on the consumer’s consent to receive paper writings electronically from the original creditor. First, the E-Sign consent only relates to transactions between the two parties involved in the consent process. The language of § 7001(c) makes this clear when it says in subsection (1)(B) that “the consumer, prior to consenting, is provided with a clear and conspicuous statement -- . . . (ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the

¹³³ See NCLC, Federal Deception Law §11.4 (1st Ed. 2012).

record, or (II) to identified *categories of records that may be provided or made available during the course of the parties' relationship; . . .*" (emphasis added).

If a consumer has consented to receive electronic records from a creditor, the creditor and the consumer are the parties to which this provision would apply. The debt collector would not be included in the "the parties' relationship." So any electronic consent provided by the consumer to the creditor would not carry over to the debt collector.

In addition, under § 7001(c)(1)(A), the right to replace paper writings with electronic transmissions lapses as soon as the consumer withdraws consent. A debt collector that is relying on consent given by the consumer to the original creditor is unlikely to know whether the consumer has withdrawn that consent. Therefore, it would be entirely inappropriate to allow a subsequent party to the transaction (like a debt collector) to satisfy writing requirements by providing electronic records without a separate electronic consent between the debt collector and the consumer.

For the same reason, subsequent debt collectors are not permitted to rely on the electronic consent provided to previous collectors. Each new party to the transaction – each new owner of the debt or collector of the debt – must, pursuant to the explicit language of E-Sign, obtain its own, independent consent from the consumer before it can provide electronic records to satisfy writing requirements.

Q27 Recommendation: Debt collectors should be allowed to send validation notices to consumers electronically, but only if the consumer has given consent in accord with E-Sign to the collector, not to some prior collector or owner of the debt.

Q28: Do debt collectors currently treat emails, text messages, or other forms of electronic communications as satisfying the "in writing" requirement to exercise the three rights described above? If so, what would be the costs and benefits of treating them as satisfying the "in writing" requirement?

Response Q28: Neither we, nor any of the attorneys who responded to our survey, have ever seen these electronic communications used to satisfy the "in writing" requirements of the FDCPA. The costs and benefits are not relevant here. The CFPB does not have the legal authority to prevent the parties from engaging electronically, under E-Sign. 15 U.S.C. § 7004(b)(2) limits the authority of federal and state agencies and prohibits the exclusion of electronic transactions. Please see our Response to Q27 for more information on this subject relating to the consumer's consent requirements.

However, it should be noted that none of the strict requirements for consumer consent in E-Sign mean that the consumer's communications with the debt collector cannot be electronic, or that the debt collector should not be required to recognize and accept electronic communications from the consumer. The E-Sign consumer consent provisions were put in place to protect consumers, not to provide a mechanism for creditors or debt collectors to ignore electronic communications provided to them.

Whether an electronic communication from the consumer satisfies a writing requirement imposed on the consumer under the FDCPA depends first on the question of whether the parties have "agree[d] to use or accept electronic records or electronic signatures . . ." as required by §

7001(b)(2). If the debt collector has given the consumer cause to believe that it agrees to use electronic records, then there is no reason to believe that the consumer's electronic communications with the debt collector do not satisfy writing requirements imposed on the consumer (such as the requirements to request a validation of the debt or to cease communications or to notify the collector that the consumer is represented by an attorney). If a collector makes an electronic means of communication available to the consumer, it should be required to treat electronic communications received from the consumer as meeting any FDCPA requirements that communications be in writing.

Q29: Have industry organizations, consumer groups, academics, or governmental entities developed model validation notices? Have any of these entities or individuals developed a model summary of rights under the FDCPA that is being given to consumers to explain their rights, or a model summary of rights under State debt collection laws? Which of these models, if any, should the Bureau consider in developing proposed rules?

Response Q29: The ACA has a model notice that simply tracks the statutory language and is completely unreadable to most unsophisticated consumers:

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days after receiving this notice that the debt or any portion thereof is disputed, this office will obtain verification of the debt or obtain a copy of a judgment, if there is one and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

The readability of this notice tests out at a grade level of 20; in other words, someone has to have completed four years of graduate school to understand it.¹³⁴ We have had experts in various cases opine that this disclosure is not understandable to the average person.

We propose an alternative, much simpler notice. Please see our as Response to Q19.

Q30: Is there consumer testing or other research concerning consumer understanding or disclosures relating to validation notices that the Bureau should consider? If so, please provide any data collected or reports summarizing such data.

¹³⁴ This analysis was conducted using the Method used: Flesch-Kincaid (English) online measurement of readability. www.standards-schmandards.com/exhibits/rix/ - Here are the results:

Flesch-Kincaid Grade level: 20.
Flesch-Kincaid Reading Ease score: 21.

“The Flesch-Kincaid Reading Ease score indicates how easy a text is to read. A high score implies an easy text. In comparison comics typically score around 90 while legalese can get a score below 10.

The Flesch-Kincaid Grade level indicates the grade a person will have to have reached to be able to understand the text. E.g. a grade level of 7 means that a seventh grader will be able to understand the text.”

We have nothing to add here.

Q31: What types of consumer inquiries do debt collectors currently treat as “disputes” under the FDCPA? What standards do debt collectors currently apply in distinguishing disputes from other types of consumer communications? What data exist to indicate the percentage of debts that are disputed, and what definition of “dispute” is being used to arrive at this percentage? What data exist to indicate how disputes are resolved by debt collectors?

Response Q31: How debt collectors treat disputes is a mixed bag. Some provide an account statement and that is all (for credit cards). Some provide the billing records (for medical bills). Some simply stop collecting, and transfer the account back to the entity they acquired it from or to a new debt buyer. Most, however, just provide the name of the original creditor, the amount owed and occasionally the last payment date. As discussed in more detail in the responses that follow, the industry’s current method of responding to disputes is inadequate.

As to the standards for distinguishing between disputes and other types of consumer communications, we urge the CFPB to adopt a regulation codifying the rule that the consumer is not required to use sophisticated methods to exercise the right to dispute a debt or request verification.¹³⁵ For example, the CFPB should make it clear that the word “dispute” need not be used in the request if the meaning is otherwise clear.¹³⁶ The CFPB should reject the FTC staff’s overly technical view that the request for verification should state the collector’s claim is disputed.¹³⁷ It should also make it clear that a request for verification may be made by a lawyer for a consumer. An early FTC staff letter questioning this position is overly technical and fails to consider established principles of agency and attorney-client relationships.¹³⁸

We also ask that the CFPB address the treatment of oral disputes and disputes made outside the 30-day period set by § 1692g. The FDCPA requires a dispute or a request for verification to be in writing and made within the 30-day period in order to trigger the collector’s statutory duty to cease collection and respond. However, under another provision of the FDCPA, oral disputes and disputes made outside the 30-day period must be reported by the debt collector to the creditor and credit reporting agencies when the collector communicates with them.¹³⁹ We urge the CFPB to codify this position in a regulation. In addition, we urge the CFPB’s rule to state that if a debt collector represents that it will verify a debt but does not do so in response to a consumer’s oral request for verification, the debt collector’s representation violates section 1692e if it does not validate the debt.

¹³⁵ *Horkey v. J.V.D.B. & Assocs., Inc.*, 333 F.3d 769 (7th Cir. 2003). *See also* *Burke v. Messerli & Kramer P.A.*, 2010 WL 3167403 (D. Minn. Aug. 9, 2010) (prior correspondence during period sufficient; written dispute of paid debt).

¹³⁶ *Clark’s Jewelers v. Humble*, 823 P.2d 818 (Kan. Ct. App. 1991). *See also* *Mendez v. M.R.S. Assocs.*, 2005 WL 1564977 (N.D. Ill. June 27, 2005) (“explain nature of dispute”).

¹³⁷ *Stockham*, FTC Informal Staff Letter (May 15, 1986). *See also* *Hoffman v. Partners in Collections, Inc.*, 1993 WL 358158 (N.D. Ill. Sept. 14, 1993) (consumer’s statement of invalid reason for disputing liability did not undermine FDCPA claim).

¹³⁸ *Stockham*, FTC Informal Staff Letter (May 15, 1986).

¹³⁹ 15 U.S.C. § 1692e(8), *see* *Brady v. Credit Recovery Co.*, 160 F.3d 64 (1st Cir. 1998) (section 1692e(8) applied when disputed nature of debt was conveyed orally, and was not limited to written disputes).

A final issue with respect to the treatment of disputes is that we urge the CFPB to codify the FTC staff's view that a collector who charges for copies of a requested verification of a debt pursuant to section 1692g violates section 1692f(1).¹⁴⁰

Q31 Recommendations: The CFPB should adopt a regulation codifying the rule that the consumer is not required to use sophisticated methods or any special language to exercise the right to dispute a debt or request verification and providing that a lawyer may raise a dispute or request verification on behalf of a consumer. The CFPB should also make it clear that oral disputes and disputes made outside the 30-day period must be reported when the collector reports a debt to a creditor or credit reporting agency. The CFPB should also adopt a rule stating that it is a deceptive practice for a collector to represent that it will validate a debt and then fail to do so, and that a collector may not charge the consumer any fee in connection with responding to a dispute or verifying a debt.

Q32: Are certain types of debts (e.g., credit card vs. student) disputed at higher rates than others? Do dispute rates differ between debts being collected by debt buyers versus those being collected by third-party collectors?

Response Q32: The overwhelming response to this question in our survey was that credit card debts, whether collected by a third party collector or by a debt buyer, are disputed at very high rates. These disputes often concern the junk fees and bogus interest charges added to the debt. This supports the need for the CFPB to require itemization of the debt, as we describe in response to Q17. Where experts examine the detailed billing statements that hospitals use to compile the billing summaries that they send to patients, the experts find frequent errors.¹⁴¹

Q33: What data or other information are available regarding how disputed debts are resolved? What percentage of disputed debts are verified? What percentage of debt disputes are never investigated? Where disputes are investigated, what percentage of the investigations reveal that there was an error?

Response Q33: In our opinion, disputed debts are rarely, if ever appropriately resolved. The investigations conducted into the consumers' disputes are completely inadequate in most cases. We know this from our own experience, from the extensive number of cases challenging inadequate verifications, and from the uniform answers received on our survey of consumer lawyers. The CFPB must address this important issue.

As discussed below, the Fourth and Ninth Circuits have departed from the common meaning of the word in a way that undermines the effectiveness of this error resolution procedure. We hope the CFPB will restore the effectiveness of the procedure through regulation.

Verification requirements should vary depending upon the reason for the dispute. For example, a consumer claiming mistaken identity needs very different verification than a consumer claiming full payment or uncredited payments. A consumer claiming failure to deliver or breach of warranty needs yet a different verification.

¹⁴⁰ Matthews, FTC Informal Staff Letter (May 17, 1993); Krisor, FTC Informal Staff Letter (Mar. 3, 1992).

¹⁴¹ See National Consumer Law Center, *Fair Debt Collection* § 1.5.14 (2013 Supp.) (30% of medical bills contain errors, citing "How to Fight a Bogus Bill," Wall St. J. Feb. 18, 2011.).

Recent Ninth and Fourth Circuit decisions inappropriately diminish consumers' section 1692g debt dispute rights. In *Clark v. Capital Credit & Collection Servs., Inc.*,¹⁴² the Ninth Circuit announced it was adopting a low standard for the response required of debt collectors when a consumer timely disputes the debt in writing:

We decline to impose such a high threshold [as it had previously imposed]. Rather, we adopt as a baseline the more reasonable standard articulated by the Fourth Circuit in *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999). At the minimum, “verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed.”¹⁴³

In reaching this conclusion, the Ninth Circuit adopted unfortunate *dicta* from an earlier Fourth Circuit decision, *Chaudhry v. Gallerizzo*:

[V]erification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt. *See Azar v. Hayter*, 874 F. Supp. 1314, 1317 (N.D. Fla.), *aff'd*, 66 F.3d 342 (11th Cir. 1995). Consistent with the legislative history, verification is only intended to “eliminate the ... problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.” S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. There is no concomitant obligation to forward copies of bills or other detailed evidence of the debt.¹⁴⁴

An earlier Ninth Circuit decision, *Mahon*, had suggested a higher standard. It described an adequate response by a collection agency to a consumer's request for verification:

[T]he Credit Bureau, when it received the[verification] request, promptly contacted [the creditor's] office, verified the nature and balance of the outstanding bill, learned that monthly statements had been sent from [the creditor's] office to the [debtors] for over two years, and established that the balance was still unpaid. The Credit Bureau then promptly conveyed this information to the [debtors], along with an itemized statement of the account.¹⁴⁵

Mahon did not address the question of whether some lesser response would also have been sufficient, however, so is only an indirect endorsement of this higher standard.

¹⁴² 460 F.3d 1162 (9th Cir. 2006).

¹⁴³ *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1174 (9th Cir. 2006). *See also* *Lee v. Security Check, L.L.C.*, 2010 WL 3075673 (M.D. Fla. Aug. 5, 2010); *Rudek v. Frederick J. Hanna & Assocs., P.C.*, 2009 WL 385804 (E.D. Tenn. Feb. 17, 2009); *Holsinger v. Wolpoff & Abramson, L.L.P.*, 2006 U.S. Dist. LEXIS 55406 (N.D. Cal. July 27, 2006) (NAF MBNA claim sent to consumer constituted sufficient verification even though it listed attorney fees that could have been unreasonably high); *Frederick v. Discover Bank*, 901 N.E.2d 79 (Ind. Ct. App. 2009) (no copy of signed contract and detailed payment history okay); *Weathersby v. Citibank, N.A.*, 928 So. 2d 941 (Miss. Ct. App. 2006) (copies of periodic statements and employee affidavits stating they were sent was sufficient despite not providing requested signed agreement).

¹⁴⁴ *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999)..

¹⁴⁵ *Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1203 (9th Cir. 1999).

The usual starting point for determining congressional intent, the plain meaning of the words used by Congress, was unfortunately not considered by the *Clark* and *Chaudbry* decisions.¹⁴⁶ Congress used the word “verification,” which commonly means prove by evidence,¹⁴⁷ when it finally enacted the FDCPA. Just prior to the FDCPA’s enactment, several fair debt collection bills in the House and the Senate had used the word “certification” where the word “verification” now appears.¹⁴⁸ Congress then rejected the lower standard of “certification,” which means “confirm,”¹⁴⁹ the key operational word superimposed in the *Chaudbry* and *Clark* decisions.

The Senate Report states:

Another significant feature of this legislation is its provision requiring validation of debts. This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts that the consumer has already paid.... [T]he current practice of most debt collectors is to send similar information to consumers.¹⁵⁰

The Senate version was intended to provide a significant method of resolving debt collectors’ mistakes. That congressional intent is undermined by reverting to the lower confirmation requirement that is suggested by *Chaudbry* and *Clark*.¹⁵¹

For one thing, the *Chaudbry* standard does not begin to deal with the myriad of common consumer disputes. For example, if the consumer disputes the balance of an account, based on the misapplication of the last installment payment, a meaningful response would be to check primary records to see if the payment in fact had been received, but not credited or applied to the wrong account. If, on the other hand, the consumer disputes the common mistaken debt collector claim that she is responsible for one of her relative’s bills, an examination of the signatures to the underlying agreement is called for to determine whether she actually accepted the obligation for the debt. If the consumer asserts his name was forged on a check, an examination of the signature is required to compare the signature with the consumer’s signature and a disclosure of the time and place where the check was signed to compare with the consumer’s location that day. If the consumer asserts she was a minor without capacity to contract on the day the debt was incurred, the transaction date would be the relevant focus. If the consumer alleges he had responded to a debt

¹⁴⁶ See *Heintz v. Jenkins*, 514 U.S. 291 (1995).

¹⁴⁷ “[V]erify: 1. To prove the truth of by presentation of evidence or testimony; substantiate. 2. To determine or test the truth or accuracy of, as by comparison, investigation, or reference....” *The American Heritage Dictionary of the English Language* (4th ed. 2006).

¹⁴⁸ Compare S. 656, 123 Cong. Rec. S2380 (daily ed. Feb. 4, 1977) and S. 918, 123 Cong. Rec. S3484 (daily ed. Mar. 4, 1977) with H.R. 5294, 95th Cong., 1st Sess. (Apr. 6, 1977) (available in *Fair Debt Collection Practices Act: Hearings on S. 656, etc. Before the Subcommittee on Consumer Affairs of the Senate Banking, Housing and Urban Affairs Committee, 95th Cong. 1st Sess. 91977*), which all used the word “certification” rather than “verification” that was substituted in the Senate subcommittee amendments to H.R. 5294 as passed by Congress and signed by President Carter.

¹⁴⁹ “[C]ertify: 1. to attest authoritatively: as a : CONFIRM....” *The American Heritage Dictionary of the English Language* (4th ed. 2006).

¹⁵⁰ Sen. Rpt. 95-382, 95th Cong. 1st Sess. 4.

¹⁵¹ It is possible to read *Clark* and *Chaudbry* as holding only that the information provided by the debt collectors to the consumers in those cases, which was actually quite detailed, is all that is required to verify a debt where the consumer disputes only the amount claimed. However, the Courts’ statement of the standard for verification, even if it is *dicta*, is dangerous and should be repudiated by the CFPB.

buyer's offer of full settlement with payment of a portion of the balance, the debt buyer's offer and the date and amount of the consumer's payment are the relevant information.

A very recent Fourth Circuit decision, *Johnson v. MBNA America Bank*, provides a more reasoned approach to consumer dispute resolution. In reviewing a parallel but different consumer dispute resolution procedure provided by the Fair Credit Reporting Act,¹⁵² the court held that:

It would make little sense to conclude that, in creating a system intended to give consumers a means to dispute--and, ultimately, correct--inaccurate information on their credit reports, Congress used the term "investigation" to include superficial, unreasonable inquiries by creditors.¹⁵³

The court noted:

MBNA argues that the language of section 1681s-2(b)(1)(A), requiring furnishers of credit information to "conduct an investigation" regarding disputed information, imposes only a minimal duty on creditors to briefly review their records to determine whether the disputed information is correct. The key term at issue here, "investigation," is defined as "[a] detailed inquiry or systematic examination." Thus, the plain meaning of "investigation" clearly requires some degree of careful inquiry by creditors.¹⁵⁴

Another court lamented the weakness of the *Chaudhry* approach, while following it:

However, the Court is gravely disappointed by the actions of Defendants [collection attorneys] and the creditor. Defendants did the bare minimum to comply with the FDCPA's verification requirements. Had they investigated Kermit Erickson's identity theft allegations further before continuing with the state court lawsuit, they could have saved considerable time and effort by the parties and the state and federal court systems....

Although the FDCPA does not punish Defendants for continuing to attempt to collect this debt when their proof of verification was weak, the Court admonishes Defendants and their clients that both good business practices and good citizenship require them to do their part to prevent identity theft.¹⁵⁵

¹⁵² 15 U.S.C. § 1681s-2(b)(1).

¹⁵³ *Johnson v. MBNA Am. Bank, N.A.*, 357 F.3d 426, 430-431 (4th Cir. 2004). *See also* *United States v. Performance Capital Mgmt., Inc.* (C.D. Cal. Aug. 2000) (consent decree) (debt buyer failed to properly investigate consumer disputes, as required by Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b), when consumer reporting agencies referred disputes to it pursuant to § 1681i(a)(2); in order to comply with § 1681s-2(b) when consumer disputed accuracy of information reported by defendant to consumer reporting agency, defendant shall either verify information with original account records within time period set forth in Fair Credit Reporting Act or take all necessary steps to delete information from files of all consumer reporting agencies to which information was reported; in any situation where defendant either knew that no original records exist, or was informed by original creditor that no records existed, defendant should notify all consumer reporting agencies to which information has been provided that information was to be deleted from file of consumer who had disputed account), *available at* www.ftc.gov/os/2000/08/performconsent.htm.

¹⁵⁴ *Johnson v. MBNA Am. Bank, N.A.*, 357 F.3d 426, 430 (4th Cir. 2004).

¹⁵⁵ *Erickson v. Johnson*, 2006 WL 453201 (D. Minn. Feb. 22, 2006) (where debt collector provided statements of account sent to plaintiff and his spouse, and canceled checks drawn on marital joint account, verification was "minimally

Q33 Recommendation: We urge the CFPB to reject the Ninth and Fourth Circuit’s view that verification of a debt merely requires confirmation that the amount being demanded is what the creditor claims is owed. This interpretation robs the verification requirement of its meaning, converting it into a mere echo chamber in which the collector simply repeats the information from the creditor that the consumer disputed. The CFPB should adopt a rule requiring a meaningful and robust response to consumer disputes and requests for verification.

Q34: Should the Bureau define or set standards for what communications must be treated as “disputes” under the FDCPA and, if so, how? What are the advantages and disadvantages of the definition recommended?

Q34 Response and Recommendation: Yes, the Bureau should clarify the standards for what communications must be treated as disputes under the FDCPA. Any question from the consumer about the account should be treated as a dispute. For instance, the consumer might say she is only an authorized user, or might want to know the basis for the interest rate charged, or might want information about how the account was transferred to the current creditor to make sure it is a valid collection. All of these statements should be sufficient to initiate a dispute.

The CFPB should resolve the differing rulings about how precise the consumer has to be in order to dispute or request no further calls. The FDCPA does not require consumers to use “magic words” to trigger disputes.¹⁵⁶ This issue is discussed in more detail in our response to Q31.

Q35: Should consumers be required to provide particular information or documentation as part of their disputes to debt collectors to trigger an investigation requirement under the FDCPA? What would be the costs and benefits of requiring that consumers provide the same or similar information as required under the FCRA when making disputes directly to debt collectors? Should a consumer’s obligation to provide this information about the basis for their disputes be contingent on having received a validation notice with requisite information? Why or why not?

Response Q35: Absolutely not. The FDCPA is geared to protecting the least sophisticated consumer, so no magic words should ever be required to initiate a dispute.¹⁵⁷ The CFPB should adopt the Seventh Circuit’s view under section 1692c that the consumer should not be required to

sufficient” since FDCPA does not require investigation and does not require collector to ascertain legality of debt; where plaintiff did not request verification of attorney fee component of amount demanded, collector had no obligation to verify it; dismissing verification claims).

¹⁵⁶ A plaintiff’s refusal to pay need not be unconditional, nor does the FDCPA require more than a plaintiff’s wish to be left alone be stated in the most general terms. *See* Bishop v. I.C. Systems, Inc., 713 F. Supp. 2d 1361, 1367-68 (M.D. Fla. 2010) (finding that the “ordinary meaning [of “refuse”] does not encompass an unalterable rejection” and that the FDCPA “does not require that the consumer use any specific language or ‘magic words’ to tell a debt collector to cease communication.”).

¹⁵⁷ *See, e.g.* March v. Federal Nat’l Mortgage Ass’n, 2011 WL 3648235 (E.D. Mich. Aug. 18, 2011) (genuine issue of material fact existed as to whether letter in its entirety could lead a reasonable trier of fact to conclude that plaintiff’s letter was meant as a RESPA qualified written request seeking disclosure of certain loan documents and not as a request to validate plaintiff’s debt under 15 U.S.C. § 1692); Reese v. CAC Servs., Inc., 2011 WL 830084 (D. Or. Mar. 3, 2011) (“the ordinary usage of “dispute” is defined as “to call into question; ... to struggle against; ... to contend over”; could not conclude as a matter of law that plaintiff’s letter did not constitute a notice of his dispute; consumer statement in letter to the collector that the account had been paid in full was sufficient to obtain verification). *See also* Devlin v. Law Offices Howard Lee Schiff, P.C., 2012 WL 4469139 (D. Mass. Sept. 25, 2012).

use sophisticated methods to exercise FDCPA rights,¹⁵⁸ and should apply that principle to consumers' disputes and requests for verification.

As the Fourth Circuit has held, the debt collector should be permitted to ask the consumer for clarification upon receiving a timely dispute of the debt, as long as payment is not requested.¹⁵⁹ However, the debt collector should not be allowed to require any particular information or documentation as a condition of responding to the consumer's request. This position is consistent with the FTC's interpretation of the FCRA to prohibit *requiring* a consumer to provide a police report or affidavit, although the investigator is permitted to request a copy of an existing police report.¹⁶⁰

While consumers should not be required to provide any particular information or documentation when disputing a debt, the collector should be required to investigate and respond to any specific claim or information that the consumer does raise. For example, if the consumer claims that her signature was forged, the collector should be required to obtain a document with the consumer's signature. On the other hand, if the consumer claims that the balance does not reflect a certain payment, the collector cannot satisfy the verification requirement by providing a copy of a signed agreement, but should investigate and verify the calculation of the balance and whether the payment was received.

Q35 Recommendation: The CFPB should adopt a rule stating that a consumer cannot be required to submit documentation or other information to trigger an investigation requirement under the FDCPA. The rule should also provide that the collector can ask the consumer for clarification of a dispute, and must respond to any specific dispute or information that the consumer raises, but cannot condition its duty to respond to the dispute upon the consumer's provision of any particular information or documentation.

Q36: Do consumer disputes typically specify what is being disputed, or do consumers simply make general statements that they dispute the debt? If consumers do make specific statements, are those statements typically relevant to the consumer's particular circumstances or the alleged debt, or do they typically appear to be unrelated to the consumer's particular circumstances or the alleged debt? What types of specific disputes are most commonly received by debt collectors (e.g., identity theft, wrong amount, do not recognize the debt, previously paid, previously disputed)?

Response Q36: See response to Q35.

Q37: What practices do debt collectors follow when they receive a dispute after the 30-day period following receipt of the validation notice has expired? Do collectors usually follow the same verification procedures as for disputes that are received during the 30-day period? What would be the potential costs and benefits of a debt collector following the same investigation and verification procedures for disputes received after the 30-day period relative to disputes received within the 30-day period?

¹⁵⁸ Horkey v. J.V.D.B. & Assocs., Inc., 333 F.3d 769 (7th Cir. 2003). See also Burke v. Messerli & Kramer P.A., 2010 WL 3167403 (D. Minn. Aug. 9, 2010) (prior correspondence during period sufficient; written dispute of paid debt).

¹⁵⁹ See Marro v. Crosscheck, Inc., 2004 WL 3688137 (E.D. Va. Aug. 6, 2004), *aff'd*, 115 Fed. Appx. 168 (4th Cir. 2004).

¹⁶⁰ See National Consumer Law Center, Truth in Lending § 7.9.7.2 (8th ed. 2012).

Response Q37: We urge the CFPB to require collectors to respond to disputes that consumers make after the 30-day period has expired. As described in more detail in our response to Q31, even under current law collectors cannot simply disregard disputes that consumers raise after the 30-day period. Instead, section 1692e(8) requires the collector to include the fact that the debt is disputed whenever it communicates credit information to another person, and this duty applies regardless of whether the consumer initiated the dispute within or outside the 30-day period. In addition, a collector who continues collection efforts despite a consumer's complaint that the debt is the result of identity theft, has been paid, or is time-barred, may face liability under the FDCPA for harassment.¹⁶¹ If the CFPB adopted a rule requiring collectors to investigate disputes raised after the 30-day period, it would not only help consumers but would also help collectors avoid liability for these violations.

Q37 Recommendation: The CFPB should adopt a rule requiring collectors to respond to disputes that consumers make after the 30-day period has expired, and should point out the potential liability under the FDCPA that collectors face if they continue to pursue a debt that the consumer does not owe.

Q38: How long does it typically take after a debt has been disputed for the collector to investigate and provide verification to the consumer? Would establishing a specific time period for responding to a dispute be beneficial to consumers? Does the prohibition on collection until verification has been provided give collectors a sufficient incentive to investigate expeditiously and appropriately? What costs and burdens would establishing a specific deadline for an investigation impose?

Response Q38 So long as it is clear that no collection activities, including the sale of the debt or suit on it, can proceed until the dispute has been satisfactorily resolved, no other time period need be set. The cases clearly state this.

Q38 Recommendation: The CFPB should not set a time limit for collectors to respond to consumer disputes, but it should reiterate in regulations that –

- no collection activities, including the sale of the debt or suit on it, can proceed until the dispute has been satisfactorily resolved;
- if an unverified debt is returned to the creditor, the creditor must verify it before taking any efforts to sell or otherwise collect on the debt;
- the collector must cease collection activities on the date it receives the request for verification,¹⁶² and will be held liable if it continues to collect the debt before it provides an appropriate verification.¹⁶³

¹⁶¹ See National Consumer Law Center, Fair Debt Collection § 2.6.2 (2013 Supp. to 7th ed. 2011).

¹⁶² See *Dragon v. I.C. Sys., Inc.*, 483 F. Supp. 2d 198 (D. Conn. 2007); *Jeffries v. Dutton & Dutton, P.C.*, 2006 WL 1343629 (N.D. Ill. May 11, 2006); *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987); *But see Kaschak v. Raritan Valley Collection Agency*, 1989 U.S. Dist. LEXIS 19103 (D.N.J. May 22, 1989) (no liability where collector sent collection letter day after it received request for verification, but before it had processed it).

¹⁶³ *Casas v. Midland Credit Mgmt., Inc.*, 2009 WL 249992 (S.D. Cal. Jan. 30, 2009); *Spencer v. Hendersen-Webb*, 81 F. Supp. 2d 582 (D. Md. 1999); *In re Young*, 280 B.R. 864 (Bankr. S.D. Ala. 2001). See also *Martinez v. Credit Bureau*, 2005 WL 1972538 (S.D. Fla. Aug. 12, 2005); *Dikun v. Streich*, 369 F. Supp. 2d 781 (E.D. Va. 2005); *Bohensky v. Hospital Billing & Collection Servs., Ltd.*, 1999 WL 294726 (E.D.N.Y. Mar. 23, 1999). (*Editor's Note*: Some collectors routinely purge their files after year) *Cf. Allen v. ATG Credit L.L.C.*, 2004 WL 2931298 (N.D. Ill. Dec. 14, 2004) (called consumer five times to confirm that verification information was received, not to collect).

- The collector may not resume collection activities,¹⁶⁴ including affirmative steps in a debt collection suit,¹⁶⁵ until it mails verification to the consumer.

Q39: What steps do collectors take to investigate a dispute under the FDCPA? Do collectors request information from the debt owner or any other parties? Do they look beyond confirming that the information contained in the validation notice is consistent with their records? Are the steps debt collectors are taking adequate?

Response Q39: Unfortunately, collectors take full advantage of a narrow reading of the *Chaudhry* case cited in your footnote 118 and discussed in our Response to Q33, divorced from its factual underpinnings. Most collectors simply look at their own computer records. On a going forward basis, our consistent recommendation is that the CFPB should not permit collectors (or debt buyers) to initiate collection on debts for which they do not have adequate documentation to respond to the wide range of expected consumer requests for verification, including proving the identity of the real debtor, the elements of the debt (delineated between principal, interest and fees), the dates of these charges, the date of the last payment, and more. (See our responses to Qs1-15). If there is a request for verification or a dispute that triggers the need for more information, the collectors should be required to go back to the original creditor and obtain the necessary additional documentation. Automated computer-to-computer investigations have proven to be a distinct failure under the FCRA, and should be prohibited in the FDCPA context as well.

Additionally, if the consumer has made a specific dispute, or raised a specific question, the collector should be required to respond to that dispute or question. See Q33 for our specific recommendations on this topic.

Q40: What steps should debt collectors be required to take to investigate a dispute? Would a “reasonableness” standard benefit consumers and debt collectors? Would more specific standards or guidance be useful to help effectuate such a standard? For example, should debt collectors be required to review account-specific documents upon receiving the consumer’s dispute? Should debt collectors be required to consider the accuracy and completeness of the information with a portfolio of accounts, including whether the information is facially inaccurate or incomplete? Should debt collectors be required to consider the nature and frequency of disputes they have received about other accounts within the same portfolio?

¹⁶⁴ *Gilmore v. Account Mgmt., Inc.*, 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009), *rev’d on other grounds*, 2009 WL 4826953 (11th Cir. Dec. 16, 2009); *Zaborac v. Mutual Hosp. Serv., Inc.*, 2004 WL 2538643 (S.D. Ind. Oct. 7, 2004) (collector may continue settlement negotiations initiated by consumer’s attorney); *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (Wyo. 1989). *See also* *Spencer v. Hendersen-Webb*, 81 F. Supp. 2d 582 (D. Md. 1999) (did not comply by faxing printout itemizing debt to consumer’s future father-in-law); Castle, FTC Informal Staff Letter (June 13, 1995).

¹⁶⁵ *See* *Shimek v. Forbes*, 374 F.3d 1011 (11th Cir. 2004); *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997); *Garcia-Contreras v. Brock & Scott, P.L.L.C.*, 2010 WL 4962940 (M.D.N.C. Nov. 30, 2010); *Forman v. Lauinger*, 2007 WL 1580082 (D. Mont. May 31, 2007); *Lietz v. Mikel M. Boley Attorney at Law*, 2006 WL 335854 (D. Utah Feb. 14, 2006); *Recker v. Cent. Collection Bureau, Inc.*, 2005 WL 2654222 (S.D. Ind. Oct. 17, 2005); *McDaniel v. South & Assocs., P.C.*, 325 F. Supp. 2d 1210 (D. Kan. 2004); *Levin v. Kluever & Platt, L.L.C.*, 2003 WL 22757763 (N.D. Ill. Nov. 19, 2003); *Frey v. Satter, Beyer & Spires*, 1999 WL 301650 (N.D. Ill. May 3, 1999); *Taylor v. Fink*, 1994 WL 669605 (N.D. Ill. Nov. 25, 1994).

Response Q40: As is described much more fully in response to Questions 42 through 44, the current standard of investigations is deplorable. Much more needs to be done and required by the CFPB. Please see the discussion relating to those questions for more specifics.

Q41: How should the investigation required vary depending on the type of dispute? For example, if a consumer states the balance on a debt is incorrect, what information should a debt collector review for its investigation? If a consumer states that she is not the alleged debtor, what information should a debt collector be required to obtain or review? If a consumer disputes the debt by stating that she does not recognize it, what information should a debt collector obtain or review? If the consumer claims prior payment of the debt, what information should a debt collector obtain or review? Please comment on other common dispute scenarios that may require review of specific types of information.

Response Q41: The collector should be required to investigate and respond to the consumer’s specific dispute. See our response to Q35 for further discussion of this issue. In addition, as described in Response to Q3, Q5, Q7, and Q17, we are advocating that no collector be permitted to initiate collection activities without having access to sufficient information to provide all of this information in response to a request for a verification. All of these dispute scenarios would be sufficiently addressed if the collector had the information before initiating the collection activity.

Q41 Recommendation: The CFPB should adopt a rule requiring the collector to investigate and respond to the consumer’s specific dispute.

Q42: What percentage of debt collectors are “furnishers” under the FCRA? How many FCRA disputes do debt collectors receive? What percentage of FDCPA disputes do collectors treat as direct disputes under the FCRA? How do debt collectors fulfill their responsibilities to investigate disputes that are covered by both the FDCPA and the FCRA? To what extent do debt collectors stop collecting debts disputed pursuant to the FDCPA and the FCRA without investigation? To what extent do debt collectors stop reporting debts disputed pursuant to the FDCPA and the FCRA without investigation?

Response Q42: We commend the CFPB for raising the question of collectors’ credit reporting practices. It is universally recognized that reporting a debt to a consumer reporting agency is a “powerful tool designed, in part, to wrench compliance with payment terms. . . .”¹⁶⁶ Thus, credit reporting should be considered a debt collection method, and regulated as such.

The CFPB’s question begins by asking about the extent to which debt collectors and debt buyers furnish information to credit reporting agencies and the extent to which they receive FCRA disputes. Debt collectors and debt buyers are a major category of “furnishers” of information to the nationwide consumer reporting agencies (NCRAs). While we do not have specific information on what percentage of debt collectors are furnishers, we do know from the CFPB’s own study that debt collectors provide a sizable portion of the data on consumer credit reports – 13% of tradelines.¹⁶⁷

¹⁶⁶ *Rivera v. Bank One*, 145 F.R.D. 614, 623 (D. P.R. 1993). See National Consumer Law Center, *Fair Credit Reporting* § 6.13 (7th ed. 2010 and Supp.) (collecting cases with similar statements).

¹⁶⁷ Consumer Fin. Prot. Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation’s largest credit bureaus manage consumer data* 14, 29 (2012).

Debt collectors and debt buyers generate a hugely disproportionate number of the disputes received by the NCRAs, accounting for nearly 40% of credit reporting disputes, in contrast to the 13% of tradelines they represent.¹⁶⁸ Debt collectors have the highest rates of disputes of all furnishers, according to the CFPB's own data.¹⁶⁹ Collection tradelines have a dispute rate of about 1.06%, compared to a dispute rate of 0.17% for credit card issuers and .27% for banks. Thus, debt collectors have a dispute rate that is 4 to 6 times higher than other furnishers.

We do not have an exact number of disputed debt collection items per year. However, we do know that the NCRAs have 1.3 billion active tradelines in their databases, and that 13% of those – or 169 million tradelines– are furnished by debt collectors.¹⁷⁰ With a dispute rate of 1.06%, that would be approximately 1.8 million disputes per year.

The uniquely unreliable nature of the information reported to NCRAs by debt collectors is certainly at least one of the explanations for the disproportionate number of disputes they generate. Tradelines reported by debt buyers, who have a documented history of FCRA misconduct,¹⁷¹ are particularly unreliable. In fact, it is a debt buyer that has the distinction of being one of the few (if not the only) furnisher that has been sued by an NCRA for providing inaccurate information.¹⁷²

The second part of Q42 asks about how debt collectors handle disputes that they receive under the FCRA. Unfortunately, we believe that many of these 1.8 million disputes are not being properly investigated. Debt collectors and debt buyers all too frequently fail to fulfill their responsibilities to conduct a “reasonable investigation” of a credit reporting dispute, despite the requirements of the FCRA. Like the NCRAs,¹⁷³ some debt collectors engage in automated perfunctory investigations that consist of nothing more than comparing basic identifying information (name, Social Security number, date of birth, and address), then “verifying” the debt if this information matches the same information on the Automated Consumer Dispute Verification Form (ACDV) sent by the NCRA.

For example, in its complaint against debt buyer Asset Acceptance, the FTC noted that Asset only employs 14 to 20 “ACDV specialists” despite receiving half a million credit reporting disputes each year, and expects each specialist to process at least 18-20 ACDVs per hour¹⁷⁴ – *or one dispute every 3.33 minutes*. The FTC noted:

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 29 (2012).

¹⁷⁰ *Id.* at 14 (2012).

¹⁷¹ See, e.g., *Brim v. Midland Credit Mgmt., Inc.*, 795 F. Supp. 2d 1255 (N.D. Ala. 2011) (approving on grounds of reprehensibility jury's award of punitive damages of \$623,180 against debt buyer based on its repeating of the original creditor's inaccurate data; citing debt buyer's inadequate procedures for investigating disputes and noting “defendant then asserts the debt is valid each and every time.”); *U.S. v. Asset Acceptance, L.L.C.* (M.D. Fla. Jan. 31, 2012), *consent decree available at* www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf; *U.S. v. Credit Bureau Collection Serv.* (S.D. Ohio Feb. 24, 2010), *consent decree available at* www.ftc.gov/os/caselist/0623226/100303creditcollectiondecree.pdf; *U.S. v. Performance Capital Mgmt. (Bankr. C.D. Cal. Aug. 24, 2000)* (FTC consent decree requiring debt buyer to refer to the original creditor's records and/or consult with that creditor when necessary to investigate the merits of a dispute), and accompanying FTC News Release, 2000 WL 1204636 (F.T.C. Aug. 24, 2000), *available at* www.ftc.gov/opa/2000/08/performance.htm.

¹⁷² Complaint, *Trans Union L.L.C. v. Asset Acceptance, L.L.C.*, (Ill. Cir. Ct. Cook Cty July 12, 2011).

¹⁷³ See Chi Chi Wu *et al.*, National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (Jan. 2009) (describing NCRA's perfunctory automated dispute systems).

¹⁷⁴ Complaint, *United States v. Asset Acceptance, LLC*, Case No. 8:12-cv-182-T-27 (M.D. Fla. Jan 30, 2012), at ¶¶44 and 45.

Asset processed many ACDVs through ‘batch processing,’ an automated system in which certain ‘identifiers’ in Asset’s electronic account records are automatically compared with the information provided on the ACDV forms. When the Social Security number and consumer name on the ACDV match the information in Asset’s database, Asset reports to the consumer reporting agency that it has verified the information....The batch processing of comparing a consumer’s name and Social Security number often does not adequately respond to the consumer’s dispute and is not a reasonable investigation. ... Asset does not investigate the particular merits of the consumer’s claim by, for example, reviewing individual account documents, contacting the portfolio seller to verify the accuracy of the information, asking the consumer reporting agency for more information, or reviewing its own internal notes.

In its 2010 complaint against another debt collector, Credit Bureau Collection Services (CBCS), the FTC alleged:

For certain types of disputes, such as those where the consumer claims the account is not his or hers or belongs to someone with a similar name, it is CBCS’s policy and practice only to compare the name, social security number, date of birth, and address in CBCS’s computer database with the information provided on ACDV forms. Where three of the four items match, CBCS will report to the CRA that it has verified the information it furnished as accurate. It is CBCS’s policy that only after the consumer has alleged the same type of account inaccuracy more than four times will the matter become assigned to a supervisor to do further ‘investigation.’”¹⁷⁵

A third example of a debt collector that conducted perfunctory investigations is Professional Collection Consultants (PCC). In a deposition conducted during an FCRA litigation, a PCC employee testified that she handled fifty disputes per day, at a rate of about five minutes per dispute.¹⁷⁶ This same employee testified that:

She regularly verified disputed accounts as belonging to the person in question even where there were differences in addresses. And she never contacted any outside parties, including Plaintiff, to clear up any disputes where there might be confusion on an issue. In the dispute at issue in this case, Ms. Villavicencio verified the dispute because both forms had the same social security number, although the PCC internal system contained a different address from that in the ACDV, and a date of birth that was off by over 25 years. She did not review any documents other than the account summary, and did so because she viewed the account summary in PCC’s records as sufficiently similar to that on the ACDV.
(citations omitted).

Another example of a major debt buyer that engages in non-substantive, unreasonable investigations is Midland Credit Management. The case of *Brim v. Midland*,¹⁷⁷ documents the deficiencies in Midland’s investigations. Mr. Brim sent numerous credit reporting disputes between 2008 and 2009

¹⁷⁵ Complaint, *United States v. Credit Bureau Collection Services*, Case No. 2:10-cv-169 (S.D. Ohio Feb. 24, 2010).

¹⁷⁶ *Fregoso v. Wells Fargo Dealer Servs., Inc.*, 2012 WL 4903291 (N.D. Cal. Oct. 16, 2012).

¹⁷⁷ *Brim v. Midland Credit Management*, 795 F. Supp.2d 1255 (N.D. Ala. 2011).

concerning a Dell Computer account that Midland bought, for which Brim had unimpeachable evidence that he had already paid. Midland responded to the notices by merely checking the dispute against its own records. Its review did not go any further than simply verifying that the debt existed on its books. Midland also responded to Brim's evidence (specifically, a bank account payment history) as "inadequate" and requested supplemental bank documents that were not available.

Given the deplorable record of debt collectors' investigation of disputes under the FCRA, those investigations should not be used as a model for the FDCPA's investigation requirements. Nor should the fact that a consumer previously invoked the FCRA's dispute process diminish in any way the collector's duty under the FDCPA to investigate a dispute. Both dispute procedures require major improvements.

The CFPB has taken the first step in attempting to reform unreasonable, inadequate investigations of credit reporting disputes by issuing its September 2013 Bulletin reminding furnishers of their duty to examine all relevant documents during a dispute.¹⁷⁸ However, the CFPB can and should go further.

Another issue regarding inaccuracies in credit reports relates to disputes that consumers raise after a debt collector has already reported an account to the credit bureaus. To the extent that a debt collector has reported an account to the credit bureaus, it should be required to also report a dispute. Although section 1692e(8) requires collectors that furnish information to a credit reporting agency to indicate if a debt is disputed, collectors claim that, once a debt has been reported, they do not have to update the report if there is a dispute. That enables them to engage in misleading omissions by "parking" the debt as though it is undisputed -- which harms the consumer's ability to get credit.

The final part of Q42 asks to what extent collectors stop collecting debts disputed under the FCRA without investigation. We have no information on this issue, but we do suspect that many collectors (and creditors) do conduct an investigation, but a perfunctory unreasonable one, so that they can continue to collect the debt and report it to the NCRAs. We suspect that other collectors and creditors, when a debt is disputed, simply sell the debts to a debt buyer or place the debt with a new third-party collector. One example of a very large creditor that allegedly sold disputed debts is JPMorgan Chase.¹⁷⁹

The CFPB has asked to what extent do collectors stop reporting disputed debts to the NCRAs without investigation. Based on their experience, practitioners report to us that they believe that collectors do not affirmatively stop reporting when a debt is disputed, in that they do not remove the information from the consumer's credit report. Instead, they simply cease to update the account, in which case it remains on the consumer's credit report. In such cases, the collector's duty under current law is clear -- it must mark the tradeline as "disputed."¹⁸⁰

¹⁷⁸ Consumer Fin. Prot. Bureau, The FCRA's Requirement to Investigate Disputes and Review "All Relevant" Information Provided by Consumer Reporting Agencies (CRAs) About the Dispute, CFPB Bulletin 2013-09, Sept. 4, 2013.

¹⁷⁹ See, e.g., State ex rel. Hood v. JPMorgan Chase, Civ. Ac. No. 13-cv-001939 (Miss. Chancery Ct -- 1st. Jud. Dist. Hinds Cty Dec. 17, 2013).

¹⁸⁰ 15 U.S.C. § 1681s-2(a)(3).

Given the problems that surround the handling of disputed debt collection items, we recommend that they should not be included in the calculation of a consumer's credit score. While this is the case for some disputes, it is not universal and it is entirely voluntary at this point. The CFPB should institute a mandatory requirement that disputed debts be excluded from calculation of a credit score.

In addition, creditors should not be permitted to consider disputed tradelines when deciding whether to approve or deny an application for credit. Denying credit or charging more based upon a dispute would be taking an adverse action based on the applicant's exercise of rights under the Consumer Credit Protection Act (which includes the FCRA and FDCPA). This type of adverse action is prohibited by the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(3), which prohibits creditors from discriminating against applicants based on a good faith exercise of their rights under the CCPA.

Q42 Recommendations:

- 1) The CFPB should issue guidance reminding debt collectors and debt buyers that merely comparing personal identifiers (name, SSN, DOB, address) does not constitute a reasonable investigation under the FCRA. Debt collectors and debt buyers should be required to have in their possession or obtain underlying account documents and review these documents in a credit reporting dispute. The debt collector or buyer must be required to contact the original creditor or other parties with relevant information as needed to resolve a dispute.
- 2) The CFPB should examine larger participant debt collectors under its supervision to ensure they are engaging in substantive, meaningful investigations of credit reporting disputes. The CFPB should take enforcement action against those debt collectors and debt buyers that are engaged in perfunctory, unreasonable investigations.
- 3) Any debt that is disputed pursuant to a federal consumer law, must be marked as disputed and cannot be considered in the consumer's credit score. Lenders should be prohibited from taking adverse action based on the fact that a debt is disputed, including denying credit or referring the application to any process that makes it more probable the consumer will be denied credit. (While this prohibition would not prevent referral to manual underwriting, such manual underwriting cannot serve as an effective denial of credit, make it more likely the consumer will be denied credit, or cost the consumer more in fees or interest).
- 4) When a disputed debt is sold or re-sold, the seller should be required to inform the buyer that the debt is disputed. The buyer in turn should be required to report these debts as disputed, and such tradelines must also be excluded from the consumer's credit score.
- 5) Debt collectors should be prohibited from "parking" their claims in a consumer's credit report without providing a § 1692g verification notice. The CFPB should make it clear that credit reporting is debt collection and that making report to a NCRA is a communication that triggers § 1692g.
- 6) Once a consumer disputes a debt, the debt collector should be required to update any report that it made to a credit reporting agency by informing the CRA of the dispute.

Q43: What percentage of disputes are repeat disputes that were already subject to a reasonable investigation and do not include any new information from consumers? How do debt collectors currently handle repeat disputes or disputes that are unclear or incomplete? Do debt collectors receive a significant number of disputes from credit repair organizations? Is any data available as to the number of repeat disputes or disputes from credit repair organizations that debt collectors receive?

It is our impression that credit repair organizations rarely file disputes under the FDCPA. As to repeat disputes by consumers themselves, we do not have statistics. However, given the utterly superficial, echo-chamber nature of collectors' investigation of disputes, it should not be surprising at all that consumers might reiterate their disputes, in the hope that a renewed and perhaps more detailed or emphatic dispute letter might invoke an actual response.

Q44: Should the Bureau consider including in proposed rules for debt collection an exception for "frivolous and irrelevant" disputes, similar to the one found in the FCRA? Are the incentives of those collecting on debts different from the incentives of other furnishers and CRAs with respect to information included on consumer reports? What would be the costs and benefits of allowing collectors not to investigate "frivolous and irrelevant" disputes?

Response Q44: No. Consumers are usually sincere in their disputes. Until debt collectors begin complying with the basic tenets of the law, there is no need to give them an excuse to do less than the law requires. Collectors typically provide the very minimum that they can get away with: "the amount being demanded is the amount the creditor claims is owed" (irrespective of the nature of the dispute) and rarely provide documentation. Additional loopholes would simply provide collectors with discretion to abuse the situation.

Furthermore, the frivolous and irrelevant standard is often used to exclude a second or third dispute involving the same matter. Yet note that some of the cases cited in our response to Question 42 involved debt buyers' failure to conduct reasonable investigations even after repeated and multiple disputes. For example, the CBCS case documented how that debt collector had a practice of not conducting any meaningful examination of a dispute until it was disputed for the fourth time. Thus, we oppose any proposal, such as the one that would exclude repeat disputes as "frivolous and irrelevant" disputes, similar to the provision found in Section 1681s-2(a)(8)(F) of the FCRA. Circumstances can change so that a second dispute is handled differently than the first. For example, information supporting the dispute that was not available during the first investigation may become available. Or the person investigating the second dispute may actually take the time to do more than compare personal identifying information.

Q45: What information do debt collectors currently provide to verify a disputed debt? Do debt collectors typically provide documentation (media) to consumers to verify a debt?

Response Q45: The information that debt collectors currently provide is dismally inadequate. As stated elsewhere in these comments, the information is rarely responsive to the consumer's dispute.

Q45 Recommendation: The CFPB should require that fully responsive documentation, specifically addressing the details of the consumer's dispute, be provided to the consumer by the collector.

Q46: Under which circumstances, if any, should collectors be required to provide consumers with documentation (media) to verify a debt? Would providing the last periodic or billing statement related to the account be sufficient to verify most disputed debts?

Q46 Response and Recommendation: If there is a dispute, collectors should be required to provide whatever documentation is requested, typically a signature card or periodic statements, or information as to what part of the debt represents interest, late or over limit charges, cash advances or purchases. The last billing statement would not verify most debts, since it will not disclose purchases or charges that could be disputed. Nor will it show the date of the last payment (which is sometimes faked and therefore disputable). As is described in response to Q3, collectors should only be collecting on debts for which they already have access to sufficient documentation, including itemization of the charges of debt before it was charged off. As explained in response to Q17, itemization of the debt including a breakdown between principal, interest and fees, and the last 12 monthly statements should also be provided to the consumer who requests verification of a debt resulting from an open end line of credit. If the debt is medical debt, the consumer should be provided an itemization of all of the charges incurred based on the procedures and services provided. Similarly requests for verification of other types of debt should trigger all of the information necessary to show the consumer the separate elements of the total debt alleged to be due.

Q47: What would be the costs and benefits of requiring particular forms of information to verify a debt? Are there any particular types of verification that would be especially beneficial to consumers or particularly costly for collectors to provide?

Response Q47: See responses to prior questions.

Q48: Section 809(b) of the FDCPA states that verifications must be “mailed” to the consumer. Do debt collectors currently provide the verifications only by postal mail, or are debt collectors providing verifications in other formats, such as email or text message? Do collectors obtain consumer consent if they wish to provide the verification electronically and, if so, what type of consent are they obtaining (e.g., do they follow E-Sign standards)?

Response Q48: Please see our Responses Q26, Q27, and Q28.

Q49: If consumers disagree with the verification of disputed debts provided by debt collectors, or if they do not receive verification of the disputed debts, should consumers be afforded the opportunity to file statements with collectors that explain the nature of their disputes with the debt collector, and should the debt collector then be required to provide that statement to the owner of the debt or subsequent collectors? What would be the costs and benefits of requiring debt collectors to accept and communicate consumers’ statements of dispute?

Response Q49: If consumers disagree with the verification of disputed debts, they should be able to file rebuttal statements, explaining the nature of their dispute. Collectors should also be required to convey the dispute to the creditor, and most importantly, to all subsequent owners and collectors of the debt, either as part of the investigation process, or as part of their returning the account to the creditor. Failure to do so should constitute a violation of §1692e(8). Please see our Response to Q5.

Q50: To what extent do debt collectors attempt to verify a debt that is disputed? What do debt collectors currently do when they are unable to verify a disputed debt? What, if anything, should debt collectors be required to do when they are unable to verify a disputed debt? Do third-party collectors typically return the account to the debt owner when it is disputed, without attempting to verify it?

Response Q50: Third-party collectors do typically return the account to the debt owner when it is disputed, without attempting to verify it, and also without telling the owner that it is disputed. The consumer will then have to re-dispute with the next collector. That contravenes the purpose of §1692g and should be prohibited. Please see our Response to Q5 on this point.

Q51: If a debt collector's investigation reveals errors or misrepresentations with respect to the debt, do collectors report those findings to the consumer? When and how are such findings conveyed to consumers?

Response Q51: No, they just stop collecting without alerting the consumer. The consumer should have some closure. The collector should be required to send the consumer an explanation of its actions.

Q52: Do owners of debts sell disputed but unverified debts to debt buyers or place them with new third-party collectors? Are these debts reported to CRAs? What limitations should be placed on the sale or re-placement of unverified disputed debts? For example, should the owner of the debt or the collector be required to inform debt buyers and new collectors that it is an unverified disputed debt when it is sold or re-placed? Should the new debt buyer or collector be required to verify the debt before making collection efforts? What would be the potential costs and benefits of such restrictions or conditions?

Response Q52: If the debt collector failed to verify a debt when it was required to do so, the debt collector should be prohibited from selling the debt. The collector could return the debt to the seller, but if it does so, the collector should be required to notify the creditor that the debt must be verified before it is placed for collection or re-sold.

This is part of our holistic recommendations for change. The CFPB should mandate that all information about the collection of the debt be passed from one collector of the debt to the next, regardless of the ownership of the debt. The information that should be passed along should include requests for verification and disputes, the results of the disputes, along with other information such as the times the consumer has said not to call, whether the consumer is represented by an attorney, and whether the consumer has said to stop communicating. Please see our Response to Q5.

Q52 Recommendation: The CFPB should prohibit creditors from selling, collecting, or suing on unverified debts. These debts are reported to the CRAs (see Response to Qs 42, 43 and 44).

Q53: What would be the costs and benefits of prohibiting collectors from reporting a debt to a CRA during the 30-day window?

Response Q53: We support adoption of a rule prohibiting collectors from reporting a debt to a CRA during the 30 day period that a consumer has to request verification. Such a rule would give the consumers some time to respond to the debt prior to the collector reporting the debt to the

NCRAs. It would address the practice of “parking” as discussed in Section IV (regarding medical debt), in that it would require that the consumer actually receive a notice about the debt before it is placed on a credit report. If it turns out that the consumer can successfully dispute the debt during the first 30 days, it saves her the time and resources of having to dispute it on her credit report too.

There would not be great costs to such a requirement – it would just be a matter of programming the collector’s software correctly to wait a month before sending the first transmission of the information to the CRAs. In fact, practitioners report that some collectors already do wait 30 days, because their initial dunning letters state they the collector will report the debt to the CRAs if the collector does not receive a dispute within 30 days.

There is no reason for collectors to report during the 30-day window. They have no new information. If they were allowed to report at this early stage, they should be required to re-report a dispute if the consumer requests verification. It would actually be less expensive for collectors to wait until after the 30-day period. That should be standard procedure to avoid the abuse that arises from not updating the report as an excuse to leave a debt on the credit report as undisputed. Please see our Response to Q43.

Q53 Recommendation: The CFPB should prohibit creditors from reporting a debt to a credit reporting agency during the 30-day period for the consumer to dispute the debt or request verification.

Part VIII. Debt Collection Communications (Qs 54-91)

The CFPB has asked a series of questions about debt collection communications. In general, we recommend very strict restrictions on debt collection communications, particularly third-party contacts and workplace calls. The CFPB should not undermine the rule that collectors violate the FDCPA by leaving voice mail messages that may be heard by others. Debt collection communications through social media should be completely banned. However, a consumer who has sent a mortgage servicer a “cease communication” request should not thereby be deprived of important non-collection notices required by RESPA and TILA.

Q54: In addition to telephone and mail, what technologies, if any, do debt collectors currently use on a regular basis to communicate or transact business with consumers? For which technologies would it be useful for the Bureau to clarify the application of the FDCPA or laws regarding unfair, deceptive, or abusive acts or practices? What are the potential efficiencies or cost savings to collectors of using certain technologies, such as email or text messaging? What potential privacy, security, or other risks of harm to consumers may arise from those technologies and how significant are those harms? Could regulations prevent or mitigate those harms? Should consumers also be able to communicate with and respond to collectors through such technologies, including to exercise their rights under the FDCPA and particularly when a collector uses the same technology for outgoing communications to the consumer? What would be the potential costs and benefits of such regulations?

Response Q54: Debt collectors seem to make use of all of the new technologies to communicate with consumers – email, interactive websites, Facebook, text messages, even electronic greeting cards. In later questions in this section we address particular issues about the application of FDCPA

protections to these methods of communication. Here we present some general comments about new forms of communication.

The CFPB should recognize that these new technologies also allow a collector to “spoofer” telephone numbers -- a misleading and deceptive tactic to lure the consumer to answer a call from someone with whom he does not want to speak. Local numbers are often spoofed, and caller ID names are likewise spoofed. As discussed in our response to Q85, spoofing should be strictly forbidden.

Regarding whether consumers should be able to communicate with collectors using these new technologies, please see our response to Q28 for more detail on this issue.

Q55: Are there nascent communication technologies, or communication technologies that are likely to arise in the future, whose use in connection with debt collection might materially benefit or harm debt collectors or consumers? What additional challenges do those communication technologies present in applying the FDCPA or the Dodd-Frank Act’s prohibition against unfair, deceptive, and abusive acts and practices to debt collectors?

Response Q55: Text messaging presents special concerns. In addressing the application of the FDCPA to text messaging, the CFPB should keep in mind that text messages are governed by the Telephone Consumer Protection Act (“TCPA”). That statute prohibits collectors from using auto dialers to send texts to cell phones without the prior express consent of the consumer. In addition, text messages are electronic communications governed by E-Sign. (Please see our Response to Q27). This means that a text can take the place of a communication such as a validation notice which is required to be in writing only if the consumer has consented electronically in full compliance with E-Sign. If the consumer has consented to receive texts under both E-Sign and the TCPA, then privacy issues are not likely to be a problem, because texts are generally private. In that case, the notice that the communication is from a debt collector can be included, with no invasion of the consumer’s privacy.

The issue with texts is not so much privacy as space. A collector will not have much space in the text to say anything substantive if it always must provide the notice that the communication is from a debt collector. However, that is the collector’s problem and may be sufficient reason to make texts an inappropriate tool for debt collection – even with E-Sign and TCPA consent. There is no reason – or legal justification – for any exceptions to be made to facilitate this form of communication in ways which would not comply with Congress’s explicit instruction that every communication from a debt collector be accompanied by a notice that it is from a debt collector.

Q55 Recommendation: We urge the CFPB to clarify that the E-Sign consent requirement applies to all electronic communications that are used to replace writing requirements (see Response to Qs 26, 27, 28 and 29), and that the Telephone Consumer Protection Act applies to text messages – prohibiting both text messages and calls to cell phones that are initiated by autodialers, without prior express consent from the consumer.¹⁸¹

Q56: What complications or compliance issues do social media present for consumers or collectors in the debt collection process? How, if at all, should collector communications via social media be

¹⁸¹ 47 U.S.C. §227(b)(1)(A)(iii).

treated differently from other types of communications under debt collection rules? What privacy concerns are raised by various social media platforms?

Response Q56: Social media is a completely inappropriate place for debt collectors to be contacting consumers, because of the obvious privacy implications.

Q56 Recommendation: The use of social media for debt collection activities should be flatly prohibited.

Q57: FDCPA section 807(11) declares it to be a false, deceptive, or misleading representation for collectors to fail to disclose that a communication is from a debt collector. This section also requires in the collector's initial communication what is often called a "mini- Miranda" warning, in which the collectors state that they are attempting to collect a debt and any information obtained will be used for that purpose. Standard industry practice is for third-party debt collectors to provide the mini-Miranda warning during every collection call. What are the costs and benefits of such collectors including the mini-Miranda disclosure when they send communications via social media?

Response Q57: Social media is a completely inappropriate place for debt collectors to be contacting consumers, because of the obvious privacy implications. The use of social media for debt collection activities should be flatly prohibited.

Q58: How frequently do debt collectors communicate with third parties about matters other than the location of the consumer? What other topics are discussed and for what reason? What are the potential risks to consumers or third parties? Would additional regulation to address this issue be useful?

Response Q57: Debt collectors communicate with third parties illegally all the time, precipitating thousands of complaints to government agencies.¹⁸² According to the CFPB's 2012 Report on Debt Collection, there were between 12,000 and 38,000 complaints in each of the previous five years about collectors improperly revealing the debt to third parties.¹⁸³

The number of litigated and reported cases challenging this activity also continues to rise, which is another sign of the continued and serious nature of these abuses. *See* Appendix K.2.2.4 to Hobbs, *Fair Debt Collection* (7th Ed. 2011) and *Supplement* (2013). In a two year period, there were eighteen reported cases in federal courts across the country on this one issue. Many of these cases recounted multiple instances of improper contact with third parties. Below are just some of the reported cases

¹⁸² In our survey of attorneys representing consumers in debt collection cases, every single response included a long explanation of how often, how typical, and how abusive this routine practice is among debt collectors. Here is just one typical response: "Very frequently. Often neighbors or relatives are told to pass on messages, ostensibly to get in touch with the consumer. By the very such communication, the collectors are violating debt collection laws and are trying to embarrass and pressure consumers to pay. Often, family members or friends are told to encourage the consumer to pay a debt. I've had cases where it is even more blatant, where there were specific threats to the consumers that if they don't pay, certain people (their friends, neighbors, co-workers, family, bosses, etc.) will be told of the debt, and the debt collectors in fact told these people that my client owed money. Sometimes, collectors ask skip-tracing information that goes far beyond location information (which they already have), such as the identity of people who live with the consumer, whether a lease is in that person's name, where the person works and when, personal and work habits, what cars they own, etc."

¹⁸³ CFPB, *Fair Debt Collection Practices Act CFPB Annual Report, 2012*, at 7.

http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf.

from 2011 and 2012. They are clearly just the tip of the iceberg with regard to the regular violation of the prohibitions on this issue by debt collectors.

- *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015 (9th Cir. 2012). Mickell’s act of sending letters “care of” employer constitutes a per se violation of the FDCPA. “Mickell knew or could reasonably anticipate that a letter sent to a class member’s employer might be opened and read by someone other than the debtor as it made its way to him/her.” Correspondence with a return address of an attorney’s office rarely relays good news and often communicates information that can be embarrassing or even frightening to the recipient.
- *Vaile v. National Credit Works, Inc.*, 2012 WL 1520120 (D. Ariz. Mar. 26, 2012), *adopted by* 2012 WL 1520115 (D. Ariz. May 1, 2012). The defendant violated §§ 1692c(b) and 1692b(2) by informing a third party it was going to sue the plaintiff for a debt and asking the third party to convey this message to the plaintiff.
- *Ortega v. Griggs & Assocs. L.L.C.*, 2012 WL 2913202 (N.D. Cal. July 13, 2012). Defendants violated § 1692c(b) by discussing the debt with plaintiff’s coworker at plaintiff’s place of employment.
- *McEndree v. Rash Curtis & Assocs.*, 2012 WL 1640465 (E.D. Cal. May 9, 2012). It is a fact question whether the defendant violated § 1692c(b) by speaking to the plaintiff’s girlfriend in telephone calls.
- *Murphy v. Stephens & Michaels Assocs., Inc.*, 2011 WL 1465761 (S.D. Cal. Apr. 18, 2011). The consumer stated valid FDCPA claims by alleging, among other things, that the defendant repeatedly contacted her ex-boyfriend in an attempt to collect her alleged debt and continued this practice even after contacting the plaintiff directly.
- *Thomas v. Smith, Dean & Assocs., Inc.*, 2011 WL 2730787 (D. Md. July 12, 2011), *adopted by* 2011 WL 3567043 (D. Md. Aug. 10, 2011). Where the debt collector called the plaintiff’s boss and friend regarding the debt she owed after it had already located the plaintiff and spoken with her about the debt, the collector violated § 1692c(b).
- *Travers v. Collecto, Inc.*, 2013 WL 55819 (D. Mass. Jan. 2, 2013). Where automated messages were directed to a number which, according to the plaintiff, was never associated with him, at a residence where he had not resided for eight months and, as a result, information regarding the plaintiff’s debt was communicated to the new resident, the plaintiff stated a valid claim. “The use of automated phone calls creates an inherent risk of violating the FDCPA.”
- *Kempa v. Cadlerock Joint Ventures, L.P.*, 2011 WL 761500 (E.D. Mich. Feb. 25, 2011). Collector violated § 1692c(b) by communicating its name to the consumer’s mother in connection with the collection of the debt. The court rejected the collector’s location information exception defense to § 1692c(b) because the collector in fact knew the consumer’s location information.
- *Curto v. Palisades Collection, L.L.C.*, 2011 WL 5196708 (W.D.N.Y. Oct. 31, 2011). Leaving a summons and complaint in a curbside mailbox without an envelope or other packaging risks disclosure of information to third parties.
- *Beckworth v. Law Office of Thomas Landis, L.L.C.*, 2012 WL 1361671 (E.D. Pa. Apr. 18, 2012). Claim stated under §§ 1692b and 1692c(b) where the complaint alleged calls to the plaintiff’s mother that revealed the plaintiff’s debt.
- *Fed. Trade Comm’n v. LoanPointe, L.L.C.*, 2011 WL 4348304 (D. Utah Sept. 16, 2011). Because the defendants communicated with the consumers’ employers and co-workers about the

consumers' debts without the consumers' knowledge or consent, the defendants violated § 1692c(b).

- *Anderson v. Didonato*, 2012 WL 6553675 (E.D. Va. Nov. 19, 2012), *adopted by* 2012 WL 6561259 (E.D. Va. Dec. 14, 2012). The voicemail message at issue, left with the plaintiff's sister, indicated that the plaintiff had a court date for the following day and that a civil warrant would be imminently served against plaintiff by a police officer. The plaintiff did not consent to this communication, and both of these statements are outside of the scope of the exception allowing third party communications.

A multitude of businesses, many of them Internet-based, maintain databases of contact information and offer this information at low cost to other businesses, including debt collectors and creditors. Given these many sources of information about an individual's location, seeking location information is often just a pretext for collectors to contact a consumer's friends, neighbors, relatives, and employers in order to embarrass and harass the consumer.

The language of the FDCPA is clear on this topic, and regulations are not necessary. It would be particularly inappropriate to adopt regulations creating exceptions to the restrictions on contacting third parties. The pervasive violations of the clear statutory language on this subject is an indication of the need to beef up enforcement on this topic – both private and public. **To facilitate private enforcement, we encourage the CFPB to issue regulations clarifying that multiple awards of statutory damages are available for multiple violations of the FDCPA**, as set forth more fully in Section III.B.2 above.

Q59: What would be the costs and benefits of setting a standard for when a debt collector's belief about a third party's erroneous or incomplete location information is reasonable? If a standard would be useful, what standard would be appropriate?

Response Q59: The language of the FDCPA is clear. A collector may not seek location information for a person more than once unless the collector has a good reason to believe that the person's earlier response was erroneous or incomplete *and* that the person now has correct or complete information. Outside these relatively unusual circumstances, collectors are not and should not be permitted to make repeat calls to a person for location information. Third parties may not want to disclose location information, and the CFPB should not permit them to be harassed. If the CFPB adopts any regulation on this topic, it should emphasize that the circumstances under which collectors may make repeat calls to a person for location information are very rare and that the collector must document good reasons to believe both that the person's earlier information was complete or erroneous and that the person now has correct or complete information.

Q60: Some individuals employed by debt collectors use aliases to identify themselves to third parties when seeking location information about a consumer. Should this practice be addressed in a rulemaking? If so, how?

Response Q60: The concept of aliases is alien to the principles of transparency in the collection of debts governed by the FDCPA and should not be permitted.

Q61: Under FDCPA section 804(1), debt collectors are permitted to identify their employers during location communications only if the recipient of the communication expressly requests that

information. Does providing the true and full name of the collector's employer upon request risk disclosing the fact of the alleged debt to a third party? If so, how could the risk be minimized? What would be the costs and benefits of minimizing or otherwise addressing this risk?

Response Q61: Truth is always the best course of action, but the name of the collector's employer should not be provided unless asked.

Q62: FDCPA section 804(5) bars a debt collector from using any language or symbol on an envelope or elsewhere in a written communication seeking location information if the name indicates that the collector is in the debt collection business or that the communication relates to the collection of the debt. How should such a restriction apply to technologies like email, text message, or fax?

Response Q62: In § 1692b Congress was very clearly enacting strong privacy protections for consumers. That provision allows a debt collector to contact a third party for the purpose of obtaining location information as defined in § 1692a(7) only under very clear limitations regarding how that contact may occur. If the limitations cannot be met, as in the case of a postcard, the method is inappropriate for obtaining location information. The debt collector may not use its employer's business name if its name indicates it is a debt collector, unless the debt collector is asked for the employer's name. The debt collector may only say he is confirming or correcting contact or location information regarding the consumer.

The Congressional purpose of this provision can only be served by extending its protections to email. If a collector seeks location information from a third party via email, there should be nothing in the message, or in the sender's email address, that would indicate that the sender is in the collection business or that the communication relates to collection of a debt. The same rule should apply to text messages and faxes: nothing in the message, or in the information conveyed about the sender, should suggest debt collection. In addition, fax communications should never be sent to a person's workplace as a way of seeking location information about a debtor. The possibility that many people at the workplace will see the fax on the fax machine and in circulation to the proper person is simply too great.

Q62 Recommendation: The CFPB should specify that § 1692b(5) applies to email messages, text messages, and faxes. In addition, it should prohibit collectors from sending faxes to a third party's workplace to seek location information about a debtor.

Q63: Does sufficiently reliable technology exist to allow collectors to screen to determine whether a given phone number is a landline versus a mobile phone? If so, should collectors conduct such screening before relying on an area code to determine a consumer's time zone? What would be the costs and benefits of requiring such screening? Should collectors be allowed to rely on information provided by consumers at the time they applied for credit, such as when a consumer provides a phone number identified as a "home" number or a "mobile" phone number on an initial credit application without screening the area code?

Response Q63: We believe that technology already exists to scrub cell phone numbers from lists of telephone numbers, and that this technology is already used by telemarketers and debt collectors so that they can avoid violating the TCPA's restrictions on calls to cell phones. Collectors should use screening technology before relying on an area code to determine a consumer's time zone.

Collectors should not be allowed to rely on information provided by consumers at the time they applied for credit, regarding whether a phone number is a “home” number or a “mobile” phone number. The technology should be used to determine this information.

Q64: Should collectors assume that the consumer’s mailing address on file with the collector indicates the consumer’s local time zone? If the local time zone for the consumer’s mailing address and for the area code of the consumer’s landline or mobile telephone number conflict, should collectors be prohibited from communicating during any inconvenient hours at any of the potential locations, or should one type of information (e.g., the home address) prevail for determining the consumer’s assumed local time zone?

Response Q64: Collectors should not assume that the consumer’s mailing address on file with the collector indicates the consumer’s local time zone. The unemployed consumers and financially distressed consumers that debt collectors pursue are by necessity a mobile group.

The question also asks how collectors should determine what times are inconvenient when the time zone indicated by the consumer’s address is different from that indicated by a telephone number, or the debtor has two telephone numbers that indicate different time zones. In these circumstances, the collector should place calls only during those times that are presumed convenient in all of the time zones until the collector has asked the consumer about convenient times to call. Debt collectors should assume that they do not know the consumer’s location until they have verified it.

Q65: A main purpose of designating certain hours in the FDCPA as presumptively convenient apparently was to prevent the telephone from ringing while consumers or their families were asleep. Do similar concerns exist for other technologies? Should any distinction be made between the effect of a telephone ringing and an audio alert associated with another type of message delivery, such as email or text message, if a mobile phone is on during the night?

Response Q65: Text messages and emails on a “smart phone” may cause an audible alert. Many people leave these alerts on at night, so their teenage or grown children can alert them in case of emergencies.

Collectors can easily time text messages and emails so that they arrive during the time periods that are presumed convenient. There is no excuse for collectors to send these messages at nighttime unless the debt collector has verified with the consumer that it is not inconvenient to receive them then.

In addition, since consumers are often charged for receiving text messages, the CFPB should reiterate that text messages must comply with § 1692f(5), which prohibits causing a consumer to incur charges for a communication by concealing its true purpose. The CFPB should also reiterate that the TCPA prohibits autodialed text messages to cell phones without the prior express consent of the called party.

Q65 Recommendation: Text messages and emails should be treated as telephone calls – and allowable times should be governed by the statutory restrictions in 15 U.S.C. § 1692c(a)(1). Debt collectors should ask consumers if nighttime is a convenient time to receive an email or text message before sending one.

Q66: Should a limitation on usual times for communications apply to those sent via email, text message, or other new media? Should it matter whether the consumer initiates contact with the collector via that media? Is there a means of reliably determining when an electronic message is received by the consumer? Are there data on how frequently consumers receive audio alerts when either emails or text messages are delivered? Are there data showing how many consumers disable audio alerts on their devices when they wish not to be disturbed?

Response Q66: See our response to Q65.

Q67: Is there a general principle that can guide the incorporation of standards on unusual times for communications to newer technologies? For instance, should such restrictions apply only to technologies that have “disruptive” effects, like phone calls, and if so, how might “disruptive” be best defined? What would be the costs and benefits of applying any such general principles?

Response Q67: See our response to Q65.

Q68: Especially with the advent and widespread adoption of mobile phones, consumers often receive calls at places other than at home or at work. Under what circumstance do collectors know, or should know, that the consumer is at one of the types of places listed below? What would be the costs and benefits of specifying that such locations are unusual or inconvenient, assuming the debt collector knows or should know the location of the consumer at the time of the communication?

Response Q68: Assuming that a collector has complied with the TCPA restrictions, and either has the consumer’s consent to call the consumer’s cell phone or is making the call without using auto-dialing technologies or an artificial voice, the collector should always ask if this is a convenient time to speak before proceeding with a conversation over a mobile phone.

The prohibition against contacting a consumer at an inconvenient or unusual place was added by a Senate bill, S. 918,¹⁸⁴ late in the legislative process. The language in 15 U.S.C. § 1692c(a)(1) – “at a time or place known or which should be known to be inconvenient to the consumer” – holds the collector to both a subjective actual knowledge standard and an objective standard of what one could reasonably infer from the circumstances known or readily ascertainable by the collector. For example, one court found: “Intent may be inferred by evidence that the debt collector continued to call the debtor after the debtor had asked not to be called and had repeatedly refused to pay the alleged debt, or during a time of day which the debtor had informed the debt collector was inconvenient.”¹⁸⁵ The objective standard strongly suggests that the collector has a burden of reasonable inquiry to determine the times or places that are unusual or inconvenient for a particular consumer. The Seventh Circuit has made clear that the consumer need not use legally precise language to indicate the inconvenience of a call to the debt collector.¹⁸⁶

The information about convenient and inconvenient times for collection calls should be required to be passed along from creditor to collector and subsequent collectors. The CFPB should require collectors and creditors to establish a system to record times and places that are known to be inconvenient or unusual for the consumer to receive communications, and to convey

¹⁸⁴ S. 918, 95th Cong., 2d Sess. § 805(a)(1) (1977).

¹⁸⁵ *Brandt v. I.C. Sys., Inc.*, 2010 WL 582051 (M.D. Fla. Feb. 19, 2010).

¹⁸⁶ *Horky v. J.V.D.B. & Assocs.*, 333 F.3d 769 (7th Cir. 2003).

this information whenever the debt is sold or reassigned. For example, a creditor may know the consumer's occupation from the credit application in its files. The collector may also know of an illness or death in the family from its collection efforts. The creditor's file may tell the collector whether the consumer's job is one for which contacts at the workplace are inherently inconvenient. Or the collector may learn this information from a third party: a child might tell the collector that the consumer is ill or asleep or a union might warn a collector not to contact its members at work. All of this information should be recorded, and conveyed whenever the debt is sold or reassigned.

Debt collectors' calls to many consumers' cell phones are prohibited by another provision of the FDCPA, section 1692f(5), because the consumer may not be able to determine that the "true purpose" of the call before incurring the cell phone usage fees. Whether the debt collector's caller ID reveals the "true purpose" of the call would be a factual issue in many cases given that the debt collector's name—let alone the purpose of the call—may not be clear to the consumer in the caller ID information, not only because of inconsistencies in telephone service providers' abbreviation of names and timely provision of caller ID information, but also because of the ease with which a debt collector may suppress its caller ID information. Debt collectors must also be particularly careful when calling a cell phone that the call is made at a convenient time and place, given the mobility of cell phones. In addition to complying with the requirement not to conceal the true purpose of the call, debt collectors should be required, after verifying that they have reached the consumer, to preface the cell phone call with both the section 1692e(11) disclosure and an inquiry whether it is convenient for the consumer to talk at that time.

This question also asks about a number of particular locations that may be inconvenient. Please see our responses to Qs 69-70.

Q68 Recommendation: In addition to complying with the requirement not to conceal the true purpose of the call and all TCPA requirements, debt collectors should be required, after verifying that they have reached the consumer on a cell phone, to preface the call with both the section 1692e(11) disclosure and an inquiry whether it is convenient for the consumer to talk at that time.

Q69: Are there additional places not listed above that would be inconvenient places for consumers to be contacted?

Response Q69: Q68 lists a number of locations such as hospitals, emergency rooms, funeral homes, military combat zones, and daycare centers, and asks whether they should be presumed to be inconvenient locations for consumers to receive collection calls. The answer is yes. In addition, it should be presumed inconvenient to call a consumer who is driving a vehicle or to call a consumer at any workplace that involves operating machinery or caring for others. However, as noted in our response to Q70, the CFPB should take a simpler approach and adopt a regulation requiring collectors to assume that calls to the consumer's workplace are inconvenient unless the consumer states otherwise.

Q70: Under what circumstances are communications at a consumer's place of employment inconvenient, even if the employer does not prohibit the receipt of such communications? What would be the potential costs and benefits of prohibiting communications at a consumer's place of employment due to inconvenience, assuming that the collector knows or should know the consumer's location? To what extent does the inconvenience depend on the nature of the consumer's workplace or on the consumer's type of employment at that workplace?

Response Q70: Communications at a consumer’s place of employment can be inconvenient because of privacy reasons, because the calls interrupt the consumer’s concentration, and because the consumer is often not permitted to deal with personal business during the work day. Many consumers work in jobs that involve operating machinery, driving a vehicle, or caring for others. Given their upsetting and distracting nature, debt collection calls not only jeopardize a worker’s ability to perform a job but may create a safety hazard. The CFPB should prohibiting these communications, with the sole exception being when the consumer requests that communications be directed to her there.

In the alternative, if the CFPB does not ban collection calls to a consumer’s workplace altogether, it should adopt rules that clarify and simplify the consumer’s ability to stop such contacts. It should require a collector that calls a consumer at work to 1) ask, immediately after disclosing the debt collection purpose of the call, whether it is convenient for the consumer to receive calls at work; 2) terminate the call and make no further calls to the consumer at work if the consumer responds that calls there are inconvenient or gives any other indication during the contact that she does not wish to receive calls there; and 3) record the consumer’s instructions not to call her at work and convey this information to any future transferee or assignee of the debt.

Giving effect to any and every indication by a consumer that workplace contacts are inconvenient is supported by existing decisions interpreting 15 U.S.C. § 1692c(a)(3). That section prohibits the collector from contacting the consumer “at the consumer’s place of employment if the debt collector knows or has reason to know that the consumer’s employer prohibits the consumer from receiving such communication.” The Seventh Circuit has held that a simple statement that a consumer cannot speak to the debt collector at work is sufficient to place the collector on notice that the employer did not allow such collection calls. As the court said:

[T]he FDCPA exists to protect the unsophisticated consumer. Unsophisticated consumers, whatever else may be said about them, cannot be expected to assert their § 1692c(a)(3) rights in legally precise phrases. It is therefore enough to put debt collectors on notice under § 1692c(a)(3) when a consumer states in plain English that she cannot speak to the debt collector at work. That is what Horkey did. Without evidence that J.V.D.B. knew, contrary to Horkey’s assertion, that her employer did not prohibit her from taking debt-related calls at work, she is entitled to summary judgment on her § 1692c(a)(3) claim.¹⁸⁷

While *Horkey* deals with the protection against calls when the employer prohibits them, not the protection against calls at inconvenient times or places, the principle is the same: the collector must abide by *any* indication that the consumer cannot or does not want to receive calls there.

If the CFPB does not completely ban workplace calls made without the consumer’s consent, it should also clarify and strengthen the prohibition against calls when the employer prohibits such calls. It should require some level of investigation by the debt collector before placing a workplace call.

The statutory phrase “has reason to know” implies that, before contacting the consumer at work, the collector has a duty to ask the creditor, the consumer, and perhaps others (for example, other

¹⁸⁷ *Horkey v. J.V.D.B. & Assocs.*, 333 F.3d 769 (7th Cir. 2003).

collectors or a union official) about the employer's policy regarding personal phone calls at work. It also suggests that the creditor's knowledge of the employer's policy is imputed to a collector who fails to make a reasonable inquiry.

Finally, if the CFPB does not completely ban workplace contacts, it should adopt rules that provide guidance regarding two particular methods of communicating at the workplace: faxes and email. Faxes are routinely delivered into a public area. It is therefore highly likely that faxes will be seen by at least one person other than the consumer. The fax could not properly include the notice that it is from a debt collector without violating the consumer's right to privacy. As a result, faxes to workplaces are highly likely to violate either the privacy protections or the notice protections of the FDCPA. The analysis for the reasonableness of a fax to a consumer's workplace is identical to the analysis for whether a voicemail to a phone number that is accessed to more than one person is reasonable. Please see our Response to Q82 for a full discussion of the intersection of voicemail and privacy rights under the FDCPA. The bottom line is that if the communication is likely to be accessed by people other than the consumer, it cannot be made by the collector without violating either the consumer's privacy rights or the consumer's right to know that the communication is from a debt collector – and thus cannot be made.

Emails are more likely to be private to the consumer, and, other than the requirement to comply with E-Sign if an email is intended to replace a writing, there is no prohibition against communication by an email. However, again, just as in the fax situation, there should be an evaluation of whether it is likely that the email may be accessed by the employer. As many employers prohibit the use of work emails for personal purposes and reserve the right to read employees' emails, the presumption should be that emails to employers' systems are prohibited unless the consumer has specifically provided consent to have emails sent to a workplace email system.

Q70 Recommendation: The CFPB should adopt a rule that bans collection communications to consumers at their workplaces unless the consumer has specifically consented to receive such communications there. In the alternative, the CFPB should codify a number of other protections against unwanted workplace calls.

Q71: Do employers typically distinguish, in their policies regarding employee contacts at work, between collection communications and other personal communications? Are employers' policies concerning receipt of communications usually company-wide, specific to certain job types, or specific to certain individuals?

Response Q71: Employers do not typically distinguish between types of communications allowed to be received by employees, with the exception of emergencies. We know of no employers that encourage personal calls at work. Even those that do not flatly prohibit such calls typically frown on them and consider them to be negative factors when determining whether to retain or promote an employee.

Q72: Collectors may have many accounts with consumers employed by the same large employer, such as a national chain store, and this may enable collectors to become familiar with the employers' policies regarding receipt of personal or collection communications in the workplace. Can collectors reliably determine consumers' employers and their policies with regard to receiving communications at work? If so, what would be the costs and benefits of requiring that collectors cease communications at work for all consumers working for a certain employer if collectors are informed

by one (or more) consumer(s) that the employer does not permit personal communications for any of its employees overall, or at a particular location or job type (e.g., retail premises employers)? What would be the costs and benefits of requiring that collectors cease communication at work if they learn of the employer’s policy through other means, such as the policy being posted on the employer’s website?

Response Q72: Collectors already have the burden of determining whether communicating with a consumer at a place of employment is prohibited or inconvenient. The language in 15 U.S.C. § 1692c(a)(3) is quite explicit. If a collector knows by any means—for example, the employer’s website or previous contacts with workers in that workplace—that an employer prohibits workplace calls, then the collector violates the FDCPA by calling debtors there. The CFPB should not issue any rule or statement that suggests otherwise.

Q73: The FDCPA’s restriction on contacting consumers represented by attorneys does not apply if “the attorney fails to respond within a reasonable period of time.” How do collectors typically calculate a “reasonable period of time” for this purpose, and does the answer vary depending on particular circumstances?

Response Q73: The length of a reasonable response time depends entirely on the circumstances – the nature of the collector’s call, whether the call is one of a series of repeat calls that raise no new questions or issues, whether the attorney is in trial, whether the attorney needs to make inquiries before responding. For these reasons, the CFPB should not issue a rule or interpretation defining this term.

The CFPB should, however, issue a rule that clarifies certain issues regarding the prohibition against contacting represented debtors. First, clarification is needed about when a debt collector “knows” a consumer is represented by an attorney. Debt collectors often claim to need a “power of attorney” in order to communicate with an attorney about a client’s account. Normally lawyers do not have or need formal “powers of attorney.” Collectors should be forbidden from asking for more than the FDCPA allows; it is merely an excuse to continue to contact the consumer. Collectors are able to communicate with anyone the consumer identifies as her attorney, or with anyone who claims to be an attorney, without further proof and without liability. Collectors should be mandated to notate the account with the name address or phone number of anyone claiming to be the consumer’s attorney. That a person is an attorney is easy to verify at the time or later.

Second, the CFPB should make it clear that harassment or deceit of a debtor through the debtor’s attorney violates the FDCPA. Communications to the lawyer are aimed at the consumer, and the lawyer is obligated to convey them to the client. When the communication is false, misleading, or threatening, or demands an amount not owing, the fact that the communication is directed to the attorney should not exonerate the collector. The CFPB should resolve the split in the Circuits represented by *Sayed v. Wolpoff & Abramson*,¹⁸⁸ answering yes to liability, with *Guerrero v. RJM Acquisitions LLC*,¹⁸⁹ and *Kropelnicki v. Siegel*,¹⁹⁰ both answering no; and *Evory v. RJM Acquisitions Funding*

¹⁸⁸ 485 F.3d 226 (4th Cir.2007).

¹⁸⁹ 499 F.3d 926 (9th Cir.2007) (per curiam),

¹⁹⁰ 290 F.3d 118, 128 (2d Cir.2002).

L.L.C.,¹⁹¹ (answering maybe). The CFPB's December, 2011 opposition to *certiorari* in *Fein Such, Kahn and Shepard, P.C. v. Allen*,¹⁹² comports with the FDCPA and should be officially adopted.

Q73 Recommendation: The CFPB should issue a rule or interpretation clarifying that 1) collectors may not require additional documentation that a consumer is represented by an attorney, beyond the consumer's statement; and 2) unfair, deceptive, or abusive statements communicated through the consumer's attorney violate the FDCPA.

Q74: How common is it for consumers to be represented by attorneys on debts? When consumers have multiple debts, do attorneys usually represent them on one debt, all debts, or some number of debts less than the total? How often do consumers with debts change their attorney?

Response Q73: Collectors should assume that the consumer's bankruptcy lawyer represents the consumer on nearly all of the consumer's debts. For other lawyers, retainers are usually made on an individual basis.

Q75: How prevalent is the practice of requesting or requiring, as part of a credit application or credit contract, contact information and consent to contact a service member's commanding officer or other third parties? Are such consent agreements to contact a consumer's employer or boss as common among civilian consumers? How frequently do debt collectors actually contact service members' commanding officers or other third parties identified in credit contracts? Are service members harmed in unique ways by communications with their commanding officers? Relatedly, do such harms suggest solutions that are unique to service members, either in the disclosures they receive as part of credit applications or regarding limits on communications with commanding officers?

Response Q75: The practice of requiring contact information of third parties, like a commanding officer, is used by some retailers and auto dealers, usually the "Anyone Financed E-1 and up" locations.

Servicemembers are seriously harmed by these contacts with their commanding officers, in the following ways:

1. Reduced consideration for positions of responsibility. In the military due to its structure and operational requirements there is amplified significance and reliance on the servicemember's reputation. Servicemembers work in commands and within those commands, in divisions. Large commands may have several divisions including maintenance, medical, navigation, engineering, and others. Each division is a small professional community. In the military a negative reputation will influence the level of trust that co-workers and supervisors have in a servicemember's readiness and ability to support the command's mission. That trust level directly corresponds with assigned duties and level of responsibility. Reduced trust resulting in decreased responsibility will negatively impact a servicemember's career growth and ability to obtain promotions.

¹⁹¹ 505 F.3d 769, 772 (7th Cir. 2007).

¹⁹² 2011 WL 6780149 (U.S.S.Ct. Dec. 23, 2011).

2. The debt collectors' communication goes beyond the commanding officer. When the debt collector contacts the command or commanding officer they are not contacting one individual about a situation. That contact and information is likely to travel from the commanding officer down the chain of command to the individual servicemember or from the servicemember's immediate superior up to the commanding officer. Depending upon the size of the command, the chain of command can consist of multiple individuals, including the commanding officer, executive officer, administrative officer, command master chief, security officer, department head, division officer, chief petty officer and leading petty officer. Each of these individuals has an important role in the career of the servicemember assigned under them. While it is important that leadership have situational awareness of the issues impacting the readiness of the individuals under their command, the tone and content of the messaging from debt collectors can cause unnecessary harm.
3. Negative impact on the assessment of the servicemember's capability. Negative information, even if inaccurate, will impact the servicemember's reputation in his professional community and command. The military operates on trust. Each servicemember has to be present, ready, willing, and able to perform his or her duties and each relies on the other for that level of commitment and attention. If the servicemember is considered unreliable, those around him or her will lose confidence in his or her commitment to support the mission.

Q75 Recommendation: Debt collectors should be prohibited from contacting a servicemember's command except to obtain location information.

Q76: How common are the practices mentioned [contact with commanding officers, spouses, and other third parties]?

Response Q76: Collector communication with the spouse of servicemembers while deployed and/or in a combat is very common. Spouses frequently have powers of attorney to allow them to conduct business for the servicemember in his absence. Communication with the servicemember, even with today's technology, is not guaranteed. During some periods non-military essential communication may be prohibited or unavailable.

The problem occurs when the debt collector threatens the spouse or family member. This can be more damaging than threatening the servicemember. Servicemembers who are forward deployed and fighting are motivated by the fact that they are away fighting so that their families are safe at home. Debt collection harassment directed to a servicemember's family is highly distracting and demoralizing to a servicemember who is away on the nation's business. That distraction can be damaging to mission accomplishment. Making sure that spouses know their resources and rights is important.

Q77: During a consumer's lifetime, a collector can communicate with a consumer's spouse about the consumer's debt. When a consumer dies, the FDCPA does not specify whether a consumer's surviving spouse continues to be the consumer's "spouse," such that collectors may continue to contact the person without violating section 805(b). How often do collectors contact surviving spouses and what is the effect of such contacts? What would be the potential costs and benefits of regarding surviving spouses as "spouses" under section 805(b)?

Response to Q77: Spouses of deceased debtors, and other relatives, are routinely and

inappropriately contacted by debt collectors in an effort to coerce them to pay the debts of the deceased. This is inappropriate and should be made explicitly illegal. The CFPB should clarify that the only reason that relatives can be contacted is to obtain the name and contact information of the executor or administrator handling the estate.

About 2.4 million Americans die each year,¹⁹³ and, unlike prior generations, which were often excluded from or avoided borrowing, many of today's older consumers have large amounts of mortgage, credit card, and medical debt. Most older households leave few financial assets for their heirs and creditors. Survivors often feel that the costs of probate are prohibitive where there are not enough of the decedent's assets to pay the decedent's creditors, and they do not pursue probate or any of the informal substitutes for probate. For example, thirty percent of people seventy to seventy-four years old have an average of only \$2885 of net worth (excluding home equity, which usually passes to the widow or widower or requires probate).¹⁹⁴ The majority of estates are most likely not probated. The decedent's creditors can initiate administration of the estate if they believe it will be worthwhile and the survivors do not.

Outside of community property states, only the decedent's estate is responsible for the decedent's debts. In community property states the marital community is generally responsible for the debts of decedents who were married. The community dissolves on the death of a spouse and the earnings of the surviving spouse may be separate, not community, property.

Whether in a community property state or otherwise, much of the property of the decedent, such as life insurance proceeds, property held jointly or with a right of survivorship, many types of retirement funds, and trusts, may flow directly to heirs, avoiding probate. Such property is generally not available to the decedent's creditors through probate.

State and federal law deliberately exempt the proceeds of life insurance, IRAs, and property transfers through tenancies by the entirety from being included in the estates of the deceased just to preserve this property for the intended beneficiaries. Debts of the deceased cannot be collected from this property. Rules facilitating beneficiaries of these transfers – or other relatives – being coerced to pay the decedent's otherwise uncollectable debts, subvert the protections of these governmental policies.

The frequency with which non-obligated survivors are contacted by collectors is likely increasing in light of the rise of a new breed of specialized debt collection agencies that focus on the collection of decedents' debts.¹⁹⁵ Their websites often stress their gentle handling of bereaved relatives in order to develop a new customer for the creditor client as well as to enhance recovery on the decedent's debt: "When finalizing financial obligations during a period of grief, it's critical that collectors employ techniques that are sensitive and respectful of survivors' circumstances."¹⁹⁶ However, their actual practices are not always in tune with that approach.¹⁹⁷

¹⁹³ U.S. Dep't of Commerce, Statistical Abstract of the U.S. Table 78.

¹⁹⁴ See He Wan, U.S. Census Bur., 65+ in the United States: 2005, at 108 (2005) (sixty percent have less than \$31,513).

¹⁹⁵ See Phillips and Cohen at www.phillips-cohen.com/; Probate Finder OnDemand at www.probatefinder.com; Forte, L.L.C. at www.fortedatasolutions.com; DCM Services at www.dcmservices.com.

¹⁹⁶ www.dcmservices.com/solutions_empathetic_active.php.

¹⁹⁷ See, e.g., *Sparks v. Phillips & Cohen Assocs., Ltd.*, 641 F. Supp. 2d 1234 (S.D. Ala. 2008) ("if plaintiffs' version of the facts is accepted as true, a reasonable jury could find that [defendant's employee] must have subjectively known that her acts of calling [plaintiffs'] home despite knowledge that [plaintiff] was not involved with the Glover [decedent's] matter,

For filing creditor claims against wealthier decedents' estates, one debt collector, Probate Finder OnDemand,¹⁹⁸ has established a database of probate cases for creditors and other debt collectors, and provides a creditor claim form filing and tracking system. An affiliated debt collector, DCM Services,¹⁹⁹ markets a system to encourage decedents' creditors to use the time of grieving to establish a customer relationship with the decedent's survivors while DCM Services recovers on the debt from the estate.

A paper by DCM Services mentions several times some creditors' goal of having the *survivors* assume the decedent's debts.²⁰⁰ The funds and income streams of survivors, combined with their vulnerability, create strong incentives for creditors and debt collectors to approach unobligated survivors about "honoring the memory of the deceased" by assuming the deceased's debt or by implying that it is the survivor's obligation to pay the decedent's debt.

DCM Services and its affiliated decedent debt collection firms also maintain a separate website for the bereaved that provides useful information in their time of grief. Noticeably absent from that website is any statement that the bereaved are usually not legally responsible for the debts of the decedent unless they cosigned for the debt.²⁰¹

Unobligated survivors should not be approached at all by debt collectors in connection with paying the debts of the decedent's estate unless they are the representative of the estate through the probate process. If there is no probate process, the debt collector can initiate one or abandon the claim. Debt collectors should not use the absence of a probate to seek payment from survivor's funds.

The Federal Trade Commission (FTC) recently promulgated its first enforcement policy explaining the leeway from the plain requirements of the FDCPA that the FTC would allow debt collectors when collecting decedents' debts.²⁰² We believe this enforcement policy is seriously flawed, because it facilitates the inappropriate contact between collectors and relatives of the decedent, in an inappropriate attempt to coerce these non-obligors to pay the debts of the deceased.²⁰³

Q77 Recommendation: The rule should be simple. It should be legal for debt collectors to contact spouses of deceased debtors, along with other relatives, friends and employers of the deceased, *only* for the purpose of obtaining information about the formal administrator of the estate.

refusing to identify herself when calling [plaintiffs'] home telephone number, berating [plaintiff's daughter] even after [she] told her to call her mother, casting aspersions on [plaintiff's daughters] in her communications with [plaintiff], browbeating [plaintiff] with a statement that defendant had already investigated her, and going out of her way to denigrate and calumniate [plaintiff's daughter] to her boss were all outside the scope of permissible activity under the FDCPA."); *also see, e.g.,* Kinkade v. Estate Info. Servs., L.L.C., 2012 WL 4511397 (E.D.N.Y. Sept. 28, 2012) (plaintiff, the debtor's recent widow who opened and read defendant's "Dear Family" letter addressed to the estate of the debtor, had standing to assert the alleged 15 U.S.C. § 1692e violations in the letter based on her "injurious exposure" since the letter was in fact directed to her.).

¹⁹⁸ See Probate Finder OnDemand at www.probatefinder.com.

¹⁹⁹ See DCM Services at www.dcmservices.com.

²⁰⁰ See Forte, From CRM to DCRM: A Multi-Generational Approach to Customer Relationships 3, 5, 6 (2009), available at www.fortedatasolutions.com/whitepaper.php.

²⁰¹ www.mywayforward.com.

²⁰² FTC Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts, 76 Fed. Reg. 44,915 (July 27, 2011), available at www.FTC.gov.

²⁰³ See Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall St. J., Dec. 3, 2011.

Q78: Are there circumstances under which a collector should not be permitted to contact a consumer's spouse, for example, the individuals are estranged or the consumer has obtained a restraining order against her spouse? How frequently do these circumstances occur? What would be the costs and benefits of prohibiting or limiting communications with a consumer's spouse upon the consumer's request?

Response Q78: We agree that collectors should not be permitted to contact a consumer's spouse when the collector has been informed or has reason to know that the couple is estranged or that one spouse has obtained a restraining order against the other. If the consumer is the spouse who has obtained the restraining order, it would be dangerous for the collector to be talking to the spouse against whom the restraining order is applicable, as the collector might inadvertently reveal some information which would endanger the protected spouse.

Q78 Recommendation: The CFPB should issue regulations clearly stating that collectors should not be permitted to contact a consumer's spouse when the collector has been informed or has reason to know that the couple is estranged or that one spouse has obtained a restraining order against the other.

Q79: The FDCPA permits collectors to communicate with "executors" and "administrators" about a decedent's debts. State laws may allow individuals other than those with the status of "executor" or "administrator" under State law, for example, "personal representatives," to pay the debts of a decedent out of the assets of the decedent's estate. How frequently do collectors contact individuals who are not "executors" or "administrators" but still have the authority under State law to pay the debts of decedents out of the assets of decedents estates? What is the effect of these contacts? What would be the potential costs and benefits of treating any person who has the authority to pay the debts of the decedent out of the assets of the estate as "executors" or "administrators?" To what extent do spouses, executors, and administrators pay decedents' debts out of their own assets? Do collectors state or imply that such parties have an obligation to pay these debts?

Response Q79: As to the first part of this question, the law should not base distinctions on the name under state law for the person appointed to administer a decedent's estate. As long as the person has been formally appointed to a position of authority equivalent to that of an executor or administrator, the collector should be permitted to contact him or her regarding payment of the debt. However, the collector should be barred from contacting other family members, even those who may be performing some informal function with respect to the decedent's assets, except to obtain information about the formal administration of the estate.

As to the second part of this question, we do not have statistics about how often unobligated survivors pay decedents' debts out of their own assets, but we have received reports of collectors pressuring them to do so. The FTC recently proposed its first debt collection "enforcement policy," addressing the collection of decedent's debts under the Fair Debt Collection Practices Act (FDCPA).²⁰⁴ The proposal was criticized by NCLC for failing to recognize that the FDCPA prohibits a debt collector from requesting payment from unobligated heirs.²⁰⁵ For further information on this question, please see our response to Q7.

²⁰⁴ 75 Fed. Reg. 62,389 (Oct. 8, 2010).

²⁰⁵ See Comments of the National Consumer Law Center (on Behalf of Its Low-Income Clients) and of the National Association of Consumer Advocates on the Federal Trade Commission's Statement of Policy Regarding

Q80: Do owners of debts or collectors inform executors and administrators when collecting on debt that was disputed by the decedent prior to the decedent's death?

Response Q79: Although it is conceivable that it may have happened, we have never heard of an instance of a collector informing an executor or administrator that a debt was disputed. However, they should be required to do so by regulation.

Q79 Recommendation: The CFPB should require collectors to inform the executor or administrator of a deceased debtor's estate of any dispute about the debt that the debtor had raised..

Q81: A third party who is not a "consumer" under FDCPA section 805(d) may know details about the consumer's debt and contact a debt collector to settle a consumer's debt. For example, the parent of a non-minor child may reach out to a collector to assist with the child's debt. How often are such contacts made? Should collectors be permitted to assume that the consumer has consented to the third-party contact, where a third party already knows about the consumer's debt and is offering to repay the debt? When would it be appropriate to allow collectors to rely on this theory of implied consent?

Response Q81: Debt collectors should never be permitted to correspond with anyone, even a relative, without the direct written consent of the debtor/consumer. Consent is not hard to obtain and should be a prerequisite. This is an essential rule to protect the privacy of consumers.

Q81 Recommendation: Collectors and creditors should not be allowed to seek payments from people who did not take responsibility when the credit was extended. Such collector behavior promotes predatory and reckless extension of credit and undermines the development of personal responsibility by the borrower. It should not be encouraged.

Q82: How should a rule treat recorded messages, if at all? What benefits do recorded messages (as distinct from live phone calls) offer to debt collectors or consumers?

Response Q82: There is no need for new rules on recorded messages. The interpretation of the FDCPA in the *Foti* decision²⁰⁶ and cases following it, is required by the clear language of the FDCPA. As the *Foti* court noted, Congress was quite clear on both the privacy and the notice provisions in 15 U.S.C. §§ 1692c(b) and 1692e(11), respectively. The CFPB does not have the authority to compromise either of these provisions.

Sections 1692c(b) and 1692e(11) in combination join to prohibit leaving debt collection voicemail messages for consumers if the voicemail may be heard by children, roommates, other third parties, or the employer.²⁰⁷ While section 1692e(11) debt collection disclosure is required in "communications" as defined by the FDCPA, section 1692d(6) prohibits "the placement of telephone calls without meaningful disclosure of the caller's identity." These requirements at times overlap and at other times may not. For example, the section 1692d(6) disclosures apply to every

Communications in Connection with Collection of a Decedent's Debt or Deceased Debt Collection Policy Statement (Nov. 4, 2010), available at www.nclc.org/images/pdf/debt_collection/comments-ftc-bereavement-policy.pdf.

²⁰⁶ *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006) (denying collector's motion to dismiss).

²⁰⁷ See *Kelemen v. Professional Collection Sys.*, 2011 WL 31396 (M.D. Fla. Jan. 4, 2011) (plaintiff asserted that defendant left message on plaintiff's work voicemail that was overheard by her co-worker).

“placement of telephone calls.” The only exception is for calls made to locate the consumer governed by section 1692b. As a result, every voicemail left by a debt collector in other situations must contain the section 1692d(6) disclosure, even if there is no “communication,” the “conveying of information regarding the debt.”²⁰⁸

The Eleventh Circuit, in *Edwards v. Niagara Credit Solutions, Inc.*,²⁰⁹ held that a debt collector leaving a voicemail message must disclose that it is a debt collector as required by section 1692e(11) and could not ignore that provision to avoid violating section 1692c(b)’s prohibition of disclosing the debt to a third party on a shared messaging system. A further implication of *Edwards* is that a debt collector should not leave any message directly with a third party to have the debtor return a call.²¹⁰ The *Edwards* decision holds that the FDCPA prohibits a common debt collection strategy of leaving anonymous voice messages for a named consumer to call about “an important business matter.”

The *Edwards* decision did not have to reach the debt collector’s other argument that its message was not a “communication” and therefore not subject to the section 1692e(11) notice requirements, as the debt collector did not appeal that issue. The district court in *Edwards* held that the broad language of the FDCPA definition of “communication” clearly covered the debt collector’s request for a call back even though the message did not specifically mention the debt or request payment.²¹¹ The lower court’s decision in *Edwards* was supported by a long string of other district court decisions that gained momentum with the strong analysis in *Foti v. NCO Fin. Sys., Inc.*²¹² that a narrowing

²⁰⁸ See *Whatley v. Creditwatch Servs., Ltd.*, 2012 WL 2885640 (E.D. Tex. July 13, 2012), *adopted by* 2012 WL 3151261 (E.D. Tex. Aug. 2, 2012).

²⁰⁹ See *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009).

²¹⁰ See also *Berg v. Merchants Ass’n Collection Div., Inc.*, 586 F. Supp. 2d 1336 (S.D. Fla. 2008) (leaving prerecorded debt collection messages on shared voicemail stated claim even though message instructed nondebtors not to listen to rest of message); *Niven v. Nat’l Action Fin. Servs., Inc.*, 2008 WL 4190961 (M.D. Fla. Sept. 10, 2008) (denying consumer’s motion for summary judgment for violation of § 1692c(b) by leaving two voicemails with debtor’s assistant at work, because debt collector’s bona fide error defense raised questions of triable fact); *Belin v. Litton Loan Serv., L.P.*, 2006 WL 1992410 (M.D. Fla. July 14, 2006) (claim stated against collector who requested mother to have debtor return his calls, and left only his company name and phone number; this was indirect communication to mother to collect debt); *Henderson v. Eaton*, 2001 WL 969105 (E.D. La. 2001); *West v. Nationwide Credit, Inc.*, 998 F. Supp. 642 (W.D.N.C. 1998) (debt collector that left message with neighbor for consumer to return call violated § 1692c(b), even though it did not mention that debt was owed).

²¹¹ *Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346 (N.D. Ga. 2008), *aff’d on other grounds*, 584 F.3d 1350 (11th Cir. 2009) (request to return call about important matter indirectly referred to debt being collected and was “communication” as defined by FDCPA).

²¹² 424 F. Supp. 2d 643 (S.D.N.Y. 2006) (prerecorded communication: “Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back 1-866-701-1275 . . . this is not a solicitation.”). See also *Inman v. NCO Fin. Sys., Inc.*, 2009 WL 3415281 (E.D. Pa. Oct. 21, 2009) (prerecorded messages naming consumer and requesting return call today without naming caller at all was communication violating § 1692e(11)); *Mark v. J.C. Christensen & Assocs., Inc.*, 2009 WL 2407700 (D. Minn. Aug. 4, 2009) (messages requesting call back left for consumer by name by debt collector without naming her employer were “communications”); *Gilmore v. Account Mgmt., Inc.*, 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009) (default judgment for consumer where defendant left series of prerecorded messages for consumer without stating name of company placing calls or that communications were from debt collectors, violated §§ 1692d(6) and 1692e(11)), *rev’d on other grounds*, 20 09 WL 4826953 (11th Cir. Dec. 16, 2009); *Masciarelli v. Richard J. Boudreau & Assocs., L.L.C.*, 529 F. Supp. 2d 183, 185–186 (D. Mass. 2007) (debt collector called consumer by name without identifying collector’s employer and stated that failure to return call was permission for collector to contact consumer’s employer’s payroll department); *Leyse v. Corporate Collection Servs., Inc.*, 2006 WL 2708451 (S.D.N.Y. Sept. 18, 2006) (“CCS has been cornered between a rock and a hard place, not because of any contradictory provisions of the FDCPA, but because the method they have selected to collect debts [prerecorded calls] has put them there”); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104 (C.D. Cal. 2005) (messages not mentioning debt were each “communication”). *Cf.* *Federal Trade Comm’n v. Check*

construction of the FDCPA term “communications”²¹³ was at odds with the plain FDCPA language defining that term and that exempting such debt collector’s messages undermined sections 1692c(b) and 1692e(11).

Those district court decisions received significant support from the Seventh Circuit’s recent decision in *Gburek*.²¹⁴ *Gburek* examined whether three communications in the case fell outside of the phrase “communicate with a consumer in connection with the collection of a debt” as used in sections 1692c, 1692e, and 1692g because none of the communications expressly demanded payment. The court held that the broad language of the FDCPA applied to communications from debt collectors that did not demand payment if the “nature of the parties’ relationship” and “the purpose and context of the communications—viewed objectively” indicated the communications were made in connection with the collection of a debt.²¹⁵ The court found that the debt collectors were communicating to explore the consumer’s mortgage payment options and those communications were covered by the FDCPA even though there was no demand for payment.

Also instructive about the reach of the FDCPA rule limiting messages for a consumer to return a debt collector’s call is *Romine v. Diversified Collection Services, Inc.*,²¹⁶ a Ninth Circuit case. *Romine* held that a “personal telegram” message from Western Union that intentionally did not mention a debt or that Western Union was working for a debt collector was sent as an “indirect” attempt to collect a debt and, like *Edwards*, required the section 1692e(11) disclosures that the sender was a debt collector and that any information provided by the consumer would be used for that purpose. Western Union’s message simply urged the consumer to call Western Union to confirm information for delivery of a personal telegram. A debt collector had hired Western Union to send the message. When the consumer called Western Union, Western Union recorded the consumer’s telephone caller ID and confirmed it with the consumer and then provided the phone number to the debt collector who used it to contact the consumer for payment. Western Union claimed it was only the “messenger.” The court rejected that approach and held Western Union was a “debt collector” subject to the FDCPA as Western Union marketed its ruse to debt collectors and creditors as greatly increasing contacts with consumers and payments from them.

The interplay between voicemail and the notices and privacy rights in 1692b(c), 1692d(6), and 1692e(11)²¹⁷ was recently played out in the district court case in *Koby v. ARS Nat’l Services, Inc.*²¹⁸ The court found that section 1692b(c) protections are triggered by a “communication” as that term is broadly defined in section 1692a(2). None of the calls specifically mentioned the caller’s employer or

Enforcement, 20 05 WL 1677480 (D.N.J. July 18, 20 05), *aff’d on other grounds*, 502 F.3d 159 (3d Cir. 2007) (collector violated § 1692c by leaving messages on answering machines that children and parents could hear); *Costa v. Nat’l Action Fin. Servs.*, 634 F. Supp. 2d 1069 (E.D. Cal. 2007) (no meaningful disclosure as required by § 1692d(6)); *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 281 F. Supp. 2d 1156 (N.D. Cal. 2003) (no § 1692d(6) disclosure violated FDCPA in message to return call for “important message”).

²¹³ The term ‘communication’ means conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).

²¹⁴ *Gburek v. Litton Loan Servicing L.P.*, 614 F.3d 380 (7th Cir. 2010).

²¹⁵ *Id.* at 385.

²¹⁶ 155 F.3d 1142 (9th Cir. 1998).

²¹⁷ *See Makreas v. Moore Law Group, A.P.C.*, 2012 WL 359710 (N.D. Cal. Feb. 2, 2012) (denying to dismiss claim alleging that defendant’s voice mail message, asking consumer to phone Moore Law Group, known by consumer to be a debt collector and omitting § 1692e(11) disclosure, since defendant’s argument that message was not a “communication” could not be resolved on pleadings).

²¹⁸ 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010).

the debt involved. The court found that two of the voicemails were communications because they contained vague references to the debt. One stated a long “reference number” and the other stated: “Umm, there appears to be some documents here in my office, uh, John at this point your [sic] involved.” The court held that given the debt collection purpose of the call and the references to the debt, the calls were subject to all three of the FDCPA sections involved. The third message stated: “this is Brian Cooper. This call is for Mike Simmons, I need you to return this call as soon as you get this message 877-333-3880, extension 2571.” The court held this call did not involve a communication that would trigger the section 1692e(11) debt collector disclosure. The court held the messages would violate the section 1692d(6) requirement of a meaningful identification of the caller in the absence of any disclosure that the caller’s employer is a debt collector, noting a split in the lower courts.

In *Branco v. Credit Collection Services Inc.*,²¹⁹ the debt collector left the following message on consumer’s parents’ answering machine five times:

This is for Travis Branco. If the intended party cannot be reached at this number, please call 800-998-5000, and we will cease further attempts to this number. If you are not the intended party, please hang up at this time. This message contains private information and should not be played in a manner where it can be heard by others (music) . . . This call is from CCS, Credit Collection Services. This is an attempt to collect a debt and any information obtained will be used for that purpose. For your privacy protection, please visit our secure website at www.warningnotice.com to access your personal account information. Your file number is 05036201574. Thank you.

The outgoing message on plaintiff’s parents’ answering machine stated: “You have reached the Branco residence. Please leave a message and phone number so that Steve, Sari, or Travis may return your call.” The consumer’s parents’ answering machine did not have a function that permitted the listener to skip the message. The consumer was not living with his parents at the time. His mother heard the message and conveyed the information to the consumer.

The debt collector contended that third parties like the consumer’s mother must refrain from listening to a voice message in his or her own home merely because the message is for another person. The court concluded that “. . . the weight of the case law militates strongly in favor of the inverse conclusion.” The *Branco* decision found convincing the holding in *Berg v. Merchants Assoc. Collection Div., Inc.*²²⁰ dealing with essentially the same type of “don’t listen” approach for third parties receiving another’s debt collection calls. The court held the debt collector was strictly liable under section 1692c(b) for communicating with a third party, the consumer’s mother, without the consumer’s consent and without regard to whether the communication was deliberate or intentional, citing *Zorman v. J.C. Christensen & Associates*.²²¹

Another decision²²² describes the system devised by a nationwide debt collector to comply with the

²¹⁹ 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011).

²²⁰ 586 F. Supp. 2d 1336, 1338–1339 (S.D. Fla. 2008).

²²¹ 19 F. Supp. 2d 874 (D. Minn. 2011).

²²² *Abernathy v. NCC Bus. Servs., Inc.*, 2012 WL 4320810 (N.D. Miss. Sept. 18, 2012). *See also* *Pawelczak v. Nations Recovery Ctr., Inc.*, 2012 WL 2192263 (N.D. Ill. June 14, 2012) (similar system failed in thirteen calls to the consumer in three months).

FDCPA by using an automated calling that has some capability to identify when a call is answered by a voice mail system. When its system identifies a voice mail system, the call is terminated. When the system identifies the call as picked up by a live person, it conveys an automated message described below. In the instant case, the consumer stated that the debt collector's system left the automated message in his voice mail system and the message violated the FDCPA by failing to make the debt collector/debt collection disclosures.

Q83: What would be the costs and benefits of allowing the following approaches to leaving recorded messages?

Response Q83: None of these approaches are consistent with the clear language of the FDCPA on the subject – no messages can be left from debt collectors on systems for which there is a risk that someone other than the consumer may hear the message (see our response to Q82). Requiring the consumer to go to a website to obtain the debt collector notice is absurd, and simply does not comply with the explicit requirements of §§ 1692e(11) and 1692d(6). Consumers who have fallen behind on their debts usually have very limited access to the Internet, if any at all.

Q84: Some of the proposed solutions described above would permit a collector to leave a recorded message without leaving the mini-Miranda warning. Should collectors be permitted, in their communications with consumers, to ask consumers if they will opt out of receiving future mini-Miranda warnings? If consumers are permitted to opt out of receiving future mini-Miranda messages, what factors or limitations, if any, should limit consumers' right to opt out? Should consumers be allowed to opt out both in writing and orally? Should the opt-out provision extend to mini-Miranda warnings given in other communications besides recorded messages?

Response Q84: Whenever there is a reasonable risk of third-party disclosure, none of these alternative approaches are legal. The CFPB does not have the authority to allow any of these approaches, nor does it have the authority to permit opt-outs of the consumer protections established by the FDCPA.

The Ninth Circuit explicitly held that consumers generally may not waive their rights under the FDCPA:

Out of an abundance of caution, we further note what should be obvious: a consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the public policy goals pursued by the FDCPA.²²³

Any consent by the consumer to a modification of his FDCPA rights should be narrowly limited to match the intent of the consumer and should be revocable without limitation. In *Clark v. Capital Credit & Collection Servs., Inc.*,²²⁴ the Ninth Circuit noted that not all statutory protections may be waived, but held a consumer may waive the protections of a cease communication letter, but only where least sophisticated consumer would understand her actions to be a modification and it was

²²³ See *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 n.5 (9th Cir. 2006); *Spears v. Brennan*, 745 N.E.2d 862 (Ind. Ct. App. 2001).

²²⁴ 460 F.3d 1162, 1170–1171 (9th Cir. 2006).

voluntary. Even then, the modification was not a general modification and was limited to the collection lawyer to whom the modification was given. The modification could not be claimed by the debt collection agency to whom it was not given.

The issues involved in an opt-out are complicated, involving a balancing of three different consumer protections in the FDCPA and two different interests of the consumer (privacy and the right to know who is calling). It is inconceivable that any opt-out mechanism would successfully disclose these complex choices to consumers, while meeting the least sophisticated consumer standard.

Q84 Recommendation: The CFPB should not adopt any rules purporting to undermine the *Foti* decision or to allow waiver of FDCPA protections.

Q85: What would be the costs and benefits for collectors in transmitting caller-ID information? In addition to the benefit of consumers being able to screen calls, how do consumers benefit from receiving caller-ID information? Do space limitations constrain the ability of collectors to disclose information (e.g., the collector's identity) via caller ID? What are the risks of third-party disclosure by caller ID? The Bureau is particularly interested in data showing how many consumers currently use telephones that provide technologies such as caller ID, and whether these technologies display for consumers only a telephone number or whether they display additional information, such as the name of the caller. How can collectors use these technologies to minimize third-party disclosure risks while still providing consumers with relevant, truthful, and non-misleading information?

Response Q85: The truth is always the best. Collectors should not be allowed to use deceptive caller ID's. Spoofing numbers or IDs is far too common. Technology allows a collector to spoof telephone numbers, which is a misleading and deceptive tactic to get the consumer to answer a call from someone he does not want to talk to. Local numbers are often spoofed, and caller ID names are likewise spoofed. Spoofing should be strictly forbidden; since it is intentional, spoofing is probably a violation of §1692d(5) and §1692e(14) and (9) by analogy.

Q85 Recommendation: The CFPB should adopt a rule specifying that it is a deceptive practice for a collector to spoof a caller ID.

Q86: Should debt collectors be prohibited from blocking or altering the telephone number or identification information transmitted when making a telephone call, for example by blocking the name of the company or the caller's phone number or by changing the phone number to a local area code? What technological issues might complicate or ease compliance with regulation regarding caller-ID technologies?

Response Q86: Debt collectors should be prohibited from blocking or altering the telephone number or identification information transmitted when making a telephone call. Consumers should have a choice whether to answer the phone. See response to Q85.

Q86 Recommendation: Debt collectors should be prohibited from blocking or altering the telephone number or identification information transmitted when making a telephone call.

Q87: Should the email provider's privacy policy affect whether collectors send emails to that account? For instance, where a collector knows or should know that an employer reserves the right to access emails sent to its employees, should the collector be prohibited from or limited in its ability

to email a consumer at the employer-provided email address? Should a collector be prohibited from using an employer-provided email address if a collector is unsure whether an employer or other third party has access to email sent to a consumer? How difficult is it for collectors to discern whether an email address belongs to an employer?

Response Q87: The simplest and best solution should be an absolute bar of emails to an employment address. There might be an exception for the situation when a consumer has explicitly consented to receive electronic communications, pursuant to E-Sign’s consent provisions, at an employer’s address. For more information on the implications and legalities of using emails, please responses to Q27, Q28, and Q62.

Q87 Recommendation: The CFPB should bar collectors from sending collection emails to a consumer’s employment email address without explicit consent.

Q88: What third-party disclosure issues arise from providing FDCPA section 807(11)’s mini-Miranda via email, text message, or other means of electronic communication? Are an email’s subject line and sender’s address akin to the front of an envelope mailed by post, and should it be subject to the same restrictions? Should the restrictions apply to the sender’s name on a text message or to the banner line on a fax?

Response Q88: The subject line and the sender’s name are often visible not only to the recipient of an email but also to passersby or co-workers. Collectors should avoid subject lines or sender names that might reveal the debt collection purpose of an email message to others. Please also see our response to Q62.

Q89: What would be the costs and benefits of allowing consumers to limit the media through which collectors communicate with them? What would be the costs and benefits of allowing consumers to specify the times or locations that are convenient for collectors to contact them? What would be the costs and benefits of allowing consumers to provide notice orally or in writing to collectors of their preferred means or time of contact? Should there be limits or exceptions to a consumer’s ability to restrict the media, time, or location of debt collection communications? Should consumers also be allowed to restrict the frequency of communications from debt collectors?

Response Q89: We are troubled by this question, as the law already prohibits collectors from contacting consumers at times “known or which should be known” are inconvenient.²²⁵ Collectors are already obliged to avoid contacting consumers at times or places which the consumers have indicated are inconvenient.

The phrase “known or which should be known” holds the collector to both a subjective actual knowledge standard and an objective standard of what one could reasonably infer from the circumstances known or readily ascertainable by the collector. For example, one court found: “Intent may be inferred by evidence that the debt collector continued to call the debtor after the debtor had asked not to be called and had repeatedly refused to pay the alleged debt, or during a time of day which the debtor had informed the debt collector was inconvenient.”²²⁶ The objective standard strongly suggests that the collector has a burden of reasonable inquiry to determine the times or places that are unusual or inconvenient for a particular consumer. The Seventh Circuit has

²²⁵ 15 U.S.C. § 1692c(a)(1).

²²⁶ Brandt v. I.C. Sys., Inc., 2010 WL 582051 (M.D. Fla. Feb. 19,2010).

made clear that the consumer need not use legally precise language to indicate the inconvenience of a call to the debt collector.²²⁷

As we have said repeatedly, the new regulations should require that creditors keep information about the collection process, including inconvenient times and places, and pass this information along to subsequent collectors of the debt. Moreover, collectors should be required to ask at the outset of every call – “is this a convenient time to speak?” See our response to Q68. Consumers should also be allowed to set limits on the frequency of calls.

Q90: How often do debt collectors provide notices or disclosures to consumers required by other Federal consumer financial laws? What would be the advantages and disadvantages to consumers of receiving these notices and disclosures notwithstanding their cease communication requests?

Response Q90: When the consumer has provided a cease communication request, that means the consumer wants collection efforts to stop. Communications required under RESPA and TILA regarding such matters as rate changes and loss mitigation options are not collection efforts. Instead, these notices serve other purposes, generally to apprise consumers of important rights that they may have, or consequences that may occur given a certain course of events.

The CFPB should require collectors to send these important non-collection notices to consumers who have made cease-communication requests. It should repeal the provisions of its servicing rules that exempt mortgage servicers from complying with early intervention requirements and the requirement to send rate change notices where a borrower has exercised the FDCPA “cease communication” right.²²⁸ When the CFPB adopted these exceptions, it indicated that it had concerns about the effect on debtors and might alter or eliminate the exception as part of the FDCPA rulemaking.²²⁹ We urge the CFPB to eliminate the exceptions.

As we said in our comments to the CFPB regarding the servicing rules,²³⁰ it is not inconsistent with either the servicing rules, or the protections provided by the FDCPA, for both laws to be complied with by a servicer who is also a covered debt collector. Moreover, the CFPB could make explicit that sending these notices are not a violation of the cease communications provision in 15 U.S.C. § 1692c(c).

The CFPB put these servicing requirements in place in the belief that they would help borrowers understand the status of their loans and the options available to them, and thus potentially avoid or cure default. Servicers do not need to be excused from providing the reset notices with important information to homeowners out of unsubstantiated fear of litigation risk. Some version of the rate reset notices required by Reg. Z § 1026.20(c) has been in Regulation Z since 1987. We are unaware of any FDCPA litigation involving the sending of rate reset notices. Servicers who are careful to send only mandated notices in compliance with the Bureau’s forms are unlikely to face any litigation risk. The reset notice is distinguishable from debt collection communications because it is sent to all homeowners, not just those who are behind in their payments. The early intervention notice is also

²²⁷ Horkey v. J.V.D.B. & Assocs., 333 F.3d 769 (7th Cir. 2003).

²²⁸ 12 C.F.R. §§ 1024.39(d)(2), 1026.20(c)(1)(ii)(C).

²²⁹ 78 Fed. Reg. 62993, 63003 (Oct. 23, 2013).

²³⁰ Docket No. CFPB-2013-0031, RIN 3170-AA37, Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), filed by the National Consumer Law Center, November 22, 2013.

distinguishable because it is, by definition, sent pre-collection as an effort to avert the need for collection.

Moreover, in many circumstances, borrowers issue a cease-communication letter under 15 U.S.C. § 1692c(c) and later, or sometimes simultaneously, require that all further communications be sent to an attorney under 15 U.S.C. § 1692c(a)(2). In those situations, where the borrower has clearly authorized communication with an attorney as to the status of the debt, there is no reason not to require the servicer to provide all relevant notices to the attorney.

The elimination of the Reg. X § 1024.39 and Reg. Z § 1026.20(c) notices is likely to confuse borrowers who do exercise their cease-communications right under 15 U.S.C. § 1692c(c). This is particularly true for the notice of a rate reset coupled with a payment change. While the CFPB has exempted servicers from providing this crucial notice to borrowers—that the terms of their mortgage are changing—the statutory requirement that servicers provide borrowers notice of the first rate adjustment, whether or not it is coupled with a payment adjustment, remains intact. Thus, borrowers are likely to have received a notice advising them of a rate change, and may well assume that their rate and payment remains unchanged in the absence of the subsequent notice. From a borrower’s perspective, there is no meaningful distinction between the content of the two notices, and few borrowers are likely to understand that a cease-communication letter means they lose their right to be told of subsequent rate and payment adjustments while being told of an initial rate change. The CFPB should treat all TILA-mandated disclosures equivalently, whether required by regulation or statute. The CFPB could, to allay any concerns about consumer confusion, require that such notices, when they are sent after a cease contact letter has been received, must state that the servicer is providing information that may be important to the homeowner and that it will continue to honor the homeowner’s request to cease other communications to the homeowner.

CFPB regulations on debt collection should make clear that servicers who are debt collectors under the FDCPA should absolutely be forbidden to resume debt collection communications without the consumer’s express consent. But a form letter advising that the homeowner may contact HUD-certified housing counselors is unlikely to be interpreted by borrowers as the type of debt collection that they meant to stop with their cease-communications letter.

The CFPB carve-outs in the servicing regulations – unless changed by these rules – may actually result in fewer consumers exercising their rights under the FDCPA in order to keep the flow of information they will need when they get back on their feet. It would be better for the consumer to have the right to the information and the protection § 1692c(c) gives them from other debt collection communications. In many cases, consumers will wish to continue loss mitigation discussions with the servicer and receive current information about the interest rate on the loans. The CFPB’s rule forces consumers to choose: either stop harassing phone calls and lose the home to foreclosure or continue to accept all harassing phone calls and have all available loss mitigation options open to them. A middle road is suggested by *Clark v. Capital Credit & Collections Servs., Inc.*²³¹ and an FTC Advisory Opinion:²³² creditors receiving cease-communication notices may not request payment and may not continue telephoning the homeowner, but they may comply with other regulations and respond directly within the scope of a consumer’s inquiry.

²³¹ 460 F.3d 1162 (9th Cir. 2006).

²³² Anderson, FTC Advisory Opinion (June 23, 2009).

We see no reason to exempt servicers who are FDCPA debt collectors from providing homeowners with mandated information about available loss mitigation options and neutral (and free) third-party housing counseling services. A consumer who has requested a cease to debt collection communications will want and needs information on how to mitigate the debt. Additionally, while the subsequent rate reset notices have some slight potential to be interpreted as ongoing debt collection, these notices should be provided. The debt collector should also reaffirm in both instances that it will continue to abide by the consumer's cease-communication request. And the CFPB should protect borrowers' rights under the FDCPA by acknowledging the rationale of *Clark* and the FTC Advisory Opinion: the homeowner's right to be free from harassing phone calls is not trumped by limited non-collection contact, particularly when initiated or requested by the homeowner.

Q90 Recommendation: The CFPB should issue regulations under RESPA, TILA and the FDCPA clarifying that after a consumer has provided a cease communication notice, servicer notices required under RESPA and TILA (Reg. X § 1024.39 and Reg. Z § 1026.20(c) respectively) should continue to be provided.

Q91: Some jurisdictions require that collectors provide consumers with contact information. At least one jurisdiction has required that collectors provide not only contact information, but also a means of contacting the collector that will be answered by a natural person within a certain time period. How would the costs and benefits of providing contact information compare to those associated with a natural person answering calls within a certain period of time?

Q91 Response and Recommendation: Debt collectors should always be required to provide contact information to consumers, and a live individual should be available to respond to questions, disputes, and complaints.

Part IX. Unfair, Deceptive, and Abusive Acts (Qs 92-131)

Q92: Should the Bureau incorporate all of the examples in FDCPA section 806 into proposed rules prohibiting acts and practices by third-party debt collectors where the natural consequence is to harass, oppress, or abuse any person? Should any other conduct by third-party debt collectors be incorporated into proposed rules under section 806 on the grounds that such conduct has such consequences? If so, what are those practices; what information or data support or do not support the conclusion that they are harassing, oppressive, or abusive; and how prevalent are they?

Response Q92: Yes, all of the examples in the FDCPA of harassment or abuse should be incorporated into rules applicable to both third-party collectors and creditors.

Q92 Recommendation: Both creditors and collectors should be prohibited from engaging in the types of harassing conduct listed in FDCPA § 806. In addition, they should be subject to specific and strict limits on telephone communications, as follows:

- The collector should not be permitted to call the consumer (i.e. let the telephone ring) more than three times per week (subject to additional limits below). Consumers often do not answer the phone because they do not want to talk to the collector. Even hearing the phone ring

constantly is stressful, and it can be a special problem when collectors call cell phones that consumers have in their cars and workplaces.

- Voicemail messages, if otherwise permissible, should be left no more than once per week.
- Unless the consumer consents, collectors should not be permitted to call back within seven days of actually speaking with the consumer.

Additionally, we recommend that all communications other than letters sent by postal mail count toward the numerical limits on contacts. We recommend that letters sent by postal mail be allowed without limit as a fallback method that collectors may use to communicate with debtors

Q93: Should the Bureau include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as abusive conduct by third-party debt collectors? What considerations, information, or data support or do not support the conclusion that this conduct is “abusive” under the Dodd-Frank Act? Does information or data support or not support the conclusion that this conduct is “unfair” or “deceptive” conduct under the Dodd-Frank Act?

Response Q93: The CFPB should use its authority under the Dodd-Frank Act to rule that the conduct that is abusive under the FDCPA is also unfair and deceptive when a first party collector (a creditor) engages in it. The difference between “abusive” and “unfair and deceptive” in this context is immaterial. First, the FDCPA presents the prohibitions in 15 U.S.C. § 1692d not just as abusive conduct, but as “conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” Even if the CFPB has some doubt about whether “abusive” conduct is “unfair” or “deceptive” under the Dodd-Frank Act, it should be clear that harassing or oppressive conduct is. Second, most if not all of the specific examples of prohibited conduct listed in § 1692d – threats of violence, obscene or profane language, publicizing debts, telephone harassment, anonymous calls – have been held unfair under state UDAP statutes and state debt collection statutes,²³³ so there is ample precedent for treating these types of conduct as unfair.

On a related issue, the CFPB should explicitly state in regulations, what is already the majority rule, that debt buyers are subject to the FDCPA.²³⁴

Q93 Recommendation: The CFPB should adopt a rule stating that the acts that are defined as abusive by § 1692d are unfair and deceptive when committed by first-party debt collectors. It should also adopt a rule stating that debt buyers are subject to the FDCPA.

Q94: FDCPA section 806(3) enjoins debt collectors from “the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of 603(f) or 604(a)(3) of [the Fair Credit Reporting Act].” Should the Bureau clarify or supplement this prohibition in proposed rules? If so, how? The Bureau notes that in communicating with debtors through social media, the use of this media might cause collectors to make known the names of debtors to others using that medium. Should the Bureau include in proposed rules

²³³ National Consumer Law Center, *Fair Debt Collection* §§ 10.2.4.4, 10.3.4 (7th ed. 2011).

²³⁴ In *Federal Trade Comm’n v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007), the Third Circuit held that it is immaterial that the defendants actually owned the debt they were trying to collect; that did not make them creditors under the Act. See also *Kimber v. Federal Fin. Corp.*, 107 668 F. Supp. 1480, 1484 (M.D. Ala. 1987); *Chulskey v. Hudson Law Offices, P.C.*, 777 F. Supp. 2d 823 (D.N.J. 2011).

provisions setting forth what constitutes the publication of a list of debtors in the context of newer communications technologies, such as social media? If so, what should these provisions prohibit or require and why?

Response Q94: We are extremely alarmed at even the suggestion that it would not be a gross violation of the FDCPA for a debt collector to communicate openly on social media with a consumer. No clarification of the law should be necessary. This is already illegal because it violates the consumer's privacy and this should not be changed.

Q95: FDCPA section 806(5) bars debt collectors from "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." Should the Bureau clarify or supplement this prohibition in proposed rules? If so, how?

Response Q95: Yes. Please see our specific suggestions on this point in response to Q92.

Q96: The FDCPA does not specify what frequency or pattern of phone calls constitutes annoyance, abuse, or harassment. Courts have issued differing opinions regarding what frequency of calls is sufficient to establish a potential violation. Courts also often consider other factors beyond frequency, such as the pattern and content of the calls, where the calls were placed, and other factors demonstrating intent. Should the Bureau articulate standards in proposed rules for when calls demonstrate an intent to annoy, harass, or abuse a person by telephone? If so, what should those standards be and why?

Response Q96: Yes, please see our specific suggestions on this point in response to Q92.

Q97: At least one State has codified bright-line prohibitions on repeated communications. Massachusetts allows only two communications via phone — whether phone calls, texts, or audio recordings — in any seven-day period. The prohibition is stricter for phone calls to a work phone, allowing only two in any 30-day period. If the Bureau provides bright-line standards in proposed rules, what should these standards include? Should there be a prohibition on repetitious or continuous communications for media other than phone calls and should that prohibition be in addition to any proposed restriction on phone calls? Should all communications be treated equally for this purpose, regardless of the communication media, such that one phone communication (call or text), one email, or one social networking message each count as "one" communication? What time period should be used in proposed rules in assessing an appropriate frequency of communications?

Response Q97: Please see our specific suggestions on this point in response to Q92. To the extent that contacts are made to cell phones through either calls or texts, the CFPB's regulation should emphasize that collectors must comply with the TCPA. See our responses to Qs116-119. We recommend that all communications other than letters sent by postal mail count toward the numerical limits on contacts. We recommend that letters sent by postal mail be allowed without limit as a fallback method that collectors may use to communicate with debtors.

Q98: What are the costs and benefits to consumers and collectors of using predictive dialers? How commonly are they used by the collection industry and what are the different ways in which they are used? How often do consumers receive debt collection calls resulting in hang-ups, dead air, or other

similar treatment?

Response Q98: There are no benefits to consumers from predictive dialers. We do not have statistics regarding hang-ups and dead air, but our impression is that these are very frequent and that consumers find them highly irritating and disruptive. The use of predictive dialers results in an increase in the number of annoying and harassing phone calls that consumers receive. Instead of taking steps that would increase the number of calls, the CFPB should place limits on the number of calls a collector may place to a consumer. Please see our specific suggestions on this point in response to Q92.

Q99: Should there be standards limiting call abandonment or dead air for debt collection calls, similar to the standards under the FTC's Telemarketing Sales Rule? Are there reasons why debt collection standards should be more stringent or more lenient than standards for telemarketing?

Response Q99: One problem with automatic dialing systems is that they lead to abandoned calls, because the called party may answer the call at a time when all of the solicitors are still on other calls. This may happen when a telemarketer uses automatic dialing equipment (predictive dialers) that calls too many numbers for the employees of the telemarketing company to handle. Consumers rightfully complain that they rush to answer the phone, only to find no one at the other end of the call.²³⁵

Both the FTC Telemarketing Sales Rule and the FCC rules implementing the TCPA²³⁶ contain provisions limiting abandoned calls. The CFPB should adopt rules, applicable to both debt collectors and creditors collecting their own debts, mirroring the protections in these rules.

Q99 Recommendation: The CFPB should adopt rules regarding abandoned calls that mirror those in the FTC's Telemarketing Sales Rule.

Q100: With respect to each of the areas covered in FDCPA section 807, should the Bureau clarify or supplement any of these FDCPA provisions? If so, how? Are there other representations or omissions that the Bureau should address to prevent deception in each of these areas? For each additional representation or omission you believe should be addressed, please describe its prevalence and why you believe it is material to consumers.

Response Q100:

Clarifying (e)(3). Section (e)(3) prohibits the false representation or implication that an individual is a lawyer or that a communication is from a lawyer. Because of the *Greco* decision from the Second Circuit,²³⁷ the development of the case law on the extent of this protection is confusing and regulations clarifying the rules would be helpful. The CFPB should clarify that no collection letter can be signed by an attorney without a meaningful review by that attorney supporting the demands in the letter.

In *Clomon v. Jackson*, the Second Circuit held that a mass-produced letter containing a collection agency's part-time, general counsel's name in the letterhead and a facsimile of his signature at its

²³⁵ 3 Fed. Reg. 51,163, 51,196 (Aug. 29, 2008); 68 Fed. Reg. 4580,4641, 4645 (Jan. 29, 2003); see *Irvine v. Akron Beacon J.*, 770 N.E.2d 1105 (Ohio Ct. App. 2002).

²³⁶ 47 C.F.R. § 64.1200(a)6

²³⁷ *Greco v. Trauner, Coben & Thomas, L.L.P.*, 412 F.3d 360, 364 (2d Cir. 2005).

conclusion, where the attorney reviewed neither the debtor's file nor any particular dunning letter (other than the form) before mailing, constituted a false and misleading communication in violation of 15 U.S.C. § 1692e, 1692e(3) and (10).²³⁸

In *Avila v. Rubin* the Seventh Circuit held that an attorney who owned both a law firm and a collection agency that were intertwined violated this provision by allowing mass mailings of letters to be sent on his law firm letterhead and over his facsimile signature. The lawyer had insufficient involvement in the cases to avoid the deceptive implication that he was involved in the account as a lawyer. He did not review debtor files, did not decide which letters to send, and did not see particular letters before they were sent. "The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action."²³⁹ That was not the case.²⁴⁰

In *Boyd v. Wexler*,²⁴¹ the Seventh Circuit reversed a trial court's holding that a collection attorney had sufficient involvement in sending a collection letter to avoid deception. The court found that although the collection attorney's affidavit stated that he reviewed every file before a dun was sent, the mere volume of that undertaking (tens of thousands in some weeks, hundreds of thousands of duns a year) was sufficient to permit a reasonable jury to conclude that "the defendant violated the Fair Debt Collection Practices Act by rubber stamping his clients' demands for payment, thus misrepresenting to the recipients of his dunning letters that a lawyer had made a minimally responsible determination that there was probable cause to believe that the recipient actually owed the amount claimed by the creditor."²⁴²

A later Seventh Circuit decision, *Nielsen v. Dickerson*, revisited the issue of how much involvement is sufficient for a collection lawyer to sign his name to a collection letter without misrepresenting that he is involved as a lawyer in the collection of the debt. The decision builds on prior decisions of the court, and finds a lawyer's cursory information about individual credit cards insufficient to make a legal judgment that there was a legitimate claim to pursue. The court found that the collection attorney did not make a "considered, professional judgment" that individual consumers were delinquent and were candidates for legal action or that the dunning letter should be sent to them. Factors showing lack of attorney involvement were:

- The creditor made the decision about which consumers should receive the letters.
- The creditor did not provide sufficient information about the account for the collection lawyer to reach an independent, professional judgment about liability and collectability.
- The use of the same form letter in every case and the great volume of accounts to which it was sent reinforced the finding that there was no use of professional judgment.

²³⁸ 988 F.2d 1314 (2d Cir. 1993). See Appx. K.2.4.4, *infra*. See also *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292 (2d Cir. 2003) (collection law firm could not rely on retail store or its other lawyer's opinion claim was owed); *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86 (E.D.N.Y. 2009) (where collection records show no attorney involvement other than signing court papers at high volume, there was no meaningful attorney involvement). *But see* *Wolf v. Javitch, Block, Eisen & Rathbone, L.L.P.*, 2004 WL 3964424 (6th Cir. Dec. 16, 2004) (affirming dismissal of § 1692e(3) claim where evidence that attorney was assigned to and involved with underlying state collection case despite subsequent statement to consumer's counsel that no attorney had been assigned to case).

²³⁹ See also *Chulsky v. Hudson Law Offices, P.C.*, 2011 WL 500202 (D.N.J. Feb. 10, 2011).

²⁴⁰ *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

²⁴¹ 275 F.3d 642 (7th Cir. 2001).

²⁴² *Id.* at 647.

- The collection lawyer’s role in dealing with responses to the letter was not more than ministerial, referring most of them back to creditor. He had no authority to negotiate payments or settle the debt.
- The collection lawyer’s flat fee of \$2.45 per letter suggested that he was not being paid by the creditor for his legal judgment but rather for the marquee value of his name.
- The collection lawyer was not ever authorized to file suit for the creditor.²⁴³

The Sixth Circuit more recently decided that a collection letter on lawyer letterhead, where the lawyer was not acting as a lawyer, may be deceptive, violating the Fair Debt Collection Practices Act.²⁴⁴ This was not new legal territory; the court explicitly relied on the seminal decision of the Second Circuit in *Clomon*²⁴⁵ to reach its result:

The LLC’s [collection] letter is printed on law firm letterhead, it makes repeated reference to a law firm, and it directs remittance to an individually named lawyer. But it also explicitly states that it is from a debt collector and is “signed” by an unnamed “Account Representative.” Based on these conflicting aspects of the letter, we conclude that the district court erred in granting summary judgment to [the collection lawyer], but we will not go to the other extreme either by granting summary judgment to [the consumer]. Instead, a jury should determine whether the letter is deceptive and misleading--specifically, whether the letter gives the impression that it is from an attorney even though it is not.²⁴⁶

A lower court case is a good example of protection provided by this provision.²⁴⁷ A dunning letter on law firm letterhead with references in the dun that the sender was an attorney would cause the least sophisticated debtor to believe that the letter originated with a lawyer. The required attorney review necessary to comply with section 1692e(3) under the *Clomon/Avila* doctrine “need not be lengthy, but it must permit the attorney to form a professional opinion about whether the debt is potentially viable, barred by the statute of limitations, uncollectable due to the debtor’s bankruptcy, and to evaluate similar legal considerations.”²⁴⁸ The court granted summary judgment to the plaintiff on the section 1692e(3) claim where the attorney claimed that “when reviewing debts, he uses a variety of software applications, to evaluate large numbers of accounts quickly” so that the “attorneys personally review files in bulk numbers based on the results of computer programs applied to large amounts of data.” The court held “that these rapid, technologically aided review processes did not demonstrate the sort of independent analysis and professional opinion that must

²⁴³ *Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002). See also *Wolf v. Javitch, Block, Eisen & Rathbone, L.L.P.*, 2004 WL 3964424 (6th Cir. Dec. 16, 2004) (affirming dismissal of § 1692e(3) claim where evidence that attorney with collection law firm signed state collection complaint and was assigned to and involved with underlying state collection case despite subsequent statement to consumer’s counsel that no attorney had been assigned to case).

²⁴⁴ *Kistner v. Law Offices of Michael P. Margelefsky, L.L.C.*, 518 F.3d 433 (6th Cir. 2008). See 15 U.S.C. § 1692e(3).

²⁴⁵ *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

²⁴⁶ *Kistner v. Law Offices of Michael P. Margelefsky, L.L.C.*, 518 F.3d 433 (6th Cir. 2008).

²⁴⁷ *Martsof v. JBC Legal Group, P.C.*, 2008 WL 275719 (M.D. Pa. Jan. 30, 2008). See also *Navarro v. Eskanos & Adler*, 2007 U.S. Dist. LEXIS 15046 (N.D. Cal. Feb. 20, 2007).

²⁴⁸ See also *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 102 (E.D.N.Y. 2009) (“In evaluating the sufficiency of attorney review, the Court’s inquiry focuses not upon general procedure, but upon the sufficiency of the attorney’s independent review of a particular case prior to the issuance of a debt collection letter. Indeed, as evident in *Nielsen*, a law firm may employ a robust set of overarching procedures, but an attorney’s failure to conduct an independent review of the particular circumstances of an individual debt collection letter will still doom the process.”).

occur when a debt collector represents that an attorney has reviewed a debt. An attorney using these processes becomes little more than a computer operator unengaged in a considered legal analysis of the debtor's account.”

However, in 2005 the Second Circuit, in *Greco v. Trauner, Cohen & Thomas*,²⁴⁹ allowed a lawyer to mass mail duns before making any evaluation of the legal merits of a claim. The court based this conclusion on its finding that the lawyer had clearly disclosed to the consumer that the lawyer had not reviewed the claim. The court reasoned that even an unsophisticated consumer would not be misled where the collector's disclosure was clear and there was nothing in the letter to suggest the sender was actually acting in the capacity of a lawyer. Unfortunately, the court seemed to ignore the fact that the letter was on a law firm's letterhead, with the firm's name printed as the signature block, so created a conflicting message to the consumer that a lawyer as such was involved.

Greco creates a potentially sizable exception to the salutary rules developed in the Second and Seventh Circuits' decisions. What the court failed to appreciate is that there is a contradiction between, on the one hand, the disclaimer and, on the other hand, the letterhead and the statement in the body of the letter that the sender is a law firm. Confusingly, the letter looked like a lawyer's letter and said it was from a lawyer, but said that the lawyer had not reviewed the consumer's file. It is hard to think that this would be clear to nonlawyers.

Distinguishing *Greco*, the Fifth Circuit in *Gonzalez v. Kay*,²⁵⁰ held that a debt collection letter on a law firm's letterhead containing a *Greco* disclaimer of lawyer involvement could be found by a jury to deceptively imply that a lawyer was involved in sending the letter. The deception was not necessarily overcome by a disclaimer on the back of the collection letter that no lawyer had reviewed the claim.

The court noted that the *Kay* letter was not as clearly deceptive as the dunning letter, mass produced on lawyer letterhead, with a facsimile signature, and with no disclaimer, that was before the Fifth Circuit in *Taylor v. Perrin, Landry, deLaunay & Durand*.²⁵¹ Nevertheless, the court rejected the debt collector's argument that the letter was not deceptive because it had used the exact same disclaimer that the Second Circuit found convincing in *Greco v. Trauner, Cohen & Thomas, L.L.P.*:²⁵² “At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.” The court held that the disclaimer was effective in *Greco* because it was stated conspicuously on the front of the letter. In the *Kay* letter, the disclaimer was stuck on the back of the dunning letter following other disclaimers that were in legalese.

²⁴⁹ 412 F.3d 360 (2d Cir. 2005). See also *Pujol v. Universal Fid. Corp.*, 2004 WL 1278163 (E.D.N.Y. June 9, 2004).

²⁵⁰ 577 F.3d 600 (5th Cir. 2009). See also *Dunn v. Derrick E. McGavic, P.C.*, 653 F. Supp. 2d 1109 (D. Or. 2009) (attorney debt collector's verbatim *Greco* disclaimer inadequate as matter of law to avoid false representation of attorney involvement because 1) disclaimer was “obscured by the relative complexity” of remainder of attorney's letter, and 2) letter's references to legal action and threat of immediate suit implied that attorney had made “legal assessment” of debt when he had not); *Brazier v. Law Offices of Mitchell N. Kay, P.C.*, 2009 WL 764161 (M.D. Fla. Mar. 19, 2009) (whether letter is self-contradictory and confusing is question of interpretation and fact, not pure legal question; defendant contended that language used was identical to disclaimer in *Greco* and was appropriately used, but placement of disclaimer on reverse and use of letterhead are factual questions not answered or addressed in *Greco*); *Smith v. Harrison*, 2008 WL 2704825 (D.N.J. July 7, 2008) (denying attorney debt collector's motion to dismiss where attorney argued that his attempted *Greco* disclaimer in dun sent on attorney stationery with attorney signature insulated him from consumer's claim of false representation of attorney involvement).

²⁵¹ 103 F.3d 1232 (5th Cir. 1997), *relying on* *Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993).

²⁵² 412 F.3d 360, 361-362 (2d Cir. 2005).

Several district courts have also distinguished the *Greco* case.²⁵³ One of those decisions went further and discussed the confusion almost inherent in a letter on law firm letterhead containing a *Greco* disclaimer:

An attorney advising the least sophisticated debtor that he should not imply that an attorney reviewed his account is like asking someone not to think about pink elephants. From the least sophisticated debtor's perspective, a debt collection letter from an attorney would imply that an attorney has reviewed the debtor's account at some level. While Defendant's disclaimer advises the debtor not to [infer] that an attorney has reviewed his account, the answer to whether an attorney did in fact reviewed his account is no or yes at some level. A debt collection letter "is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate . . ." Here, there is sufficient ambiguity in Defendant's debt collection letter that the least sophisticated debtor could believe that an attorney has reviewed the debtor's account. Construing section 1692e(3) of the FDCPA liberally and under the standard of the least sophisticated debtor, the Court finds that Plaintiff has stated a claim under the FDCPA.²⁵⁴

The CFPB should issue a rule clarifying the law in this area and stating that a collection letter that is signed by an attorney or sent on law firm letterhead is deceptive if there has not been a meaningful review by that attorney or firm to determine probable liability for the demands stated in the letter, regardless of any disclaimer in the letter.

Clarifying (e)(5). Section (e)(5) prohibits the threat to take an action which is illegal. There are two issues which need to be corrected under this section. The first is that not all courts have applied the least sophisticated consumer standard. The second is that some courts have confused the intent of this protection and improperly held that this subsection is not violated when the collector actually takes the action threatened, even when the action itself is illegal.

Least Sophisticated Consumer. The Eleventh Circuit in *Jeter* declined to apply the "least sophisticated consumer" standard to section 1692e(5), finding the issue in the case was simply whether the explicit threat of suit before the court was intended or not.²⁵⁵ However, the Ninth Circuit reached a different result in *Swanson v. Southern Oregon Credit Service, Inc.*, by considering the possibility of veiled false threats:²⁵⁶

²⁵³ See *Dunn v. Derrick E. McGavic, P.C.*, 653 F. Supp. 2d 1109 (D. Or. 2009) (attorney debt collector's verbatim *Greco* disclaimer inadequate as matter of law to avoid false representation of attorney involvement because 1) disclaimer "obscured by the relative complexity" of remainder of attorney's letter, and 2) letter's references to legal action and threat of immediate suit implied that attorney had made "legal assessment" of debt when he had not); *Brazier v. Law Offices of Mitchell N. Kay, P.C.*, 2009 WL 764161 (M.D. Fla. Mar. 19, 2009) (whether letter is self-contradictory and confusing is question of interpretation and fact, not pure legal question; defendant contended that language used was identical to disclaimer in *Greco* and was appropriately used; however placement of disclaimer on reverse and use of letterhead are factual questions not answered or addressed in *Greco*); *Smith v. Harrison*, 2008 WL 2704825 (D.N.J. July 7, 2008) (attorney debt collector's motion to dismiss denied where attorney argued that attempted *Greco* disclaimer in dun sent on attorney stationery with attorney signature insulated him from consumer's claim of false representation of attorney involvement).

²⁵⁴ *Smith v. Harrison*, 2008 WL 2704825 (D.N.J. July 7, 2008).

²⁵⁵ *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985) (emphasis in original).

²⁵⁶ 869 F.2d 1222 (9th Cir. 1988).

We conclude, therefore, that the least sophisticated debtor standard does apply to an allegation that a debt collector made a “threat to take any action that cannot legally be taken.” 15 U.S.C. § 1692e(5). Otherwise, a debt collector could couch threatened action in language that misleads some debtors as to what the debt collector could legally do. Allowing such “misleading” threats would run counter to the plain language of section 1692e.²⁵⁷

Taking Threatened but Illegal Action. In *LeBlanc v. Unifund CCR Partners*,²⁵⁸ the Eleventh Circuit found that the debt buyer’s veiled threat of suit could be found unfair by a jury because the debt buyer did not have a state debt collection license it was required to have under state law. The jury was to determine whether the letter would reasonably be construed as a threat of suit by a least sophisticated consumer, as the letter was subject to various constructions.²⁵⁹

Other circuit courts have skirted around the issue of whether debt collection threats by an unlicensed debt collector violate section 1692e(5). In *Wade v. Regional Credit Ass’n*, the Ninth Circuit²⁶⁰ held that an “informational,” nonthreatening letter sent to a consumer in Idaho by a debt collector not licensed in Idaho did not violate section 1692e(5) because it was only informational and did not contain a “threat.”

In *Carlson v. First Revenue Assurance*, the Eighth Circuit²⁶¹ held that the debt collector was not required by Minnesota law to license its Seattle mail drop with Minnesota authorities, but stated that even if the debt collector was required by Minnesota law to license the mail drop, it was not a violation of section 1692e(5) to simply fail to get a license. The consumer would also have to show deception or a threat in connection with the unlicensed debt collection.

²⁵⁷ *Id.* at 1227.

²⁵⁸ 601 F.3d 1185, 1199-1201 (11th Cir. 2010).

²⁵⁹ See also *St. Denis v. New Horizon Credit, Inc.*, 2006 WL 1965779 (D. Conn. July 12, 2006) (unfair to engage in unlicensed debt collection); *Hauk v. LVNV Funding, L.L.C.*, 2010 WL 4395395 (D. Md. Nov. 5, 2010); *but see McDowell v. Vengroff, Williams, & Assocs., Inc.*, 2006 WL 1720435 (E.D.N.Y. June 21, 2006) (dismissing FDCPA claim where collector did not have local New York City collection license). Cf. *Chulsky v. Hudson Law Offices, P.C.*, 2011 WL 500202 (D.N.J. Feb. 10, 2011) (plaintiff sufficiently alleged that Hudson Law’s operation of debt buying and collection business would render its attempt to collect debt unenforceable under N.J. professional organizations and professional responsibility law and violated § 1692e by misrepresenting viability of its state collection suit; thus plaintiff sufficiently alleged that defendant misrepresented legal status of debt by attempting to collect on debt that was unenforceable; attorneys may be held liable for misleading statements made on behalf of their law firm clients)

²⁶⁰ 87 F.3d 1098 (9th Cir. 1996). Accord *James v. Merchants & Professionals, Inc.*, 2010 WL 785803 (E.D.N.Y. Mar. 8, 2010); *Nero v. Law Office of Sam Streeter, P.L.L.C.*, 655 F. Supp. 2d 200 (E.D.N.Y. 2009); *Thibodeau v. Credit Adjustment Bur.*, 2006 WL 3498159 (M.D. Fla. Dec. 4, 2006). See also *Lemire v. Wolpoff & Abramson, L.L.P.*, 256 F.R.D. 321 (D. Conn. 2009) (granting class certification on issue of whether defendant can legally collect consumer debts in Connecticut without license); *Taylor v. Quall*, 471 F. Supp. 2d 1053 (C.D. Cal. 2007) (debt buyer’s failure to properly register its fictitious business name not bar to debt collection); *Richardson v. AllianceOne Receivables Mgmt., Inc.*, 2004 WL 867732 (S.D.N.Y. Apr. 23, 2004) (dismissing consumer’s claim that FDCPA was violated by licensed debt collector’s failure to list its New York City license number on its collection letter as that was not deceptive); *Ferguson v. Credit Mgmt. Control, Inc.*, 140 F. Supp. 2d 1293 (M.D. Fla. 2001). *But see Scott v. J. Anthony Cambece Law Office, P.C.*, 600 F. Supp. 2d 479 (E.D.N.Y. 2009) (complaint stated FDCPA claim against defendant law firm for collecting debts without debt collection license as required by applicable New York City municipal code, since code does not contain per se exemption for attorneys); *Goray v. Unifund CCR Partners*, 2007 WL 4260017 (D. Haw. Dec. 4, 2007) (unlicensed collection agency violated § 1692e(5) because it threatened to take action that it could not legally take); *Williams v. Goldman & Steinberg, Inc.*, 2006 U.S. Dist. LEXIS 50222 (E.D.N.Y. July 21, 2006); *Jomarron v. Nasco Enters., Inc.*, 2005 WL 2231863 (D. Conn. Aug. 4, 2005) (default judgment).

²⁶¹ 359 F.3d 1015 (8th Cir. 2004).

These decisions leave this important area of the law unsettled. The CFPB should clarify the law by adopting a rule stating that the least sophisticated consumer standard applies to all FDCPA protections and that a collector violates the FDCPA by taking or threatening to take illegal action, including action for which it should but does not have a license.

Clarifying (e)(10). Section (e)(10) is a catchall provision that broadly prohibits the use of any false representation or deceptive means to collect a debt. Despite the broad nature of this prohibition, however, courts have unreasonably narrowed its application in several circumstances relating to state court debt collection litigation. The CFPB should correct these erroneous interpretations of the FDPCA.

False Statements to Courts (and other Third Parties): One of the greatest harms to consumers occurs when debt collectors submit false and deceptive affidavits to state courts in order to obtain default judgments. As recognized by the district court in *Midland Funding, LLC v. Brent*,²⁶² such affidavits violate section 1692e of the FDCPA. Unfortunately, however, the Seventh Circuit recently came to the opposite conclusion in *O'Rourke v. Palisades Collection XVI, LLC*,²⁶³ holding (in contravention of the plain language of the statute) that the FDCPA does not extend to false communications made to state courts, rather than directly to consumers. The CFPB recently filed an excellent amicus brief in *Sykes v. Mel S. Harris and Assoc.*,²⁶⁴ refuting *O'Rourke*. The CFPB should take the opportunity to clarify that all false statements made to collect a debt are actionable under the FDCPA, whether directed at consumers or at third parties, and it should state specifically that false statements made in state court—even if never seen by the consumer—are actionable if they are made as part of an attempt to collect a debt.

Filing Lawsuits without Conducting A Meaningful Attorney Review: As discussed above, an important line of cases, including *Clomon, Avila* and *Nielsen*, has established that an attorney must conduct an independent review of the file before allowing a debt collection letter to issue under his or her signature in order to avoid making the false representation that the attorney has reviewed the file and deemed it worthy of possible legal action. Unfortunately, it is far less clear whether such protections extend to attorneys who actually file lawsuits against consumers, and some courts have held that an attorney need not conduct such a review before filing suit. The perverse result is that an attorney must do more work to verify a debt before sending a collection letter than he or she must before filing suit.

All the factors that justify requiring that an attorney conduct a meaningful review of the case file prior to sending a debt collection letter apply with even greater force in the context of litigation. When an attorney files suit on behalf of a debt collector, the consumer assumes that the attorney has reviewed the file and exercised independent professional judgment and determined that the case has merit. The consumer then makes decisions, such as whether to dispute or pay the debt, based on this assumption. Many consumers decide to pay debts that they cannot recall and do not recognize simply because they assume that the attorney would not have sued them without evidence. Most consumers do not know that debt collection attorneys routinely bring cases on behalf of debt buyers without having reviewed the file, even when the debt buyer has no documents to support the claim

²⁶² 664 F. Supp. 2d 961, 970 (N.D. Ohio 2009).

²⁶³ 635 F.3d 938 (7th Cir. 2011).

²⁶⁴ No. 13-2742 (2d. Cir.).

and no ability or intent ever to obtain them. Such practices are unconscionable and violate the FDCPA. The CFPB should clarify by regulation that a debt collection attorney violates the FDCPA by filing a lawsuit without having conducted an independent review of the file to determine that the action has merit.

Filing Lawsuits without Having the Ability or Intent to Prove the Debt: In *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006), the Sixth Circuit held that filing a lawsuit without having the immediate means to prove the debt in hand does not violate the FDCPA. Several district courts, however, have distinguished *Harvey* and held that a debt collector violates the FDCPA by filing lawsuits without the intent or ability *ever* to prove the debt.²⁶⁵ Unfortunately, in our experience, most lawsuits filed by debt buyers involve the latter category, as the purchase and sale agreements prevent debt buyers from being able to obtain proof of the debt in the vast majority of cases. Hundreds of thousands of consumers have and will be affected by these abusive, frivolous lawsuits. The CFPB should clarify in its rules that the practice of filing lawsuits without having the intent or ability ever to prove the debt violates § 1692e and e(10) of the FDCPA.

Q100 Recommendations: The CFPB should issue clarifying regulations pursuant to section 1692e that –

1. Ensures that no collection letter can be signed by an attorney or sent on law firm letterhead without a meaningful review to determine probable liability by that attorney or firm supporting the demands in the letter;
2. Ensures that the least sophisticated consumer standard is always applicable.
3. Clarifies that the FDCPA is violated if a collector threatens to take an illegal action, including action for which the collector should have but does not have a license, even if the collector then takes the illegal action.
4. Clarifies that all false statements made to collect a debt are actionable under the FDCPA, whether directed at consumers or at third parties, and that false statements made in state court—even if never seen by the consumer—are actionable if they are made as part of an attempt to collect a debt.
5. Require that attorneys filing collection lawsuits must conduct a meaningful review of the file before initiating a collection lawsuit.
6. Clarify that the practice of filing lawsuits without having the intent or ability ever to prove the debt violates § 1692e and e(10) of the FDCPA.

Q101: Do collectors falsely state or imply that the Servicemembers Civil Relief Act does not apply to debts? What would be the costs and benefits of requiring collectors to disclose information about rights related to debts subject to the Servicemembers Civil Relief Act to a consumer, consumer's spouse, or dependents? What debt collection information related to the Servicemembers Civil Relief Act should be communicated?

²⁶⁵ See, e.g., *Mello v. Great Seneca Financial Corp.*, 526 F. Supp. 2d 1020 (C.D. Cal. 2007); *Kuria v. Palisades Acquisition XVI, LLC*, 752 F.Supp.2d 1293 (N.D. Ga. 2010).

Response Q101: Some collectors do state or imply that the Servicemember's Civil Relief Act (SCRA) does not apply to debts and in some cases it may be false. The SCRA has a number of protections that are relevant to the collection process. The SCRA addresses the prohibition of negative credit comments due to protections of the Act (§516), collection of sums for the government (§547), the reduction of interest rates on certain pre-service debts (§527), and protection for indebtedness for non-payment of life insurance policies for certain servicemembers (§547). The following sections of the SCRA also have an impact on debt collection:

Sec. 521 Protection of servicemembers against default judgments. Requires a stay of civil actions and proceedings and provides the ability reopen default judgments.

Sec. 522 Stay of proceedings when servicemember has notice. Allows the servicemember to stay an action when he has made an appearance or is the plaintiff.

Sec. 523 Fines and penalties under contracts. Allows a court to adjust the fines and penalties that may accrue under a contract when the servicemember is unable to comply due to military service.

Sec. 524 Stay or vacation of execution of judgments, attachments, and garnishments. Allows the court to stay or vacate the execution of judgments where the servicemember's ability to comply with the courts order is impacted by military duty.

Sec. 531 Evictions and distress. Requires court action prior to eviction.

Sec. 532 Protection under installment contracts for purchase or lease. Requires court action prior to repossession or foreclosure of a servicemember's pre-service property when the servicemember made at least one payment.

Sec. 533 Mortgages and trust deeds. Requires court action prior to foreclosure on real property acquired before active duty.

Sec. 534 Settlement of stayed cases relating to personal property. Allows a court to order a creditor to pay the equity in a property to a servicemember as a condition of foreclosure.

Sec. 537 Enforcement of storage liens. Requires court involvement prior to enforcement of a lien on a servicemember's property.

Sec. 538 Extension of protections to dependents. Allows courts to extend the protections of the SCRA to dependents.

Debt collection on a servicemember's debt is a serious matter. Rarely are civilians subject to sudden unplanned movements or extended absences like the military. For these reasons, the CFPB should adopt rules requiring collectors and creditors to take special steps to avoid unfair treatment of servicemembers.

First, the CFPB should adopt regulations requiring collectors and creditors, before initiating collection activity on a debt, to use the Defense Manpower and Data Center SCRA verification service to determine whether a debtor is in the service. If a debtor is in the service, the CFPB should require the collector or creditor to extend an explicit invitation to the debtor to provide notice of

deployment or unavailability similar to that provided to courts under section 50 U.S.C. Appx. 522, and landlords under 50 U.S.C. Appx. 535.

Second, the CFPB should issue regulations stating that once a debtor provides verification of active duty status or notification of deployed status, there should be a full stay of collection activity during the deployment.

Third, the CFPB should take steps to prevent creditors and collectors from taking advantage of illegal waivers of SCRA rights. Some creditors have requested a waiver of rights under the SCRA at the inception of the contract. While the SCRA provides that a waiver obtained in this manner is unlawful, most of the servicemembers who sign these waivers do not understand the legal requirements for a valid waiver. These men and women will comply with the documents they signed and suffer the consequences at our peril (their mission readiness).

Q101 Recommendations: The CFPB should adopt rules 1) requiring creditors and collectors to determine whether a debtor is in the military service before beginning collection activity on a debt; 2) requiring them to stay all collection activity as to a debtor who has been deployed or is on active duty; and 3) stating that a creditor or collector commits an unfair and deceptive act by obtaining or invoking a waiver of rights that is illegal under the SCRA.

Q102: The Bureau has heard reports of debt collectors falsely stating that they will have a servicemember's security clearance revoked and threatening action under the Uniform Code of Military Justice if the servicemember fails to pay the debt. How prevalent are these threats?

Response Q102: Threats to cause revocation of a servicemember's security clearance are far too prevalent. The threat to impact the servicemember's career and security clearance is the main source of leverage for the disreputable debt collector. Most jobs in the military require a security clearance. Once servicemembers advance beyond entry level ranks, they are trained in mission essential operations that employ information or equipment that has classified aspects. Loss of the security clearance means loss of the job for the individual and detrimental impact to the mission for the command. Servicemembers have sometimes paid a debt twice because they were facing a threat to their security clearance and job. The debt was resold to a new collector who made threats to contact the command.

Q103: Spouses and surviving spouses of alleged debtors may be asked by collectors to pay the spouse's individual debt in circumstances in which the non-debtor spouse is not legally liable for the debt. Do debt collectors state or imply that the non-debtor spouse or surviving spouse has an obligation to pay debts for which they are not liable? What would be the costs and benefits of requiring that collectors, where applicable, use disclosures or other approaches to convey that non-debtor spouses or surviving spouses have no legal obligation to pay the spouse's individual debt?

Response Q103: Regarding the issue of how non-debtor spouses or surviving spouses should be protected, please see our response to Q77. In addition, specifically in regards to the impact of this issue on servicemembers and their families:

Debt collectors have too often falsely implied that the non-debtor spouse has an obligation to pay a servicemember's debts when the spouse is not liable. This has often happened to widows. Creditors and collectors have demanded that the widow of a deceased servicemember pay for the

servicemember's debts because the widow had received an insurance payment. The collector may imply that the payment is necessary to protect the servicemember's name or career. This should be specifically branded by the CFPB as illegal.

Q104: Authorized users on credit cards are sometimes contacted by debt collectors and asked to pay debts in circumstances where the cardholder is liable but the authorized user is not. How often are authorized users asked to pay debts for which they are not liable? What would be the costs and benefits of requiring that collectors disclose to authorized users, where applicable, that they have no legal obligation to pay the debt?

Response Q104: Unfortunately, this happens all the time. It is illegal and misleading unless there is some reason that the authorized user is liable for the debt. (Authorized users may be liable for their own charges in some states and spouses may be liable in community property states). A disclosure is *not* the answer. The CFPB should make it emphatically clear that the restrictions on contact with unobligated third parties apply to an authorized user who is not liable on the card. In addition, in cases where the FDCPA allows a collector to contact the authorized user – for example, where the authorized user is the debtor's spouse²⁶⁶--the CFPB should make it clear that any misrepresentation of the authorized user's liability violates the FDCPA.

Credit card issuers should be subject to strict record keeping and audits so they do not pad their books with false claims of liability of consumers who are not their account holders. As spelled out in our responses to Qs 1-15, card issuers must be prohibited from selling debts that are not accompanied by reliable, authentic business records establishing personal responsibility.

Q104 Recommendation: The CFPB should adopt a rule stating that 1) the restrictions on contact with unobligated third parties apply to an authorized user of a credit card who is not liable on the card; and 2) in cases where the FDCPA allows a collector to contact the authorized user, any misrepresentation of the authorized user's liability violates the FDCPA.

Q105: What technological limitations might prevent mini-Miranda warnings from being sent via text message? Should consumers be able to opt in to collector communications via text message that do not include a mini-Miranda warning? If so, what type of consent should be required and how and when should it be obtained? Could the mini-Miranda warning be more succinctly stated so that it fits within the character constraints of a text message?

Response Q105: Please see our Responses to Q54 and Q62.

Q106: What technological innovations (e.g., links, attachments) might facilitate the delivery of mini-Miranda warnings via text message? For instance, what would be the potential costs and benefits of allowing a collector to send the consumer a text message that does not contain the mini-Miranda but contains only a link to a website, PDF, or similar document that provides the mini-Miranda as well as other information about the consumer's debt? Should the acceptability of relying on a link or an attachment depend on the frequency with which persons who receive such links or attachments go to the linked material or open the attachment? Would relying on a link or an attachment raise privacy or security risks? If so, how significant are those risks?

²⁶⁶ See 15 U.S.C. § 1692c(d).

Response Q106: The § 1692e(11) notice is an extremely important protection for consumers. Consumers need to know that a contact is from a debt collector. Allowing debt collectors to contact consumers without making this critical disclosure will open the door to spoofing, phishing, and other pretextss seeking to find ways to embarrass debtors or seize their assets. The prospect is particularly alarming for text messages, since consumers may respond to them quickly and semi-automatically.

None of the alternatives mentioned is a legal way of requiring the § 1692e(11) notice. The CFPB has no authority to eliminate or reduce the requirement of this notice, even in text messages. For further information, please see our Responses to Q54 and Q62.

Q106 Recommendation: The disclosure that a communication is from a debt collector must be in every communication and must not be presented by way of a link or attachment.

Q107: Are there challenges in providing the mini-Miranda warning via other newer technologies, such as email or social networking sites? If so, what, if anything, should be included in proposed rules to address these challenges?

Response Q107: There are no challenges in providing this disclosure in emails. Social networking sites are a completely inappropriate means for debt collectors to contact consumers and should be expressly declared to be illegal by the CFPB. For further information on emails and social networking sites, please see our responses to Q26, Q27, Q28, and Q57.

Q108: Which methods of payment do consumers use to pay debts? How frequently do consumers use each type of payment method? In particular, how often do consumers pay collectors through electronic payment systems?

Response Q108: Debt collectors often require electronic debits or ACH debits as payment mechanisms to repay debts. See response to Q111, below.

Q109: Do collectors charge fees to consumers based on the method that they use to pay debts? How prevalent are such fees for each payment method used? How much is charged for each payment method used?

Response Q109: Fees are almost always charged. Consumers are not sufficiently apprised of available alternatives. Disclosure of less and no cost alternatives should be required.

Q110: Do collectors make false or misleading claims to consumers about the availability or cost of payment methods? If so, how prevalent are these claims and why are they material to consumers?

Response Q110: Yes. This practice is unfortunately prevalent. Here are just two of the many responses on this subject that we received from our survey of lawyers who represent consumers in debt collection cases:

Collectors often say that the consumer MUST make the payment by Western Union that day or there will be consequences, or that the consumer MUST allow the collector access to the consumer's account to take the money or there will be

consequences.²⁶⁷

...

Yes. Telling a consumer that s/he cannot pay by sending in a check or money order and requiring ONLY that the consumer give electronic banking information IS a false and misleading claim. Some consumers have complained that they were not told about costs associated with making electronic payments. A common complaint is when consumers find a lawyer and they try to get their bank to stop repeated automatic electronic payments (based on their dispute of the debt), their own banks tell them they cannot stop the withdrawal without the consent of the debt collector - and that the consumer will be charged a fee to stop the payments.²⁶⁸

Q11: Do consumers understand the costs of using specific payment methods to pay their debts or the speed with which their payment will be processed depending on which payment method they choose? Should disclosures be required with respect to the costs, speed, or reversibility of alternative payment methods and, if so, what type of disclosures?

Response Q11: There are such serious problems with electronic debits that disclosures are wholly inadequate to address them. Consumers do not understand the complex differences in cost, speed, reversibility, and consumer protections that apply to different payment methods. Instead of focusing on disclosures, the CFPB should impose substantive protections for debtors.

A common complaint by consumers results from the situation when they have provided a debt collector their bank account and routing numbers to allow a specific, single, withdrawal. Instead of the authorized amount, the debt collector makes a withdrawal of all the funds in the account, or makes multiple withdrawals when only one was authorized. Technically these withdrawals can be done either through the electronic debit system,²⁶⁹ or as remotely created checks, governed by state laws, as processed through the “ACH” system.²⁷⁰ One NACA attorney recently recounted this case:

My client, a soldier in Iraq, gave [a large debt buyer] permission to debit his account for \$300 on May 1. [The debt buyer] instead cleaned out his account. He called [his bank] and asked that the debt buyer be blocked from any further access to the account. [The bank] told him that this is not sufficient to stop these debits from [debt buyer], that it is well known to the bank, and it will simply take further monies under a different name. Apparently this debt buyer routinely does this to soldiers.

Some consumers also say that even when there was no authorization for a withdrawal provided to the collector, the bank account information was taken off a paper check the consumer sent to reduce the balance of the debt or that the consumer acquiesced to the collector’s request to provide bank account information to show that there were not sufficient funds to pay the debt or to show “good faith.” While these collection activities violate both the FDCPA and the UCC, claims are rarely pursued. The issue in a case challenging an improper withdrawal from a bank account boils

²⁶⁷ One response from our survey of hundreds of attorneys representing consumers in debt collection cases.

²⁶⁸ One response from our survey of hundreds of attorneys representing consumers in debt collection cases.

²⁶⁹ The Electronic Funds Transfer Act, EFTA, applies to electronic withdrawals, 15 USC § 1693.

²⁷⁰ Remotely created checks are governed by Articles 3 and 4 of the Uniform Commercial Code. The ACH system is the automated check clearinghouse.

down to a “he said, she said.” There is seldom any more evidence than the consumer’s recollection that the withdrawal was not authorized and the debt collector’s computer record saying it was.

An unauthorized withdrawal by a debt collector interferes with a low-income consumer’s ability to provide for basic obligations for rent, food, medical care, and other necessities. As the consumer did not anticipate the collector’s unauthorized withdrawal, the consumer’s funds are likely to be further reduced by bank fees as other checks written by the consumer are dishonored for insufficient funds.

It is also very difficult for a consumer to stop the electronic – or ACH – debiting for a payday loan or other electronic debits, including payment plans with debt collectors. Consumers report that their financial institutions refuse to stop payment on a preauthorized electronic transfer despite sufficient notice. Sometimes banks require the borrower to direct the creditor to stop debiting the account or require that the consumer confirm with the creditor in writing that authorization has been revoked. Many payday lending contracts specify that if authorization for the electronic fund transfer is revoked, then the lender will use a remotely created check to debit the very same amount from the borrower’s account. Creditors switch back and forth from traditional electronic fund transfers to remotely created checks. Creditors change routing numbers and submit the debit under different names to avoid the consumer’s efforts to stop payment. Often the lender will submit the same debit multiple times, so the consumer incurs multiple dishonored check fees.

Allowing unfettered access to a consumer’s bank account is just like allowing a lender to take a confession of judgment or an assignment of wages - both activities found to be unfair by the FTC and outlawed by the Credit Practices Rule.²⁷¹ The same rationale used to prohibit those collection activities should be used as the basis for outlawing debt collectors, payday lenders and other creditors the ability to snatch money directly from a consumer’s bank account.²⁷²

Q111 Recommendations: The CFPB should work with the Federal Reserve Board to ban remotely created checks (RCCs) and remotely created payment orders (RCPOs) for consumer transactions.²⁷³ Until a ban can be implemented, the CFPB should clarify that Regulation E covers RCCs and RCPOs. The CFPB should also prohibit debt collectors and creditors who are collecting a debt from using back-up payment devices in the event that one fails. Regulation E should be amended to prohibit use of an electronic fund transfer after a check, RCC or RCPO fails (either for stop payment, challenge to authorization or lack of funds) and to codify the recent NACHA proposals in this area.²⁷⁴ Similarly, the CFPB should address the reverse situation, and ban as unfair, deceptive and abusive the use of an RCC or RCPO to obtain payment from a consumer after an EFT is stopped or fails.

²⁷¹ 16 C.F.R. 444.

²⁷² See the extensive explanation for consumers’ inability to avoid the marketplace dynamics in such a ways that would provide them with real negotiating power and therefore the basis for the FTC’s prohibition against confessions of judgments and assignments of wages. *Statement of Basis and Purpose for the Credit Practices Rule*, 49 Fed.Reg. 7740, March 1, 1984 at 7749 to 7760.

²⁷³ A detailed discussion of this issue and additional interim proposals for addressing problems with RCCs and RCPOs can be found in Comments of National Consumer Law Center et al. to the Federal Reserve Board on Improving the U.S. Payment System (Dec. 13, 2013), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/rcc-fed-comments12132013.pdf.

²⁷⁴ See Comments of National Consumer Law Center et al. to NACHA-the Electronic Payments Association on Operating Rules Amendments to Improve Network Quality (Jan. 13, 2014), *available at* http://www.nclc.org/images/pdf/banking_and_payment_systems/comments-nacha-return-rate-2013.pdf.

Q112: Should the Bureau incorporate the examples from FDCPA section 808 into proposed rules prohibiting unfair or unconscionable means to collect or attempt to collect any debt by third-party debt collectors? Should any of the specific examples addressed in section 808 be clarified or supplemented and, if so, how? Should any other conduct by third-party debt collectors be incorporated into proposed rules prohibiting unfair or unconscionable means of collection? If so, what are those practices; what information or data support or do not support the conclusion that they are unfair or unconscionable; and how prevalent are they?

Q112 Response: It would be helpful for the Bureau to restate the fact that the prohibition against unfair practices in section 808 is not limited by the examples in the statute, but is a general prohibition that covers unfair or unconscionable collection acts falling outside the various subsection in this section.

The legal concept of unfairness has been broadly construed by the courts to preclude practices that offend public policy, are immoral or oppressive, or cause substantial injury.²⁷⁵ It was construed by the FTC staff to involve a three-prong test: (1) substantial injury to the consumer; (2) not outweighed by countervailing benefits to consumers or competition; and (3) not reasonably avoidable by the consumer.²⁷⁶

The least sophisticated or unsophisticated consumer analytical standard is appropriate for cases under this provision.²⁷⁷ Section 1692f does not require the element of knowledge or intent.²⁷⁸

Additionally, it would be helpful for the Bureau to state in a regulation that certain acts are unfair or unconscionable. Many of the following recommendations would codify leading decisions or resolve splits among the courts.

We recommend that the Bureau issue a rule stating that the following activity is unfair or unconscionable:

1. Threatening to file suit without a license to act as a debt collector. In *LeBlanc v. Unifund CCR Partners*,²⁷⁹ the Eleventh Circuit found that the debt buyer's veiled threat of suit could be found unfair by a jury because the debt buyer did not have the state debt collection license it was required to have under state law. The jury was to determine whether the letter would reasonably be construed as a threat of suit by a least sophisticated consumer.²⁸⁰

²⁷⁵ Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972). National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §§ 4.3, 4.4 (7th ed. 2008 and Supp.).

²⁷⁶ Hage v. General Serv. Bureau, 306 F. Supp. 2d 883, 887 (D. Neb. 2003); FTC Official Staff Commentary § 808-2. *But see* Piche v. Clark County Collection Serv., L.L.C., 119 Fed. Appx. 104 (9th Cir. 2004) (unpublished) (use by debt collector of confession of judgment remedy that is generally permissible under state law was not unfair practice that violated FDCPA merely because FTC and banking rules prohibit its use in other contexts).

²⁷⁷ See *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193-1194 (11th Cir. 2010); *McMillan v. Collection Professionals Inc.*, 455 F.3d 754 (7th Cir. 2006); *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004); *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir. 1996); *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1461-1462 (C.D. Cal. 1991).

²⁷⁸ *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004); *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991 (7th Cir. 2003); *Belar v. Blatt, Hasenmiller, Leibsker, Moore, L.L.C.*, 2006 WL 1423118 (C.D. Ill. May 18, 2006).

²⁷⁹ 601 F.3d 1185, 1199-1201 (11th Cir. 2010).

²⁸⁰ See also *Hauk v. LVNV Funding, L.L.C.*, 2010 WL 4395395 (D. Md. Nov. 5, 2010) (debt collector's failure to register under state debt collection law "is an appropriate consideration in deciding whether its means of collection were unfair

2. Threatening to seize, seizing, or not immediately returning funds known to be exempt. This issue has had a tortured history in the courts, but should be sufficiently straightforward for the CFPB to address in regulations. The CFPB should require creditors to provide sufficient information about the debt and the collection process to collectors, and subsequent collectors to ensure that they receive this information from their predecessors. (See our responses to Qs1-7). Collectors would then be charged with the knowledge of their predecessors as to the exempt nature of a consumer's income or assets, and it would be an unfair or unconscionable act for the collector to seize, threaten to seize, or fail to immediately return those funds.²⁸¹
3. Accusing consumers of dishonesty. The Seventh Circuit in *McMillan v. Collection Prof'ls Inc.*²⁸² held that regularly accusing consumers of dishonesty in a dunning form letter stated a claim for unfair debt collection. The collector called into question a debtor's honesty and good intentions simply because a check was dishonored. The Seventh Circuit reversed a district court's dismissal of a complaint that had claimed a violation of sections 1692e and 1692f arising from the debt collector's statement: "You are either honest or dishonest. You cannot be both." The court noted there are frequently honest reasons for a check dishonor, including mathematical error, bank error, or the unexpected delay in the clearing of funds to cover the check. The nonpayment of a debt does not mean that the debtor is "dishonest." The court decided that a claim had been stated for unfair or unconscionable collection means under section 1692f.²⁸³
4. Initiating a garnishment when consumers are current on their payments. In *Fox v. Citicorp Credit Servs., Inc.*, the Ninth Circuit held that allegations that the debt collector filed a garnishment action when the consumers were current in their payments stated a claim for violating section 1692f.²⁸⁴
5. Misrepresenting the origins or assignment history of a debt. A consumer stated a claim by alleging that a state court pleading misrepresented the identity of the original contracting party

or unconscionable"); *Sierra v. Rubin & Debski, P.A.*, 2010 WL 4384216 (S.D. Fla. Oct. 28, 2010); *St. Denis v. New Horizon Credit, Inc.*, 2006 WL 1965779 (D. Conn. July 12, 2006) (unfair to engage in unlicensed debt collection); § 5.5.8.5, *supra*, Appx. K.2.5.7, *infra*. *But see* *McDowell v. Vengroff, Williams, & Assocs., Inc.*, 2006 WL 1720435 (E.D.N.Y. June 21, 2006) (dismissing FDCPA claim where collector did not have local New York City collection license); *Castillo v. Frenkel*, 2010 WL 5507904 (N.Y. App. Div. Dec. 23, 2010) (fact that debt collection efforts were initiated in New York City by debt collector that was not licensed under city's administrative code did not by itself constitute violation of FDCPA).

²⁸¹ *See* *Hogue v. Palisades Collection, L.L.C.*, 494 F. Supp. 2d 1043 (S.D. Iowa 2007) (complaint stated a claim for engaging in unfair collection practices when collector temporarily garnished the consumer's bank account comprised entirely of federally exempt Social Security funds where, prior to initiating the garnishment, the consumer's attorney sent letter and sworn affidavit stating funds were exempt). *See also* *Bray v. Cadle Co.*, 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (follows *Hogue*); *Jordan v. Thomas & Thomas*, 2007 WL 2838474 (S.D. Ohio Sept. 26, 2007) (questions of fact remained on whether collection lawyer's affidavit that account may contain nonexempt funds was false). *But see* *Wetherelt v. Larsen Law Firm*, 577 F. Supp. 2d 1128 (D. Mont. 2008) (debt collector who availed itself of lawful garnishment procedure despite prior unsworn claims of consumer that her only funds were exempt Social Security, did not act unfairly or unconscionably); *Parker v. Wetsch & Abbott, P.L.C.*, 2006 WL 4846042 (S.D. Iowa July 11, 2006) (bank's garnishment of exempt funds was not unfair).

²⁸² 455 F.3d 754 (7th Cir. 2006).

²⁸³ *Id.* at 761. *See also* *Neill v. Bullseye Collection Agency, Inc.*, 2009 WL 1386155 (D. Minn. May 14, 2009) (allegations that printing at top of duns acronym "WWJD," for phrase "what would Jesus do?," "has the effect of invoking shame").

²⁸⁴ *See* 15 F.3d 1507 (9th Cir. 1994). *See also* *Billsie v. Brooksbank*, 525 F. Supp. 2d 1290 (D.N.M. 2007) (where collection attorney allegedly garnished wages of wrong person, issues of fact prevented summary judgment against wrong person's claims of deception and unfair practices); *Flores v. Quick Collect, Inc.*, 2007 WL 433239 (D. Or. Jan. 31, 2007) (use of illegal or improper summons may constitute unfair or unconscionable means to collect debt under § 1692f). *But see* *Shrestha v. Nadel*, 2001 U.S. Dist. LEXIS 12553 (D. Conn. Mar. 21, 2001) (debtor's funds for which exemption could have been claimed were not exempt from execution at time of attorney's seizure because debtor had failed to follow statutory requirements to claim exemptions).

and failed to set forth the debt collector's place on the chain of assignments of the alleged debt clearly and accurately.²⁸⁵

6. Filing or threatening to file a lawsuit on a debt that is time-barred. As one court put it: "a debt collector's filing of a lawsuit on a debt that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt. As previously demonstrated, time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy, and this is no less true in the consumer context. As with any defendant sued on a stale claim, the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt."²⁸⁶ Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care--that sufficient to protect the least sophisticated consumer.²⁸⁷ The *Kimber* decision on suing or threatening suit on time-barred debts was followed by the Ninth Circuit in *McCollough*.²⁸⁸ On this point, please see also our suggested remedies for dealing with time-barred debt, in response to Q133.
7. Threatening to contact unobligated third parties.²⁸⁹
8. Charging excessively high default charges.²⁹⁰

²⁸⁵ *McGinnis v. Dodeka, L.L.C.*, 2010 WL 1856450 (E.D. Tex. May 7, 2010).

²⁸⁶ *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). *See also* *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001) (citing *Kimber* approvingly); *McCollough v. Johnson, Rodenberg & Lauinger*, 610 F. Supp. 2d 1247 (D. Mont. 2009), *aff'd*, [rule] F.3d [rule], 2011 WL 746892 (9th Cir. Mar. 4, 2011) ("The inescapable conclusion is that [the debt collection attorney] asked a *pro se* defendant to admit false information. The requests for admission appear to be designed to conclusively establish each element of [the collection law firm] case against [the consumer] and to use the power of the judicial process against a *pro se* defendant to collect a time-barred debt. This conduct is abusive, unfair and unconscionable.

²⁸⁷ *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). *See also* *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001) (citing *Kimber* approvingly); *McCollough v. Johnson, Rodenberg & Lauinger*, 610 F. Supp. 2d 1247 (D. Mont. 2009), *aff'd*, [rule] F.3d [rule], 2011 WL 746892 (9th Cir. Mar. 4, 2011) ("The inescapable conclusion is that [the debt collection attorney] asked a *pro se* defendant to admit false information. The requests for admission appear to be designed to conclusively establish each element of [the collection law firm] case against [the consumer] and to use the power of the judicial process against a *pro se* defendant to collect a time-barred debt. This conduct is abusive, unfair and unconscionable.").

²⁸⁸ *McCollough v. Johnson, Rodenberg & Lauinger, L.L.C.*, [rule] F.3d [rule], 2011 WL 746892 (9th Cir. Mar. 4, 2011). *See also* *Sierra v. Rubin & Debski, P.A.*, 2010 WL 4384216 (S.D. Fla. Oct. 28, 2010); *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870 (N.D. Ill. 2009); *Larsen v. JBC Legal Group, P.C.*, 533 F. Supp. 2d 290 (E.D.N.Y. 2008); *Martsof v. JBC Legal Group, P.C.*, 2008 WL 275719 (M.D. Pa. Jan. 30, 2008); *Rawson v. Credigy Receivables, Inc.*, 2006 WL 418665 (N.D. Ill. Feb. 16, 2006); *Thinesen v. JBC Legal Group, P.C.*, 2005 WL 2346991 (D. Minn. Sept. 26, 2005); *Dunaway v. JBC & Assocs., Inc.*, 2005 WL 1529574 (E.D. Mich. June 20, 2005); *Stepney v. Outsourcing Solutions, Inc.*, 1997 WL 722972 (N.D. Ill. Nov. 13, 1997); *Martinez v. Albuquerque Collection Servs.*, 867 F. Supp. 1495 (D.N.M. 1994). *Cf.* *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001) (declining to extend *Kimber* to a request for payment that did not threaten suit). *But see* *Simmons v. Miller*, 970 F. Supp. 661 (S.D. Ind. 1997) (unclear that six-year rather than three-year statute of limitations applied). *But cf.* *Pack v. Unifund CCR Partners, G.P.*, 2008 WL 686800 (M.D. Fla. Mar. 13, 2008) (no evidence to rebut debt buyer's affidavit that collection case was filed within statute of limitations); *Lindbergh v. Transworld Sys., Inc.*, 846 F. Supp. 175 (D. Conn. 1994) (did not show that debt collector was aware that debt was barred by state statute of limitations).

²⁸⁹ *See* *Rummel*, FTC Informal Staff Letter (May 16, 1978); *Mansfield*, FTC Informal Staff Letter (Apr. 20, 1978).

²⁹⁰ *See* *Schorr*, FTC Informal Staff Letter (July 27, 1981); *Callison*, FTC Informal Staff Letter (Feb. 27, 1981); *Faulkner*, FTC Informal Staff Letter (Aug. 8, 1978); *Milhollin*, FTC Informal Staff Letter (Apr. 19, 1978); *Towry*, FTC Informal Staff Letter (Mar. 15, 1978); National Consumer Law Center, *Collection Actions* Ch. 6 (2d ed. 2011). *But see* FTC official Staff Commentary § 808(1)-3.

9. Failing to include the collector’s address in its dunning letters. This practice is unfair since it negates the consumer’s right to obtain verification of the debt section 1692g(b), even when the address appears on the envelope.²⁹¹
10. Filing a lawsuit against a consumer without substantiation. The collector should have the original, authentic business records and documents to establish the collector’s ownership of the claim, the liability of the consumer, and the correct calculations of the amount of the debt. See our response to Qs1-7.

Q112 Recommendation: The CFPB should 1) codify the rule that the prohibition of unfair practices in section 808 is not limited by the examples in the statute; 2) specify that the least sophisticated consumer standard applies to claims of unfair practices; and 3) identify a number of specific practices as unfair.

Q113: Should the Bureau include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as unfair or unconscionable by third-party debt collectors? What information or data support or do not support the conclusion that this conduct is “unfair” under the Dodd-Frank Act? What information or data support or do not support the conclusion that this conduct is “abusive” or “deceptive” conduct under the Dodd-Frank Act?

Response Q113: Yes, the Bureau should apply the same prohibitions to both first-party and third-party collectors. If the conduct is unfair or unconscionable for third-party collectors, it is just as unfair or unconscionable for first-party collectors, or creditors. There have been many, many determinations of unfairness or unconscionable activities by creditors under FTC law and in the state courts pursuant to state UDAP statutes. These are extensively discussed in Section 10.3.4 of our *Fair Debt Collection*²⁹² manual. The problem is that not all states’ UDAP statutes prohibit unfair or unconscionable acts: a number are confined to deception. A CFPB rule would be an important step toward filling this gap.

The following are highlights of determinations under state UDAP statutes and FTC law upon which the CFPB could base an unfairness rule applicable to both first-party and third-party collectors:

- Filing suit in a forum far from the consumer’s residence or from where the contract was signed;
- Attempting to collect an amount, a charge, or attorney fees that are not owed or before they are due (an abuse that is also often found to be deceptive);
- Attempting to obtain collection fees in excess of actual expenses;
- Attempting to collect from a person that the collector knows or should know is not obligated;
- Unfairly exaggerating and personalizing the consequences of nonpayment, for example by telling a woman that her deceased mother would not be able to rest in peace while a debt was outstanding;
- Initiating or threatening time-barred lawsuits;
- Threatening criminal prosecution without cause;

²⁹¹ *Wegmans Food Mkts., Inc. v. Scrimsher*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982). See also *Knoll v. Intellirisk Mgmt.*, 2006 WL 2974190 (D. Minn. Oct. 16, 2006) (denying collector’s motion to dismiss class action where collector used false name, Jennifer Smith, as caller ID).

²⁹² National Consumer Law Center, *Fair Debt Collection* (7th ed. 2011 and Supp.).

- Telephone harassment;
- Contacting unobligated third parties;
- Repeatedly calling a debtor at work and threatening to contact his supervisor;
- Using rude and abusive language;
- Including in a consumer credit contract a provision waiving the consumer’s statutory right to be free of third party collection contacts;
- Contacting a consumer known to be represented by an attorney;
- Taking or threatening to take illegal acts to collect a debt;
- Making misrepresentations to a court in order to obtain a default judgment;
- Improper repossession;
- Obtaining private financial information through deception and trickery;
- Proceeding with creditors’ remedies after becoming aware that the debtor has complied with a forbearance agreement or other arrangement;
- Seizing exempt property; and
- Evading EFTA restrictions, for example by arranging for a consumer to deposit her paycheck directly into an account from which it would be transferred to the lender and causing her to sign an illegal waiver of her Electronic Funds Transfer Act right to cancel the transfer.

Q113 Recommendation: The CFPB should issue regulations under its UDAAP authority holding creditors to the same standards regarding unfair or unconscionable debt collection methods to which third-party debt collectors are held.

Q114: Section 808(1) of the FDCPA prohibits collecting any amount unless it is expressly authorized by the agreement creating the debt or permitted by law. Should the Bureau clarify or supplement this prohibition in proposed rules?

Response Q114: Yes, it would be helpful for the Bureau to clarify the full coverage and meaning of certain provisions. Section 1692f(1) prohibits “collecting more than is legally owing.”²⁹³ This prohibits both the addition of illegal charges²⁹⁴ and overstatement of the balance of the debt,²⁹⁵ as do other provisions of the FDCPA. Falsely threatening to collect a charge in violation of this subsection violates section 1692e, prohibiting deception,²⁹⁶ as well as section 1692f, which prohibits unfair means to attempt to collect a debt.²⁹⁷ In addition, the FTC staff has stated that a collector

²⁹³ S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reprinted at* Appx. A.3, *infra*, 122 Cong. Rec. H7307 (daily ed. July 19, 1976) (remarks of Rep. Annunzio) (“[t]his bill prohibits debt collectors from adding on costs to a debt that the consumer does not legally owe”). *See* National Consumer Law Center, Collection Actions Ch. 6 (2d ed. 2011) (state restrictions on collection fees).

²⁹⁴ *See, e.g.,* Shula v. Lawent, 359 F.3d 489 (7th Cir. 2004); Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002); Pollice v. National Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000); Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2000); Kojetin v. CU Recovery, Inc., 1999 WL 33916416 (D. Minn. Feb. 17, 1999), *aff’d*, 212 F.3d 1318 (8th Cir. 2000) (state rule for construing contract allowing “costs incident to collection” would not allow 15% fee but required fee to be based on actual costs of collection).

²⁹⁵ *See, e.g., In re Maxwell*, 281 B.R. 101 (Bankr. D. Mass. 2002). *See also* Fajer v. Kaufman, Burns & Assocs., 2011 WL 334311 (W.D.N.Y. Jan. 28, 2011).

²⁹⁶ Osterloh, FTC Informal Staff Letter (July 13, 1979); Rummel, FTC Informal Staff Letter (May 16, 1978); Milhollin, FTC Informal Staff Letter (Apr. 19, 1978); § 5.5.2.9.1, *supra*.

²⁹⁷ *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., [rule] F.3d [rule], 2011 WL 746892 (9th Cir. Mar. 4, 2011); Rizzo v. Pierce & Assocs., P.C., 351 F.3d 791 (7th Cir. 2003). *See also* Shula v. Lawent, 359 F.3d 489 (7th Cir. 2004) (attempt to collect unauthorized court costs violated § 1692f(1)).

who charged for copies of a requested verification of a debt pursuant to section 1692g violated 1692f(1).²⁹⁸

The Seventh Circuit mistakenly construed section 1692f(1) in *Transamerica Fin. Servs., Inc. v. Sykes* not to prohibit the collection of a forged note, because the claim went to the validity of the note and not its amount, and any other potential claims under the FDCPA were not before it.²⁹⁹ The court mistakenly focused on the word “amount” and ignored the words “agreement creating the debt” in section 1692f(1) rather than giving full effect to all of the provision. The Bureau should clarify that this provision applies in this situation. Additionally, the Bureau should clarify that illegal charges include:³⁰⁰

- Noncontractual collection charges;
- Interest charges;
- Dishonored check charges;
- Service charges;
- Attorney fees;
- Litigation costs;
- Collection agency fees;
- Late fees;
- Prepayment fees;
- Charges under dispute;
- Statutory penalties;
- Taxes; and
- Other charges.

Q114 Recommendation: The CFPB should clarify the full meaning of § 1692f to apply to any situation in which a collector claims the right to collect an amount to which it is not entitled.

Q115: The FDCPA expressly defines the amount owed to include “any interest, fee, charge, or expense incidental to the principal obligation.” Section 808(1) makes it unlawful for debt collectors to collect on these amounts unless authorized by the agreement creating the debt or permitted by law. Should the Bureau clarify or supplement this prohibition in proposed rules?

Response Q115: Yes. Please see our response to Q114.

Q116: What communications technologies could cause consumers to incur charges from contacts by debt collectors? What are the costs to consumers and how many consumers use these technologies? For instance, how common is it for consumers to be charged for text messages and what is the average cost of receiving a text message? How common is it for consumers to be charged for mobile

²⁹⁸ Krisor, FTC Informal Staff Letter (Mar. 3, 1992).

²⁹⁹ *Transamerica Fin. Servs., Inc. v. Sykes*, 171 F.3d 553 (7th Cir. 1999). *See also* Valdez v. Capital Mgmt. Servs., L.P., 2010 WL 4643272 (S.D. Tex. Nov. 16, 2010). *But cf.* Purnell v. Arrow Fin. Servs., L.L.C., 303 Fed. Appx. 297 (6th Cir. 2008) (unpublished) (alleged collection of fraudulent debt violated § 1692f(1)).

³⁰⁰ *See* National Consumer Law Center, *Fair Debt Collection*, § 5.6.3 (7th ed. 2011 and Supp.) (lists of cases substantiating all of these points).

phone calls and what is the average cost of receiving an average-length call? Does incurring such charges vary by demographic group? If so, how?

Response Q116: Some of the issues raised by this and the next questions are governed by the Telephone Consumer Protection Act (“TCPA”) and are within the jurisdiction of the Federal Communications Commission (“FCC”). The TCPA prohibits automated dialer calls (and texts) to cell phones and to any service for which the called party is charged for the call, unless the consumer has consented.

However, it would be helpful for the CFPB to issue a rule regarding the question of consent to receive a debt collector’s call on a cell phone. In addition, the TCPA protections apply only if the caller uses an autodialer or the call delivers an artificial voice message. The CFPB should adopt restrictions on hand-dialed calls and text messages that cause the called party to incur a charge.

Background on TCPA. The Telephone Consumer Protection Act of 1991 (TCPA)³⁰¹ amended the Communications Law of 1934. It added a section to protect consumers from invasions of privacy, including autodialed telephone calls to cell phones and to any service for which the called party is charged for the call.³⁰² This prohibition is not limited to telemarketing calls. Congress specifically intended that the categories of phones listed in section 227(b)(1)(A)(iii), including cellular telephones, are entitled to the TCPA’s protections “regardless of the content of the call.”³⁰³ Thus, debt collection calls are covered.³⁰⁴

The phrases “cellular telephone service” and “any service for which the called party is charged for the call” are alternative; it is not essential that the cellular consumer be charged for the call.³⁰⁵ The prohibition applies to text messages as well as voice messages.³⁰⁶

The statute includes only two exceptions to the prohibition against autodialed or artificial/prerecorded voice calls to cell phones or where the called party will be charged for the call: calls made for emergency purposes and calls made with the prior express consent of the called party.³⁰⁷ The FCC’s regulation under the TCPA likewise includes these exemptions.³⁰⁸ In addition, the FCC has created an exemption for calls delivering health care messages when delivered by a covered entity or its business associate as defined under the HIPAA Privacy Rule.³⁰⁹

³⁰¹ 47 U.S.C. § 227; 47 C.F.R. §§ 64.1200-64.1201 (FCC regulations under TCPA).

³⁰² See Pub. L. No. 102-243 (1991); S. Rep. 102-178 (1991); 47 U.S.C. § 227(b).

³⁰³ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 23 FCC Rcd. 559, 565; ¶ 11 (Jan. 4, 2008); also 2003 TCPA Order, 18 FCC Rcd at 14,115, para. 165.

³⁰⁴ *Brown v. Hosto & Buchan, P.L.L.C.*, 748 F. Supp. 2d 847 (W.D. Tenn. 2010); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559 (F.C.C. 2008). See also *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637, 643 (7th Cir. 2012) (noting FCC’s decision not to exempt debt collection industry and applying statute to debt collector).

³⁰⁵ *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

³⁰⁶ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14115 (F.C.C. 2003).

³⁰⁷ 47 U.S.C. § 227(b)(1)(A). See also 47 U.S.C. § 227(b)(2)(C) (allowing the FCC to exempt calls to cell phones where the called party is not charged to the call).

³⁰⁸ 47 C.F.R. § 64.1200(a)(1). See also *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1374 (S.D. Fla. 2011) (established business relationship insufficient).

³⁰⁹ 47 C.F.R. § 64.1200(a)(2).

Debt collectors and creditors that “capture” incoming numbers or obtain them through skip-tracing do not thereby obtain consent allowing them to use automated equipment to call such numbers.³¹⁰ On the other hand, in a 2008 declaratory ruling, the FCC held that a consumer provides “express consent” to receive debt collection calls on a cell phone by providing the cell phone number to the creditor in connection with the transaction that resulted in the debt.³¹¹ This interpretation appears to be contrary to the statute, as it treats what at most might be implied consent as the “express consent” that the statute requires.³¹² The CFPB should issue a regulation that says that providing express consent to a creditor does not provide consent to a debt collector.

In February 2012, the FCC revised its TCPA regulations, effective October 16, 2013, to specify that express consent must be in writing, and include the consumer’s signature and a designated telephone number for receiving such calls and messages.³¹³ However, in its order it specified that these requirements applied only to telemarketing calls.³¹⁴ It structured the regulation to provide that either written or oral consent is sufficient for autodialed or prerecorded debt collection calls to cell phones.³¹⁵

Most courts hold that consent may be revoked by the called party. Two cases say that consent once given cannot be revoked,³¹⁶ but the notion that consent cannot be revoked is inconsistent with the ordinary legal concept of “consent.”³¹⁷ In 2012, the FCC confirmed that consent to receive autodialed calls can be revoked.³¹⁸ Some cases require written notice in accordance with the Fair Debt Collection Practices Act’s “cease communication” provision³¹⁹ to revoke consent to receive

³¹⁰ Meyer v. Portfolio Recovery Assocs., L.L.C., 707 F.3d 1036 (9th Cir. 2012).

³¹¹ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, ¶¶ 9-10 (F.C.C. 2008). See also Johnson v. Credit Prot. Ass’n, L.P., 2012 WL 5875605 (S.D. Fla. Nov. 20, 2012) (providing cell phone number to creditor at outset of transaction is prior express consent); Conover v. Byl Collections Servs., L.L.C., 2012 WL 4363740, at *6 (W.D.N.Y. Sept. 21, 2012) (providing cell phone number on credit application constitutes prior consent to be contacted at the number regarding the debt).

³¹² FCC regulations are subject to direct review by the U.S. Court of Appeals for the District of Columbia Circuit for thirty days, after which they are incontestable, the only issue being whether they were violated. CE Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443 (7th Cir. 2010) (relying on the Administrative Orders Review Act or Hobbs Act, 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)).

³¹³ 47 C.F.R. § 64.1200(f)(8), as amended by, *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, n.68 (F.C.C. 2012).

³¹⁴ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, ¶ 28 (F.C.C. 2012).

³¹⁵ See 47 C.F.R. § 64.1200(a)(2), effective Oct. 16, 2012 (requiring express written consent for prerecorded or autodialed advertising and telemarketing calls to cell phones).

³¹⁶ Gager v. Dell Fin. Servs., L.L.C., 2012 WL 1942079 (M.D. Pa. May 29, 2012); Saunders v. NCO Fin. Sys., Inc., 910 F. Supp. 2d 464 (E.D.N.Y. 2012).

³¹⁷ See Adamcik v. Credit Control Servs., Inc., 832 F. Supp. 2d 744 (W.D. Tex. 2011) (holding that consent is revocable and relying on the common-law meaning of “consent”); Restatement (Second) of Torts, § 892A, cmt. i (“The consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct. This unwillingness may be manifested to the actor by any words or conduct inconsistent with continued consent or it may be apparent from the terms of the original consent itself, as when a specified time limit expires”).

³¹⁸ *In re* Rules & Regulations Implementing the TCPA of 1991, 27 F.C.C. Rcd. 15391, at ¶ 7 (F.C.C. 2012) (confirming that consent to receive autodialed calls may be revoked, and finding that prior consent “can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer”).

³¹⁹ 15 U.S.C. § 1692c(c).

debt collection calls.³²⁰ However, the better view is that revocation may be oral,³²¹ and a 2012 FCC ruling also suggests that revocation can be oral.³²²

Consent must be given by the person who presently subscribes to or uses the cell phone.³²³ If the debt collector places automated calls to a cell number that has been reassigned to someone other than the debtor, consent given by the debtor is not effective.³²⁴

Impact on Low Income Consumers of Charges. Many residential wireless products, especially those used by payment troubled and poor households, still employ the “per minute of use” billing structure. Wireless consumers are often billed for incoming calls in addition to outgoing calls. As a result, these consumers are extremely sensitive to incoming calls – especially calls that they do not want.

Wireless bill shock to consumers is caused by unexpected increases in their phone bills.³²⁵ In a recent examination of the problem, the FCC found that one of the causes of bill shock is when the limits on a consumer’s voice, text or data plan have been exceeded, which in turn causes higher charges at a per-minute rate.³²⁶ Lower-income wireless consumers are especially sensitive to bill shock – as one extra-large cell phone bill can wreck their monthly budget. One monthly budget exceeded in a low-income household can cause negative repercussions for many subsequent months.

Many wireless consumers have a type of post-paid cell usage plan in which the minutes are paid for after they are used. However, prepaid wireless plans have been growing in popularity.³²⁷ The wireless marketplace targets prepaid, low-end phone service products to low-income consumers and consumers with poor credit profiles.³²⁸ The low-end prepaid wireless products provide a set number of minutes, and often texts, for a set price. Each call made or received results in a charge that uses up this limited number of minutes. The consumer must purchase a package of new minutes periodically to maintain service.

³²⁰ Moore v. Firstsource Advantage, L.L.C., 2011 WL 4345703, at *30-31 (W.D.N.Y. Sept. 15, 2011); Moltz v. Firstsource Advantage, L.L.C., 2011 WL 3360010, at *5 (W.D.N.Y. Aug. 3, 2011); Cunningham v. Credit Mgmt., L.P., 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010), *adopted by* 2010 WL 3791049 (N.D. Tex. Sept. 27, 2010); Starkey v. Firstsource Advantage, L.L.C., 2010 WL 2541756, at *6 (W.D.N.Y. Mar. 11, 2010), *adopted by* 2010 WL 2541731 (W.D.N.Y. June 21, 2010).

³²¹ Osorio v. State Farm Bank, 859 F. Supp. 2d 1326 (S.D. Fla. 2012); Adamcik v. Credit Control Servs., Inc., 832 F. Supp. 2d 744 (W.D. Tex. 2011); Gutierrez v. Barclays Group, 2011 WL 579238, at *4 (S.D. Cal. Feb. 9, 2011).

³²² *In re* Rules & Regulations Implementing the TCPA of 1991, 27 F.C.C. Rcd. 15391, at ¶ 13 (F.C.C. 2012).

³²³ Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637 (7th Cir. 2012). *But cf.* Osorio v. State Farm Bank, 859 F. Supp. 2d 1326 (S.D. Fla. 2012) (finding that mother of plaintiff’s child with whom plaintiff was living could provide express consent under TCPA on plaintiff’s behalf, where mother and plaintiff subscribed together on the same cellular family plan).

³²⁴ Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637 (7th Cir. 2012).

³²⁵ See FCC Consumer and Governmental Affairs Bureau, White Paper on Bill Shock (Oct.13, 2013); see also GAO,

³²⁶ Federal Communications Commission, Consumer and Governmental Affairs Bureau White Paper on Bill Shock (October 13, 2010) at p.3.

³²⁷ See Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.98. ; See Fifteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. June 27, 2011), FCC 11-103 at para.167.

³²⁸ See Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.159.

Over 16 million low-income households maintain essential telephone service through the federal Lifeline Assistance program.³²⁹ The low-end prepaid wireless plans are a popular product for the majority of these assisted consumers. Over three-quarters of Lifeline participants choose prepaid wireless Lifeline program, which most commonly consists of 250 minutes a month for the entire household.³³⁰

Consumer advocates have argued that 250 minutes a month is not sufficient to meet the basic monthly communication needs of a household. Any policy or practice that would open the door to depletion of these scarce subsidized minutes, allowing the receipt of unwanted calls, will further deplete the scarce minutes available for the entire Lifeline household.³³¹ Lifeline households use their Lifeline phones to find work or a doctor or access necessary services. Loss of subsidized minutes will also jeopardize health and safety, for example the ability to talk to a nurse or doctor or for a school to call a parent about a sick child.

Q117: Should proposed rules presume that consumers incur charges for calls and text messages made to their mobile phones? Should the failure to use free-to-end-user services when using technologies that would otherwise impose costs on the consumer be prohibited? What would be the costs and challenges for collectors of implementing such requirements?

Response Q117: The TCPA prohibits autodialed calls to cell phones and where the called party will incur a charge for the call unless the consumer has provided prior express consent. The CFPB has no jurisdiction to undermine this protection. We assume, therefore, that this question is intended to focus on hand-dialed calls and text messages to cell phones.

In this context, the CFPB's rules should presume that consumers will incur charges for calls and texts. Please see our response to Q116 for further detail.

Q118: Should proposed rules require collectors to obtain consent before contacting consumers using a medium that might result in charges to the consumer, such as text messaging or mobile calls? If so, what sort of consent should be required and how should collectors be required to obtain it?

Response Q118: As noted in our response to Q117, the TCPA already requires prior express consent for autodialed (and artificial voice calls) where the call would result in a charge to the called party. (The same protection applies to any call to a cell phone, whether or not the called party is charged for the call). An abusive aspect of autodialed calls that justifies their special regulation is the potential to unleash an enormous volume of calls, a problem that is less of a factor with hand-dialed calls. But a hand-dialed call to a prepaid cell phone causes the called party to incur exactly the same charge as an autodialed call. This is a particular problem in the area of debt collection, since debtors are likely to be struggling low-income individuals who are using prepaid or Lifeline cell phones as their only means of communication. See our response to Q117.

³²⁹ See 2012 Annual Report, Universal Services Administrative Company at 9.

³³⁰ See <http://www.fcc.gov/guides/lifeline-and-link-affordable-telephone-service-income-eligible-consumers>; see also *Low Income Support Mechanism Wireless Disbursement as a Percentage of Total Disbursements 3Q2013*, Universal Service Administrative Company.

³³¹ Lifeline is limited to one-per-household. See 47 C.F.R. § 54.409(c).

We strongly urge the CFPB to adopt rules requiring prior express consent for *any* debt collection call that would cause the consumer to incur a charge for the call. The CFPB should require consent to be written, and should make it clear that it is revocable.

Q119: Should proposed rules impose other limits beyond consent on communications via media that result in charges to the consumer and if so, what limits? For example, would it be feasible to require in proposed rules that consumers have the right to opt out of communications via certain media to avoid the possibility of being charged? If so, should initial communications via such media be required under proposed rules to include a disclosure of the consumer's right to opt out? Should proposed rules include limits on the frequency with which collectors use such media?

Response Q119: Consumers already have the right under the TCPA to decline to provide consent to receive autodialed or artificial voice communications for which they might be charged. In 2012, the FCC confirmed that consent to receive autodialed calls can be revoked.³³² A 2012 FCC ruling also suggests that revocation can be oral.³³³

For calls that are hand-dialed rather than autodialed and that do not include an artificial voice message, the TCPA does not require prior express consent. We urge the CFPB to impose such a requirement for hand-dialed debt collection calls and text messages that will cause the called party to incur a charge. The CFPB should expressly state that consent may be revoked.

Our position is that the CFPB should require prior express consent, rather than merely allowing consumers to opt out of receiving calls and text messages that will cause them to incur a charge. Because of the TCPA, collectors already have to have systems for determining whether a consumer has provided prior express consent to receive autodialed or artificial voice calls, so it would make sense to build on those systems rather than requiring collectors to create new ones. If, however, the CFPB merely allows consumers to opt out, it should require collectors to disclose this right in all calls or text messages whenever there is a possibility that the consumer might be charged for the call.

We also urge the CFPB to restrict the number of calls that collectors can make to a consumer who will incur a charge for receiving the call. Under either a prior express consent requirement or an opt-out rule, some consumers will allow collectors to call them. The CFPB should place limits on the number of calls so that collectors cannot drain funds from a consumer's prepaid cell phone plan by making repeated calls. In response to Q92, *supra*, we have proposed general limits on the frequency of collection calls. For calls that will cause the called party to incur a charge, the limit should be stricter—no more than one call, whether answered or unanswered, per week.

³³² *In re* Rules & Regulations Implementing the TCPA of 1991, 27 F.C.C. Rcd. 15391, at ¶ 7 (F.C.C. 2012) (confirming that consent to receive autodialed calls may be revoked, and finding that prior consent “can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer”). *See also* Gager v. Dell Fin. Servs., LLC, 727 F.3d 265 (3d Cir. 2013); Adamcik v. Credit Control Servs., Inc., 832 F. Supp. 2d 744 (W.D. Tex. 2011) (holding that consent is revocable and relying on the common-law meaning of “consent”); Restatement (Second) of Torts, § 892A, cmt. i (“The consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct. This unwillingness may be manifested to the actor by any words or conduct inconsistent with continued consent or it may be apparent from the terms of the original consent itself, as when a specified time limit expires”). *But see* Saunders v. NCO Fin. Sys., Inc., 910 F. Supp. 2d 464 (E.D.N.Y. 2012).

³³³ *In re* Rules & Regulations Implementing the TCPA of 1991, 27 F.C.C. Rcd. 15391, at ¶ 13 (F.C.C. 2012).

Q119 Recommendation: The CFPB should adopt a rule prohibiting debt collectors from sending hand-dialed calls or text messages to consumers where the consumer will incur a charge for the call, unless the consumer has provided prior express consent. The consumer should have the explicit right to revoke consent. The CFPB should also limit such calls, whether answered or unanswered, to one per week.

Q120: FDCPA section 810 states, “If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer’s direction.” Should the Bureau clarify or supplement this prohibition in proposed rules? If so, how? In addition, what information or data support or do not support the conclusion that conduct that violates FDCPA section 810 is unfair or abusive conduct under the Dodd-Frank Act? Why or why not?

Q120 Response and Recommendation: Yes, it would be helpful for the CFPB to clarify that section 810 requires the collector to follow the consumer’s instructions about the debt or debts to which a payment should be applied. For example, the consumer may instruct the collector to apply a payment to a secured debt over an unsecured debt. Moreover, it would be helpful for regulations to clarify that even when there is only one debt, if part of the debt is disputed the collector may not apply a payment to the disputed part of the debt.³³⁴ Collectors should also be required to give consumers notice of the rights available under this section if they are collecting on multiple debts. The collector should be required to wait for instructions by the consumer after receipt of the notice.

Q120 Recommendation: The CFPB should require collectors who are collecting several debts from the same consumer to follow the consumer’s instructions about the debt or debts to which a payment should be applied.

Q. 121: Should proposed rules require that payments be applied according to specific standards in the absence of an express consumer request or require a collector to identify the manner in which a payment will be applied? Should proposed rules require that the payment be applied on or as of the date received or at some other time?

Response Q121: If there is an applicable contract that specifies how payments should be applied, presumably the rules in the contract would govern. Otherwise it is a matter of state law. Payments should always be applied as of the date received, unless the contract requires otherwise (such as for mortgage loans written on the Fannie Mae/Freddie Mac Uniform Instruments which commonly require that payments are applied as of the date the payments are *scheduled* rather than on the date the payments are made).³³⁵

Q122: Many consumers complain that debt collectors seek to recover on debts that consumers have already paid and therefore no longer owe. Other consumers assert that debt collectors promise that they will treat partial payments on debts as payment in full, but then collectors subsequently seek to recover the remaining balance on these debts. To what extent do debt collectors currently provide

³³⁴ Cf. Dowling v. Litton Loan Serv., L.P., 2006 WL 3498292 (S.D. Ohio Dec. 1, 2006).

³³⁵ The language in the Multistate Fixed Rate Note, Paragraph 3, is “Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal.” See, <http://www.freddiemac.com/uniform/unifnotes.html>.

consumers with a receipt or other documentation showing the amount they have paid and whether it is or is not payment in full? Should such documentation be required under proposed rules? Are there any State or local laws that are useful models to consider?

Response Q122: It is very rare that receipts are provided by debt collectors, and this should be corrected by CFPB rules. Written receipts should always be required, to protect consumers against the abuses cited in this question. The receipts should be required to state the amount paid on the date the receipt is provided, the total amount paid to that date, and the remaining amount due. If interest is accruing on the debt, the CFPB should require the receipt to state the applicable interest rate and the rules for applying that interest rate.

Q122 Recommendation: The CFPB should require debt collectors to provide receipts for payments.

Q123: Should the Bureau's proposed rules impose standards for the substantiation of common claims related to debt collection? If so, what types of claims should be covered and what level of support should be required for each such claim? What would be the costs and benefits to consumers, collectors, and others of requiring different levels of substantiation? Would a case-by-case approach to substantiating claims instead be preferable? Why or why not?

Response Q123: We have articulated the need for these standards in response to the questions on the applicable rules for debt buyers, in Q3, Q5 and Q7. We think the same standards should apply to all collectors regarding what information they should have before initiating collection activities. The CFPB should require that before any litigation is either threatened or initiated, the party bringing the case must have on hand authentic business records and documents and reliable information to prove that it has the right to bring the case against the consumer for amount claimed.

As we recommended in response to Q7, no collection action should be initiated unless the collector has the necessary proof to show that it has the right to bring the lawsuit collecting on the debt. There should be one standard for the documentation necessary for a collector (or creditor or debt buyer, to the extent they are different) to *begin* collection activities. Another standard, a higher one, should be required before legal actions are initiated on the debt: before legal action is initiated the plaintiff/collector should be required to have in its possession sufficient information to prove to the court that it is the real party in interest, with the legal right to enforce the debt.

Q124: Should the information or documentation substantiating a claim depend upon the type of debt to which the claim relates (e.g., mortgage, credit card, auto, medical)? Is it more costly or beneficial to substantiate claims regarding certain types of debts than others?

Response Q124: The same general standards should apply to all types of debt. The specific items needed to substantiate each of these different types of debt should obviously be adapted to what is necessary to show the terms of the original credit, or events leading to the incurrence of the debt (as in the case of medical debt), along with sufficient information to satisfy the requirements for determining whether the debt is time-barred. Please also see our Response Q133 for specific recommendations on dealing with time-barred debt.

Q125: Should the information or documentation expected to substantiate a claim depend on the stage in the collection process (e.g., initial communication, subsequent communications, litigation)?

and if so, why?

Response Q125: Collectors (whether first or third party) should always be required to have a certain amount of documentation before they initiate collection activities. (See our responses to Q3 and Q5 for the specifics of this documentation). Before a collection lawsuit is threatened or filed, a collector should be required to have admissible evidence of all the key points that would have to be proven in a contested case.

The middle of this process – what information is necessary for a collector have – or to produce – when there has been a dispute or a verification request, is more subtle. This is because it depends on what the substance of the dispute or verification requests turns out to be. A collector should be able to resolve most disputes by providing the information that it will be required to have before initiating the collection activity. (See our responses to Q3 and Q5). However, in some situations, such as medical debt, more information will be necessary. For example, where the verification request relates to the medical procedures for which the consumer is being charged or to the extent to which health insurance is responsible for a bill, it will be necessary for the collector to go back to the initial provider for that level of detail.

Q126: What information do debt collectors use and should they use to support claims of indebtedness:

- prior to sending a validation notice;
- after a consumer has disputed the debt;
- after a consumer has disputed the debt and it has been verified; and
- prior to commencing a lawsuit to enforce a debt?

Response Q126: This answer will summarize the information provided in response to previous questions.

Prior to sending a validation notice. Before initiating collection activities, collectors should be required to have substantial information about both the debt itself and the prior collection efforts to collect the debt. The information that should be required about the debt is set out in response to Q3. The information that should be required about the collection efforts related to the debt is set out in response to Q5.

After the consumer has disputed the debt. The collector should gather the information necessary to address the consumer’s specific dispute. See our responses to Q33, Q39, and Q125.

After a consumer has disputed a debt and it has been verified. Collectors should be required to provide much better information in response to a dispute. Please see our responses to Q33 and Q39 for more information on this issue. They should be required to maintain this information and pass it on to any future buyer or assignee of the debt.

Prior to commencing a lawsuit to enforce a debt. Before a collector is permitted to threaten or initiate legal action to collect a debt, the collector must have on hand sufficient information to show that it has the right to initiate such action, and that it has the right to receive payment of the debt. Please see our specific recommendation on this subject in response to Q7.

Q127: In July 2013, the Bureau released a compliance bulletin explaining that representations about the effect of debt payments on credit reports, credit scores, and creditworthiness have the potential to be deceptive under the FDCPA and the Dodd-Frank Act. What information are debt collectors using to support the following claims:

- the consumer's credit score will improve if the consumer pays the debt;
- payment of the debt will result in the collection trade line being removed from a consumer's credit report;
- the consumer's creditworthiness will improve if the consumer pays the debt; and the collector will furnish information about a consumer's debt to a CRA?

Response Q127: It is not likely that collectors can produce any reliable data to support these claims. In July 2013, the Bureau released a compliance bulletin explaining that representations about the effect of debt payments on credit reports, credit scores, and creditworthiness have the potential to be deceptive under the FDCPA and the Dodd-Frank Act. We commend the CFPB for issuing this bulletin. However, we urge the CFPB to go further and make sure that consumers are fully aware of the very limited credit reporting consequences of paying debts in collection.

Most importantly, consumers should be informed that paying off a debt in collection will not result in its removal from a credit report, unless the consumer has specifically negotiated to delete the tradeline. Furthermore, it may or may not necessarily improve the consumer's credit score, especially if the account is older.³³⁶ In fact, there are some indications that payment of an old collection item might even cause a credit score to decrease. Paying off a collection account will help a Vantage score, since Vantage does not consider paid collection items in its scores. However, FICO is still the dominant score, with 90% of the market share.

Unfortunately, debt collectors sometimes take advantage of consumers' ignorance about the impact of paying off a collection account on their credit reports and scores. The CFPB should require that collectors and creditors make certain affirmative disclosures about this impact, much like the CFPB required in its consent order against American Express that Amex make disclosures that obsolete debt cannot be reported to a CRA.

The CFPB should require debt collectors and buyers to make the following disclosures:

- If a debt is already reported on the consumer's credit report:

Paying this debt will not remove it from your credit report, but will only show that the account has been paid.

Paying this debt could, but might not necessarily, improve your credit record or score.

- If a debt is not obsolete, does not show up on a credit report, and the creditor or collector does not have the current ability to report it because it is not currently a furnisher to the NCRAs:

³³⁶ FICO, Understanding Your FICO Score 8 (November 2011), available at www.myfico.com/Downloads/Files/myFICO_UYES_Booklet.pdf. See also Experian, *Ask Max: Credit Advice--Paying Collection Accounts in Full Can Help, But Might Not Improve Credit Scores*, Mar. 22, 2006, available at www.experian.com/ask_max/max032206d.html (last visited Oct. 2, 2013).

This debt does not show up on your credit report. Paying this debt will not help your credit record or score.

- If a debt is obsolete:

This debt is too old to be included in your credit report. Paying this debt will not help your credit record or score.

Finally, we believe that it is perfectly legal, as well as beneficial to consumers, for a debt collector to agree to remove a collection item from a credit report in exchange for the consumer's payment. Contrary to the industry's assertions, neither section 1681s-2(a)(1) nor any other FCRA provision provides any support for the idea that as a matter of law lenders cannot delete accurate information. This is because, as the industry has repeatedly noted,³³⁷ the act of furnishing information to a CRA is completely voluntary. The FCRA imposes no requirement or mandate that a furnisher provide any information to a CRA.³³⁸ Confirming this conclusion is the fact that there is no liability for omitting information unless the omission renders already-existing information in a credit report misleading. The FTC has stated that: "A CRA is not required to . . . add information about accounts not reflected in an existing file."³³⁹ If a CRA is under no obligation to include the existence of a particular account or maintain it in a consumer's credit report, the furnisher of that account is under no obligation to report its existence or to maintain information about that account in the consumer's credit report.

Q127 Recommendation: The CFPB should require debt collectors to make specific disclosures about the limited or non-existence improvement in a consumer's credit score that will result from payment of an obsolete debt.

Q128: What services are provided to debt collectors in connection with the collection of debts and who provides them? Are the types of services the same for first-party and third-party collectors? What information or data support or do not support the conclusion that such services provided are material to the collection of debts?

Q129: Are there specific acts or practices by service providers that should be specified in proposed rules as constituting unfair, deceptive, or abusive acts or practices in connection with the collection of debts? How prevalent are such acts or practices?

Q130: Who provides substantial assistance to debt collectors? Is the assistance provided to first-party collectors the same as the assistance provided to third-party collectors? What measure should be used to assess whether such services provided are material to the collection of debts?

³³⁷ See, e.g., Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H. Comm. on Fin. Serv., 110 Congr. 50 (2007) (written statement of Stuart Pratt, President and CEO, Consumer Data Industry Association) ("not a single one of the more than 18,000 data furnishers has to provide a single record of data to our members").

³³⁸ See Key Dimensions Report at 15 ("Reporting to credit bureaus and other consumer reporting agencies by creditors is voluntary and historically has been. Not all creditors report information about their borrowers. Some creditors report information about users of some of their credit products, but not others.")

³³⁹ FTC, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* § 611(a) item 3B.

Q131: In what types of circumstances, if any, are persons knowingly or recklessly providing substantial assistance to collectors who are a “covered person” or “service provider” as defined in the Dodd-Frank Act with respect to acts or practices by the covered person or service provider that violate section 1031? How prevalent is conduct by such persons?

Response Qs129-131: We do not have detailed information on these questions, but we recommend that the CFPB investigate the practices of companies that obtain and sell location information about consumers and that provide area code and caller ID spoofing technology to collectors. Please also see our response to Q111 regarding remotely created checks and other payment methods, an area in which other entities may be assisting collectors.

Part X. Dealing with Time-Barred Debt (Qs 132-142)

This section provides multiple recommendations to the CFPB to deal with old debts. We also direct the CFPB’s attention to our comments and recommendations on a related question, collectors’ improper practice of “re-aging” time-barred debt. Those are set forth in our response to Q151.

Q132: Is there any data or other information that demonstrate or indicate what consumers believe may occur when they do not pay debts in response to collection attempts? Does it show that consumers believe that being sued is a possibility?

Response Q132: We do not know of statistics or studies on this question. However, we know from experience that consumers who are subjected to debt collection attempts generally believe that they will be sued. Many who have merely received a dun believe that they have already been sued.

Q133: Should the Bureau include in proposed rules a requirement that debt collectors disclose when a debt is time-barred and that the debt collector cannot lawfully sue to collect such a debt? Should the disclosure be made in the validation notice? Should it be made at other times and in other contexts? Should such a rule be limited to situations in which the collector knows or should have known that the debt is time-barred? Is there another standard that the Bureau should consider?

Response Q133: The issue of how to deal with debt that is time-barred by statutes of limitations must begin with the recognition that most debtors are not deliberately refusing to pay. Rather, most debtors who owe money are unable to pay. As Congress emphasized when passing the Fair Debt Collection Practices Act: “all major studies [show that] *the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.*”³⁴⁰

Regulation of debt collection should be premised on the recognition that in many instances paying old debts will cause difficulty -- sometimes significant difficulty -- for the debtor. Especially for low-income consumers, paying these debts means that other debts or necessities like food, housing, transportation, health care, or utilities go unpaid.

³⁴⁰ Senate Report No. 95-382 on the Fair Debt Collection Practices Act, Report of the Committee on Banking, Housing and Urban Affairs, U.S. Senate, Aug. 2, 1977 (emphasis added).

Additionally, the FDCPA is premised on providing protections for the least sophisticated consumer. Its protections must be geared for the least sophisticated consumer – not for average consumers. The U.S. Court of Appeals for the Eleventh Circuit in *Jeter v. Credit Bureau, Inc.*³⁴¹ relied heavily on Federal Trade Commission Act cases in describing the least sophisticated consumer standard.

The law was not “made for the protection of experts, but for the public--that vast multitude which includes the ignorant, the unthinking, and the credulous,” and the “fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.”³⁴²

The use of this standard is supported by other federal circuit courts.³⁴³ For example, the Second Circuit described the approach slightly differently but to the same effect:

The Act is aimed at protecting consumers in general from abusive debt collection practices and the test is how the least sophisticated consumer--one not having the astuteness of a “Philadelphia lawyer” or even the sophistication of the average, every day, common consumer--understands the notice he or she receives. This least-sophisticated-consumer standard best effectuates the Act’s purpose of *limiting the “suffering and anguish” often inflicted by independent debt collectors.*³⁴⁴

The Seventh Circuit further amplified how the standard should be applied:

Literally, *the least sophisticated consumer is not merely “below average,” he is the very last rung on the sophistication ladder.* Stated another way, he is the single most unsophisticated consumer who exists. *Even assuming that he would be willing to do so, such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion.* Courts which use the “least sophisticated consumer” test, however, routinely blend in the element of reasonableness.³⁴⁵

The context of the debt collection activity itself adds a further element to be considered when evaluating how a certain debt collection activity affects the least sophisticated consumer:

However, we cannot simply apply a “least sophisticated consumer” standard. Whether a consumer is more or less likely to be harassed, oppressed, or abused by a certain debt collection practices does not relate solely to the consumer’s relative sophistication; rather, *such susceptibility might be affected by other circumstances of the consumer*

³⁴¹ 760 F.2d 1168 (11th Cir. 1985).

³⁴² 760 F.2d 1168, 1173 (11th Cir. 1985) (citations omitted), *quoting* Charles of the Ritz Distribs. Corp. v. Federal Trade Comm’n, 143 F.2d 676, 679 (2d Cir. 1944). *See also* Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993) (“In recent years, as courts have incorporated the jurisprudence of the FTC Act into their interpretations of the FDCPA, the language of Exposition Press has gradually evolved into what we now know as the least-sophisticated-consumer standard.”); Federal Trade Comm’n v. Raladan Co., 316 U.S. 149, 151-152, 62 S. Ct. 966, 968-969, 86 L. Ed. 1336 (1942); Exposition Press, Inc. v. Federal Trade Comm’n, 295 F.2d 869 (2d Cir. 1961).

³⁴³ Baker v. G.C. Servs. Corp., 677 F.2d 775, 778 (9th Cir. 1982); Wright v. Credit Bureau of Ga., Inc., 548 F. Supp. 591, 599 (N.D. Ga. 1982), *modified on other grounds*, 555 F. Supp. 1005 (N.D. Ga. 1983); Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 870 (D.N.D. 1981).

³⁴⁴ Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996) (emphasis added).

³⁴⁵ Gammon v. GC Servs., 27 F.3d 1254, 1257 (7th Cir. 1994) (emphasis added).

or by the relationship between the consumer and the debt collection agency. For example, a very intelligent and sophisticated consumer might well be susceptible to harassment, oppression, or abuse because he is poor (i.e., has limited access to the legal system), is on probation, or is otherwise at the mercy of a power relationship.³⁴⁶

The Seventh Circuit further elaborated on the importance of context in a later case: “if the debt collector has targeted a particularly vulnerable group--say, consumers who he knows have a poor command of English--the benchmark for deciding whether the communication is deceptive would be the competence of the substantial bottom fraction of that group.”³⁴⁷

Given the least sophisticated consumer approach, we challenge the CFPB to ask how helpful any disclosure relating to a time-barred debt to a consumer can be that seeks to apprise the consumer of a variety of fairly complex legal matters. Each of these complex legal issues requires the consumer not only to have the ability to evaluate and understand the information, but also to weigh the risks posed from a variety of different courses of actions:

- First, the consumer is told that the debt *may* – which means that it may not – be barred by the statute of limitations. This requires the consumer to understand what a statute of limitations is – that it means that if she is sued, and if she is able to find an attorney to defend her, that she will have a defense to the lawsuit such that the case will be dismissed.
- This information also requires her to evaluate what the “may” means – and whether the fact that the collector said that means that there will really be this defense to the lawsuit. So is the consumer to make an independent evaluation of whether the debt is time-barred?
- The consumer is likely to be confused about this ambivalent information, which is provided at the same time the collector is requesting payment of this debt. Most consumers would think to themselves – “why are they dunning me if I cannot be sued on this debt?” Most will not understand the subtle distinction between being able to be sued and having a defense to a collection action brought in the courts, and the fact that the collector is still demanding payment.
- Even if expressly told in a disclosure that the payment of any amount will revive the debt, it is highly doubtful that consumers will be able to appreciate that by paying something they make themselves legally liable for paying off the whole debt. Except to lawyers – who go through law school to learn to think this way – this is a counterintuitive concept.
- Add to these confusing messages the issue that most low-income people face on a regular basis: balancing too much debt with insufficient income to meet that debt.

Altogether, it should be fairly obvious that there is no reasonable way that the least sophisticated consumer (the consumer who is not merely “below average,” but on the very last rung on the sophistication ladder³⁴⁸) is going to be able to make reasonable use of a disclosure with this information in it.

For these reasons, the CFPB should codify cases holding that it is a violation of the FDCPA to file a lawsuit, or threaten to do so, for old debts that are time-barred. Secondly, collectors should be required to make the determination that a debt is time-barred. There should be no caveats, such as

³⁴⁶ Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1179 (11th Cir. 1985) (emphasis added).

³⁴⁷ Evory v. Nat'l Action Fin. Servs., Inc., 505 F.3d 769, 774 (7th Cir. 2007).

³⁴⁸ Gammon v. GC Servs., 27 F.3d 1254, 1257 (7th Cir. 1994).

“this debt *may be* time-barred.” Collectors are already making this determination to comply with the judicial restraint on filing suit on time-barred debt. They should also be making it for all other collection attempts.

But the CFPB should go further and prohibit all efforts to collect old debt that is beyond the statute of limitations. The collector could be permitted to accept a voluntary, unsolicited payment, but no affirmative collection activities should be permitted. Lost records, faded memories, and abusive collection practices plague older debts even if collection efforts are outside of court. Older debts can follow consumers to their graves and get passed down to fringe debt collectors who are less likely to follow the law and more likely to engage in abusive tactics. This prohibition should apply once a debt is time-barred, regardless of any later payment or acknowledgment by a consumer or a revised determination by a subsequent collector.

There is ample evidence to support a complete ban on all collection of time-barred debt. Indeed, in at least one state – North Carolina – this activity has been banned altogether for collection actions on behalf of debt buyers.³⁴⁹ In Wisconsin, the rule since at least 1945 has been that the state statute of limitations extinguishes the debt and it cannot be revived. As a result, even a request for a payment on a time-barred debt violates the FDCPA and the Wisconsin Consumer Act.³⁵⁰

If the CFPB decides to permit collectors to engage in out-of-court efforts to collect time-barred debts, it should permit collection activities only under strict rules:

- a. Collectors themselves must determine that the statute of limitations has run for the debt and that the debt is time-barred before initiating any collection activity
- b. Collectors must disclose to the consumer in any communication (written or oral, if oral contacts are permitted) that the debt is time-barred.
- c. Any reports to consumer reporting agencies must accurately reflect the time-barred nature of the debt, and no reporting should be permitted of debts that are more than seven years old.
- d. Once a debt has become or been determined to be time-barred, it must remain time-barred, and it cannot be revived by payments on the debt, consumer acknowledgement, or a revised determination by a subsequent debt collector.

The last item is particularly critical. Any effort to seek a payment on a time-barred debt should be viewed as *per se* unfair and abusive if it could expose the consumer to a previously barred lawsuit.

The notice to the consumer must be in plain, clear language, such as the following:

Please Note –

- We CANNOT SUE YOU to collect this debt, because it is too old.
- We are providing information about the debt in case you wish to pay it.
- [Include only if the CFPB does not prohibit the revival of a time-barred debt.] But IF YOU MAKE ANY PAYMENTS to us on this debt, OR IF YOU AGREE that you owe us this debt, WE MAY BE ABLE TO SUE YOU for the entire debt.

³⁴⁹ N.C. Gen.Stat. § 58-70-115(4).

³⁵⁰ Klewer v. Cavalry Investments, LLC., 2002 WL 2018830 (W.D.Wis. 2002).

However, we reiterate our view that disclosures will not solve the abuses associated with time-barred debt, as many consumers will overlook or not understand such a notice. The better course is to prohibit any collection of time-barred debt, or at most to limit collection activities to written materials that can be more easily monitored and regulated.

For either the disclosure approach or a prohibition, an underlying premise is that the debt collector must make a determination as to whether a debt is time-barred. Determining whether the statute has run can be a complicated legal issue.³⁵¹ For that reason alone, it makes far more sense for the collector, rather than the “least sophisticated consumer,” to make this determination. Moreover, *debt collectors are already making this determination* – because the determination of whether the debt is time-barred dictates whether collection efforts will include the threat of suit. It would be absurd to put this onus on the consumer.

A related issue is the effect on a consumer’s credit report of paying an old debt. Under the FCRA, an obsolete debt must be removed from a consumer’s credit report whether or not it is barred by the statute of limitations. Collectors typically misrepresent – by commission or at least omission – the effect of paying these debts during the dunning process. We commend the CFPB for its July 2013 Bulletin warning collectors against making potentially deceptive claims about the impact that paying a debt in collection may have on credit reports and credit scores. However, we believe that the CFPB should go further with respect to obsolete debts by requiring collectors and creditors to make a disclosure similar to the one that the Bureau required in its October 2012 consent decree against American Express when that creditor is collecting obsolete debt.³⁵² We have revised the language from the American Express consent decree to make it simpler for less-sophisticated consumers. The collector or creditor should be required to disclose:

This debt is too old to be included in your credit report. Paying this debt will not help your credit record or score.

Q133 Recommendation: For the reasons explained above, we urge the CFPB to prohibit all efforts to collect time-barred debts. It should prohibit collectors from treating acknowledgment of or payment on a time-barred debt as reviving it. In addition, if a creditor or debt collector is seeking to collect a debt that cannot be reported because it is obsolete as defined by the FCRA, the CFPB should require the creditor or collector to disclose this fact in simple language.

Q134: The FTC in its *Asset Acceptance* consent order and several States by statute or regulation have mandated specific language disclosing that consumers cannot be lawfully sued if they do not pay time-barred debts. Please identify what language would be most effective in conveying to consumers that the collector cannot lawfully sue to collect the debt, and why.

Response Q134: As set forth in our response to Q133, the CFPB should ban collection activity on time-barred debts rather than taking a disclosure approach. If, however, it takes a disclosure

³⁵¹ See National Consumer Law Center, *Collection Actions* § 3.5 (2d ed. 2011 and Supp.).

³⁵² CFPB/FDIC Consent Order with American Express subsidiaries (*In re: American Express Centurion Bank*, File No. 2012-CFPB-0002; *In re: American Express Bank, FSB*, File No. 2012-CFPB-0003; and *In re: American Express Travel Related Services Co. Inc.*, File No. 2012-CFPB-0004, all issued Oct. 1, 2012), available at www.consumerfinance.gov/pressreleases/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices.

approach, it should require a very simple and straightforward disclosure. The disclosure required in the *Asset Acceptance* case appears to have been of no benefit to consumers. This is evident from the fact that Asset Acceptance says that the disclosure will not affect its bottom line at all.³⁵³

How much overall impact do you expect from the Consent Decree on future collections?

We have already implemented many of the requirements of the Consent Decree. We do not believe the Consent Decree will have a material impact on our collections or cost to collect

Will you need to revalue your portfolio?

No. We have reviewed our portfolio and we do not expect the operational requirements of the Consent Decree to have a material adverse effect on our business. Our past statute inventory has a small, diminishing impact on our overall cash collections. Any revaluation would be reflected in our estimated remaining collections (ERC), which has not changed.

If the new disclosures will have no effect on the income of the company implementing them, they are quite obviously not changing consumer behavior. That means these disclosures are not helpful to consumers.

Q135: Is there any data or other information indicating how frequently time-barred debt is revived by consumers' partial payments? How frequently do owners of debts and collectors sue to recover on time-barred debts that have been revived?

Response Q135: We have every reason to believe that this happens frequently, largely because of consumers' lack of understanding of the effect of making partial payments. It is counter-intuitive that making a partial payment will mean that the consumer owes more than if no payment was made. If the least-sophisticated consumer standard is indeed used in the development of rules on this point, the CFPB will recognize that it is not appropriate that any payments or acknowledgements should have the effect of reviving time-barred debts.

Q136: Is there any data or other information bearing on what consumers believe are the consequences for them if collectors demand payment on debts and they make partial payments?

Response Q136: Consumers cannot be expected to understand this complex and arcane area of law.

Q137: Should the Bureau require debt collectors seeking or accepting partial payments on time-barred debts to include a statement in the validation notice that paying revives the collector's right to file an action for a new statute of limitations period for the entire balance of the debt if that is the case under State law? What would be the benefits to consumers of receiving such disclosure? What would be the costs to debt collectors in making such a disclosure? How should such a disclosure be

³⁵³ Asset Acceptance Capital Corp., Consent Decree Facts, <http://www.assetacceptance.com/ftc/faq.html> (accessed Feb. 26, 2014).

made to be effective? Are there any State or local models that the Bureau should consider in developing proposed rules concerning disclosures and the revival of time-barred debts?

Response Q137: The Bureau should prohibit collectors and creditors from treating payment on a time-barred debt as reviving it. See our response to Q133. If the Bureau does not adopt this approach, at the very least it should require the notice set out in our response to Q133 to be included in every written and oral communication relating to the collection of the debt. The cost of including the notice in these communications would be negligible but the benefits to consumers and the economy would be substantial.

Q138: Some debts may become time-barred after collectors have sent validation notices to consumers. In this case, if a collector is still attempting to collect debts after they become time-barred, should the collector be required to disclose information about the debt being time-barred, the right of the collector to sue, and the effect of making partial payment to these consumers, and, if so, when and how should it be provided?

Response Q138: As explained in response to Q133, the collector should have the full burden of making the determination of legal status of the debt. As soon as the debt becomes time-barred, the collector should be required to cease attempts to collect the debt.

In the alternative, if the CFPB merely requires disclosure, the collector should have the obligation to notify the consumer that the debt has become time-barred, and provide the disclosure set forth in our response to Q133. This disclosure should be provided in every communication with the consumer once the debt has been determined to be time-barred. The failure to make this determination by a debt collector – and thus the failure to provide the disclosure – should be considered an unfair practice under the FDCPA.

Q139: A substantial period of time may transpire between the time of the first disclosure that debt is time-barred and of the consequence of making a partial payment and subsequent collection attempts. Should collectors be required to repeat the partial payment disclosure during subsequent collection attempts? If so, when and how often should the disclosure be required?

Response Q139: Yes. Please see our responses to Q133 and 137.

Q140: How frequently do actions by consumers other than partial payment (e.g., written confirmation by the consumer) revive the ability of debt collectors to sue on time-barred debts? If so, what other actions trigger the revival of time-barred debts? Should debt collectors be required to provide the same type of disclosures to consumers before they take one of these actions that they would be required to provide in connection with payment on a time-barred debt?

Response Q140: A consumer may also revive a debt by acknowledging it, but the law on this topic differs from state to state in a number of ways.³⁵⁴ As noted in our response to Q133, the CFPB should prohibit collectors and creditors from treating a time-barred debt as revived by a payment or acknowledgment. If that recommendation is not accepted, and the CFPB takes a disclosure approach instead, the disclosure must be very, very clear and simple to read. We recommend a disclosure along the lines illustrated in our response to Q133.

Q141: Have industry organizations, consumer groups, academics, or governmental entities developed model time-barred debt notices? Have any of these entities or individuals developed a model summary of rights under the FDCPA or State debt collection laws related to time-barred debt? Which of these models, if any, should the Bureau consider for proposed rules?

Response Q141: Please see our sample disclosure in Response to Q133. If the CFPB takes a disclosure approach, the disclosure should not be delivered as part of a generic summary of rights, but should be prominently highlighted in communications with the consumer and provided only in communications regarding collection of time-barred debts.

Q142: Is there consumer testing or other research concerning consumer understanding or disclosures relating to time-barred debts that the Bureau should consider? If so, please provide any data collected or reports summarizing such data.

Response Q142: We do not have any information on this question at this time.

Part XI. Debt Collection Litigation Practices (Q143-151)

The CFPB has asked a number of questions about where collection suits are filed, their volume, and unfair and deceptive practices in connection with such suits. The volume of collection suits has grown enormously along with the debt buying industry. Unfair and deceptive practices are common in these suits. We urge the CFPB to take strong and aggressive action to deal with these problems.

Q143: Where do most collectors file suit? For example, do collectors usually select the place of suit based on a consumer's place of residence or based on where a contract was signed? Do collectors' choices of venue differ based on the type of debt, the amount of debt, or other considerations?

Response Q143: Before the FDCPA's venue abuse provisions³⁵⁵ were adopted, a number of disreputable collectors filed all their collection suits in distant forums as a way of ensuring that default judgments would be easy to obtain. The FDCPA has reduced this practice. However, the fact that it still remains a problem at least to some extent is illustrated by the relatively modest but continuing level of litigation under § 1692i.³⁵⁶ Venue abuse by creditors, who are not governed by the FDCPA when collecting their own debts, continues to occur. The number of reported decisions on this abuse may provide something of a proxy for estimating its frequency.³⁵⁷

Q144: Are there any consumer protection concerns related to the geographic size of judicial districts, and if so, where do these problems arise specifically? Are States implementing any measures to decrease burdens on consumers in areas where it may be more burdensome for indigent consumers to travel to courts that are farther away from their places of residency?

Response Q144: We do not have any suggestions at this time.

Q145: Are there any particular unfair, deceptive, or abusive practices related to choice of venue that the Bureau should address in proposed rules?

³⁵⁵ 15 U.S.C. § 1692i.

³⁵⁶ See National Consumer Law Center, Fair Debt Collection § 5.9 (7th ed. 2011 and Supp.).

³⁵⁷ See National Consumer Law Center, Fair Debt Collection § 10.3.4 (7th ed. 2011 and Supp.).

Response Q145: We do not have any information to provide on this question at this time.

Q146: How many debt collection actions do collectors file against consumers each year? If the number of actions filed has changed over time, please explain why. Has the resolution of collection actions changed over time? For example, are default judgments more prevalent than in the past? If cases are being resolved for different reasons than before, why?

Response Q146: Local research strongly suggests that millions of debt collection suits are filed in state courts each year. Few of those suits can be substantiated by authentic documents. Nevertheless, perhaps as many as 90% of those suits result in default judgments that in many states last for 20 years or even more. These hundreds of millions of judgments hang over struggling families. Credit reporting agencies now offer services to let debt buyers know as soon as a family shows signs of recovering from the Great Recession -- a job, a better apartment, a car purchase -- so that the debt buyer can pursue seizure of these hard-won wages and possessions. Seizure of assets when a family is just getting back on its feet can push it back into the abyss.

No one knows how many millions of suits and judgments there are against consumers. But all of the local studies support the view that the most common law suit in the U.S. is an undocumented suit for an unpaid debt against a consumer. Collectors have taken over small claims and other low level courts in state after state.

Massachusetts. In Massachusetts, “the people’s court has become the collectors’ court,” the Boston Globe said in its 2006 investigation into the debt industry.³⁵⁸ The Globe found that the state’s debt collectors filed 575,000 lawsuits between 2000 and 2005, or three out of every five civil lawsuits. In Boston, 40,000 debt collection suits accounted for 85 percent of all small claims cases over a five-year period. Credit card giant Capital One alone filed 38,000 lawsuits in a four-year period.³⁵⁹

The vast majority of court cases resulted in judgments in favor of creditors. In Massachusetts, such a judgment extends the life of a debt to 20 years or more, allows it to accrue interest at an annual rate of 12 percent (doubling the debt in less than 6 years if not paid down) and empowers collectors to get court orders that obligate consumers to make payments or face the threat of jail. Creditors can also use judgments to seize automobiles or other property, garnish wages, put a lien on a home or have a civil arrest warrant issued.³⁶⁰

The Globe’s study documented the disadvantages that debtors face in Massachusetts courts. Notices were vague and confusing, and often sent to the wrong addresses. Only one in five defendants even showed up for court hearings. Those who did show up had their interests undercut by court officials and collection attorneys who routinely failed to observe court guidelines. In addition, while defendants generally represented themselves, creditors were usually represented by a lawyer. And although creditors technically had the burden of proving their claims, they were rarely asked to provide supporting evidence or documentation.

³⁵⁸ “Dignity faces a steamroller: Small-claims proceedings ignore rights, tilt to collectors” by Boston Globe spotlight team, July 31, 2006.

³⁵⁹*Id.*

³⁶⁰ “Dignity faces a steamroller: Small-claims proceedings ignore rights, tilt to collectors” by Boston Globe spotlight team, July 31, 2006.

The *Globe* characterized Massachusetts small claims courts as “a de facto arm of a fast-growing and aggressive industry that has swamped court dockets with lawsuits – cases that often lead to threats of jail for debtors.”³⁶¹

Virginia. An academic study found that creditors had a huge impact on Virginia’s legal system. A review of two decades of electronic court records found that “each year hundreds of thousands of Virginians are sued for defaulting on consumer judgments.”³⁶² Low level courts processed creditors’ claims against consumers at an astonishing annual rate of one collection lawsuit for every 20 residents, and the great majority of those lawsuits resulted in judgments against consumers.³⁶³

The Virginia study also found that debt collection actions, which accounted for a majority of filings in the state’s civil courts, were “concentrated in cities and counties with lower median income and homeownership rates; higher incidences of poverty and crime; and higher concentrations of relatively young and minority residents.”³⁶⁴

New York. In New York City, the flood of 180,000 collection lawsuits filed by seven large collection firms during 2007 accounted for three out of 10 civil court filings, according to a 2007 study.³⁶⁵ Similarly, 26 debt buyers filed 457,000 lawsuits and obtained \$1.1 billion in judgments during a 31-month period that ended in July 2008. The debt buyers prevailed in 94 percent of the lawsuits, while only 10 percent of the alleged debtors responded to a summons and complaint and only 1 percent had legal representation.³⁶⁶

Why many alleged debtors did not know that they were being sued was spelled out in criminal complaints filed in April 2009 by New York Attorney General Andrew Cuomo. Cuomo alleged that tens of thousands of defendants in New York debt collection lawsuits were denied their day in court by improper service, often referred to as “sewer service.”³⁶⁷ Three months later, Cuomo filed a lawsuit seeking to void about 100,000 default judgments with a total face value of more than \$500 million. Those judgments were won in lawsuits by 35 law firms that hired a firm that Cuomo alleged regularly failed to serve notice to defendants.³⁶⁸

Iowa and Michigan. Courts in other states also churn through collection lawsuits. At a recent FTC workshop, judges from Iowa and Michigan estimated that 85 to 90 percent of the collection lawsuits filed in their courts resulted in defaults, while an Illinois judge noted that in his court “the tubs of

³⁶¹ *Id.*

³⁶² “Broke but not Bankrupt: Consumer Debt Collection in State Courts” by Richard M. Hynes, *Florida Law Review*, January 2008, at.46.

³⁶³ *Id.* at 48-49, 55.

³⁶⁴ *Id.* at. 6.

³⁶⁵ “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,” MFY Legal Services Inc., Consumer Rights Project, June 2008, p. 4.

³⁶⁶ “*Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-income New Yorkers*” by The Legal Aid Society, Neighborhood Economic Development Advocacy Project, MFY Legal Services and the Urban Justice Center’s Community Development Project, May 2010, p. 1. See also “*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*,” MFY Legal Services Inc., Consumer Rights Project, June 2008, p.5.

³⁶⁷ “*Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court*,” news release of April 14, 2009, posted on-line at www.oag.state.ny.us/media_center/2009/apr/apr14a_09.html.

³⁶⁸ “*Attorney General Cuomo Sues to Throw Out over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation*,” release dated July 23, 2009.

default records are enormous, so you'll have sometime, in a collection call, 300 to 600 default orders to go through."³⁶⁹

Minnesota, Illinois, and Virginia. Mass processing of claims against consumers is widespread. In Minnesota during 2008, state courts issued more than 51,000 uncontested judgments in favor of collectors – mostly large banks and debt buyers – seeking \$462 million from consumers, the Minneapolis Star Tribune found.³⁷⁰

A year earlier, Illinois' Cook County Circuit Court topped that output by issuing about 60,000 default judgments to resolve more than half of the 119,000 lawsuits filed by creditors, according to the Chicago Tribune.³⁷¹

In some areas, hospitals lead the collections charge. In western Virginia during a 66-month period, nonprofit Carilion Clinics obtained 40 percent of all judgments issued by the Roanoke District Court, or 33,000 judgments that had a face value of \$61.6 million and yielded \$25 million in revenue.³⁷²

Other data. Some evidence indicates that debt collectors' use of small claims and other low level state courts has increased in recent years. In Cook County, the annual crop of default judgments doubled from 2000 to 2007.³⁷³ In Minnesota, the volume of debt collection lawsuits doubled from 2006 to 2008, and the volume of default judgments rose 58 percent in a single year.³⁷⁴ In three counties in the San Francisco Bay Area, the number of lawsuits filed to collect consumer debts rose to 96,000 in 2009 from 53,700 in 2007.³⁷⁵ In New York City, researchers concluded that a surge in debt collection lawsuits was a major contributor to a near tripling of all civil court lawsuits, from 213,000 in 2000 to 618,000 in 2007.³⁷⁶

Disclosures from some debt buyers show a similar trend. Encore Capital Group reported that the outside law firms it hires to do collections on a contingency fee basis filed nearly 450,000 lawsuits in 2008, up 18 percent in a year.³⁷⁷ That same year, Portfolio Recovery Associates Inc. paid outside attorneys \$33 million in contingency fees, up 14 percent from \$29 million in 2007.³⁷⁸

Q147: Some States have adopted requirements for the information that must be set forth in debt

³⁶⁹ See transcript for Aug. 5, 2009 for "Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion" a workshop hosted by the Federal Trade Commission and Northwestern Law School's Searle Center, p. 34, posted on-line at <http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf>.

³⁷⁰ "Default surge: Misery by numbers; A deteriorating job market is blamed for a record amount of judgments in Minnesota in 2008, and 2009 might be worse" by Randy Furst and Glenn Howatt, Minneapolis Star Tribune, March 8, 2009.

³⁷¹ "Debt collectors pushing to get their day in court: More aggressive strategies fill court dockets, result in mistaken identities" by Ameet Sachdev, Chicago Tribune, June 8, 2008.

³⁷² "Carilion cases dominate general district docket" by Laurence Hammack, Roanoke Times, Sept. 14, 2008.

³⁷³ "Debt collectors pushing to get their day in court: More aggressive strategies fill court dockets, result in mistaken identities" by Ameet Sachdev, Chicago Tribune, June 8, 2008.

³⁷⁴ "Default surge: Misery by numbers; A deteriorating job market is blamed for a record amount of judgments in Minnesota in 2008, and 2009 might be worse" by Randy Furst and Glenn Howatt, Minneapolis Star Tribune, March 8, 2009.

³⁷⁵ "Some Lawyers Want to Keep Debt Collection Out of the Courts" by Bernice Yeung, in the New York Times, April 22, 2010.

³⁷⁶ "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," MFY Legal Services Inc., Consumer Rights Project, June 2008, p.5.

³⁷⁷ Encore Capital Group Form 10-K for 2008, p. 3, 39.

³⁷⁸ Form 10-K for the fiscal year ended Dec. 31, 2008, filed with the U.S. Securities and Exchange Commission by Portfolio Recovery Associates Inc.

collection complaints, as well as for documents (e.g., a copy of the credit contract) that must be attached to them. Other States have set forth specific requirements for the information that collectors must file in support of motions for default judgment, including adopting standards for the information that must be included in or attached to supporting affidavits and the reliability of the information in the affidavits. Should the Bureau incorporate into proposed rules any requirements to complement or avoid interfering with States' pleading, motions, and supporting documentation requirements?

Response Q147: Yes, the Bureau should adopt rules that provide minimum requirements for collection actions in state courts. We have written many of these requirements in response to Q100. Below, we provide some background on the need for these requirements.

The abuses by debt collectors in state courts have become so widespread and egregious that the Federal Trade Commission recently concluded that “the system for resolving disputes about consumer debts is broken.”³⁷⁹ Millions of consumers have been the victims of abusive debt collection, resulting in faulty judgments against them, wage or benefit garnishments, frozen bank accounts, and ruined credit records that could prevent them from obtaining insurance, housing or even employment. Only a handful of state legislatures and courts have responded to these daily injustices. The CFPB should step in and provide minimum standards for debt collectors suing self-represented consumers for alleged debts in state courts. NCLC recommends consideration of its proposed minimum standards in the Model Family Financial Protection Act.³⁸⁰ In addition, as set forth in our response to Q7, the CFPB should require debt collectors and debt buyers to have certain specific documents demonstrating their right to bring suit on debts, and to attach those documents to complaints they file in collection actions.

Q148: What types of deceptive claims are made in pleadings, motions, and documentation filed in debt collection litigation? How common are such deceptive claims? For example, how frequently do collectors make the false claim that they have properly served consumers?

Response Q148: All of the evidence is that deceptive or unfair litigation practices by debt collection lawyers are routine. Examples include:

- Seeking a claim, interest, fees, or other amounts not permitted by law or authorized by the contract, has been found to violate the FDCPA.³⁸¹
- Manufacturing fake credit card billing statements and attaching them to complaints in collection actions³⁸²
- Filing motions that contain misrepresentations.³⁸³

³⁷⁹ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration* (July 2010) at I (Executive Summary), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> [hereinafter “FTC, Repairing a Broken System”].

³⁸⁰ Available on our website at http://www.nclc.org/images/pdf/debt_collection/model_family_financial_protection_act.pdf.

³⁸² *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009). *See also O'Rourke v. Palisades Acquisition XVI, L.L.C.*, ___ F.3d ___, 2011 WL 905815 (7th Cir. Mar. 17, 2011) (documenting the same practice but finding no FDCPA violation); *Manlapaz v. Unifund CCR Partners*, 2009 WL 3015166 (N.D. Ill. Sept. 15, 2009) (document's mere appearance as bill previously sent to plaintiff, when it was actually created for purpose of suit, may qualify as misrepresentation).

- Falsely stating in a garnishment affidavit that the collection attorney had a “reasonable basis” to believe that non-exempt funds “may have” been in plaintiff’s bank account.³⁸⁴
- Falsely swearing to having personal knowledge of the factual basis for the amount of or liability for the claim in a state court debt collection suit.³⁸⁵
- Falsely stating the amount of a debt.³⁸⁶

³⁸³ See *Harrington v. CACV, L.L.C.*, 508 F. Supp. 2d 128 (D. Mass. 2007) (filing a motion for default misrepresenting that the consumer had not responded to discovery violated § 1692e(5)). See also *Hasbrouck v. Arrow Fin. Servs. L.L.C.*, 2010 WL 1257885 (N.D.N.Y. Mar. 26, 2010) (denying debt collector’s motion on pleadings where consumer’s complaint that defendant filed false or “phony” affidavit in seeking default judgment against her gave rise to at least “plausible inference of falsity”); *Capital Credit & Collection Serv., Inc. v. Armani*, 206 P.3d 1114 (Or. Ct. App. 2009) (jury could properly conclude that litigation after reaching settlement agreement violated § 1692e). *But see* *Hemmingsen v. Messerli & Kramer, P.A.*, 2011 WL 494941 (D. Minn. Feb. 7, 2011) (section 1692e did not apply to collector’s allegedly false statements made in its motion for summary judgment and memorandum of law in its unsuccessful state court collection lawsuit since representations were directed to court and not consumer); *Gonzalez v. Lawent*, 2004 WL 2036409 (N.D. Ill. Sept. 10, 2004) (allegation that attorney had verified collection complaint on behalf of creditor “on information and belief” and did not personally know of fact that debt had been paid did not state claim since verification did not purport to be made on personal knowledge); *Young v. Meyer & Njus*, 1997 WL 452685 (N.D. Ill. Aug. 6, 1997) (deception claim stated where collection attorney allegedly verified collection suit based on insufficient information from creditor to form belief in veracity of complaint).

³⁸⁴ See *Lee v. Javitch, Block & Rathbone, L.L.P.*, 2008 WL 1886178 (S.D. Ohio Apr. 25, 2008) (sustaining jury’s rejection of defendant’s bona fide error defense). See also *Chalik v. Westport Recovery Corp.*, 677 F. Supp. 2d 1322 (S.D. Fla. 2009) (collectors’ filing of sworn statement denying consumer’s claim of exemption, without any specific knowledge regarding exemption, in garnishment proceeding could be violation of § 1692e).

³⁸⁵ See *Ison v. Javitch, Block & Rathbone*, 2007 WL 2769674 (S.D. Ohio Sept. 18, 2007). See also *Gionis v. Javitch, Block, Rathbone, L.L.P.*, 238 Fed. Appx. 24 (6th Cir. 2007) (unpublished) (affidavit claiming attorney fees to which collector was entitled was deceptive when collector may not have been entitled to any fees); *Midland Funding L.L.C. v. Brent*, 644 F. Supp. 2d 961 (N.D. Ohio 2009) (debt buyer’s employee’s affidavit, stating that he had personal knowledge that consumer’s account was due and owing, was false in many respects; employee’s responsibility was mainly to sign affidavits and not to verify claims against consumers), modified on other grounds, 2009WL 3086560 (N.D. Ohio Sept. 23, 2009); *Gutierrez v. LVNV Funding, L.L.C.*, 2009 U.S. Dist. LEXIS 54479 (W.D. Tex. Mar. 16, 2009) (certifying class action alleging that defendant debt buyer violated §§ 1692e, 1692e(2), and 1692e(10) by filing all of its state court collection complaints with attached “Affidavit of Account” that falsely attested that affiant had “personal knowledge” of supporting account documents); *Williams v. Javitch, Block & Rathbone, L.L.P.*, 480 F. Supp. 2d 1016 (S.D. Ohio 2007) (denying defendant law firm’s motion to dismiss where consumer alleged that law firm knew or should have known that “accounts specialist” who executed affidavits lacked personal knowledge of matters she was attesting to); *Gonzalez v. Lawent*, 2004 WL 2036409 (N.D. Ill. Sept. 10, 2004) (attorney who verified collection complaint on behalf of creditor “on information and belief” and who did not have personal knowledge of fact that debt had been paid did not violate FDCPA since verification did not purport to be made on personal knowledge, but allegation that attorney who verified collection complaint “on information and belief” in fact had been presented evidence prior to verifying complaint that debt in question had been paid in full stated claim for violating FDCPA); *Hartman v. Asset Acceptance Corp.*, 2004 U.S. Dist. LEXIS 24845 (S.D. Ohio Sept. 29, 2004) (FDCPA claims that affidavit misrepresented that debt buyer was holder in due course in state collection action violated § 1692e(2), (12)); *Lockett v. Freedman*, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004) (denying motion to dismiss claim that filing verified complaint including inflated collection attorney fees was deceptive where complaint was verified based on personal knowledge and not information and belief). See also *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004) (no knowledge of violation of bankruptcy stay required for claims under § 1692e(a)(1), although bona fide error defense may shield collector). *But see* *Myers v. Asset Acceptance L.L.C.*, 2010 WL 3522470 (S.D. Ohio Sept. 7, 2010). *But cf.* *Fisher v. Asset Acceptance, L.L.C.*, 2005 WL 1799275 (N.D. Ill. July 26, 2005) (collection attorney’s sworn verification of state collection complaint “on information and belief,” when there was in fact insufficient documentation to prove nature and extent of indebtedness by plaintiff bad debt purchaser, did not violate either §§ 1692e or 1692f since attorney did not claim to provide verification on personal knowledge); *Manlapaz v. Unifund CCR Partners*, 2009 WL 3015166 (N.D. Ill. Sept. 15, 2009) (falsity of employee’s statement that she had personal knowledge of facts that she gleaned from review of business records is technicality which would not mislead unsophisticated consumer and would not likely affect consumer’s reaction to lawsuit).

- Using false pretences to induce a consumer to sign a consent judgment.³⁸⁷
- Filing a false affidavit in a state debt collection suit against a consumer.³⁸⁸
- Violating a promise to refrain from further action in return for a settlement agreement.³⁸⁹
- Attempting to garnish wages with interest on the judgment when the judgment struck a provision for interest.³⁹⁰
- Threatening to file or the filing of a time-barred suit.³⁹¹
- Filing a state debt collection complaint on a debt that was discharged in bankruptcy.³⁹²

So far, courts have generally found it is not deceptive for debt buyers to file suit without evidence to prove their claims in the event that their claims were contested by the consumer.³⁹³ A recent

³⁸⁶ Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162 (9th Cir. 2006). *Accord* Ross v. RJM Acquisitions Funding L.L.C., 480 F.3d 493, 495 (7th Cir. 2007); Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. Aug. 6, 2007). See also Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) (imposition of \$250 shoplifting fee on dishonored check not permitted by law under § 1692f(1) where state supreme court would hold that \$15 maximum fee in dishonored check law would apply). *Cf.* Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992) (bona fide error protected debt collector from creditor's mistaken statement of amount of debt). *But see* Spangler v. Conrad, 2010 WL 2389481 (E.D. Tenn. June 9, 2010) (attorney did not violate §§ 1692e and 1692f merely by attaching to state court collection complaint client's sworn statement of account allegedly misstating amount of debt: "A debt collection attorney should be allowed to confidently rely upon affidavit of Sworn Account executed by his client that sets forth the total amount owed."); Sanchez v. United Collection Bureau, Inc., 649 F. Supp. 2d 1374 (N.D. Ga. 2009) (consumer presented no evidence that amount showing as due from defendant was "a false representation" or evidence showing what she contends was "correct" amount).

³⁸⁷ Long v. Shorebank Dev. Corp., 182 F.3d 548 (7th Cir. 1999) (ordering reinstatement of complaint that collection attorney violated FDCPA by procuring tenant's signature on consent eviction judgment through fraudulent misrepresentations); Copeland v. Kramer & Frank, P.C., 2010 WL 2232712 (E.D. Mo. June 1, 2010) (disputed facts precluded summary judgment to attorney collectors who allegedly enticed consumer, acting pro se in underlying state collection case, to sign consent judgment under false and deceptive pretenses);

³⁸⁸ See Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007) (unpublished) (affidavit seeking collection attorney fees attached to debt collection complaint falsely created deceptive impression that Ohio law would permit recovery of collection attorney fees in suit against consumer when that recovery was prohibited by Ohio law); Owings v. Hunt & Henriques, 2010 WL 3489342 (S.D. Cal. Sept. 3, 2010) (consumer on duty with National Guard entitled to benefits of Servicemembers Civil Relief Act so as to render false, misleading, and unfair defendant's declaration that plaintiff was not in active military service). *But see* Berg v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (summary judgment for defendant on claim that affiant misrepresented that she was "the employee/agent" of creditor when in fact she was employed by creditor's "debt servicer"; since debt servicer acted as creditor's agent in pursuing collection on its accounts and was part of same corporate family, court found plaintiff's claim without merit); O'Chaney v. Shapiro & Kreisman, L.L.C., 2004 WL 635060 (N.D. Ill. Mar. 29, 2004) (dismissing claim that collection attorney's verification of erroneous complaint was deceptive because it was based on information and belief not based on personal knowledge).

³⁸⁹ Moore v. Diversified Collection Servs., Inc., 2009 WL 1873654 (E.D.N.Y. June 29, 2009) (consumer's FDCPA complaint, alleging violation of § 1692e for collector's wage garnishment after promising not to garnish when it settled claim for lump sum payment, stated cause of action);

³⁹⁰ Egletes v. Law Offices Howard Lee Schiff, P.C., 2010 WL 3025236 (D. Conn. July 30, 2010) ("inexcusable" for collection lawyers to seek interest).

³⁹¹ McCollough v. Johnson, Rodenberg & Lauinger, 637 F.3d 939 (9th Cir. 2011). See also National Consumer Law Center, Fair Debt Collection §§ 5.5.2.13.3.1, 5.5.2.13.3.2, 5.5.2.13.3. (7th ed. 2011 and Supp.).

³⁹² See National Consumer Law Center, Fair Debt Collection §§ 5.5.4.2, 8.11.3.4. (7th ed. 2011 and Supp.).

³⁹³ See Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006); Jenkins v. Centurion Capital Corp., 2009 WL 3414248 (N.D. Ill. Oct. 20, 2009) (where consumer did not dispute that credit card remained unpaid, debt collector's failure to attach documentation other than affidavit as to accuracy of its recordkeeping to its state court collection complaint did not violate FDCPA); Velazquez v. Arrow Fin. Servs., L.L.C., 2009 WL 2780372 (S.D. Cal. Aug. 31, 2009) (dismissing § 1692e(5) claim alleging that defendant filed its underlying state court collection suit "without adequate investigation and dismiss[ed] that suit because it knew it could not prove its allegations"; relying on plaintiff's right of

decision offers hope for improving the diligence undertaken by debt collectors before they sue consumers, however. In *Miller v. Upton Cohen & Slamonitz*,³⁹⁴ a federal court found an FDCPA violation where the collection lawyer failed to know many of the basic facts about the debt, about the consumer's disputes, and about what law applied under the underlying credit card agreement. The "least sophisticated consumer" would expect that a lawyer signing a dunning letter and a state collection complaint would know such fundamental aspects of the credit card account before he dunned or sued.

Our specific recommendations on this issue are provided in response to Q100.

Q149: What specific documentation or information do collectors have or provide in State courts to support claims that (1) the creditor has the right to collect on debts; (2) the consumer owes the debt; and (3) the consumer owes the debt in the amount claimed?

Response Q149: In its study, *The Structure and Practices of the Debt Buying Industry*,³⁹⁵ the FTC examined debt buyer data on more than 5,000 portfolios, containing nearly 90 million consumer accounts, purchased during a three-year study period. Its study confirmed what the FTC had been told by consumer advocates in its series of roundtables on debt collection law suits: that. Debt buyers and debt collection law firms do not regularly obtain authentic business records to support their state court collection suits but proceed on summary information that is generally obtained without any guarantee of its accuracy.

Debt collectors may even use unreliable summary information about an alleged debt to create a fake document that looks like a billing statement that may have been sent by the creditor to the consumer in the past.³⁹⁶ Nor do collectors hesitate to manufacture false affidavits by the thousands that swear that the information that the debt collector obtained is accurate, even though they obtained the accounts from the debt sellers with disclaimers of accuracy. When challenged, debt collectors regularly offer up form credit card contracts as the applicable contracts when they are not, but are simply made-up documents, with nothing to do with the debt at issue in the case.

Our recommendations on this issues are provided in response to Q100.

Q150: The FTC's Staff Commentary to section 803 excludes from the definition of "communication" "formal legal actions," like the filing of a lawsuit or other petition/pleadings with a court, as well as the service of a complaint or other legal papers in connection with a lawsuit, or

dismissal in state court rules); *Whittiker v. Deutsche Bank Nat'l Trust Co.*, 605 F. Supp. 2d 914 (N.D. Ohio 2009) (filing of foreclosure action by plaintiff in process of obtaining assignment not yet fully documented was not deceptive). *See also* *Forgey v. Parker Bush & Lane, P.C.*, 2004 WL 1945737 (D. Or. Sept. 1, 2004) (dismissing claim that attorney lacked sufficient independent knowledge to bring lawsuit; citing *Heintz*, attorney does not have to conduct independent investigation). Three decisions hold that filing a lawsuit supported by the affidavit of the debt buyer plaintiff attesting to the existence and amount of the debt when it did not have the documents related to the debt was not a false representation of the character or legal status of the debt when no specific deceptive statement was alleged. *Clark v. Unifund CCR Partners*, 2007 WL 1258113 (W.D. Pa. Apr. 30, 2007); *Davis v. NCO Portfolio Mgmt., Inc.*, 2006 WL 290491 (S.D. Ohio Feb. 7, 2006); *Deere v. Javitch, Block & Rathbone L.L.P.*, 413 F. Supp. 2d 886 (S.D. Ohio 2006).³⁹⁴ 687 F. Supp. 2d 86 (E.D.N.Y. 2009), on remand from *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292 (2d Cir. 2003).

³⁹⁵ (Jan. 2013), available at <http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>.

³⁹⁶ *See Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009).

activities directly related to such service. Should the Bureau address communications in formal legal actions in proposed rules? If so, how?

Response Q150: The CFPB should disregard the interpretation by the FTC staff in its 1988 Commentary of the term “communication,” broadly defined in §1692a(3), to exclude formal legal actions. The Commentary does not reflect the current position of the FTC staff or of the Commissioners, and has not been updated since 1988. The Commentary was informal and expressly stated it was not binding on the FTC.

The FTC’s change in position was explained in a FTC Advisory Opinion issued March 31, 2000,³⁹⁷ which stated that the FTC staff changed the staff position on this issue to follow the U.S. Court’s decision in *Heintz v. Jenkins*.³⁹⁸ *Heintz* held that litigation related debt collection activities are generally covered by Congress’ plain language in the FDCPA.

The FDCPA generally applies to debt collectors’ litigation activities unless litigation activities are expressly excluded from a provision, as is the case of §§ 1692e(11) and 1692g(b). But clearly the broad definition of “communication” in § 1692a(2)³⁹⁹ does not exclude any type debt collection activity, pleadings, or litigation.⁴⁰⁰

Q150 Recommendation: If the CFPB adopts a rule on this subject, it should provide that the term “communication” does not exclude any type debt collection activity, pleadings, or litigation.

Q151: Are there any other acts and practices in debt collection litigation that the Bureau should address in a proposed rule? For each type of act or practice, how prevalent is it, what harm does it cause to consumers, and how could the Bureau address it in proposed rules in a manner that complements and that is not inconsistent with State law?

Response Q151: We are addressing two issues – forced arbitration and obsolete debts -- in response to this question.

Forced Arbitration and Debt Collection

Forced arbitration is an increasingly pervasive problem for the victims of abusive debt collection practices. We encourage the CFPB to prohibit debt collectors from compelling debtors to arbitrate disputes.

Very often, the first step a debt collector takes when confronted with a private enforcement action under the FDCPA, particularly a class action, is to move to compel arbitration under the terms and conditions of the contract between the debtor and original creditor. Courts may compel arbitration of claims against debt collectors where the debt collector can establish either (1) that the express

³⁹⁷ See FTC Fomal Advisory Opinion on the Fair Debt Collection Practices Act (March 31, 2000), *available at* National Consumer Law Center, *Fair Debt Collection* § Appx.B.1.5, p.734 (7th ed. 2011 and Supp.). It should be noted that the March 31, 2000 FTC Advisory Opinion has not been updated to reflect the 2006 amendment to 15 U.S.C § 1692g(b) that provides that a formal legal pleading is not an “initial communication” under § 1692g(a).

³⁹⁸ 514 U.S. 291 (1995).

³⁹⁹ (2) The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium. 15 U.S.C. § 1692a(2).

⁴⁰⁰ *See* National Consumer Law Center, *Fair Debt Collection* § 4.6.4 (7th ed. 2011 and Supp.).

terms of the arbitration clause entered into by the original creditor and the debtor cover the debt collector,⁴⁰¹ or (2) that common law contract principles allow the collector to enforce the provision as a non-signatory.⁴⁰²

For at least three reasons, forced arbitration is especially unfair when invoked by debt collectors in private-enforcement actions brought under the FDCPA.

First, in these cases, the debtor has almost never formed a direct contractual relationship with the debt collector. Even if, under normal principles of contract law, a debt collector is technically covered by an arbitration provision, allowing the debt collector to enforce this provision stretches the fiction of consumer assent too far. In these actions, the debtor alleges that she has been mistreated by an entity, the debt collector, which she has never sought out for services and of which she has most likely never heard. This type of contractual arrangement is particularly unfair when the contractual term at issue was presented to the consumer on a take-it-or-leave-it basis and forces the consumer to waive her constitutional right to a jury trial.

Second, arbitration is secret and, unlike litigation in court, does not set valuable precedent with regard to the contours of the FDCPA. FDCPA claims are especially in need of judicial resolution because debt collection practices continue to evolve with technological and economic changes.⁴⁰³ Historically, courts have played a critical role in defining the conduct that constitutes a violation of the Act.⁴⁰⁴ When FDCPA claims are arbitrated in secret, debt collectors, advocates, and arbitrators themselves cannot learn about new kinds of debt collection abuses and how the Act should be applied to address them.

Finally, and perhaps most significantly, forced arbitration fundamentally undermines the effectiveness of the FDCPA by imposing significant obstacles to private enforcement of the statute.⁴⁰⁵ As discussed in Part III of these comments, Congress intended the FDCPA to be enforced largely through private civil litigation brought by debtors. But private enforcement of the Act relies on the class action device, and almost all arbitration clauses at issue in FDCPA cases require claimants to arbitrate their disputes individually, thus forcing them to waive their right to file a class or collective action. As the Supreme Court has recently held, these clauses are enforceable even where the considerable costs of bringing an individual arbitration, as relative to the potential

⁴⁰¹ Arbitration clauses often bind “assigns” or “successors in interest,” allowing debt collectors that actually purchase the debt to benefit from the provision. *See, e.g.,* Hoefs v. CACV of Colo., LLC, 365 F. Supp. 2d 69, 75 (S.D.N.Y. 2005) (“CACV has become the *de facto* owner of the account,” and can thus benefit from arbitration provision covering “assigns.”). But some courts have held that the express terms of an arbitration clause protect debt collectors that have more attenuated relationships with the initial creditor. *See, e.g.,* O’Fallon v. Encore Receivable Mgmt., 831 F. Supp. 2d 95, 966 (S.D. Miss. 2011) (concluding that arbitration clause stating that it “inur[es] to the benefit” of “any third party named as a co-defendant” covered debt collector that was named as a co-defendant in the action).

⁴⁰² Among the bases upon which a debt collector might rely to argue that it benefits from an arbitration clause to which it is not a party are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *Smith/Enron Cogeneration Ltd. P’shp v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999).

⁴⁰³ *Cf.* U.S. Gov’t Accountability Office, GAO–09–748, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* (2009), available at <http://www.gao.gov/products/GAO-09-748>.

⁴⁰⁴ *See* Colin Hector, Note, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 Cal. L. Rev. 1601, 1611-17 (2011).

⁴⁰⁵ *See generally*, Richard M. Alderman, 24 Loy. Consumer L. Rev. 586 (2012).

award, render it impossible for individuals to effectively vindicate their federal rights under statutes like the FDCPA.⁴⁰⁶ The FDCPA provides for statutory damages to deter and punish abusive debt collection practices. In individual cases, however, the available statutory damages are often quite small, and in cases involving widespread abuse, there is often little incentive for an attorney and client to bring an individual action. Class actions are needed, then, to protect against many of the most egregious abuses, and class actions against debt collectors cannot proceed where the debt collector is covered by an arbitration clause and class waiver.

Q151 Recommendation on Mandatory Arbitration: The CFPB should prohibit debt collectors and debt buyers from invoking mandatory, pre-dispute arbitration clauses in cases involving disputes arising out of their debt collection activities.

Obsolete Debts. We urge the CFPB to specifically address the credit reporting issues involving obsolete debts. One of the most egregious violations by debt collectors and debt buyers is the “re-aging” of debts. This involves misrepresenting to CRAs the date of delinquency for the debt, from which the seven-year period for calculating how long negative information may be reported is calculated.⁴⁰⁷

Re-aging is caused by the failure of debt collectors and debt buyers to comply with the FCRA, which requires furnishers to supply the correct date of delinquency for an account.⁴⁰⁸ It also represents a failure to follow the Metro 2 reporting format, which requires that furnishers supply a “date of first delinquency” [DOFD] to the CRAs.⁴⁰⁹ There appears to be an extraordinarily high rate of non-compliance with these requirements. The FTC’s January 2013 report on the debt buying industry indicated that debt buyers obtained information about this date for only 35% of the accounts at the time of purchase⁴¹⁰ – which means that up to two-thirds of debt buyer accounts could be reporting an incorrect date.

Further, there is considerable confusion regarding disclosure of the date of first delinquency for one of the NCRAs. Two of the three NCRAs – Experian and TransUnion – provide a clear disclosure of when a negative item will become obsolete. In contrast, Equifax does not disclose this information. Instead, Equifax’s consumer disclosures list several dates for an account, including: (1) date of last payment; (2) date of first major delinquency; and (3) date of first delinquency. It is only the last date from which the seven year FCRA obsolescence period is calculated. These multiple date disclosures can be confusing for consumers, who may mistakenly believe that a negative item will remain on a credit report for longer than it actually will. We urge the CFPB to require all of the NCRAs to disclose what two of the three already provide – disclosure of the date on which an adverse item will be deleted.

⁴⁰⁶ Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).

⁴⁰⁷ National Consumer Law Center, Fair Credit Reporting § 5.2.3.4 and § 6.3.3.7 (7th ed. 2010 and Supp.) (discussion of re-aging).

⁴⁰⁸ 15 U.S.C. § 1681s-2(a)(5).

⁴⁰⁹ Consumer Data Indus. Ass’n, Inc., Credit Reporting Resources Guide (2012) (Metro 2 Manual), at pp. 4-17, 5-30 through 5-39 (Exhibit 9: Examples of FCRA Compliance/Date of First Delinquency (Field 25), 6-15 (Frequently Asked Question 24) and 10-4 through 10-5).

⁴¹⁰ Federal Trade Comm’n, Structure of Practices of the Debt Buying Industry, at Table 8 (Jan. 2013), *available at* www.ftc.gov/os/2013/01/debtbuyingreport.pdf. The report indicated that debt buyers did obtain the date of last payment in 90% of cases. *Id.* However, this date is not necessarily the date of first delinquency, for example, if later partial payments are made after the initial delinquency.

Q151 Recommendation on credit reporting practices and the re-aging of debt:

1) The CFPB should examine larger participant debt collectors, large banks and others furnishers under its supervision to ensure they are reporting correct dates of first delinquency to the NCRAs. For furnishers that are original creditors, the CFPB should also ensure that they are providing the correct date to the debt collector or buyer when they sell a debt or place it for collection. The CFPB should take enforcement action against furnishers that are not providing correct dates to the NCRAs.

2) Debt collectors and buyers should be explicitly required to comply with the Metro 2 standards concerning determining and reporting the Date of First Delinquency. The CFPB should prohibit the furnishing of any collection item that fails to include the correct DOFD.

3) All of the NCRAs should be required to provide a clear, easy-to-understand disclosure of when an adverse item will be removed from a credit report due to the FCRA obsolescence periods.

Part XII. State and Local Debt Collection Systems (Qs 152-162)

Q152: Do the procedures and criteria set forth in sections 1006.1 through 1006.8 of Regulation F adequately enable States to apply for exemption? Are there any specific revisions to the procedures or criteria set forth in sections 1006.1 through 1006.8 of Regulation F that the Bureau should consider?

Response Q152: We have no information on this subject.

Q153: How prevalent are bad check pretrial diversion programs?

Response Q153: There are over 3,000 counties in the United States. We estimate that private check diversion companies are operating in 300-400 counties. In 2006, in connection with enactment of the check diversion amendment to the FDCPA, an industry spokesperson projected that private check diversion programs would be collecting 25% of the unpaid checks in this country.

Background on Bad Check Diversion Programs⁴¹¹

There are two types of check diversion programs. First, in a few jurisdictions, law enforcement operates an in-house diversion program, either as a real alternative to prosecution, or simply as a means to collect checks and generate department income.⁴¹² These in-house programs are not regulated by the FDCPA because they are exempt government entities. 15 U.S.C. § 1692a(6)(C). These comments deal exclusively with the second kind of check diversion— the private, for-profit companies that dominate this market.

⁴¹¹ This section of our comments was written by Paul Arons, an expert in the area of check diversion programs. *See* <http://checkrestitution.com/Home.php>.

⁴¹² In some jurisdictions, prosecutors view check diversion as one of the ways to fund general department operations. *See* Appendix 2, “Retailers will Review Policy,” describing the controversy that arose from Walmart’s decision that it would no longer use check diversion programs to collect its checks. When a sheriff or prosecutor has an in-house program, it retains all the fees it collects. With a privately operated program, the private company retains the bulk of the fees.

The private, for-profit companies market their check diversion programs to law enforcement agencies, offering a “turn-key” operation requiring “minimal effort” from the prosecutor’s office.⁴¹³ These privately-operated programs, termed “check diversion companies” in these comments, amount to check collection in law enforcement clothing. They are openly in competition with traditional private debt collectors.⁴¹⁴ The check diversion companies collect checks for major national retailers and also for other debt collectors. Walmart, Walgreen’s, Target, Safeway, Costco, CVS Pharmacy and a host of other national retailers routinely use these private companies for check collection. The two largest check payment processing companies in the United States, FIS, Inc. (aka Certegy Check Services), and TeleCheck, (a division of First Data Corp.) also use these private companies as one of the steps in their collection efforts.

The largest check diversion company is National Corrective Group, Inc., dba Corrective Solutions, located in San Clemente, California. On its website, Corrective Solutions states that it is operating check diversion programs in over 140 jurisdictions. It does not publish its financial information, but based on past financial data, we estimate that this company collects more than \$20 million annually in fees. The next largest company is Bounceback, Inc., located in Kansas City, MO. We estimate that Bounceback is about half the size of Corrective Solutions. There are also a handful of smaller companies engaged in this business.

These companies generally follow the same procedures used by ordinary check collection companies. The check diversion company solicits checks from major referral sources, such as Walmart and Telecheck. When the referral source is unsuccessful in collecting a check, it transmits an electronic file containing check information to the diversion company. The diversion company inputs this data into its computer system. The diversion company then initiates a computer-driven collection process, consisting of form demand letters, phone calls, and emails. The check writer sends payment to the diversion company, which then allocates payments to itself, the creditor and the prosecutor’s office.

Although check diversion companies and ordinary check collection companies follow the same processes, there are material differences in the substance of the collection efforts based on the check diversion companies’ use of coercive collection strategies. We are attaching examples of collection letters use by Corrective Solutions and Bounceback.⁴¹⁵ The differences that check diverse companies’ practices from ordinary check collection are also the elements that make it unlawful:⁴¹⁶

1. **Use of Prosecutor Letterhead:** The debt collector has a contract with the local prosecutor, purporting to permit it to operate in the prosecutor’s name. However, the FDCPA, and many state laws, prohibit a debt collector both from using anything other than its true name and from pretending it is a law office. In all or most states, a non-attorney company that holds itself out

⁴¹³ We are attaching a solicitation made by NCG’s predecessor to the district attorney of Marin County. The overall focus of the sales pitch is on increasing check volume and fees, not law enforcement. *See* Appendix 3.

⁴¹⁴ When NCG’s predecessor was soliciting Walmart’s check collection business, the core selling point was that the check diversion company would recover more money for Walmart than a “traditional” collection agency. *See* Appendix 4, p.4, Walmart sales solicitation. NCG’s predecessor promoted itself to merchants as being “superior” to collection agencies, through the “power of the District Attorney’s brand. *See* Appendix 8, Executive Summary.

⁴¹⁵ Corrective Solutions letters are labeled as being sent by the “Bad Check Restitution Program. Bounceback letters are from the prosecutor’s “Check Enforcement Program.” *See* Appendices 5 and 6.

⁴¹⁶ Even the major collection industry organization, the American Collectors Association, recognized the dangers to consumers represented by exempting diversion companies from FDCPA coverage. *See* Appendix 9.

as a law office is engaged in the unauthorized practice of law.

2. **Prosecution Threats:**

(1) The collection demands threaten prosecution: The mere use of prosecutor letterhead might be enough to carry with it an implicit threat of prosecution. The form letters go much further. A typical letter states that the check writer has been accused of a bad check crime, that prosecution is a possibility, and that to avoid criminal action, the check writer must pay for and participate in a criminal diversion program. Participation in the Diversion Program requires payment of various fees that may easily total over \$250, regardless of the amount of the check. The largest fee is for the “diversion class.” We have seen class fees as high as \$235.

(2) The Prosecution Threats are False: At the time the collection effort takes place, the prosecutor has not reviewed any evidence or made any decision to prosecute a check writer who does not participate in “diversion.”⁴¹⁷ In fact, most prosecutors rarely prosecute check writers. When a prosecution does take place, it is based on an investigation and prosecution decision made by the prosecutor *only after* the diversion company has concluded its collection efforts. Additionally, in most instances even a partial payment by the check writer eliminates even a theoretical prosecution threat. Paying for the expensive diversion class is very important for the diversion company. We are unaware of any instance where a check writer who paid for the diversion class, but never took it, suffered any adverse consequences.⁴¹⁸

3. **Unlawful Fees:** A few states have statutes expressly authorizing check diversion programs, and setting fees. However, despite the limits in the state statutes, the diversion companies routinely charge far more than the statutorily authorized fees.⁴¹⁹ Most states do not have any specific legal authorization for these programs, and there does not appear to be any legal justification for a prosecutor or debt collector to charge a check writer fees. Typical fees charged by diversion companies are:

Administrative fee:	\$ 25-\$50
Bank charge fee:	\$ 1-\$50
Diversion class fee	\$ 125-\$235
Payment plan fee	\$ 10-\$25
Missed payment fee	\$ 10-\$25
Credit/Debit card fee	\$ 6-\$10
Overpayment refund fee ⁴²⁰	\$ 5

4. **Arbitration Provision:** Corrective Solutions letters now include an arbitration provision. The letters threaten check writers that they will be prosecuted if they do not pay money and take the diversion class, but also state that by paying money, the check writer agrees to arbitration and a

⁴¹⁷ In a minority of jurisdictions, the diversion company sends a prosecutor a list of check writers, and the prosecutor has a short opportunity to remove names from the list. In the absence of word from the prosecutor, the diversion company initiates collection activity. There is sparse evidence of prosecutors actually reviewing these lists.

⁴¹⁸ Diversion classes come in many forms, and usually focus on skills such as balancing a check book and budgeting, neither of which would seem to be the problem of a person who allegedly intentionally wrote a bad check, intending to defraud the merchant. The class may be on-line, a short brochure, a home workbook, or an in-person class running from as little as 30 minutes to as much as four hours.

⁴¹⁹ For instance, in California, the Bad Check Diversion Program Act permits up to \$65 in fees. See Cal. Penal Code §§ 1101.60, et seq. Corrective Solutions, which dominates the California market, typically charges more than \$230 in fees.

⁴²⁰ Corrective Solutions typically charges a check writer \$5 to refund an inadvertent overpayment. This allows Corrective Solutions to retain all overpayments of \$5 or less. It appears that Bounceback does not refund overpayments at all.

class action ban. Under current Supreme Court law, this may be an enforceable arbitration provision. If all debt collectors adopted this provision, it would be possible to victimize consumers with the most vicious threats and blatantly illegal fees, yet effectively deny anyone who paid access to the courts.

Q154: What provisions typically are included in the “administrative support services contracts” between private entities operating bad check pretrial diversion programs and State or district attorneys? Are these contracts available to the public? Should the Bureau define “administrative support services contracts” in proposed rules or specify in such rules what types of provisions must be included for contracts to meet the definition? Why or why not?

Response Q154: Failure to follow the contracts does not appear to be an issue. Check diversion companies solicit prosecutors to let them operate in the prosecutor’s jurisdiction, and then proffer a contract that the prosecutor signs. However, prosecutors do not have the power to alter federal or state laws protecting consumers from abusive collection practices. The contracts typically permit the check diversion company to send out form letters and collect the fees that they assess. The contracts generally permit the private company to create an illusion of prosecutor involvement. However, other than initially approving form letters, and completing checklists relating to intake and prosecution review criteria, the prosecutor’s office has little meaningful involvement in daily collection activities. The contracts do not appear to impact the actual operation of these programs. We have been able to obtain these contracts through public records act requests.

Q154 Recommendation: The Bureau need not issue any clarifying regulations. As explained, the programs have little to do with the contractual provisions. More enforcement would be helpful, however.

Q155: What do State or district attorneys usually do to ensure that the private entities that operate bad check pretrial diversion programs are subject to their “direction, supervision, and control”? Should the Bureau specify in proposed rules what State or district attorneys must do to direct, supervise, and control the private entities that operate bad check pretrial diversion programs in order for these programs to be excluded from the FDCPA? If so, what should be required?

Response Q155: Other than initially approving form letters, fees and intake and prosecution criteria, district attorneys exercise little oversight. Like any service business, the check diversion companies will modify practices to conform to their client’s wishes, but so long as the business is operating smoothly, there is little for a district attorney to do. One of the selling points of these programs is that it will allow a district attorney to please the business community and generate an income stream, all with little or no effort by the prosecutor.⁴²¹

Q156: One of the specific requirements in section 818(2)(C) of the FDCPA is that in their initial written communication with consumers the private entities operating bad check diversion programs must provide a “clear and conspicuous” statement of the consumers’ rights. How do private entities currently disclose this information? Should the Bureau specify in proposed rules what constitutes a “clear and conspicuous statement” of these rights? If so, what standards should be included?

Response Q156: The intent of 15 U.S.C. § 1692p(a)(2)(C)(v)(III) is to require that a person in the

⁴²¹ See solicitation to the district attorney of Marin County, California, Appendix 3..

prosecutor's office, as opposed to the diversion company, actually review evidence and make a determination of probable cause. The Corrective Solutions initial form letter includes a statement that it, not an employee of the prosecutor, will review disputes and makes no mention of probable cause. This statement is hidden in two pages of fine print "Terms and Conditions." The Bounceback initial form letter does not contain any language regarding a thirty day written dispute requirement. The FDCPA does not authorize check diversion programs. It merely provides a conditional exemption for diversion companies that want to escape FDCPA coverage. Please see our response to Q158 for our recommendations regarding CFPB rules.

Q156 Recommendation: If the Bureau takes any action relating to this aspect of the statute, it should simply be to issue a rule that strict compliance with all provisions of 15 U.S.C. § 1692p is required for the exemption to be effective.

Q157: Private entities operating bad check pretrial diversion programs that meet the conditions set forth in section 818 are exempt from the FDCPA. Where these private entities are subject to title X of the Dodd-Frank Act, should the Bureau exempt these entities from title X of the Dodd-Frank Act and any implementing regulations?

Q157 Response and Recommendation: No, absolutely not. There should be no exemption for these entities from any consumer protections. The privately-operated "check diversion" industry is rife with predatory and abusive practices. As explained above, this is essentially debt collection, not law enforcement. These companies use a realistic, but false, threat of prosecution to extract hundreds of dollars in fees. In one extreme example, the consumer paid \$441.00 in fees on a \$3.87 check, where there was never any possibility of prosecution.⁴²²

Q158: Are there any other aspects of bad check pretrial diversion programs that the Bureau should address in a proposed rule? To the extent commenters have concerns about acts or practices involving these programs, describe how prevalent the practice is and what harm it causes to consumers?

Response Q158: We have multiple comments on this subject:

Abusive arbitration provisions. One pernicious practice is Corrective Solutions' use of an arbitration provision. The consumer is coerced into paying fees that are not owed, but the arbitration provision states that by paying any money at all, the consumer waives his or her right to file a lawsuit or bring a class action. Standing by itself, this arbitration provision may pass muster under existing Supreme Court precedent, since the Supreme Court has ruled that fraud or coercion in the formation of a contract is no defense to enforcement of an arbitration clause. As explained above, there is nothing that prevents any debt collector from adopting a similar arbitration provision, to insulate itself from liability for clearly illegal practices. Possible rules to address the arbitration problem include: (1) to prohibit the use of arbitration provisions by debt collectors, (2) to prohibit arbitration without an express arbitration agreement, signed and dated by the consumer; and (3) to prohibit arbitration where the agreement to arbitrate is part of an otherwise illegal agreement.

Lax compliance with requirements for the exemption. Our responses to Q154 to Q157 show that there is little true compliance with the requirements for the § 1692p exemption. The Bureau should make

⁴²² We are attaching, in Appendix 7, a copy of one of the collection letters sent to the consumer who paid \$441 on a \$3.87 check, or a fee that is 114 times the amount of the check.

clear that strict compliance with the requirements in 15 U.S.C. § 1692p is required for the FDCPA exemption to apply.

Prosecutor involvement. There is also little compliance with § 1692p's requirement that, prior to any involvement by a check diversion company, a prosecutor must make a "determination . . . that probable cause of a bad check violation under State penal law exists." The Bureau should make clear that, in order to invoke § 1692p's exemption from the FDCPA, a prosecutor must conduct an individualized review of evidence, which must consist of more than evidence available from the face of the check. Examples of such evidence would be a review of check writer bank records, consideration of any explanation offered by the check writer, and requiring individualized proof that the check writer received an adequate demand of payment.

Q158 Recommendations:

- Prohibit the use of pre-dispute mandatory arbitration clauses involving check diversion companies' contracts.
- Clarify and enforce compliance with the section 1692 exemption.
- Require prosecutor involvement in the process in order for the exemption to be applicable.

Part XIII. Recordkeeping, Monitoring, and Compliance Requirements

Q159: Should the Bureau propose rules to require debt collectors to register? Should any such registration system be used to register individual debt collectors, debt collection firms, or both? What information should be required for registration, and are there any particular State models that the Bureau should consider? Are there data on how consumers have benefitted from similar systems now operating in States? Are there data on the costs imposed on collectors by registration? How could a registration system be structured to minimize the cost of registration for debt collectors, while still providing adequate information for those who use the registration system?

Q159 Response and Recommendation: CFPB rules should require debt collectors to comply with all applicable state laws. To the extent that certain information is captured in the state licensing system, the CFPB database would simply repeat it. To the extent that information is not required by state law, the CFPB could require it to be provided and maintained as accurate on the CFPB database. It is essential, however, that the CFPB database not be seen to preempt state law in any way.

Everyone engaging in collection activities against consumers should be required to be included in the CFPB database, including creditors, debt buyers, and collectors. Full contact information for the collector, and the collector's employer, should be a prerequisite to engaging in collection activities covered by the CFPB's regulations.

Part XIII. Recordkeeping, Monitoring, and Compliance Requirements

Q160: The Nationwide Mortgage Licensing System and Registry ("NMLSR"), which was originally used by State regulators for the registry of mortgage loan originators, is increasingly being used as a broader licensing platform, including for the registration of debt collectors. Would it be desirable for NMLSR to expand or for some other existing platform to be used to create a nationwide system for registering debt collectors rather than having the Bureau create such a system? What could the

Bureau do to facilitate the sharing of information among regulators who are part of the NMLSR or other nationwide system to safeguard confidentiality and protect privileged information?

Response Q160: The NMLSR does not seem to be an appropriate database to use for debt collectors, although there are several aspects of it that could be used as a guide for the CFPB database of collectors of consumer debt. These include the principle that the federal database is an overlay over the state licensing system, and does not supplant the state system.

Q161: What records do creditors and collectors currently retain relating to debts in collection? Should proposed rules impose record retention requirements in connection with debt collection activities? If so, what requirements should be imposed and who should have to comply with them? What would be the costs and benefits of these requirements?

Response Q161: A recordkeeping requirement will be meaningless if collectors are not required to have records. We urge the CFPB to adopt our recommendations regarding the necessary documentation required for a collector to initiate collection activities (see our responses to Q3 and Q5) and to initiate judicial enforcement of the debt (see our response to Q7). If the CFPB does so, then the marketplace will provide a powerful incentive to comply with a record retention rule such as that discussed in our response to Q162. The need to have documentation before initiating collection activities or suit will provide an incentive to collectors to save all of the necessary information so long as there is any intention to collect on a debt.

Q162: How long do creditors and debt collectors currently retain records, and how does it differ based on the type of debt or type of record? Should the length of time that debt collection records are retained relate to how long a debt may generally be reported in a consumer report, how long a collector may collect upon the debt, or how long a consumer has to bring private action under the FDCPA? Or is another time period more appropriate?

Response Q162:

As discussed above, one of the most critical and fundamental problems with debt collection in this country is the failure of collectors and debt buyers to obtain and retain documentation to substantiate the debts they are collecting. The problems caused by this lack of documentation, such as collecting against the wrong consumer or dunning for the wrong amount, also have a significant impact on the information furnished by debt collectors to CRAs.

The CFPB has asked whether the length of time that debt collection records are retained should be related to how long a debt may generally be reported in a consumer report. We believe that the answer should be “yes” and there should be a firm, bright line rule that a debt collector must retain operative records for an account as long as the account is being reported to the CRAs.

There is support for this idea already in the FCRA Furnisher Accuracy and Integrity Guidelines. Section III(c) of the Guidelines provide that furnishers should develop policies and procedures that address the need for “[m]aintaining records for a reasonable period of time, not less than any

applicable recordkeeping requirement, *in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute.*"⁴²³

Thus, under the existing Guidelines, debt collectors and debt buyers should already have policies for maintaining records to substantiate the debts that they report to the NCRAs, in the event they receive a dispute under the FCRA. Of course, as discussed throughout these comments, debt collectors and debt buyers do not maintain any such documentation and thus are not following the Furnisher Accuracy and Integrity Guidelines. Thus, the CFPB must take a firmer, more bright line approach on this issue.

Q162 Recommendation: The CFPB should specifically provide by regulation that a debt collector cannot report a debt to a CRA unless the collector has documentation that substantiates the debt. (The type of documentation that we recommend be required is discuss in response to Q3, Q5, Q7, and Q17 of these comments). Moreover, if a collector reports accounts to the credit bureaus, it must keep the records of those accounts for the entire time the account is reported. If it does not report accounts, records should be kept for seven years.

⁴²³ Appx. E to 12 C.F.R. Part 1022, Guidelines Concerning the Accuracy and Integrity of Information Furnisher to Consumer Reporting Agencies, § III(c)(emphasis added).

Appendix 1

Appendix 1

Americans for Financial Reform is a coalition of more than 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups. www.ourfinancialsecurity.org.

Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities. By providing extensive financial education materials in multiple languages, a free national hotline, and payment card surveys, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. More than 8,000 community and grassroots organizations benefit annually from its wide-ranging outreach programs, training materials, and support. www.consumer-action.org

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education. www.consumerfed.org.

Consumers Union of United States, Inc., publisher of *Consumer Reports*, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, fees, and noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support. www.consumer.org.

The **National Association of Consumer Advocates (NACA)** is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. www.naca.net.

The New Economy Project (NEDAP) is a New York City-based policy and advocacy center that works with community groups to promote economic justice. NEDAP employs multiple strategies – including community outreach and education, advocacy, coalition organizing, policy research and analysis, media outreach, technical support for community groups, and direct legal services – to address inequities in the financial services system that adversely affect people living in low and moderate income neighborhoods and communities of color. www.nedap.org.

U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful

interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our research and advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending and rent-to-own, credit reporting and credit scoring and opposition to preemption of strong state laws and enforcement. On the web at www.uspirg.org. U.S. PIRG's most recent report, released in February 2014, is "Debt Collectors, Debt Complaints: The CFPB's Consumer Complaint Database Gets Real Results for Consumers."

Appendix 2

TOP STORIES

- Has Anne McLellan been negligent in guarding Canada's borders?
- Military readying for air strikes in "undisclosed" Southwest Asian country
- Liberal columnist: Blacks must deal with murder rate
- UND allowed to keep Sioux nickname for now
- Alito: Where are the questions on his government bias?
- Qaddafi: A champion of women's lib
- Underemployed Seattle liberals take city crisis into their own hands
- Iran Enriching Uranium; IAEA Report Imminent
- It's a Mac Mac Mac Mac World
- Murder your children, get a plea deal



PAJAMAS MEDIA™

ADVERTI

Story Date: 2006-Jan-08 at 14:33:22

By Kevin Murphy

Retailer will review policy

Categories: [United States](#) / [retail supply chain](#) / [politics](#) / [local authority](#)

Jan. 8, 2006 (Knight Ridder/Tribune Business News delivered by Newstex) --

"Wal-Mart (NYSE:WMT) -is the second-largest client that we serve in the prosecutor's office."

Mike Sanders, Jackson County prosecutor

When retail giant Wal-Mart decided recently to refer all deadbeat check writers to a collection agency, county prosecutors in Missouri and some other states winced.

Bad checks, it seems, are good business for some prosecutors and district attorneys, who collect fees from the check writers. Fees usually exceed the collection costs, meaning money is left over for all sorts of prosecution expenses.

Wal-Mart, the nation's top retailer, is a top producer of bad-check cases. Its stores represent one-third to one-half of fees collected in some Missouri counties, and **each case can bring fees of at least \$25 to \$75 to county tills.** Such cases are less lucrative in Kansas because state law limits fees to \$10 per check.

"Wal-Mart is the second-largest client that we serve in the prosecutor's office," said Mike Sanders, Jackson County prosecutor. The county collected about \$43,481 in fees from Wal-Mart check writers in the first 11 months of 2005, Sanders said.

Wal-Mart's decision not to refer cases to prosecutors has created so much opposition nationally that the company is re-evaluating its November decision to go entirely with a collection agency.

"In some states, prosecutors have come to rely on that type of income to fund a significant portion of their budgets," said Paul Logli, an Illinois prosecutor who is president of the National District Attorneys Association. The money also funds educational programs to reduce check fraud, he said.

When prosecutors receive bad-check cases, they send letters to the check writer seeking payment to avoid prosecution. They collect fees along with the amounts of the checks. In Missouri, the business or person who took the bad check gets an additional fee from the check writer.

Wal-Mart switched to TeleCheck Services to assess the worthiness of all customer checks and to seek collection of bad checks that get through.

Until November, Wal-Mart used another private company to collect checks at most of its stores but sent cases directly to prosecutors from about 500 stores, said Marty Heires, a Wal-Mart spokesman.

"We wanted to establish a standard process and add a higher level of accountability to the system," Heires said. "As large as we are and as many stores as we operate, we feel a consistent system is good for us."

Recently in politics
2006/01/08:

- [AP: Santorum Rails Against Alito Opposition](#)
- [UPI: Schwarzenegger injured in traffic accident](#)
- [AP: Santorum Rails Against Alito Opposition](#)
- [UPI: Army says divorce rate dropping](#)
- [UPI: Former minister Banks dies after stroke](#)
- [AP: Stroke Experts Describe Sharon Procedure](#)
- [AP: Sharon Case May Raise Theological Issues](#)

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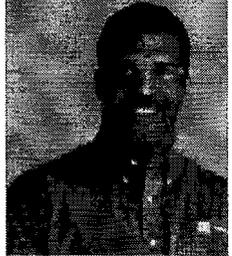
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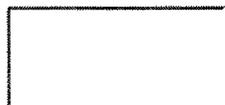
Send news tips to PJM

H&R BLOCK
In Your Corner

Play the
Double
Your Refund
Instant Win
Game.
Learn more



CLICK NOW
to get a coupon
for \$25 off
professional tax
preparation.



But a conference call with some district attorneys last month has led the company to consider ways it can modify the program to address their concerns, Heires said.

The effect of bad checks at Wal-Mart varies widely by state and county, depending on fees collected and the dominance Wal-Mart has in the retail market.

Wal-Mart has about 13 percent of the bad-check business in Jackson County, second only to QuikTrip, records show. Jackson County collected about \$341,137 overall in its bad-check unit through November, he said. The slight annual profit in the bad-check unit is used to update technology in the prosecutor's office and for various trial preparation costs, Sanders said.

Platte and Clay counties each get about 17 percent of their bad-check collections from Wal-Mart cases, according to prosecutor offices. Platte County prosecutor Eric Zahnd said overall fees on bad checks pay the salary of one prosecutor.

The impact of Wal-Mart's bad-check business is even greater in Missouri counties where its stores are more dominant. In Greene County, where Springfield is located, Wal-Mart brought in about \$87,000 in 2005, or 56 percent of all bad-check fees, said prosecutor Darrell Moore.

Moore said that the bad-check fund pays for two prosecutors and one investigator and that Wal-Mart "is a critical piece" of that fund.

"Like most prosecutors' offices, we are strapped for funds," Moore said.

Jasper County, where Joplin is located, got about one-third of its \$147,000 in bad-check fees from Wal-Mart cases through the first 11 months of 2005, said prosecutor Dean Dankelson. In adjacent Newton County, Wal-Mart generates about one-third of the total cases, prosecutor Scott Watson said.

In Kansas, Johnson County only collected about \$20,000 in bad-check fees last year, according to an official in the bad-check unit who said Wal-Mart probably accounted for 10 percent to 30 percent of the amount.

"In Johnson County, we effectively process such a tiny percentage of bad checks that the loss of one retailer will not affect us too much," District Attorney Paul Morrison said. Wyandotte County will suffer no ill effects of the Wal-Mart decision, district attorney spokesman Chris Schneider said.

Morrison, however, said that his office is in the midst of a campaign to make businesses aware that prosecutors will handle bad-check cases.

Logli said Wal-Mart is giving writers of bad checks a break by sending them to a collection agency instead of prosecutors.

"Our concern ... is with any decision by a large corporation to basically decriminalize what is certainly a violation of the law," Logli said. He said that is tantamount to a store declaring, for instance, that shoplifting should not be prosecuted.

If a collection agency fails to get the bad-check writer to pay up, the case could still be referred to a prosecutor, but the case would be more difficult to carry through because of the time that has passed, prosecutors said.

Sanders said stores like Wal-Mart are best off going to prosecutors first.

"We are uniquely qualified to perform this function because overarching all of this is the possibility of criminal prosecution," Sanders said. "It will be very interesting to see how the private collection agency competes with that."

To reach Kevin Murphy, call (816) 234-4464 or send e-mail to kmurphy@kcstar.com.

Newstex ID: KRTB-0102-6888390

Appendix 3



October 4, 2004

Mr. David Ball
The Marin County District Attorney's office
3501 Civic Center Drive Room 1
San Rafael, California 94903

Dear Mr. Ball:

Thank you again for taking the time to speak with me on Wednesday, September 29th. Per our conversation I have put together a proposal and competitive analysis in writing. This proposal will forecast what we can offer to you and Marin County.

A review of that proposal includes the following:

ACCS check volume is based on our national average. I forecast 2500 checks per year. Currently, Reports Unlimited is producing approximately 1200 checks per year, which is half of what we project.

The **ACCS forecast for DA revenue** is \$13,125 per year based on a split of 50/50 of the administrative fee. Our national recovery average is nearly 35%. Does RU track recovery percentage? I am confident that we can increase your current revenue. You did not share with me the RU's revenue figures. Based on the check volume figures given to me and your administrative split, I came up with approximately \$8,280 per year. The ACCS forecast is still better than RU, which is based on a higher revenue split.

Our specially designed diversion class has a national recidivism rate of less than 5%. You did not give me RU's statistics therefore I could not offer a competitive analysis. Are they tracking these important statistics? In Contra Costa County, RU had a no-show rate of 70%. That is high. Our rate is less than 50%.

In addition, ACCS will provide a **Community Relations Representative** to promote the program to merchants and interact with law enforcement. The primary goals of the representative are to promote the program while enhancing the public visibility and confidence of the District Attorney's office. This also results in more checks and revenue. ACCS also has relationships with national merchants. I am confident that our merchant participation will far exceed those of Reports Unlimited. This is in part due to our Community Relations component. Having a representative to promote the program is invaluable. The representative will work

accs
American Corrective
Counseling Services Inc.

Corporate Office
180 Avenida La Pata
San Clemente, CA
92673
Tel. (800) 325-3910
Fax (800) 325-3873
www.accs-inc.com

EXHIBIT 2

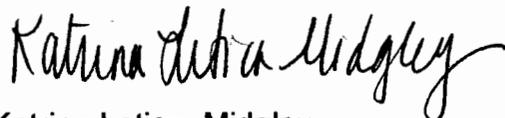
with victims and other sources to maintain constant program awareness.

Again, ACCS has been successfully contracted in several California counties for many years. In fact, ACCS has recently contracted with Contra Costa and Napa Counties, whom were previously contracted with RU. I would like to suggest that you contact Gayle Graham, Senior Deputy District Attorney, with the Contra Costa District Attorney's office for a reference. I am confident that she will give us a strong referral. The Contra Costa transition from RU to ACCS has been smooth and virtually pain free for the victims, check writers and the DA's office.

I am also requesting that in-person appointment we keep discussing. At that time I will share with you other important components of our program. You will find these to be valuable and useful for you and the constituents of Marin County.

I will contact you soon. In the meantime, if you have any questions, please contact me at (800) 213-1467 or via email: kletica@checkprogram.com. I look forward to speaking with you.

Thank you for your consideration,



Katrina Letica- Midgley
Regional Manager

Enclosures

cc: Kristy Silguero, ACCS Associate Vice-President

**Marin County
ACCS Forecast and Proposal
Competitive Analysis**

Check Volume:

ACCS Forecast

Marin County Population: 250,000

Forecast: 2,500 checks per year (Based on minimum national average)

Reports Unlimited: 80-100 checks per month

Approximately 1200 checks per year

DA Revenue:

ACCS Forecast

\$ 13,125 projected ACCS DA Revenue based on 2,500 checks per year and a 50/50 split of the administration fee.

RU Forecast: approximately \$8,280 per year. Based on 1200 checks per year and recovery of 30%.

Educational Component:

ACCS Forecast- Less than 5% recidivism

Less than 50% no show rate

RU recidivism rate- No statistics given

70 % no show rate in Contra Costa

Community Relations Component:

ACCS Forecast- Hire Community Relations Representative (in addition to monthly DA revenue.)

RU forecast- NO COMMUNITY RELATIONS REPRESENTATIVE

Monthly reporting of statistics and Community Relations:

- We report monthly statistics for victim restitution, class attendance, check volume, DA revenue and a community relations activity report.

ACCS Community Relations Proposal for Marin County, California

Community Relations Representative (CRR) will focus on converting local independent grocery stores (several locations, including Bell Markets) and other businesses to program users.

CRR will also work with the 10+ chambers of commerce and Downtown Associations to insure constant program awareness. Present the program to the membership and supply chamber with program materials.

CRR will also be in regular contact with all law enforcement agencies in the county. Will supply offices with program materials and act as a liaison for the bad check program.

CRR will assist victims with filing crime reports and give tips for check acceptance.

CRR will also be a member of the CFCIA organization.

CRR will interface with business license departments.

Bad Check Restitution Programs

"It's a win-win situation for merchants, the District Attorney's office and for the check writers themselves."

Los Angeles Times

The Problem

The actual volume of misdemeanor bad checks in most jurisdictions has the potential to completely overwhelm the local criminal justice system. Most jurisdictions have no choice but to look the other way as they do not have the staff or budget to help these crime victims due to the growing backlog of more serious crimes.

The Solution

American Corrective Counseling Services, (ACCS) provides turn-key bad check restitution programs to District Attorneys that allow you to manage misdemeanor bad check cases with minimal effort, and at absolutely NO COST to local government!

How Does the Program Work?

ACCS handles all the details for you. We work behind the scenes while your office receives all the credit. Your office determines all program criteria and parameters and has ongoing control over all aspects of the program. This Public/Private partnership provides your community a proven remedy for bad checks with features such as:

- *Live, local intervention counseling classes for offenders resulting in recidivism rates of less than 5%*
- *Continuous local public relation campaigns for merchant education and program promotion by local program employees.*
- *Coordination of restitution recovery and reimbursement to victims.*
- *Investigation and preparation of cases to be forwarded for prosecution review.*
- *Coordination of program information for law enforcement and the prosecutor's office.*

"Checks & Balances" Class Curriculum

All program participants are required to attend an 8 hour financial responsibility class. Our "Checks and Balances" class provides a critical link to reducing the overall impact of bad checks on local economies, and subsequent problems created within the criminal justice system. The program identifies the precipitating factors relating to the check writer's behavior, and exposes the offender's rationalizations. The psychological impact of confronting one's own internal rationalizations, and their resulting personal consequences, is what creates the environment for behavioral change. The following concepts are covered in the course:

- ◆ **Impact of Bad Checks on Society**
- ◆ **Values, Attitudes and Behavior**
- ◆ **Situational Awareness**
- ◆ **Communication**
- ◆ **Stress Management**
- ◆ **Personal Finance**
- ◆ **Budgeting**
- ◆ **Checkbook Reconciliation**

Public Relations & Customer Service

ACCS provides participating jurisdictions with community relations services to manage an on-going public relations campaign. This campaign enhances the public's perception of the prosecutor's office and promotes the bad check program to the local business community. Community Relations Representatives systematically visit each city of the jurisdiction distributing program brochures and complaint forms to local businesses, chambers of commerce and law enforcement agencies. In addition to providing newsletter articles, distributing program information, and attending monthly functions, community relations representatives coordinate speaking engagements for the prosecutor or other designated program personnel.



ACCS

Bad Check Restitution Program

Programs Operating in the following jurisdictions:

California

- ◆ Contra Costa County
- ◆ El Dorado County
- ◆ Los Angeles County
- ◆ Merced County
- ◆ Monterey County
- ◆ Orange County
- ◆ Riverside County
- ◆ San Bernardino County
- ◆ San Joaquin County
- ◆ Santa Clara County
- ◆ Sonoma County
- ◆ Stanislaus County

Colorado

- ◆ 1st Judicial District
Jefferson County
- ◆ 2nd Judicial District
Denver County
- ◆ 8th Judicial District
Larimer County
- ◆ 10th Judicial District
Pueblo County
- ◆ 14th Judicial District
Grand County
Moffat County
Routt County
- ◆ 17th Judicial District
Adams County
- ◆ 18th Judicial District
Arapahoe County
Douglas County
Elbert County
Lincoln County
- ◆ 20th Judicial District
Boulder County
- ◆ 21st Judicial District
Mesa County

Florida

- ◆ 20th Judicial Circuit
Charlotte County
Collier County
Glades County
Henry County
Lee County
- ◆ Miami Dade
- ◆ Palm Beach

Hawaii

- ◆ Honolulu County

Illinois

- ◆ DeKalb County
- ◆ Douglas County
- ◆ DuPage County
- ◆ Effingham County
- ◆ Kane County
- ◆ Knox County
- ◆ LaSalle County
- ◆ Madison County
- ◆ McHenry County
- ◆ Sangamon County
- ◆ St. Clair County
- ◆ Vermilion County

Indiana

- ◆ Allen County
- ◆ Marion County
- ◆ Noble County
- ◆ St. Joseph County

Iowa

- ◆ Dubuque County
- ◆ Jefferson County
- ◆ Polk County

Massachusetts

- ◆ Bristol County
- ◆ Hampden County

Maryland

- ◆ Anne Arundel County
- ◆ Baltimore County
- ◆ Cecil County
- ◆ Frederick County
- ◆ Harford County
- ◆ Howard County
- ◆ Prince George's County

Michigan

- ◆ Bay County
- ◆ Branch County
- ◆ Genesee County
- ◆ Huron County
- ◆ Ingham County
- ◆ Livingston County
- ◆ Macomb County
- ◆ Oakland County
- ◆ Saginaw County
- ◆ St. Clair County
- ◆ Washtenaw County
- ◆ Wayne County

Minnesota

- ◆ Wright County

Nevada

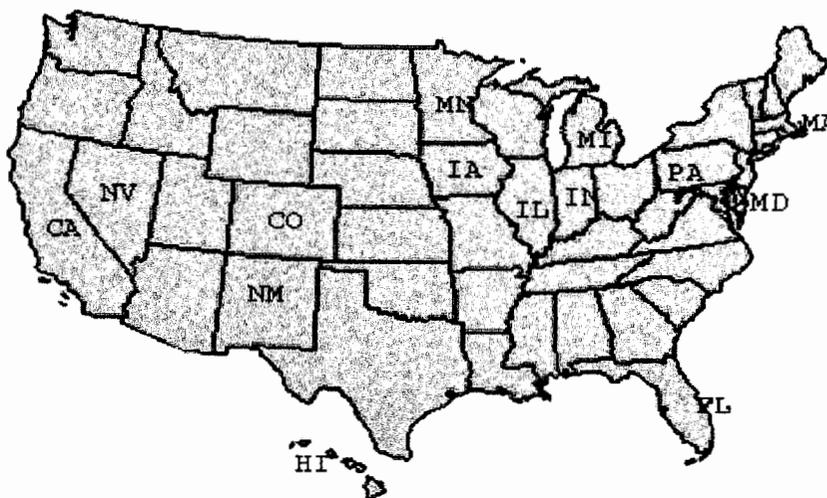
- ◆ Carson City

New Mexico

- ◆ 1st Judicial District
Sante Fe County
Los Alamos County
Rio Arriba County
- ◆ 9th Judicial District
Curry County
Roosevelt County
- ◆ 11th Judicial District Div. II
McKinley County
- ◆ 13th Judicial District
Cibola County
Sandoval County
Valencia County

Pennsylvania

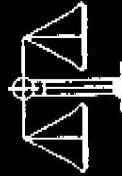
- ◆ Bedford County
- ◆ Blair County
- ◆ Butler County
- ◆ Dauphin County
- ◆ Delaware County
- ◆ Indiana County
- ◆ Lackawanna County
- ◆ Lancaster County
- ◆ Lawrence County
- ◆ Lebanon County
- ◆ McKean County
- ◆ Montgomery County
- ◆ Somerset County
- ◆ Wayne County



Appendix 4

WAL-MART 000192

WAL★MART



ACCS
EST. 1987

LOS ANGELES HONOLULU DENVER CHICAGO INDIANAPOLIS BALTIMORE MIAMI NEW YORK

THE DEFINITIVE AUTHORITY IN RESTITUTION RECOVERY
800-325-9910 · CHECKPROGRAM.COM

ACCS District Attorney Bad Check Restitution Program

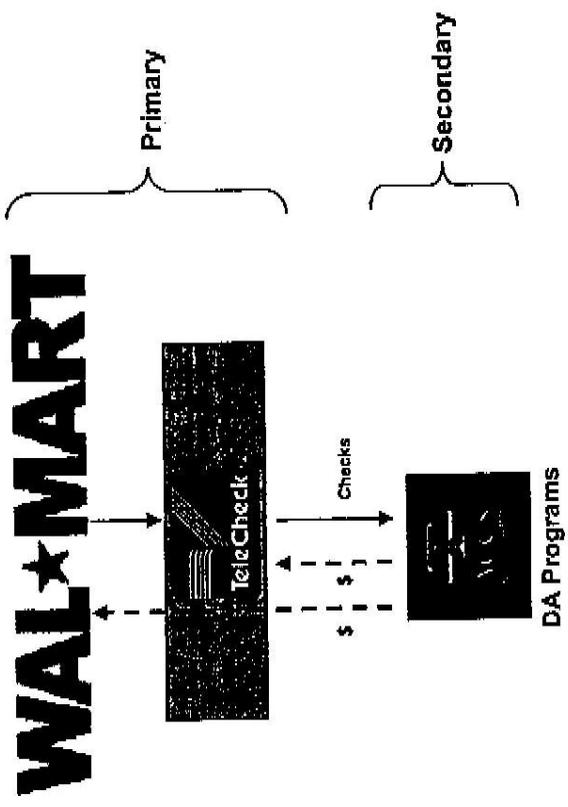
Complementary to Centralized Recovery Solution

WAL-MART 000193



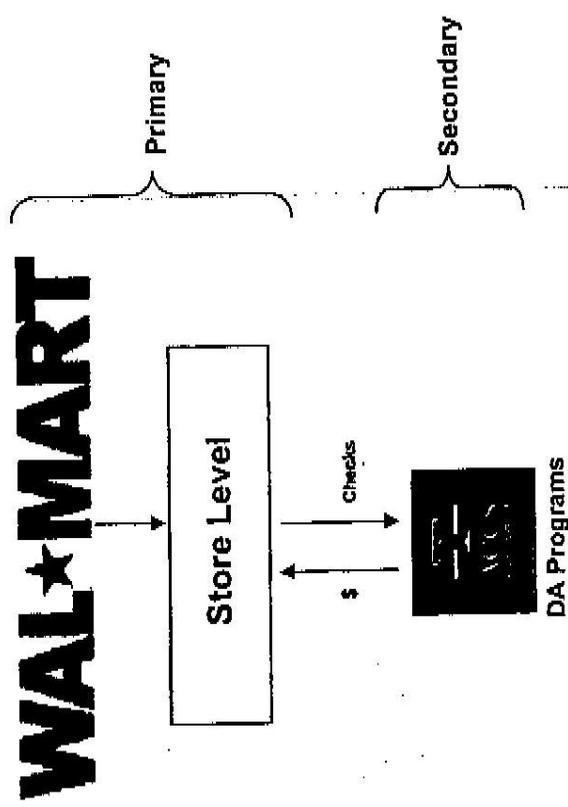
Decision To Centralize Is Win/Win

Proposed
(Centralized)



- Supports Centralized Recovery Program
- Increased Restitution At No Cost
- ACCS Proven Solution For Largest Retailers

Previously
(Decentralized)



- 18 Years Of Service To WMT
- \$13MM In Restitution To WMT
- 55 FTEs Support WMT At Store Level Nationally

WAL-MART 000194



DA Programs Complement Telecheck As Primary

- **What is it?**
 - ACCS/DA Bad Check Restitution Programs offer a **NO-COST** recovery solution to bad checks
 - Unmatched restitution recovery rates driven through the power of the District Attorney's local community brand
 - Full restitution at no cost and no commission to WMT/Telecheck
 - Increased financial accountability turns check writers back into good customers
- **Who is ACCS?**
 - Since 1987, the largest bad check program provider for the nation's leading District Attorneys
 - Returning over **\$120 million** to merchant victims at no cost to them
 - Serving more than **38,000** leading national and local merchants
 - Providing intervention classes/study for more than 500,000 bad check writers
- **Why it works?**
 - **Better Results**
 - Unmatched restitution recovery rates, 100% of recovered restitution (including all relevant bank fees)
 - No commissions, services fees or transactions fees to pay ("public service" to merchants)
 - **Highly Efficient and Flexible Solution**
 - Electronic filing speeds recovery
 - Effective as Primary or Secondary recovery option
 - **Reduces long-term check problem**
 - 75,000 WMT bad check writers educated through ACCS (under 5% of the offenders have not returned to write a bad check)
 - Prosecution of serious offenders deters check fraud; reduces bad checks

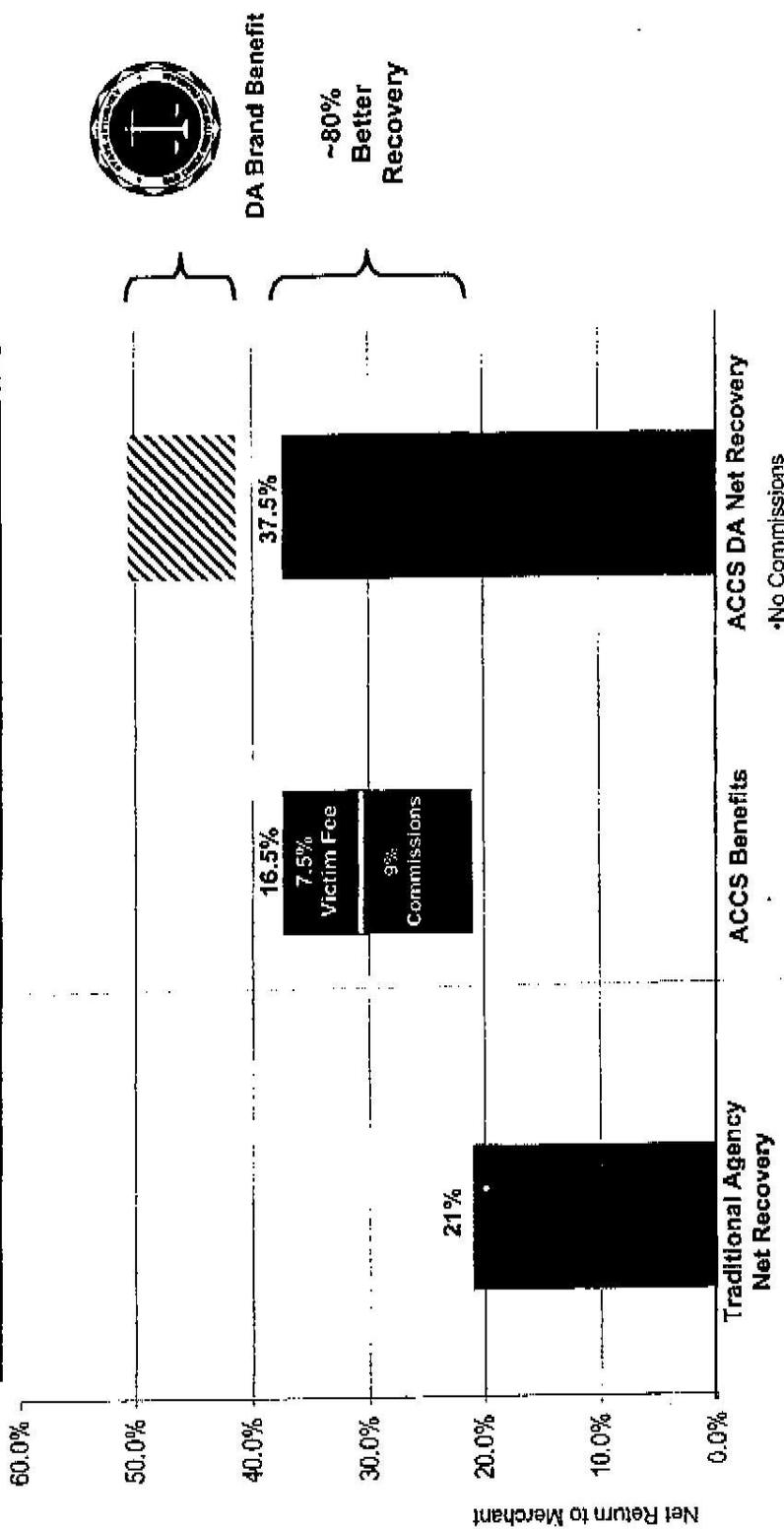
WAI-MART 000195



ACCIS/DA Programs Delivers 100+% Restitution Potential At No Cost

ILLUSTRATIVE

Net Recovery Rates To Merchant: ACCIS vs. Traditional Agency



Illustration/Assumptions:

- Face value of check: \$100
- Victim Fee: \$25 (system wide)
- Avg Recovery: 30%
- Avg Agency Commissions: 30%

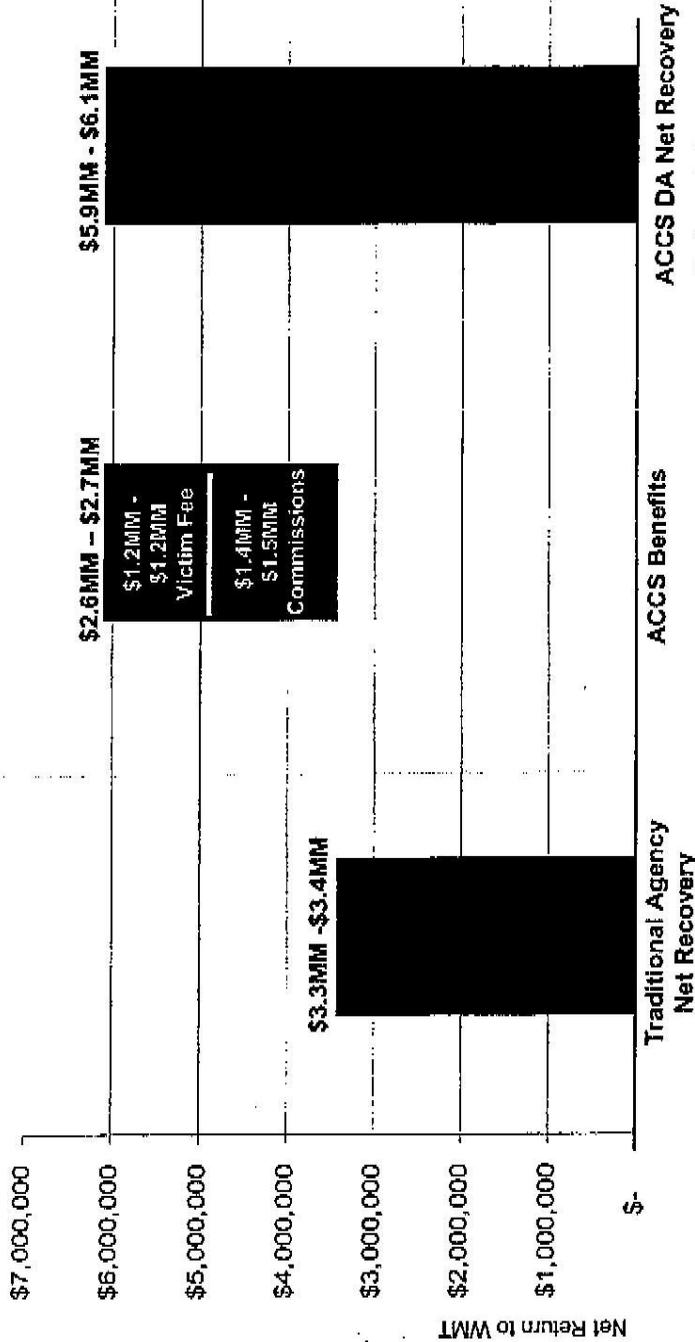
WAL-MART 000196

Program Provides Substantial Economic Value to WMT



ESTIMATES

Net Recovery Rates To WMT: ACCS vs. Traditional Agencies (04-05P)



Notes/Assumptions:

- ACCS data from 2004-05P
- Avg Face Value of WMT Check: \$110
- Victim Fee: \$25 (system wide)
- Avg Recovery: 30%
- Avg Agency Commissions: 30%
- Midpoint 05 WMT P/E: 23

Handwritten notes:
 '04-'05
 class fees \$100-150 for class w/DA shared w/DA split varies
 200,000 cks
 60,000 cks recovered
 partial payments
 \$5.1 mil



WAL-MART

Supported Market Cap
\$68MM - \$70MM

30/710

5 pursue thru Statute of Lim.

WAL-MART 000197



DA Programs Provide Significant Value to WMT Nationwide

Reduces Financial Crimes

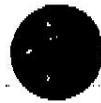
"...it decriminalizes bad checks. It's not a crime. It's just a collection matter... [Wal-mart] might see a higher number of bad checks as a result."



Paul Logli, President, NDAA
Winnemago County
State's Attorney

Supports Local Law Enforcement

"My budget will have to be cut \$384,000. That could include clerical staffand having to lay off deputy district attorneys. About 100 people work for me, and 12 to 14 could have to be laid off."



Tim Kuykendall
Cleveland County
District Attorney

Local Community Support

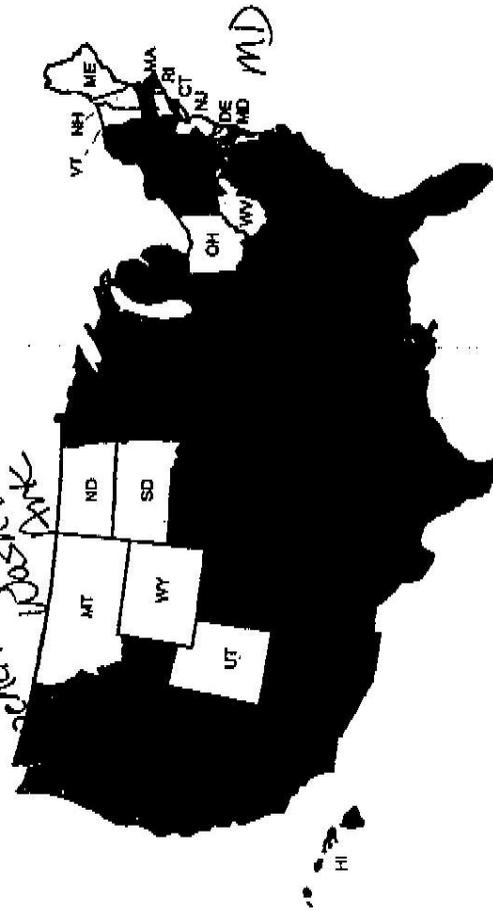
"My hope is when they [Wal-Mart] understand the impact on district attorney's offices they will reconsider"



Cathy Stocker
Garfield County
District Attorney

191

States with DA Bad Check Programs



- 350-400 DA Programs nationally
- 150MM population served
- \$100MM+ returned to victims annually
- \$25-30MM potential to WMT annually

WAL-MART 000198



Partnership Solution Benefits WMT

WAL*MART

Primary

Primary benefits to WMT

- Centralized solution
- Strong primary provider

Secondary

Secondary benefits to WMT

- No cost secondary collection resource
- Increased recovery rates
- Continued local District Attorney relationships and support
- Effective deterrent for serious offenders



Checks



DA Programs



We Have Done This Before;
Proven Solution

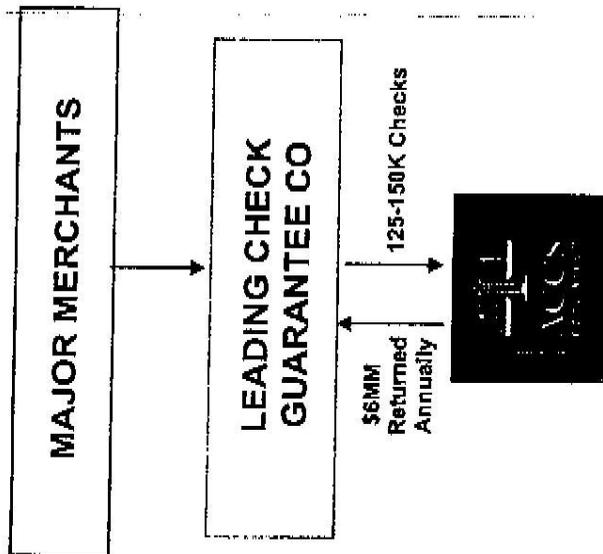
WAL-MART 000198

WAL-MART 000199

Successfully Served Top Merchants As Primary and Secondary Solution



Case Study: Secondary Solution



Support \$145MM - \$150MM in MKT CAP

Leading Merchants Trust ACCS/DAs

ROBINSONS • MAY



38K merchants

\$120MM in Free Restitution

Appendix 5



Porter County Prosecuting Attorney
Bad Check Restitution Program
 PO Box 1217
 Valparaiso, IN. 46383-1217

Brian T. Gensel
 Prosecuting Attorney



084RC33

OFFICIAL NOTICE - IMMEDIATE ATTENTION REQUIRED

*** DIV.0117DUP.BLU.001
 4000000942 01.0000.0000 324/1



Office Hours: 9:00 a.m. - 5:00 p.m.
 Phone: (866)889-5501
 Date of Notice: 01/17/2013
 Case #: 40735660
 Balance Due: \$276.08
 Page: 1

You have been accused of violating Title 35 Article 43 Chapter 5 Section 5 of the Indiana Code, entitled "Check Deception". A Class A Misdemeanor conviction for a bad check of under \$2,500 carries a potential jail sentence of up to one (1) year and, in addition, may be fined up to \$5,000. See page 5 for details on the party(s) initiating this allegation.

My office has established a Bad Check Restitution Program. The 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 Prosecuting 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.**

Porter County Prosecuting Attorney Bad Check Restitution Program

TOTAL BALANCE DUE: \$276.08

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)889-5501 or visit www.checkprogram.com
TO MAKE PAYMENT/SCHEDULE CLASS

Please have your case number ready: 40735660 and Password: 38112313

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 Porter County Prosecuting Attorney.

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

Sincerely,

Brian T. Gensel
Prosecuting Attorney

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.

■ **IF YOU BELIEVE YOU RECEIVED THIS NOTICE IN ERROR OR WISH TO DISPUTE THIS NOTICE IN WRITING:**

- Review your records CAREFULLY.
- Call the Prosecuting Attorney's Bad Check Restitution Program Office at (866)889-5501.
- Ask for a Compliance Specialist.
- Explain the error.
- The Compliance Specialist will ask you to fax or mail in documentation of the error. For cases involving stop payments on checks or performance disputes, please consult a Compliance Specialist for more information.
- You may dispute the validity of this allegation in writing to this Office within 30 days of receiving this Official Notice. Upon submitting your written dispute not later than 30 days after receiving the Official Notice (along with any relevant supporting documentation), the authorized administrator of the Bad Check Restitution Program will review the written dispute based on criteria established by the Porter County Prosecuting Attorney.
- Fax or mail your case documentation to: **Fax: (800) 227-3041**

**Porter County Prosecuting Attorney
Bad Check Restitution Program
PO Box 1217
Valparaiso, IN. 46383-1217**

■ **IF YOU BELIEVE YOU RECEIVED THIS NOTICE AS A RESULT OF IDENTITY THEFT, FORGERY, THEFT, OR OTHER FRAUD:**

You will be required to promptly provide further written documentation to support your claim. If you are a victim of identity theft, you will need to go to the bank to obtain and sign an identity theft affidavit. If you were not the victim of identity theft but did not write the check(s), you will need to go to the bank to obtain and sign an affidavit of forgery that you did not write the check(s) in question. In most cases, if you believe the check(s) were stolen or forged, you will also be required to file a police report.

■ **IF YOU BELIEVE YOU WERE NOT PROPERLY NOTIFIED:**

The Bad Check Restitution Program is only for reports of bad check activity from those businesses or parties that have notified you according to Indiana State Law and provided you with an opportunity to make good on the check. In addition to notification from the party you issued the check to banks routinely send customers notice of returned items. Non-sufficient funds (NSF) checks also appear on your monthly account statement. **PLEASE CHECK YOUR RECORDS CAREFULLY.**

■ **IF YOU HAVE ALREADY PAID THE MERCHANT OR FILING PARTY:**

Please fax or mail documentation that the merchant or filing party received payment BEFORE the date of this Notice. Appropriate documentation consists of a receipt of payment to the victim and/or a cleared copy (front and back) of repayment to the victim. The administrator of the Bad Check Restitution Program will review the submitted documentation. Allow fourteen (14) days to process information before calling.

■ **IF YOU WANT TO CONTEST THIS MATTER:**

You have the right to choose not to participate, and to contest this matter. If you wish, you may want to consult an attorney. Personal bankruptcies DO NOT void responsibility in a criminal matter.

To Make Payment/Schedule Class, Call (866)889-5501 or www.checkprogram.com

Case Number: Password:

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

■ TERMS AND CONDITIONS OF THE BAD CHECK RESTITUTION PROGRAM:

Participant agrees to participate in the Porter County Prosecuting Attorney Bad Check Restitution Program ("Program"). Participant acknowledges and agrees that the fees charged for the Program are reasonable and appropriate. Participant acknowledges and agrees that in addition to the fees that are charged, participant is required to attend a rehabilitative counseling class conducted by an instructor hired by the private entity under contract with the Prosecuting Attorney to administer the Program ("Administrator"). Participant further agrees that by paying the fees charged for the Program, participant is bound by the terms and conditions of the Program, as set forth in this agreement.

Agreement to Arbitrate: You and Administrator agree to resolve any and all claims and disputes relating in any way to the Program ("Claims"), except for Claims concerning the validity, scope or enforceability of this Arbitration Agreement, through BINDING INDIVIDUAL ARBITRATION before the American Arbitration Association ("AAA"). This means you will be unable to have Claim(s) resolved by a court or jury, or to participate in a class action or class arbitration. Other rights you would have if you went to court may be unavailable or limited in arbitration, including your right to appeal. The only exception to this agreement to arbitrate is that you and/or Administrator may seek relief in a small claims court for Claims within the jurisdiction of that court in any particular state.

CLASS ACTION WAIVER: NO ARBITRATOR OR COURT MAY ORDER, PERMIT OR CERTIFY A CLASS ACTION, REPRESENTATIVE ACTION, PRIVATE ATTORNEY-GENERAL ACTION OR CONSOLIDATED ARBITRATION IN CONNECTION WITH THIS ARBITRATION AGREEMENT. NO ARBITRATOR OR COURT MAY ORDER OR PERMIT A JOINDER OF PARTIES IN CONNECTION WITH THIS ARBITRATION AGREEMENT UNLESS ALL PARTIES CONSENT TO SUCH JOINDER IN WRITING.

Governing Law and Jurisdiction: Any arbitration proceeding will be governed by the Consumer Procedures or other applicable rules of AAA in effect when the Claim is filed. The arbitration proceeding will take place in the county where you reside or any other mutually acceptable location. Judgment on the arbitration award may be entered in any court having jurisdiction.

The arbitrator shall follow applicable law and is empowered to grant any relief, including attorneys' fees, costs, and other expenses, to the extent such relief would be available in court. You and Administrator agree the Program and transactions subject to this Arbitration Agreement involve interstate commerce and that this Arbitration Agreement is governed by and enforceable under the Federal Arbitration Act. You and Administrator also agree this Arbitration Agreement extends to parties related to Administrator that are involved in any Claims, including without limitation, Administrator's parents, affiliates, subsidiaries, agents, principals, contractors, officers and employees.

Costs: Administrator shall pay all arbitration costs if it initiates arbitration. If you initiate arbitration, you will not be required to pay any fees that exceed the fees you would have paid had you brought the Claim(s) in court. You may seek a waiver of the filing fee under AAA Rules. If you do not qualify for a waiver, you may request, in writing, that Administrator advance all or part of the filing fee.

Enforceability: This Arbitration Agreement shall govern if there is a conflict between it and the AAA Rules, unless Administrator waives any conflict in writing. If any part of this Arbitration Agreement, except the class action waiver, is found invalid or unenforceable, the remaining provisions shall remain in full force and effect. If the class action waiver is found invalid or unenforceable as to a particular Claim, the Arbitration Agreement shall not apply to that Claim.

You may contact AAA to obtain information about arbitration, arbitration procedures and fees by calling 800-778-7879 or visiting www.adr.org.

YOU HAVE THE RIGHT TO REJECT THIS ARBITRATION AGREEMENT, BUT YOU MUST DO SO PROMPTLY. If you do not agree to arbitration, you must notify us in writing within sixty (60) days after the date you enroll in the Program. You must send your notice to: 806 E Avenida Pico STE I PMB 340, San Clemente, CA 92673-5639, and include your full name, address, and the statement "I reject the arbitration agreement for the Porter County Prosecuting Attorney Bad Check Restitution Program."

■ OTHER IMPORTANT INFORMATION:

Completion of the Bad Check Restitution Program is valid ONLY if you comply with ALL Prosecuting Attorney's requirements. Should you be permitted to comply by a payment plan, such payments may be allocated ratably between restitution and program fees until they are fully satisfied. By making full or partial payment, you are agreeing to be enrolled in the Bad Check Restitution Program, and you are agreeing to pay restitution on all reported checks as well as pay all required fees, including program, administrative, and returned item fees pursuant to the terms of this Notice. Once enrolled, program fees will be non-refundable.

You may wish to consult an attorney to obtain legal advice about your rights in regards to this matter.

The Program does not accept personal checks. Sending a personal check for payment shall be deemed sufficient authorization to complete the payment via electronic debit. By doing so, your checking account will be debited for the amount of the check and your cancelled check will not be returned to your bank. Electronic debit entries returned for insufficient or uncollected funds may be resubmitted two times following the return of the original entry.

Please note, your balance may increase if additional checks are reported to this office or program fees are changed. Additionally, you may incur a fee for missing or rescheduling class, making a late or insufficient payment, and/or paying over the phone or Internet.

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Porter County Prosecuting Attorney
 Bad Check Restitution Program
 PO Box 1217
 Valparaiso, IN. 46383-1217

Brian T. Gensel
 Prosecuting Attorney

OFFICIAL NOTICE - IMMEDIATE ATTENTION REQUIRED

BALANCE DUE ON 02/16/2013

\$276.08

Office Hours: 9:00 a.m. - 5:00 p.m.

Page: 5 of 5

PAYMENT OPTIONS:

- 1. INTERNET www.checkprogram.com
 Case Number: 40735660
 Password: 38112313
 Credit and Debit Cards

- 2. PHONE (866)889-5501
 Credit and Debit Cards or Western Union

- 3. MAIL **Porter County Prosecuting Attorney**
 Bad Check Restitution Program
 PO Box 1217
 Valparaiso, IN. 46383-1217
 Money Orders and Cashier's Checks Only

VICTIM	CHECK #	DATE	AMOUNT	PROTEST FEE	SERVICE FEE	TOTAL THIS CHECK
WALGREENS	0109	8/5/2012	\$3.58	\$27.50	\$35.00	\$66.08
Financial Accountability Class Fee						\$210.00
TOTAL BALANCE DUE:						\$276.08

*** Additional service fee may be due victim. ***

To Make Payment/Schedule Class, Call (866)889-5501 or www.checkprogram.com

Case Number: 40735660 Password: 38112313

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

Appendix 6

Grant County Prosecuting Attorney's
Check Enforcement Program
P.O. Box 37
Ephrata, WA 98823



GRANT COUNTY
D. Angus Lee
PROSECUTING ATTORNEY

October 30, 2012

S S

... WARNING OF CRIMINAL CHARGES ...

The Prosecuting Attorney's Office has received a complaint against you for issuing a worthless check(s). (See list below.) Issuing a worthless check with knowledge of insufficient funds and with the intent to defraud is a criminal offense punishable with jail time and/or fines. It appears that you have ignored the demand by the recipient of the listed check(s) to make restitution. Under Washington Statutes, this can constitute criminal intent and a Warrant for your arrest can be issued.

It is still possible to avoid a CRIMINAL CONVICTION

The Grant County Prosecuting Attorney's Check Enforcement Program allows check writers facing possible criminal action an opportunity to avoid that action. But you must comply with the conditions of this diversion program.

- YOU MUST: 1) Pay the full dollar amount shown below.
2) Complete the Check Writer's Financial Training Course.

MAIL PAYMENT TO: **Grant County Prosecuting Attorney's
Check Enforcement Program
P.O. Box 37
Ephrata, WA 98823**

If you have questions about this matter, contact the Check Enforcement Program (toll free) at (888) 871-9452.

Payment must be in the form of a CASHIER'S CHECK or MONEY ORDER, to the Check Enforcement Program and sent TO THE ADDRESS LISTED ABOVE.

<u>Item</u>	<u>Check No.</u>	<u>Case No.</u>	<u>Check Amt.</u>	<u>Victim Fee</u>	<u>Program Fees</u>
FINANCIAL TRAINING	2059		50.00	25.00	40.00 125.00

Make MONEY ORDER or Cashier's Check payable to:

CHECK ENFORCEMENT PROGRAM

For:

\$ 240.00 ♦

IMPORTANT ADDITIONAL INFORMATION

MAIL PAYMENT TO: Grant County Prosecuting Attorney's
Check Enforcement Program
P.O. Box 37
Ephrata, WA 98823

IF YOU BELIEVE YOU HAVE RECEIVED THIS NOTIFICATION IN ERROR:

1. Review your records carefully. The Check Enforcement Program is in possession of evidence that your check was dishonored by the banking institution. While it is possible that an error has occurred, it is unlikely.
2. Contact the Check Enforcement Program, toll free, at: (888) 871-9452 to explain any error you believe has occurred. Ask to speak with a Case Investigator. The Investigator will answer your questions as well as explain what is required, **WHAT DOCUMENTATION YOU MUST PROVIDE THE PROGRAM** and what the sequence of events will be in pursuing your case.
3. Be prepared to send necessary documentation that supports your contention. To dispute this notice you are required to notify the Check Enforcement Program in writing no later than 10 days after receiving this notice. If you believe your checks have been stolen or that you are the victim of forgery, fraud or identity theft, you will be asked to supply a Police Report, Bank Records or similar verifiable, written proof. **THE CHECK ENFORCEMENT PROGRAM WILL NOT DISMISS A CHECK CASE WITHOUT PROPER DOCUMENTATION.**
4. Mail the required documentation immediately. Your case can be released for review and possible prosecution if documentation is not received within the time period indicated by the Case Investigator when you call.

IF YOU BELIEVE YOU WERE NOT PROPERLY NOTIFIED ABOUT A DISHONORED CHECK:

The Check Enforcement Program accepts only checks with DOCUMENTED notification by the victims to the check writer. In addition to notification by the victim, banks routinely send customers a notice if a check has been dishonored. Checks that are dishonored because of Insufficient Funds or Non-sufficient funds appear on your monthly banking statement. **CHECK YOUR RECORDS CAREFULLY BEFORE CONTACTING THE CHECK ENFORCEMENT PROGRAM OR CONSULTING AN ATTORNEY.**

IF YOU HAVE ALREADY PAID THE MERCHANT OR PARTY FILING THE COMPLAINT:

If you have paid the victim or the party filing the Complaint, you must MAIL DOCUMENTATION that the payment was received by the victim or filing party BEFORE the date of this notice. Upon receiving your documentation, the Check Enforcement Program will contact you with regard to what action will be taken to resolve the case.

IF YOU WISH TO CONTEST THIS ACTION:

If you prefer to contest this action you are urged to consult an attorney. Contact the Check Enforcement Program to inform us of your intention to appear in court.

THE EDUCATIONAL REQUIREMENT

ALL check writers whose checks have been referred to the Check Enforcement Program MUST complete the Educational Requirement to discharge the case as part of this diversion program. You will receive additional information about this requirement after the required restitution and fees have been received.

FAILURE TO COMPLETE THE EDUCATIONAL REQUIREMENT CAN CAUSE YOUR CASE DIVERSION TO BE REVOKED.

To contact the Check Enforcement Program, call, toll free: (888) 871-9452.

Appendix 7



Los Angeles County District Attorney
Bad Check Restitution Program
 PO Box 86407
 Los Angeles, CA 90086-0407



ATTENTION: CLASS RESERVATION REMINDER

*** 0229-00037-001
 3000000016 01 0000 0000 13/1



Phone: (800)269-0206
 Office Hours: 9:00 a.m. - 5:00 p.m.
 Date of Notice: 02/29/2012
 Case #:
 Balance Due: \$0.00
 Page: 1

Your Financial Accountability Class is scheduled for Saturday, March 10, 2012. Please arrive before 7:45 AM. The class is scheduled to end at approximately 4:00 PM. You will need to bring this Notice and a pen or pencil to the class location listed below:

Pierce College
 6201 Winnetka Ave
 Woodland Hills, Ca 91371

Class will be held in Village Room #8111
 CLASS IS FROM 8:00am-4:00pm

Heading West on I-210, take I-5 South. Then take a slight right onto the 405 S. Take the exit onto US-101 toward Ventura. Take exit 25 for Winnetka Ave. Turn right onto Winnetka.

Heading on Winnetka Ave exit. Turn north (if you went to Ventura Blvd. you went the wrong way). Drive on Winnetka Blvd. until you get to the Calvert Street entrance of Pierce College. Turn left into the campus.

The Village rooms are directly behind the South Gym and the pool

Please visit www.piercecollege.edu to see a map of the campus

Other important information: Children and guests are not permitted in class. Payments are not accepted at class. Class registration begins at 7:45 AM and the class will start promptly at 8:00 AM. Students arriving late may not be admitted to class. Failure to attend your scheduled class will result in a \$25.00 rescheduling fee being added to your case.

Completion of the program is only valid if you comply with ALL Bad Check Restitution Program requirements, including paying your outstanding balance and attending class.

 If you need assistance in accessing the facility where this class is being held, or need accessibility assistance while attending this class, please call us at (800)269-0206 to discuss your needs. Thank you.

California Penal Code 476a, "Issuing a Check with Insufficient Funds."
 A conviction under this statute is punishable by up to three (3) years in state prison.

To Make Payment/Schedule Class, Call (800)269-0206 or www.checkprogram.com

Case Number: Password:

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



Los Angeles County District Attorney
Bad Check Restitution Program
 PO Box 86407
 Los Angeles, CA 90086-0407

ATTENTION: CLASS RESERVATION REMINDER

*** 0229-00037-001
 3000000017 01 0000 0000 13/2

Phone: (800)269-0206
 Office Hours: 9:00 a.m. - 5:00 p.m.
 Date of Notice: 02/29/2012
 Case #:
 Balance Due: \$0.00
 Page: 2

This session is presented in English. If you need other arrangements, please call (800)269-0206.

Our records indicate that you currently have an outstanding balance of \$0.00.

VICTIM	CHECK #	DATE	AMOUNT	RETURNED ITEM FEE	ADMIN FEE	TOTAL THIS CHECK	
RALPHS	554	12/2/2007	\$3.87	\$6.00	\$35.00	\$44.87	
						Financial Accountability Class Fee	\$150.00
						Assessed Fees	\$250.00
						Less Payments	\$444.87
						TOTAL BALANCE DUE:	\$0.00

*** Additional service fees may be due to victim. ***

No walk-in payments accepted at the above address. Thank you for your immediate response to this matter.

(Por favor de llamar (800) 574-7120 para asistencia en español.)

The Los Angeles County District Attorney's Bad Check Restitution Program is administered
 by a private entity under contract with the Los Angeles County District Attorney.

If you need assistance in accessing the facility where this class is being held, or need accessibility assistance while attending this class, please call us at (800)269-0206 to discuss your needs. Thank you.

California Penal Code 476a, "Issuing a Check with Insufficient Funds."
 A conviction under this statute is punishable by up to three (3) years in state prison.

To Make Payment/Schedule Class, Call (800)269-0206 or www.checkprogram.com

Case Number: Password:

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

Appendix 8



EXECUTIVE SUMMARY

Why District Attorney Bad Check Restitution Programs Are Superior To Collection Agencies

INTRODUCTION

ACCS is the pioneer and leader in the administration of *District Attorney Bad Check Restitution Programs* that offer retailers a no-cost recovery solution to the problem of bad checks. The District Attorney Bad Check Restitution Programs combine the strength and authority of the District Attorney's Office with the resources and efficiencies of private enterprise.

Established in 1987, ACCS operates these programs exclusively for over 135 District Attorneys nationally covering nearly 60 million people in major metropolitan areas including: Los Angeles, Chicago, Miami and hundreds of other jurisdictions nationwide. Many of the nation's leading retailers including Target®, Wal-Mart®, Kroger® and nearly 38,000 others have grown to trust ACCS as their preferred bad check recovery solution because of the unique benefits they receive:

- Unmatched restitution recovery rates driven through the power of the District Attorney's brand
- Full restitution at no cost and no commission to the participating merchant
- Bad check writers receive educational intervention designed to increase financial accountability and turn check writers back into good customers

For nearly 20 years, ACCS has grown to become the largest provider of full-service bad check diversion programs for the nation's leading District Attorneys.

- Returning over \$130 million to merchant victims at no cost to them
- Handling more than 530,000 bad checks annually
- Providing intervention classes for more than 250,000 check writers

LOS ANGELES

HONOLULU

DENVER

CHICAGO



INDIANAPOLIS

BALTIMORE

MIAMI

NEW YORK

THE DEFINITIVE AUTHORITY IN RESTITUTION RECOVERY
800-325-2910 CHECKPROGRAM.COM

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Page 1

ACCS0084251

MERCHANT PARTICIPANTS

Merchants participating in the District Attorney Bad Check Restitution Programs achieve unmatched bad check recovery results. The combination of no-cost and high recovery rates significantly impact retailers' bottom line in a way that is not available via traditional collection agency options.

Many of the nation's largest and most profitable retailers participate in these programs administered by ACCS, including:



SAFEWAY



THE DEFINITIVE AUTHORITY IN RESTITUTION RECOVERY
800-325-3910 CHECKPROGRAM.COM

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NATIONAL SOLUTION

The continuing expansion of ACCS' network of District Attorneys makes the District Attorney Bad Check Restitution Programs an irreplaceable component of major retailer's overall loss prevention strategy. ACCS administers District Attorney Bad Check Restitution Programs in California, Colorado, Florida, Hawaii, Illinois, Iowa, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York and Pennsylvania and new jurisdictions are being added each month. Below is a current list of jurisdictions where ACCS administers the DA's restitution programs at no cost to participating merchants:

ARKANSAS

6th Judicial District

CALIFORNIA

Alameda County
 Calaveras County
 Colusa County
 Contra Costa County
 El Dorado County
 Glenn County
 Imperial County
 Los Angeles County
 Madera County
 Marin County
 Mariposa County
 Merced County
 Modoc County
 Monterey County
 Napa County
 Nevada County
 Orange County
 Placer County
 Riverside County
 San Joaquin County
 San Mateo County
 Santa Barbara County
 Santa Clara County
 Sierra County
 Sonoma County
 Stanislaus County
 Tulare County
 Tuolumne County

COLORADO

1st Judicial District
 2nd Judicial District
 4th Judicial District
 5th Judicial District
 8th Judicial District
 9th Judicial District
 10th Judicial District
 14th Judicial District
 17th Judicial District
 18th Judicial District
 20th Judicial District
 21st Judicial District

FLORIDA

17th Judicial Circuit
 18th Judicial Circuit
 20th Judicial Circuit
 Miami Dade

HAWAII

City & County of Honolulu
 Kauai County

ILLINOIS

Christian County
 Clark County
 Cook County
 DeKalb County
 Edgar County
 Effingham County
 Kane County
 Kendall County
 Knox County
 LaSalle County
 Lee County
 Macon County
 McLean County
 Madison County
 Ogle County
 Peoria County
 Putnam County
 Randolph County
 Sangamon County
 St. Clair County
 Union County
 Vermilion County
 Will County
 Winnebago County

INDIANA

Allen County
 Johnson County
 Marion County
 Noble County
 Porter County
 St. Joseph County
 Vanderburgh County
 Vigo County

IOWA

Dubuque County
 Jefferson County
 Polk County

MASSACHUSETTS

Cape & Islands District
 Hampden County
 Middlesex District
 Suffolk County

MARYLAND

Anne Arundel County
 Baltimore County
 Caroline County
 Carroll County
 Cecil County
 Frederick County
 Harford County
 Howard County
 Prince George's County
 Queen Anne's County
 Washington County
 Wicomico County

MICHIGAN

Bay County
 Branch County
 Genesee County
 Huron County
 Ingham County
 Ionia County
 Isabella County
 Kent County
 Livingston County
 Macomb County
 Midland County
 Monroe County
 Oakland County
 Saginaw County

MINNESOTA

Wright County

NEVADA

Carson City
 Lyon County

NEW MEXICO

1st Judicial District
 2nd Judicial District
 4th Judicial District
 7th Judicial District
 9th Judicial District
 11th Judicial District
 13th Judicial District

NEW YORK

Rensselaer County

OREGON

Deschutes County

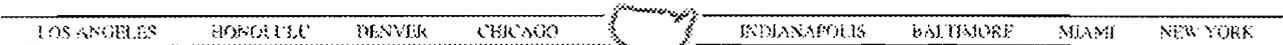
PENNSYLVANIA

Armstrong County
 Beaver County
 Bedford County
 Blair County
 Bradford County
 Butler County
 Dauphin County
 Delaware County
 Indiana County
 Lackawanna County
 Lancaster County
 Lawrence County
 Lebanon County
 Lehigh County
 McKean County
 Montgomery County
 Northampton County
 Somerset County
 Wayne County
 York County

SOUTH CAROLINA

11th Judicial Circuit
 Horry County

Revised: 1/27/08



THE DEFINITIVE AUTHORITY IN RESTITUTION RECOVERY
 800-325-3810 CHECKPROGRAM.COM

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PROGRAM PARTICIPATION

Participation in the District Attorney Bad Check Restitution Program is quite straightforward and typically consistent with existing merchant obligations. Retailers must provide adequate written notification to the check writer extending the opportunity to make the check good before being submitted to the program. If the check writer fails to repay the check during a sufficient time frame (varies by state but generally 30 days) the check can then be forwarded to the District Attorney Bad Check Restitution Program.

Each participating District Attorney establishes the intake criteria for the types of checks eligible for their respective Bad Check Restitution Program. Although check laws vary from state to state, the following are typical eligibility guidelines:

Typically Eligible

- NSF
- Account Closed
- Accepted in exchange for goods or services
- Deposited in a financial institution
- Sufficient notice given to check writer
- Identification recorded at the time of the transaction

Typically Ineligible

- Post dated
- Two-party
- Stolen/forged
- There is no amount, date or signature on the check
- The identity of the check writer is unknown

Most participating major merchants choose to submit bad check complaints electronically via modem, email or secure site on the Web. Electronic filing is the most efficient means of filing and requires no additional software or hardware for the merchant. ACCS' programming staff will work with the retailers' existing software to create compatible record formats. After submission of the bad check data electronically, the retailer retains all original evidence in the event it is needed for prosecution proceedings. Naturally, manual submission processes are also available if preferred by the merchant

Participation in the District Attorney Bad Check Restitution Program does not require any contractual commitments on behalf of the retailers. It is a public service provided by the DA to the merchant at no cost or obligation. In most states, the program provides both the no-cost recovery of the face value of the check *plus* applicable statutory fees to reimburse the merchant for relevant bank charges. It is this value proposition that has attracted so many leading merchants to participate in these ACCS' administered District Attorney restitution programs.

LOS ANGELES HOUSTON DENVER CHICAGO  INDIANAPOLIS BALTIMORE MIAMI NEW YORK

THE DEFINITIVE AUTHORITY IN RESTITUTION RECOVERY
800-325-3810 CHECKPROGRAM.COM

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PROGRAM OPERATIONS

The restitution process is fairly intuitive. It begins with an extremely effective letter campaign that is mailed within 24 hours of the eligible check's entry into the system. These letters are fully approved by and sent on behalf of each District Attorney (using their respective District Attorney official seal, name and office). They offer the bad check writer a quick and compelling procedure for paying restitution and enrolling in an intervention class designed to help them avoid prosecution and eliminate their writing bad checks in the future.

The first "Official Notice" is typically generated within 24 hours of receipt of the bad check complaint and is followed up by a coordinated call campaign executed by our team of Case Coordinators. ACCS' team of Case Coordinators, through a customer friendly approach, are trained to assist check writers in taking immediate action in the payment of restitution and enrolling them in the educational intervention class. If the check writer fails to comply after approximately 90 days of a restitution recovery effort, the prosecution review process will begin. Cases that pass the prosecution review process will move forward through the court process for filing of criminal charges.

CONCLUSION: UNMATCHED RETURN – Short term and long term benefits

ACCS delivers the most effective bad check restitution service with the highest recovery rates due to its proprietary contractual relationships with 110 District Attorneys nationwide. To fulfill their responsibility to uphold bad check laws, District Attorneys have partnered with ACCS to bring relief to merchant victims and address the bad check writer's offense in an innovative and effective way. The enforcement potential of the District Attorney's Office is the primary reason check writers tend to be so responsive to recovery efforts by ACCS on behalf of its participating merchant victims.

Because a bad check writer must typically repay the merchant the face value of the check plus all applicable statutory fees, the recovery potential through the District Attorney Bad Check Restitution Program is more than 100%, all at **NO COST** to the merchant.

In addition to the primary benefits of high collection rates and no costs, the District Attorney Bad Check Restitution Programs also deliver farther-reaching returns that include ensuring check writers do not write bad checks in the future. All ACCS administered District Attorney Bad Check Programs include an educational intervention class that is designed to create greater financial accountability and reduce the re-offense rate (recidivism is as low as 3-5% annually). This is a significant double benefit to merchant victims delivering both short-term recovery and long-term attractive customers.

LOS ANGELES

HONOLULU

DENVER

CHICAGO



INDIANAPOLIS

BALTIMORE

MIAMI

NEW YORK

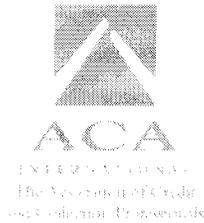
THE DEFINITIVE AUTHORITY IN RESTITUTION RECOVERY
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Appendix 9



Check Diversion Programs

Last Updated on 3/16/06

- Third-party collection agencies pursuing a debt on behalf of a merchant are subject to the Fair Debt Collection Practices Act (FDCPA). This stringent consumer protection law forbids abusive, deceptive and unfair treatment of consumers. **If private companies contracted by a district attorney's office (check diversion program) are exempted from the FDCPA, consumers will be subjected to the abusive practices the law was created to prevent.** (Source: *ACA International letter to members of Congress, Oct. 26, 2005.*)
- The Federal Trade Commission has stated, and courts have repeatedly ruled, that a check denied for insufficient funds is indeed a "debt" as defined by the FDCPA. (Source: *FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50102, Dec. 13, 1988.*)
- Under the FDCPA, it is illegal for debt collectors to misrepresent their identities or to threaten legal action that they cannot or do not intend to actually take. (Source: *Fair Debt Collection Practices Act, Section 807.*)
- Only 16 states have laws in place that allow for the district attorneys' offices to contract with private companies to collect dishonored checks. (Source: *ACA International's Statutory Penalties Guide for Returned Checks.*)
- All but two states require the check writer to have intent to defraud the payee of the check or to have written the check knowing that the check will be dishonored in order for a criminal suit to be brought against the check writer. (Source: *ACA International's Statutory Penalties Guide for Returned Checks.*)
- Check collection fees charged to consumers by collection agencies pursuing a debt on behalf of the merchant are limited by state law. Nationally, the average fee is \$30. This is in stark contrast to the costs consumers bear under check diversion programs, which can easily exceed \$200. (Source: *ACA International Internet & Check Services Program, Service Fees for Returned Checks, August 2005.*)
- The number of bounced checks in 2003 was approximately 200 million, for a value of close to \$151.2 billion. This equates to approximately 548,000 checks, for a value of \$414 million, bounced every day. (Source: *The 2004 Federal Reserve Payments Study, December 2004.*)
- The average "NSF" or bounced-check fee charged by a bank is \$27.13. (Source: *Bankrate.com Spring 2005 Checking Account Pricing Study, May 11, 2005.*)

ACA International has compiled this information from a variety of industry sources in response to frequent questions regarding the credit and collection industry. All sources are cited and every effort has been made to assure that the information is correct. For more information, contact ACA's public relations specialist at +1(952) 928-8000, ext. 714, or pr@acainternational.org.

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