February 28, 2014

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20006

Re: Debt Collection (Regulation F) Advance Notice of Proposed Rulemaking
78 Fed. Reg. 67848 (November 12, 2013)
Docket Number CFPB-2013-0033
RIN 3170-AA41

Dear Ms. Jackson:

The National Association of Retail Collection Attorneys ("NARCA") appreciates this opportunity to submit the following comments in response to the Consumer Financial Protection Bureau's *Advance Notice of Proposed Rulemaking* ("ANPR").

I. Background

In 2010, the Dodd-Frank Act authorized the Consumer Financial Protection Bureau ("Bureau") to "prescribe rules with respect to the collection of debts by debt collectors, as defined in [the FDCPA].[1] In addition to conferring rulemaking authority under the FDCPA, the Dodd-Frank Act empowers the Bureau to issue regulations "identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[2] Such rules "may include requirements for the purpose of preventing such acts or practices."[3]

The Bureau has the authority to "prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service in light of the facts and circumstances."[4] "In prescribing rules under this section, the Bureau shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services."[5]

[1] Section 814(d) of the FDCPA, 15 U.S.C. 1692l(d), as amended by section 1089 of the Dodd-Frank Act.
[2] Section 1031(b) of the Dodd-Frank Act, 12 U.S.C. 5531(b).
[3] *Id*.
[4] Section 1032(a) of the Dodd-Frank Act, 12 U.S.C. 5532(a).
[5] Section 1032(c) of the Dodd-Frank Act, 12 U.S.C. 5532(c).

The Bureau can exercise the Dodd-Frank Act rulemaking authority above with regard to any "covered person or service provider."[6] "Covered person" for purposes of the Dodd-Frank Act includes some first-party collectors and third-party collectors who are collecting or attempting to collect on debts that arise out of consumer credit transactions.[7] The Bureau has previously recognized that law firms may be service providers.[8]

Through this ANPR, the Bureau is seeking data and information that will guide its future rulemaking. "Specifically, the Bureau seeks to learn more about regulations that would best complement other governmental activities in protecting consumers from problems in debt collection. The Bureau's objective is to protect consumers, yet not impose undue or unnecessary burdens on the industry."[9]

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of debt collection law. NARCA members include more than 700 law firms located in all fifty states, all of whom must meet association standards designed to ensure experience and professionalism. Attorneys employed by NARCA member law firms are committed to the fair and ethical treatment of all participants in the debt collection process. They are required to practice law in a manner consistent with their responsibilities as officers of the court and must adhere to applicable state and federal laws, rules of civil procedure, state bar association licensing and certification requirements and their respective rules of professional conduct. NARCA has adopted a Code of Professional Conduct and Ethics which imposes professional standards beyond the requirements of state codes of ethics and regulations that govern attorneys.

NARCA members are regularly retained by creditors to lawfully collect delinquent debts. As the only national trade association dedicated solely to the needs of attorneys engaged in debt collection, NARCA has a significant interest in ensuring that the Bureau's rulemaking is consistent with its members' professional responsibilities to their clients, the courts, consumers and the general public.

II. General Comments

NARCA commends the Bureau for utilizing the ANPR as a means of collecting data from all stakeholders in the "credit ecosystem." NARCA has met with numerous representatives of the Bureau over the past two years and the exchange of information and ideas has been tremendously successful in building a solid relationship of understanding. The ANPR raises this to a new level and in many ways reflects the thoughtful approach taken by the Bureau in the breakout sessions following the FTC-CFPB *Life of a Debt* Roundtable on data integrity.

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[6] Section 1031(b) of the Dodd-Frank Act, 12 U.S.C. 5531(b).
[7] Section 1002(15)(A)(x) of the Dodd-Frank Act, 12 U.S.C. 5481(15)(A)(x).
[8] 9 Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9593 (February 17, 2012).
[9] 78 Fed. Reg. 67848, 67851 (November 12, 2013)

One of the main themes from the FTC-CFPB Roundtable as well as NARCA's *Legal Symposium on Consumer Debt Collection* which took place on October 15, 2013, at The George Washington University, was the importance of communication between consumers and debt collectors. Participants at both the Roundtable and Symposium explained that debt collectors have three avenues to collect debt: 1) communicate with the consumer by mail; 2) communicate with the consumer by telephone; and 3) file a lawsuit against the consumer if the consumer refuses to communicate. The lawsuit avenue is seldom a preferred choice for consumers, creditors or collection attorneys. Any opportunity to achieve resolution prior to suit generally inures to the benefit of all in terms of cost, convenience and outcome. The communication theme is evident throughout the ANPR, and NARCA urges the Bureau to consider the impact any future rulemaking may have, positive or negative, on communication between consumers and debt collectors.

NARCA also encourages the Bureau to consider the unique role of debt collection attorneys in the "credit ecosystem" as it formulates its future rulemaking. Collection attorneys are not simply debt collectors who happen have a license to practice law; rather, they are licensed attorneys who practice in the area of consumer collections. They are attorneys first and, as described above, are already subject to strict standards of conduct and judicial oversight. Their professional relationship with creditors or debt owners is that of attorney and client, and attorneys have ethical duties of candor before the court and fairness with consumers. This is part of what makes their role unique and not completely susceptible to broad rulemaking.

III. Data Gathering Process

The ANPR consists of almost 450 enumerated questions and sub-questions. Because the size and length of time required to complete a survey is directly related to response rate, NARCA created an ANPR Taskforce to develop a process to maximize NARCA member participation. First, the taskforce carefully narrowed the scope of questions to those which NARCA members, as attorneys, have the best ability to provide their unique professional insight. Second, the taskforce converted those questions into a user-friendly, survey-type format. Third, the taskforce created a website portal that solicited responses though two online platforms, one which requested empirical data and another which sought narrative response. Fourth, the taskforce created awareness, through newsletters, special bulletins, a webinar and direct e-mail, of the importance of participating. This outreach included both NARCA members and non-NARCA collection law firms. Finally, the Taskforce analyzed the empirical data and narrative responses and prepared this response.

The Law Firm Data Survey ("Survey") consisted of 66 questions that elicited responses primarily in the form of quantitative data. Accordingly, most of the Survey information related herein is in the form of percentages. NARCA received a 12% response rate to the Survey from its members ("Survey respondents") who collectively employ approximately 6,265 individuals, and the percentages expressed herein relate to that set of data.

The Law Practices Questionnaire ("Questionnaire") consisted of 60 questions that elicited narrative responses and, accordingly, most of the Questionnaire information described in this

response is in the form of descriptions and quoted comments from its members ("Questionnaire respondents") rather than percentages or other numeric data.

Despite the work of the Taskforce, NARCA members related that completing the Survey and Questionnaire took in excess of five hours. This clearly impacted the response rate but was unavoidable given the amount of information sought by the Bureau. NARCA respectfully suggests to the Bureau that taking a "smaller bite of the apple" will aid all stakeholders in achieving higher response rates and also in ensuring understanding by the least sophisticated consumers.

IV. Specific Comments

A. Validation Notices, Disputes & Verifications

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?

NARCA supports reasonable rules that foster communication and ensure consumers possess information sufficient to allow recognition of the debt and the ability to respond. However, NARCA respectfully objects to providing the contact information for attorneys' debt buyer clients in the validation notice as the risks to consumers outweigh any potential benefit.

Section 809 of the FDCPA (15 U.S.C. § 1692g(b) presently requires the name of the current owner to be disclosed on the validation notice. Including direct contact information for the current creditor in the initial correspondence is likely to lead to more problems than it would solve. The primary reason a creditor sends accounts to a debt collector rather than collecting the accounts itself is to avoid setting up the infrastructure necessary to service the receivables. A creditor hires third-party collectors to field the calls and inquiries. The creditor also does not have to staff a payment center at the same level to deal with payments. Including the contact information in the initial letter also might encourage payments directly to the creditor, which can lead to continued collection efforts after the payment has been made during the lag time between receipt of the payment by the creditor, the check clearing the bank, and communication to the debt collector that the account was paid directly to the creditor. For example, the ABC Collection Agency sends letters stating the balance owed is $1,000. Unbeknownst to ABC Collection Agency, a direct payment of $200 is made to the creditor. ABC continues to send letters while the creditor deposits the check and waits for notice that the check cleared. ABC's letters fail to indicate the payment, and continue to seek an increasing interest amount. Ultimately, the creditor notifies ABC, who then must reflect the payment as of the date the creditor received it, and recalculate the interest figure. The consumer is confused by the letters, which do not reflect the payment, and also by the change in the interest once the payment is reflected on the correspondence.

Additionally, this high risk of confusion does not warrant the additional contact information for complaints. Typical contractual terms between the debt owner and the servicer require the servicer to provide complaint information to the debt owner. Consumers can now also file direct complaints against the debt owner via the Bureau's complaint portal. Therefore, since there are already means by which a consumer could make a complaint against a servicer or creditor, there would be no material benefit related to notice of complaints if this additional information was provided to consumers in the validation notice.

The majority of Questionnaire respondents (81.2%) object to including their debt buyer clients' contact information included in the validation notice. The primary objection is that they, as attorneys, are retained by their clients to provide legal representation and there is, therefore, a client expectation that all communication will be through counsel. This expectation is shared by represented consumers. An additional concern is the potential for confusion, inaccuracy and potential liability resulting from two simultaneous lines of communication. Comments from Questionnaire respondents include:

- "If we are the attorney representing the creditor, communications should be through us, just like we must direct all communications through the consumer's attorney. It has been our experience that when the consumers contact the client directly, there is a "he said - she said" potential regarding what we have told the consumer and the client representative may say."
- "Unsupervised contact directly with our clients could result in our client (a) waiving attorney client privilege, (b) the client making a statement contrary to the client's interest, (c) the client making a statement that contradicts prior statements made by the firm, (d) the consumer misinterpreting something said by the client."
- "We are attorneys. We are retained to handle matters for our clients. Providing contact information for any client bears the risk of significant confusion in the handling of a legal matter. Since we are empowered to negotiate on behalf of our client and can obtain any documentary proof of the claim which our client may have, direct client communication will only confuse the situation and put the consumer, the client and my firm at greater risk of exacerbating the situation."

Q16.5: The Bureau specifically solicits comments on the alternatives discussed below for itemizing the total amount of debt.

Alternative 1: **(1) principal; (2) interest; and (3) fees and other charges?**

Alternative 2: **(1) the amount of debt at the date of charge-off or default; (2) total of interest added after the date of charge-off or default; (3) total of all fees or other charges added or credits posted after the date of charge-off or default; and (4) any payments or credits received after the date of charge-off or default.**

Alternative 3: **(1) the amount due shown on the last periodic statement given for the account; (2) any additional outstanding balance that became due after the closing date of such periodic statement; (3) any interest imposed after the closing date of such periodic statement; (4) any fees or other charges imposed after the closing date**

of such periodic statement; and (5) any payments or credits received after the closing date of such periodic statement.

NARCA supports *Alternative 2* for credit accounts with a charge-off balance. Alternative 2 presents a method that will provide the consumer with transparency while not unduly burdening legitimate debt collection. A requirement for post charge-off itemization will enable the consumer to understand additional components which may include attorney fees, contract interest, statutory interest, late charges or collection costs. This also takes into consideration that the charge-off balance itself is heavily regulated and reliance on this federal regulation typically renders such organizations unable to routinely itemize pre charge-off balances.

Credit card issuers are subject to the FFIEC's (Federal Financial Institutions Examination Council) Uniform Retail Credit Classification and Account Management Policy which requires charge-off no later than the end of the calendar month in which the account becomes more than 180 days past due. The charge-off balance is an inherently reliable number that is pervasively regulated by numerous federal agencies (Federal Reserve Board, FDIC, Office of the Comptroller of Currency (OCC) and others) as well as federal laws. Regulated banks have practically no discretion regarding the charge-off date or the amount of charge-off. Banks must remove the asset from their balance sheets six months after delinquency to avoid "puffing." A bank's discretion is limited to charging the account off at the end of the month on which the 180 days occur instead of the 180th day itself and re-aging the account in limited circumstances where the consumer makes at least three consecutive minimum monthly payments or the equivalent cumulative amount.

Due to this reliance on federal law, regulated creditors are unable to itemize pre charge-off balances electronically. Such an accounting requirement requires manual review which is possible only on a case by case (and incredibly time-consuming) basis making this process impractical. But by requiring that the original charge-off balance and date be recited, where such a date and balance exist, the law will ensure that an inherently reliable balance due is communicated to the consumer, along with an itemization of charges incurred thereafter.

Additionally, for purposes of itemized collection pleadings, state law challenges to the rate of interest charged by a national bank or an exporting state-chartered bank must fail as they are preempted by federal statute. State-chartered, limited-purpose banks, as well as national banks, charge cardholders interest, late fees and over limit fees associated with the credit they provide. Controlling law where state-chartered banks are concerned is the Depository Institution Deregulation and Monetary Control Act of 1980 ("DIDA") and, where national banks are concerned, the National Bank Act. In *Beneficial National Bank v. Anderson*[10], the United States Supreme Court held that the National Bank Act, upon which DIDA was modeled, completely preempts claims challenging the "interest" assessed by a national bank. In *Beneficial* the Supreme Court reasoned that:

[10] 539 U.S. 1 (2003) *see also*, *Ansley*, 2003 WL 2196471, at **2-3.

> Because §§ 85 and 86 [of the National Bank Act] provide the exclusive cause of action for [claims challenging the "interest" assessed by national banks], there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441.[11]

DIDA, as well, eliminates any state law claims challenging the rate of interest charged by state-chartered banks, 12 U.S.C. § 1831d(a). Federal law, thus, displaces any state law claim that fees are excessive, unfair, "troubling" or invalid as a means of recovery.[12]

The Connecticut Judicial Rules Committee adopted a court rule in 2010 that had been recommended through a highly collaborative bench-bar committee process that included three Connecticut Superior Court judges, five Connecticut magistrates, four leading Connecticut consumer attorneys and four leading Connecticut creditor attorneys. This court rule required that for the purposes of default judgments, all plaintiffs fully itemize their sought damages in small claims pleadings, and the interpretive commentary explained that plaintiffs with a charge-off balance must itemize all post charge-off requested damages. Connecticut Practice Book Section 24-24(b)(1) recites:

> A small claims writ and notice of suit signed and sworn to by the plaintiff or representative who is not the plaintiff's attorney shall be considered an affidavit of debt for purposes of this section only if it sets forth either the amount due or the principal owed as of the date of the writ and contains an itemization of interest, attorney's fees and other lawful charges. Any plaintiff claiming interest shall separately state the interest and shall specify the dates from which and to which interest is computed [and], the rate of interest, the manner in which it was calculated and the authority upon which the claim for interest is based.

The purpose of this new rule was to provide the consumer and the court with a full understanding of all balance components that are readily identifiable by plaintiffs. The Rules Committee also adopted the bench-bar recommendation that plaintiffs with a charge-off balance be exempted from this unduly burdensome requirement and instead required to itemize all alleged damages that are post charge-off. This relevant language appears as follows:

> For the purposes of subsection (b) (1), in regard to credit card debts owed to a financial institution and subject to federal requirements for the charging off of accounts, it is the intention of this rule that the federally authorized charge-off balance may be treated as the .principal. and itemization regarding such debts is required only from the date of the charge-off balance.

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[11] Id., at 11.
[12] *United Steelworkers of America* v. *Rawson, supra,* 495 U.S. 368 (1990)

Additional states have adopted this approach,[13] and NARCA respectfully encourages the Bureau to likewise require that creditors and debt buyers itemize post charge-off sought damages for purposes of validation communications. This position will be consistent with a plethora of existing federal preemption laws and it will have the important effect of transparently providing more understanding to the consumers while not unduly burdening legitimate debt collection.

From the Survey, the majority of respondents (98.6%) support using the charge-off amount as the starting point of itemization. The Questionnaire indicates 63.6% of respondents recommend additional post-charge-off information consisting of accrued interest, costs and fees, 18.2% recommend only accrued interest, 11.4% would include notice of the contractual or statutory interest rate and 6.8% would not recommend including any additional information.

- "The growing trend for large issuers is to cease accumulation of interest at the time of charge-off. As a result, most of the debt purchasers are following the same model."

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?

NARCA supports reasonable rules that ensure consumers possess information sufficient to allow recognition of the debt and the ability to respond. However, any proposed rules requiring the inclusion of additional information in the validation notice must take into consideration the risk to consumers of third-party disclosures.

Debt collectors share an interest with consumers to make the account recognizable to the consumer to facilitate an efficient resolution to the matter. As discussed below, NARCA would support the inclusion of the original account number and original creditor name in the validation letter to assist consumers in recognizing the debt. NARCA provides the following insight regarding other specific information:

- The name and address of the alleged debtor to whom the notice is sent.
  - This information is already typically provided in the validation letter.

- The names and addresses of joint borrowers.
  - Providing joint borrower information would be of minimal value to consumers in assisting them to recognize the debt. In most cases, joint borrowers are spouses and they are joint borrowers on multiple accounts. Providing the address of joint borrowers can also lead to privacy concerns in that a joint borrower may not want his/her information shared with the other joint borrower, especially in the case of divorced spouses or other persons whose relationship with the joint borrower

[13] *See:* Maryland MDR 3-306(d); Delaware Court of Common Pleas Administrative Directive 2012-2; Minnesota H.F. 80 (2013); Arkansas H.B. 2028 (2013); California S.B. 233 (2013).

National Association of Retail Collection Attorneys
601 Pennsylvania Avenue, NW, Washington, DC 20004
202-861-0706 | Fax 240-559-0959 | narca@narca.org

NARCA Operations
6151 Lake Osprey Drive, Sarasota, FL 34240
www.narca.org

might have disintegrated. Indeed, this may provide safety concerns in situations involving domestic violence.

- A partial Social Security number of the alleged debtor.
  - Although social security numbers may assist a consumer in determining whether the debt belongs to the consumer, social security numbers are not always available to a creditor or agency and may not have been provided by the consumer at the time the debt was incurred. This may result in further confusion as creditors or agencies attempt to identify a social security number through skip tracing.

- The account number used by the original creditor or a truncated version of the account number
  - To the extent the debt collector possesses this information, the original creditor account number (or truncated version) would assist consumers in identifying the debt. This information is already typically provided by debt collectors in most validation notices, along with the original creditor name, because debt collectors share an interest with consumers to make the account recognizable to the consumer to facilitate an efficient resolution to the matter. With respect to debt buyers, the introduction of this requirement should not be applied retroactively to existing portfolios but should apply to portfolios purchased after a certain date so that the requirement can be incorporated into the portfolio transfer and sale documents.

- Other identifying information.
  - As stated above, providing the original creditor account number is the most effective way to assist the consumer to identifying the debt.

- The name of the original creditor (if different from current owner).
  - To the extent the debt collector possesses this information, the original creditor name would assist consumers in identifying the debt. This information is already typically provided by debt collectors in many cases in the validation notice along with the original creditor account number because debt collectors share an interest with consumers to make the account recognizable to the consumer to facilitate an efficient resolution to the matter. With respect to debt buyers, the introduction of this requirement should not be applied retroactively to existing portfolios but should apply to portfolios purchased after a certain date so that the requirement can be incorporated into the portfolio transfer and sale documents.

- Type of debt (e.g., student loan, auto loan, etc.).
    - The vast majority of consumers should be able to identify the debt when presented with the name of the original creditor and the original creditor account number. The benefit of providing the type of debt would be minimal in comparison to the original creditor and original account number, and thus, would not outweigh the risks of data population errors.

- Date and amount of last payment by the consumer on the debt.
    - The vast majority of consumers should be able to identify the debt when presented with the name of the original creditor and the original creditor account number. Providing the date of last payment by the consumer would not assist the consumer in identifying the account. Moreover, there is a great probability that the creditor or debt collector could have erroneous information. A credit for returned goods, billing adjustment, or even a payment from a third party could be mistaken as a "last payment by the consumer." The lack of benefit of providing this information and the risks of data population errors indicate that such information should not be provided in the validation letter.

- Copy of last periodic statement.
    - The vast majority of consumers should be able to identify the debt when presented with the name of the original creditor and the original creditor account number. Furthermore, many debts do not have a last periodic statement. Even if a last periodic statement were available, the cost of including a copy with every validation letter would be significant, and lead to increases in the cost of credit to consumers. Moreover, the amount listed on the last periodic statement will probably not be the same as the amount referenced in the validation letter, which would be expected to increase because of interest and other late fees. This would cause confusion to the consumer. Further, the last periodic statement is normally the charge off statement and usually does not contain the last charge or the last payment information because charge-off occurs several months after these events. Without these pieces of information, it is unlikely that the last periodic statement would be of any value to the consumer to assist in identifying the debt.
    - One purpose of 1692g is to avoid dunning the wrong person. Thus, since Congress understood that a person who is not the correct debtor might receive a dunning letter, requiring provision of a periodic statement as part of validation may expose non-public personal information to persons who are not the correct debtor.[14] The 8th Circuit addressed this scenario in *Dunham v. Portfolio Recovery Assocs., LLC.*,[15] where the identity of the consumer and the type of information that must be provided were at issue. In *Dunham*, the debt collector (PRA) sent a dunning letter to Mr. Dunham whom it incorrectly believed to be the debtor. Dunham disputed the debt and PRA provided verification which

[14] *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 391 (D. Del. 1991).
[15] 663 F.3d 997 (8th Cir. 2011).

included, in part, the last four digits of the true debtor's Social Security number. Dunham immediately recognized that the debt was not his, but did not inform PRA until filing suit over one year later alleging PRA violated §1692g for failing to provide more information from the original creditor. The Court rejected the argument stating that PRA sent enough information to put Dunham on notice that PRA had dunned the wrong person.[16]

> A contrary conclusion under these facts would require PRA to send Dunham the true debtor's personal payment information. This information could possibly include such confidential information as the debtor's full social security number, credit score, or credit history. The FDCPA does not require such a result where the alleged debtor, as here, could sufficiently dispute the payment obligation by looking at the last four digits of the true debtor's social security number.[17]

The majority (67%) of Questionnaire respondents indicated they currently do not provide any additional information on the validation notice except for notices required by state law. The primary reason for not providing additional information is concern over potential liability for deviating from what is required by the FDCPA.

Examples of additional information provided by the other firms include:

- Name of original creditor and partially redacted original account number;
- Brand name by which the consumer would have known the creditor;
- 7th Circuit "Safe Harbor" language[18];
- A notice stating "Our law firm will cease collection efforts until verification is provided pursuant to both written and verbal disputes received 45 days after we send the validation letter to the consumer.";
- All relevant documentation provided by the client;
- Inquiry whether there is a preferred address to contact the consumer;
- Notice of statutory attorneys' fees with a description of elements of the debt that can be negotiated prior to filing a lawsuit.

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[16] *Id*., at 1003; citing *Clark v. Capital Credit & Collection Servs. Inc.*, 460 F.3d 1162, 1173 (9th Cir. 2006) ("We decline to impose such a high threshold. 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)."); *Chaudhry*, at 406 ("Contrary to Appellants' contention, 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; the debt collector is not required to keep detailed files of the alleged debt."); *Graziano v. Harrison,* 950 F.2d 107, 113 (3rd Cir. 1991) (holding that a debt collector that did not contact the original creditor satisfied the FDCPA's verification requirement by sending computer printouts that provided the alleged debtor with "the amounts of his debts, the services provided, and the dates on which the debts were incurred.").

[17] *Id*., at 1004.

[18] *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000).

Questionnaire respondents believe the following information could be helpful in varying degrees, though most must defer to their clients on the question of feasibility. In order of preference from highest to lowest:

a. The name and address of the alleged debtor to whom the notice is sent;

b. The name of the original creditor;

c. A truncated version of the original account number;

d. The brand associated with the original account (e.g. Target, Sears, medical group, hospital, etc.);

e. Type of debt (e.g. credit card, student loan, auto loan, etc.);

f. A partial Social Security number of the alleged debtor;

g. Copy of last periodic statement;

h. Date and amount of last payment.

- "As a matter of confidentiality, the information should be limited unless the debtor asks for additional information. The vast majority of debtors understand they owe the debt and have previously been contacted many times by the original creditor, another 3rd party collector or a debt buyer. Very few debtors need additional information in order to understand which debt the collection efforts concern. The purpose of the letter is not to prove the debt but to put the debtor on notice that this is an attempt to collect the debt."
- "The documents provided should be different depending on whether the debt is in the form of a judgment."
- "All of the above would be helpful however the date and amount of the last payment may cause confusion as the balance demanded may be different and result in an FDCPA violation. The more info given will result in potential mistakes and suits under the FDCPA."

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.

Based upon their experiences with consumers, 60.8% of the Survey respondents believe consumers do understand the FDCPA rights included in the validation notices. The Questionnaire responses yielded slightly different and more detailed results:

- 53.2% believe consumers understand their FDCPA rights included in the validation notice;

- 27.7% believe that consumers are confused with respect to what information the collector is required to provide in response to a dispute and attribute this to inaccurate or misleading information and forms on the internet;
- 14.9% state the notice is too confusing in general;
- 2.1% state consumers do not understand the timing to dispute a debt; and
- 2.1% state consumers do not understand that there is no obligation to verify the debt if the collector ceases collection activity upon receipt of the dispute.

NARCA members provided the following comments:

- "Language encouraging consumers to contact the Collector for more information would improve the chances of resolving any dispute and better lead to a satisfying resolution to all concerned."
- "If you don't believe this debt is yours or if you agree it is your debt but disagree with the amount due, you must send a dispute in writing within 30 days of receiving this letter."
- "It would be helpful to clarify that the debt collector may still make calls and send letters during the 30 day period."
- "This letter is an attempt to collect a debt. The debt will be presumed valid if you do not dispute it. To dispute the debt, send written notice to the sender of the letter within 30 days of the date of the letter. If you do so, the sender of this letter will discontinue any further collection activity until they have provided you with verification of the debt."
- "If you dispute this debt and/or want the name and address of the original creditor you must request that IN WRITING from our office WITHIN 30 DAYS of the date of this letter or we can continue to pursue collection."

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?

NARCA supports supplying consumers with information so that they can make informed decisions, but at the same time does not want to discourage communication to the detriment of the consumer. Based upon their experiences with consumers, 74.7% of the Survey respondents believe that consumers do understand that debt collection activity must be suspended until verification is provided in writing. Based on this degree of understanding, it is unlikely that adding this information would prove helpful, and the extra verbiage would create a more lengthy validation notice potentially more difficult for consumers to understand.

Section 1692g of the FDCPA requires the disclosure of certain information in the validation notice, but does not require that the validation notice inform the consumer that if he/she disputes a debt in writing within 30 days of receipt of the validation notice the collector must cease collection activity until verification is sent. This provides a balance to ensure that there is a prompt dispute process, rather than a methodology to delay collection efforts.[19]

Furthermore, the judicial development of case law regarding overshadowing, as codified in 15 U.S.C. 1692g(a)(5)(b), provides for adequate protection for the consumer within the intent of Congress:

> Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

Moreover, as noted above, including such a disclosure would add to the length and complexity of the validation notice without any overriding benefit, with the potential of confusing consumers and increasing costs, which will ultimately increase the cost of credit.

It is unlikely that requiring additional "cease and desist" disclosures in the validation letter will be beneficial to the consumer. Ceasing communications only leads to litigation. This is not in the best interest of consumers; rather, consumers who continue to communicate with debt collectors are in a better position to negotiate a resolution.

The majority of Survey respondents (82.5%) indicate that that once a consumer makes the decision to refuse further communication, the likelihood of filing a collection lawsuit increases by 81.1%.

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.

NARCA supports working with the Bureau (1) to develop a standardized validation notice to ensure that consumers understand their rights and their obligations in the debt collection process; (2) to ensure that debt collectors comply with clear and specific rules; and (3) to provide information to consumers as to debt collector obligations so any such failures can be easily identified. In that regard, language similar to the notice found in California Civil Code section

[19] *See Bleich v. Revenue Maximization Group, Inc.* (E.D.N.Y. 2002) 233 F. Supp.2d 496, 500.

1812.700 covers the substance of the issues above and has not caused undo confusion with consumers:

> The state Rosenthal Fair Debt Collection Practices Act and the federal Fair Debt Collection Practices Act require that, except under unusual circumstances, collectors may not contact you before 8 a.m. or after 9 p.m. They may not harass you by using threats of violence or arrest or by using obscene language. Collectors may not use false or misleading statements or call you at work if they know or have reason to know that you may not receive personal calls at work. For the most part, collectors may not tell another person, other than your attorney or spouse, about your debt. Collectors may contact another person to confirm your location or enforce a judgment. For more information about debt collection activities, you may contact the Federal Trade Commission at 1-877-FTC-HELP or www.ftc.gov.

The language of any additional notice should be collaboratively developed by a small task force made up of industry representatives, consumer advocates and Bureau personnel.

However, the addition of any language would create a greater risk of confusion with the consumer, especially dependent upon the language. Additionally, the current communications standard is that communications must be understood by the least sophisticated consumer, a level often stated as fairly low.[20] Loading up communications with extensive language has the potential to dissuade consumers from reading the communication.

The addition of any language would also raise the cost of collection, which will cause the cost of credit to increase. It is difficult to estimate the cost without knowing the length of the additional notice, and where it must be placed in the letter. However, the above language is already required in California, and can generally be found on the reverse side of validation letters from collection agencies that mail letters to California. Using identical language would not raise the cost for many debt collectors, but variation would increase collection costs.

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?

A "summary of rights" as a separate document would add consistency for these notices across the industry, which can also occur if the Bureau dictates the precise language to be included in the validation notice. If the "summary of rights" or dictated validation language is written effectively, it could also enhance consumer awareness of rights. The costs of an additional

[20] "The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd", *Clomon v. Jackson*, 988 F.2d 1314 (2d. Cir. 1993); See *Smith v. Transworld Systems, Inc*., 953 F.2d 1025, 1028 (6th Cir. 1992); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *Jeter v. Credit Bureau, Inc*., 760 F.2d 1168, 1174-75 (11th Cir. 1985); *Baker v. G.C. Services Corp*., 677 F.2d 775, 778 (9th Cir. 1982).

"summary of rights" sheet would probably double the costs of printing the validation notice, creating an expense that will cause an increase to the cost of credit.

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?

The overwhelming majority of Survey respondents (93.4%) state they provide no additional information in the validation notice other than required state disclosures. One firm states it provides the *Greco*[21] disclaimer. Another provides notice with regard to additional costs and fees that may be incurred if suit is filed and explanations of which elements of the debt are subject to negotiation pre-suit. One firm provides a truncated account number and attaches the last periodic statement. A number of firms provided comments similar to the following:

- "No, [we don't provide additional disclosures] because of our concerns about FDCPA lawsuits based on the possible confusion created by additional disclosures."
- "I only include what is required because I am afraid of violating the FDCPA, which has become difficult to interpret with different court rulings."
- "Due to the amount of FDCPA litigation, we are concerned variations from 1692g may lead to allegations we are confusing the consumer."

Litigation related to the validation notice is not uncommon, and 13.6% of the Questionnaire respondents stated they have had lawsuits threatened or filed against their firms for making disclosures other than those required by §1692g. The following examples were provided:

- "We recently had a 2 lawsuits against our firm that dissected the "g-Notice" alleging deficiencies regarding the language requiring disputes to be in writing and received within 30 days---there are two options and each of the two lawsuits alleged we had to take the opposite action so that no matter what we would be in the wrong."
- "Sued when office was providing validation to consumers for requests which were either verbal or in writing (went beyond statutory requirements; court found that the deletion of the requirement in the initial letter that request had to be in writing, violated the FDCPA; class action filed and suit ongoing over 5 years."
- "As indicated, we had four claims against us by a local FDCPA attorney based upon our old disclosure language. One of the grounds was that we misspelled a word. Another had to do with issues of whether the request for validation needed to be in writing. Because of these suits, we discontinued paraphrasing the statutory language and just copied it word-for-word."

[21] "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due." *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005).

- "We were sued for removing the "in-writing" requirement which we did to more accurately represent our internal firm policy which was to expand the rights afforded by the FDCPA by providing verification of the debt in response to a dispute in any form, oral or written."

Approximately one-fifth (22.4%) of Survey respondents practice in jurisdictions that require state law disclosures, and all incorporate them into the validation notice.

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?

Survey respondents receive disputes on an average of 3.2% of their cases. The majority (92.0%) have written policies for addressing consumer disputes and most of these policies were developed internally with client input. The Questionnaire respondents generally construe "dispute" to include any communication, verbal or written, that questions the consumer's obligation to pay any or all of the alleged debt, and 75% state they interpret their dispute guidelines broadly so as to treat almost any consumer communication as a dispute, though it is common to distinguish between a "complaint" and "dispute." Questionnaire respondents provided the following explanations and examples:

- "All disputes regarding all or a portion of the debt, all requests to cease contact, and all refusals to pay are forwarded to our Dispute Department. The Dispute Department is managed by an attorney who reviews all disputes. If there is a fraud element to the dispute, a separate attorney who handles our fraud investigations is notified. There is a written procedure and all staff (legal and collections) are trained on and have access to the procedure."
- "DEFINITIONS: 'Consumer Complaint': a consumer complaint may be in written or verbal form and it occurs where a consumer expresses dissatisfaction with how he/she has been treated by our client, another 3d party collector, or our law firm (including the marshals/sheriffs we use and appearance counsel we use) with respect to attempts to collect a particular debt. 'Dispute': a consumer dispute may be in written or verbal form and it occurs where a consumer disagrees that he/she owes any portion of the alleged due balance and the consumer explains a specific basis for the belief that they do not owe all or part of the balance (i.e., balance dispute based on prior payments; identity theft, divorce decree etc.)."
- "Depends on what is in the letter. If it says 'dispute' or 'not sure' we treat it as a dispute. When in doubt validate the debt. It lets all parties know that documentation is available to support the claim being made."

- “If there is a hint of validation request - we err on this side that validation was requested.”

Regarding the volume of consumer disputes, 68.2% of the Survey Respondents indicate an increase of an average of 65.3% over the past three years while 9.1% observed a decrease by an average of 29.9%. The remaining respondents (22%) believe the frequency has remained the same.

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?

Based on the responses above, NARCA member law firms are already taking a very consumer-centric approach in defining what constitutes a dispute. Accordingly, NARCA recommends against using the rulemaking process to impose a definition that may prove more restrictive than current practice.

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?

NARCA supports a specificity standard with regard to consumer disputes, provided enabling legislation exists through which the Bureau could, by rule, impose such a requirement.[22] Requiring consumers to describe the nature of their dispute, and to provide supporting documentation when available, would decrease the time required to verify the debt and increase the responsiveness of the verification to the actual issue. As reflected in the data and quotes provided by NARCA in response to Q36, immediately below, this additional specificity is “extremely helpful” in resolving disputes.

A consumer’s obligation to provide specific information about the basis for their dispute should not be contingent on having received a validation notice with requisite information. The debt collector and consumer each have separate responsibilities under this scenario, and the failure of one to fulfill their responsibilities should not absolve the other from fulfilling theirs. For example, if a debt collector failed to include the name of the creditor on the validation notice, it would be unproductive for the consumer to dispute the debt with a general denial. The better response would be for the consumer to dispute the debt, for example, on the basis they don’t recognize the debt because the creditor was not identified.

[22] See NARCA Comment to Q44.

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)?

Survey responses indicate consumers fail to state the specific nature of their dispute 60.2% of the time and Questionnaire responses yielded a similar average of 61.7%.

Of the Questionnaire responses received, all but one state that consumers never, or very rarely, provide any supporting information or documentation when they dispute a debt. Comments include:

- "Most disputes are canned letters from the internet or debt settlement companies."
- "The debtors provide very little up front documentation other than 'I dispute this account' and in most cases do not even explain why they dispute the account."
- "Consumers usually just state 'I dispute this debt,' and leave it at that. No further information or documentation is provided."
- "On occasion, a consumer dispute will include alleged proof of prior payment-in-full or partial payment of the account."

If consumers fail to state the specific nature of their dispute, additional information will be requested from the consumer 29.4% of the time, and 21.9% of those consumers will respond to the requests, according to Survey responses. Questionnaire responses indicate a lower consumer response rate of 15.4%.

One-half of the Questionnaire respondents (50.0%) indicate that when information is received from consumers in response to a request for additional information it is generally responsive and very helpful in resolving the issue, while 14.3% firms indicate that the information is seldom responsive or helpful.

- "Typically, consumers are reluctant or cannot provide specific information or documentation. The percentage of consumers that respond to requests for additional information is rather low at 15%. When consumers do provide information, it is extremely helpful in understanding their dispute and assists our ability to maintain a dialogue with both them and the client."
- "Typically they don't have anything to provide to support their claim. Those consumers who can provide documentation typically resolve their accounts much quicker."

Of the consumers who do specify a reason for disputing a debt, the following are the most common:

a. Not given enough information 26.0%

b. Debt is not mine 19.2%

c. Debt was paid 8.2%

d. Debt resulted from identity theft 4.1%

e. Time-barred debt 4.1%

f. Other 38.4%

Of the cases in which the consumer disputes the debt, consumers are correct in their reason for the dispute 7.8% of the time according to Survey responses.

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?

According to Survey Respondents, 51.8% of all consumer disputes are received after the 30-day validation period. Questionnaire responses indicate the majority of firms (85%) treat disputes the same regardless of whether they were received within 30 day unless suit has been filed, though several do not respond to untimely disputes after suit has been filed.

- "We treat requests received after the 30 day validation period the same as if we had received it within the time period."
- "It is our Firm's policy to respond to every dispute regardless of the time received. Whenever a dispute is received, the file is placed on HOLD. For disputes received during the validation period, we obtain verification of the debt and mail that to the consumer before continuing collection efforts. Disputes received after the validation period has ended, but prior to suit being filed, are basically handled the same way. However, after the validation period has ended and after suit has been filed, the dispute is handled differently depending upon the stage of litigation. As a general rule, we try to address and resolve a dispute prior to taking the next step in litigation, but once we are on the court's schedule, rather than our own, this is more difficult."

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?

Survey results show it takes an average of 11.2 days to respond to consumer disputes and that disputes alleging identity theft and fraud are the most time-consuming and difficult to investigate and reconcile, mostly because of lack of cooperation from the consumer.

- "I send the debtor an FTC fraud affidavit to the consumer. If is it is truly fraud they fill it out and file a police report and my investigation substantiates the fraud and we close our account. However, most of the time the consumer ignores my request."
- "This is time consuming because the issue is extremely sensitive. In addition, although we offer the debtor the suggestion of filing a fraud affidavit, many refuse to do so."
- "Fraud and identity theft, because of the failure of the consumer to cooperate with the investigation and/or file reports with law enforcement agencies regarding such claims."
- "Those that involve a claim of fraud. We have to look at all documents available and often work directly with the client. Also, fraud claims generally require the cooperation of the consumer because the unauthorized account user has made an effort to make it appear that the consumer has used or authorized the account. Consumers are often reluctant to cooperate because they know, or suspect, that someone close to them is responsible for the fraud. In our experience, a very high percentage of consumers are victimized by someone living in the same household (spouse, child, parent, sibling, roommate, etc.)."

NARCA would not recommend establishing a specific time period for responding to a dispute as the time required is dependent on the type and complexity of the dispute. In some cases, a fixed timeframe will work to the disadvantage of the consumer by not allowing sufficient time for investigation and obtaining additional documentation. The prohibition on collection until verification has been provided does give collectors a sufficient incentive to investigate expeditiously and appropriately and that is evidenced by the Survey results.

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?

Based on the responses from NARCA member law firms, a dispute investigation can include requesting information from the debt owner and a review is typically performed by an attorney or designated compliance staff to determine what additional information, if any, is necessary to respond to the dispute.

Questionnaire responses indicate most law firms have similar procedures for responding to disputes. The following are examples:

- "Upon receiving a dispute:
  (1) Emails are generated to operation leads to cease all current work on the account
  (2) The account is placed in "Hold" status; immediately terminating any letters and calls
  (3) Client is notified of the dispute
  (4) A letter is sent to the consumer confirming receipt of a dispute
  (5) Documents and data are reviewed to validate account
  (6) Information from client is reviewed and the dispute is resolved
  (7) Letter is sent to the consumer advising the consumer of the result of the firm's investigation"

- "The dispute is received either verbally (through a collection call or adverse attorney) or through written correspondence. Once received, the file is placed on hold and, generally all collection activity with the consumer is stopped until the dispute is resolved. Our file is reviewed internally and our clients are notified. We then work with our client to resolve the dispute, if possible. Additionally, the file is also reviewed by a member of the Compliance Committee to ensure proper actions are being taken and that the dispute does not rise to the level of a 'complain.' The client is also notified of the dispute in adherence to their client directives."

- "When a dispute is received, an account is placed on hold until the verification process is complete. The dispute department verifies the debt with the client. If we are unable to verify the debt within 30 days, an investigation letter is sent to the consumer (a [state] requirement). Once verification is complete, the hold on the account is lifted. If the consumer persists in their dispute, a second letter is generally sent with all available account media attached."

Regarding impediments to the investigation process, 39.5% of the Questionnaire respondents cite lack of consumer cooperation as the greatest hindrance to dispute investigations and an equal percentage cites the availability or length of time it takes to receive information from clients. 14% don't relate any problems and 7% are impeded by consumers' lack of specificity regarding the nature of the dispute.

Importantly, providing verification information to a disputing consumer can raise significant third-party disclosure concerns. Questionnaire respondents indicate they rely on all, or at a minimum two, of the following to authenticate the identity of consumers: full name, address, last four digits of the consumer's Social Security number and date of birth.

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?

NARCA opposes a "reasonableness" standard in connection with a collector's investigation of a dispute on the basis that the implementation of a reasonableness standard would significantly alter the existing statutory framework addressing a consumer's right to dispute a debt and a collector's responsibility to respond to the dispute. The FDCPA provides (15 U.S.C. §1692g(b)) that "if the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof is disputed, . . . the debt collector shall cease collection of the debt . . . until the debt collector obtains verification of the debt or a copy of the judgment." Under this standard, a consumer who writes a collector and says "I dispute the debt" obtains two valuable rights: (1) the right to be free from further collection action until the debt is verified and (2) a verification of the debt if the collector seeks to pursue additional collection activity.

The generic language appearing in 15 U.S.C. §1692g(b) does not define the nature of a consumer's dispute nor does the law require a consumer to provide any detail as to the nature of the dispute. For this reason and "consistent with the legislative history (of the FDCPA), 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.' . . . There is no concomitant obligation to forward copies of bills or other detail evidence of the debt."[23]

The adoption of a reasonableness standard in responding to a dispute under the FDCPA would open the floodgates to further litigation. Collection attorneys must be able to rely on the information supplied by their clients. Once the debt collection attorney has met the verification standard in response to a disputed debt, the attorney owes an obligation to the client under applicable Rules of Professional Conduct to act as a zealous advocate for the client and to pursue, in good faith, the client's claim, even where there is the existence of a dispute as to the validity of the obligation. The good faith pursuit of the client's claim is entirely appropriate given that the FDCPA does not require a consumer to give any explanation as to why the debt is disputed.

In pursuing a client's claim, an attorney, consistent with the attorney's obligation in representing the client to the best of the attorney's ability, should report disputes to his or her client. However, a reasonableness standard should not be imposed which would literally require the attorney to jettison his or her role as a zealous advocate for the client and instead second guess the client's facially legitimate claim, a situation that would place an attorney in a predicament inconsistent with the attorney's ethical obligations to the client.

If the Bureau does proceed with rulemaking that introduces investigation standards, the proposed rule must also incorporate a specificity standard for consumer disputes. A consumer's dispute should:

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[23] *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999), *citing S. Rep. No. 95-382, at 4* (1977); See also NARCA response to Q18.

1. Explain the basis for the dispute;
2. Identify the specific information that is being disputed;
3. Include any documentation supporting the dispute.

NARCA objects to any imposition of a "reasonableness" standard, but in the event specificity standards are imposed on consumers, NARCA would support investigation guidelines by requiring the debt collector to:

1. Review all relevant information provided by the consumer in the notice of dispute;
2. Obtain all relevant available documentation responsive to the consumer's specific dispute;
3. Provide to the consumer the results of the investigation and provide all relevant available documentation responsive to the consumer's specific dispute;
4. If the investigation reveals the basis of the dispute is accurate or the debt cannot be otherwise verified, notify the consumer and the creditor of such finding.

If the consumer fails to identify the specific nature of a dispute, the debt collector should have the opportunity to notify the consumer that the notice of dispute was inadequate and verification will not be provided unless the consumer provides additional information within a certain timeframe.

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.

Law firms report generally that the nature of the dispute will determine the focus of the investigation and the verification provided to the consumer, but the process is typically the same with the exception of disputes alleging fraud or identity theft. In those cases, law firms typically ask the consumer to complete a fraud affidavit in addition to providing additional supporting information or documents.

- "Some disputes require greater investigation. Fact specific disputes require more investigation than generalized disputes. If the consumer is claiming that someone else used their account, that claim will generally warrant a greater amount of investigation and generally requires documentation or cooperation from the consumer."

- “One scenario might be a generic dispute from a consumer which only states, ‘I dispute the debt.’ In that case, debt validation is sent without any further investigation. The consumer then responds by stating that we did not provide them with enough validation. Generally, no investigation is undertaken in these situations. Another scenario is a consumer who disputes the debt and all that is owed is a portion based on a purchase at the brand store. For whatever reason, the item (i.e. appliance) was not installed properly or something to that effect. The investigation would include notifying the client of the dispute while asking for additional information from the consumer (receipts, pictures, any communication with client or store directly, etc.). A third scenario type is post-judgment, where a validation notice was sent to Address A for Mr. Doe. No mail was returned, our firm never had any contact with Mr. Doe. We file suit, the suit is served by the Sheriff to the ‘person-in-charge’ at Address A for Mr. Doe. No response to the lawsuit is filed and default judgment is obtained. Several months later an attorney representing Mr. Doe calls and says this account was fraud. At that point, in addition to requesting all possible information from the attorney, additional documentation (i.e. application & past payments) would be requested from the client, as well as notifying the client about the possibility of identity theft. Furthermore, a fraud questionnaire would be sent to the attorney for Mr. Doe to complete.”
- “The investigation and ultimate resolution of the dispute will depend on the nature of the dispute, the information and documentation, if any, submitted by the consumer in support of the dispute, the information and documents provided by the client, and the particular client’s work standards. For example, [this law firm] utilizes an identity theft program developed in accordance with the Red Flag Rules issued by the FTC that requires creditors to detect, prevent, and mitigate identity theft in the consumer credit area. If the dispute alleges identity theft, [this law firm] requests that the consumer complete a fraud affidavit, in addition to providing additional supporting information or documents.”

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?

Only 6.7% of the Survey respondents are "furnishers" under the FCRA, and 21.9% of the Survey respondents treat FDCPA as direct disputes under the FCRA. The law firms that are not data furnishers forward FCRA disputes to their clients. Most firms investigate FCRA disputes similarly to FDCPA disputes with some variation among firms:

- “If the dispute concerns the bureaus, we escalate those matters to our client for proper handling with the consumer so we can respond after they have acted. Or if it has to do with allegations of improper credit report pulls, we investigate to ensure we have

proceeded properly under the permissible purpose theory and respond to the consumer confirming our basis to do so."

- "When a consumer disputes information on their credit report relating to an account on which [this law firm] is credit reporting, [the firm] receives the dispute through the E-OSCAR system. The E-OSCAR system is overseen by [the firm's] Compliance department; the Compliance department works directly with credit bureau agencies and [the firm's] clients to timely and properly address the dispute to ensure accuracy and integrity in reporting."
- "When we investigate a dispute about a claim that we reported to a consumer reporting agency ('CRA'), we first put a hold on reporting (which suppresses the tradeline in future reports), then follow our investigation process. If we determine that the dispute is valid, we permanently delete the tradeline. If we determine that the dispute is not valid, we resume collections; if we resume reporting to CRAs, we inform the CRA that the claim is disputed."

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?

Survey respondents state that 21.5% of consumer disputes are repeat disputes that were already subject to an investigation and do not include any new information from consumers. Approximately one-half of the Questionnaire respondents indicate they treat repeat disputes the same as the original disputes. The other law firms typically inform the consumer that the dispute was previously addressed and proceed accordingly unless the consumer provided any new information. If any new information is provided, all law firms treat it as an original dispute.

The Survey indicates 24.0% of disputes are from debt settlement companies or credit repair organizations. More than one-half of the Questionnaire respondents related very poor experiences with debt settlement companies or credit repair companies and consider them a hindrance to resolving complaints. The other Questionnaire respondents either found them to be generally helpful or stated it depends on the company.

- "They are predatory, create confusion and mislead consumers by leading them to believe they do not need to respond to our collection efforts. They also don't seem to pass on to the debtors any information we provide to them. Finally, because they frequently send us a cease regarding contact they prevent the debtor from receiving important information and voluntarily resolving the debt."
- "Reputable companies can be helpful because they facilitate a resolution and handle communications for consumers that are not comfortable negotiating on their own behalf. However, many settlement companies encourage their clients to make frivolous

'canned' disputes in an attempt to gain leverage and slow down our collection efforts. Their goal is to drag out the process for as long as possible so that they can bill more fees to the consumer. In our experience, settlement companies do not succeed in getting a more favorable settlement or payment plan for their clients. In the long run, the consumer pays money to the settlement company that could have been used to resolve the debt. This results in many clients of settlement companies eventually leaving the settlement program and filing bankruptcy."

- "Legitimate not-for-profit consumer credit counseling companies are not included in this reply as they generally do good work. This law firm's experience with 'debt settlement companies' and 'credit repair companies' has been less than stellar as these organizations tend to impede our lines of communication with the consumer resulting in increased litigation activity. Additionally, frivolous motion practices undertaken through 'ghost-written' pleadings, which may constitute the unauthorized practice of law, lead to consumers obtaining a false sense of security. Lastly, through many conversations with consumers at court, such consumers typically communicate great displeasure with the poor service they receive from these companies in relation to the flat fee or monthly payments that they have tendered to these organizations. These companies tend to greatly impede the resolution process."

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?

Given the statutory language, it is not clear that the Bureau has authority to promulgate rules that mandate restrictive requirements for dispute notification under the FDCPA. The statutory language in the FDCPA does not require that a consumer provides specific information as to the nature or basis of any dispute. Without enabling legislation that would require a consumer to provide details as to the nature of a dispute, there is no practical mechanism by which the Bureau could create an exception for a "frivolous and irrelevant" dispute.

Further, for the reasons set out in NARCA's response to Question 40, it is inappropriate to require attorneys to engage in exhaustive investigation of consumer disputes given the attorney's obligation to zealously represent the client.

According to the Questionnaire responses, law firms do not generally have guidelines for determining whether a dispute is frivolous and by necessity will investigate each on its merits.

- "All disputes are investigated, even those that appear on their face to be frivolous. Once a dispute is determined to be false, then the investigation is closed. However, while all frivolous disputes are false, not all false disputes are frivolous."

- “All disputes are handled in the same manner and are reviewed on a case-by-case basis by an attorney or a member of the compliance committee.”

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?

Questionnaire responses show that the type of information or documentation typically provided in response to a consumer dispute varies depending on the nature of the dispute and the type of debt. Most law firms provide all relevant, responsive information that is available, presently or upon request, which may include the application, statement of account, charge-off statement and contractual documents including the terms and conditions.

- “In response to a dispute, the Firm typically provides all of the details required under the FDCPA, and when available, copies of documents such as judgments, bill of sale, charge off statements, etc.”
- “A verification letter is sent once the balance has been verified. If a consumer requests documentation, then the documentation is provided if available. If a consumer persists in a dispute after the first verification letter, or if our attorney determines that it would be helpful, all account media (statement, application, card agreements, copies of payments) is sent to the consumer.”
- “Complete documentation available and always prima facie evidence to support the claim; contract, invoices, billing statements, client affidavits, statements of account.”
- “Typically we provide periodic billing statements, transaction histories, account agreements, contracts, applications and, where applicable, copies of judgments. Sometimes we are able to provide payment copies and copies of prior correspondence.”

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?

The primary issue prior to providing any media is to avoid third-party disclosures by ensuring the information is being provided to the correct person. As noted in the quoted comments included in the responses to previous questions, it is common for attorneys to include supporting documentation with verifications. The circumstances that dictate whether documentation is necessary are case specific, however, and therefore NARCA does not support the imposition of documentation requirements.

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)?

Most Survey respondents (80.0%) do not use any delivery method other than postal mail for verifications, but others (20.0%) state they do use e-mail and fax.

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?

If a consumer continues to disagree with the verification, the parties have simply reached an impasse. The judicial system already provides a forum specifically intended for this situation, and the parties have the opportunity to have an impartial judge listen to each side and determine the outcome. NARCA does not believe rulemaking is necessary to address this situation, and unlike the "level playing field" of the court, the Bureau's suggestion in this question provides no resolution to the underlying conflict.

Based on Questionnaire responses, when consumers disagree with a law firm's verification, law firms typically assign the matter for review to determine whether the debt was adequately verified and addressed the issue and, if so, proceed with collection or litigation.

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?

Survey responses show that on average, 4.3% of disputed debts cannot be verified. According to the majority of respondents (81.5%), this percentage has decreased over the past three years. According to Questionnaire responses, law firms close the case and return it to the client if it cannot be verified.

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?

Survey responses indicate the majority of law firms (77.3%) do report findings of errors to consumers.

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?

To the extent that allowing consumer to specify their preferred method and times of communication actually increases communication, NARCA is generally supportive. However, there are technological and legal/compliance issues related to using e-mail and text messaging, and these potential areas of liability would need to be addressed by the Bureau. Further, there is potential that some consumers will use the latitude to dictate the terms of communication to actually avoid communication. Some operating systems used by debt collectors my not have the functionality to address consumer-imposed restrictions which may create an unintended roadblock to communication. Thus, while on its face this concept may seem beneficial to consumers, if the end result is less communication then there will be an increase in litigation. As noted above, the majority of Survey respondents (82.5%) indicate that that once a consumer makes the decision to refuse further communication, the likelihood of filing a collection lawsuit increases by 81.1%. NARCA encourages the Bureau to create rules that encourage voluntary resolution of delinquent accounts as this serves the best interest of consumers.

As to whether requests should be in writing or may also be oral, the goal in communication is to promote unambiguous exchanges and limit the number of misunderstandings. Consumers providing notice in writing makes eminent sense. Even though the majority of creditors and debt collectors already honor consumer requests made orally, requiring written requests ensures fewer misunderstandings and provides documentation of the request.

Questionnaire respondents that do communicate with consumers by e-mail describe it as very effective, yet approximately one-half of the Questionnaire respondents indicate they never, or only very rarely, communicate by e-mail. The other one-half will communicate by e-mail, but only if the consumer initiates or requests that form of communication. Some firms allow only attorneys to communicate by e-mail. Those that do communicate by e-mail generally do so on 12.5% of their cases.

- "Our firm does communicate with consumers via email. However, no staff of the firm will initiate email correspondence with the consumer. If the consumer wishes for an employee to communicate with them via email, the employee must inform the consumer that they must first send an email to the staff member, authorizing such communication. The staff member will respond to the email only if the consumer has authorized it. This is a convenient means of communication for some consumers and it also provides evidence of the conversation."

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?

Questionnaire responses show that virtually all NARCA member law firms provide contact information to consumers and a means by which their calls will be answered by a natural person. Members report this is required by law in New York City, Massachusetts and Colorado and is simply commonsense since establishing or maintaining communication with the consumer is the most important factor in resolving debt issues.

- "Our letters to consumers include our law firm phone number. This is required by clients and it is required by [state law]. Our law firm would include this information even if no such requirement existed as it is our goal to communicate with consumers in an attempt to resolve the account to all parties' satisfaction.
- "Yes, as matter of internal policy [our law firm] provides contact information to consumers. [Our firm's] efforts to collect a debt for its clients are designed to initiate a dialogue with the consumer to resolve the account."

B. Unfair, Deceptive, and Abusive Acts and Practices

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?

Section 806 of the FDCPA, 15 U.S.C. § 1692d, provides:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
>
> (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) 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 section 1681a (f) or 1681b (3) [1] of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) 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.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

Creating a rule that reiterates the examples set forth in section 806 of the FDCPA, 15 U.S.C. § 1692d, does not provide any further guidance, making such a rule superfluous.

The second aspect of this question seeks to determine whether other examples of harassing conduct should be delineated by rule. For the most part, the language of § 1692d clearly defines the parameters of lawful conduct, setting forth, *inter alia*, examples of harassment through use of obscenities or profanities or use of threats of violence. And those examples of harassing conduct that lack such specificity and clarity, such as causing a telephone to ring repeatedly or continuously with intent to annoy, must be considered on a case by case basis. Courts have generally viewed the examples delineated in § 1692d as setting the threshold for harassing behavior as outrageous.[24]

The specific language of the statute references the "natural consequences" of the collection efforts. Such a determination can only be made based on the totality of the circumstances.[25] For instance, calls in the morning may not be harassing to one consumer, but may be harassing to a consumer who works nights. Similarly, causing a telephone to ring repeatedly or consistently is only violative if there is intent to annoy, abuse, or harass. This language implicitly recognizes the necessity to examine the entire circumstances.

Courts have continually emphasized that the circumstances should be viewed through the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, or from the perspective of a least sophisticated debtor. This objective standard ensures that gullible, ignorant, unthinking and credulous consumers are protected. But this objective standard also ensures a reasonable standard, where the consumer is considered to possess rudimentary knowledge about the financial world and is wise enough to read collection notices with added care.[26] This standard necessarily requires the examination of all circumstances, negating the ability to develop a list of collection efforts that would be harassing.

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[24] See *Frye v. Bowman, Heintz, Boscia, Vician, P.C.* (S.D. Ind. 2002) 193 F.Supp.2d 1070, 1082; *Beattie v. D.M. Collections, Inc.* (D. Del. 1991) 754 F.Supp. 383, 394.
[25] See *Beattie v. D.M. Collections, Inc.* (D. Del. 1991) 754 F.Supp.383, 394.
[26] *Gruber v. Creditors' Protection Serv., Inc.* (7th Cir. 2014) -- F.3d --, 2014 WL 292086, *1; *Easterling v. Collecto, Inc.* (2d Cir. 2012) 692 F.3d 229, 233-34; *Evon v. Law Offices of Sidney Mickell* (9th Cir. 2012) 688 F.3d 1015, 1027; *LeBlanc v. Unifund CCR Partners* (11th Cir. 2010) 601 F.3d 1185, 1194; *Gonzalez v. Kay* (5th Cir. 2009) 577

Harassment is always a summation of all activities and circumstances. How many calls were made? How many letters sent? How many messages left and on how many calls did the collector speak to the consumer? What other efforts were made? Since each account is handled individually, NARCA does not recommend developing a list of harassing, oppressive or abusive conduct other than that which is already listed in the statute.

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?

NARCA does not believe that the Bureau should articulate standards in proposed rules for when calls demonstrate an intent to annoy, harass, or abuse a person by telephone. Section 806(5) of the FDCPA, 15 U.S.C. § 1692d(5), provides:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: …
>
> > (5) 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.

Causing a telephone to ring repeatedly or consistently is only violative if there is intent to annoy, abuse, or harass. Courts have held that the particular circumstances of a case shall demonstrate whether the debt collector has the intent to annoy, abuse, or harass.[27] This language implicitly recognizes the necessity to examine the entire circumstances.

As noted in the response to Q92, above, the totality of circumstances of each case must be examined, negating the ability to develop a list of collection efforts that would be annoying, abusive or harassing.

F.3d 600, 603; *Rosenau v. Unifund Corp.* (3rd Cir. 2008) 539 F.3d 218, 221; *Kistner v. Law Offices of Michael Margelefsky, LLC* (6th Cir. 2008) 518 F.3d 433, 438.

[27] See, e.g., *Dunning v. Portfolio Recovery Assoc., LLC* (S.D. Fla. 2012) 903 F.Supp.2d 1362, 1368; *Durthaler v. Accounts Receivable Mgmt., Inc.* (S.D. Ohio 2012) 854 F.Supp.2d 485, 489; *Brown v. Hosto & Buchan, PLLC* (W.D. Tenn. 2010) 748 F.Supp.2d 847, 852; *Kerwin v. Remittance Assistance Corp.* (D. Nev. 2008) 559 F. Supp2d 1117, 1124.

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.

Section 807 of the FDCPA, 15 U.S.C. § 1692e, provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
>
> (2) The false representation of—
>
> (A) the character, amount, or legal status of any debt; or
>
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
>
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
>
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
>
> (6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—
>
> (A) lose any claim or defense to payment of the debt; or
>
> (B) become subject to any practice prohibited by this subchapter.
>
> (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
>
> (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
>
> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or

which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a (f) of this title.

The Bureau seeks to determine whether other examples of misrepresentation conduct should be delineated by rule. For the most part, the language of section 1692e clearly defines the parameters of lawful conduct. As noted in the response to Q92, above, the totality of circumstances of each case must be examined, negating the ability to develop a list of representations or omissions that would be deceptive.

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?

Questionnaire respondents state consumers pay by check, money order, cash, credit card, bank wire or ACH, debit card, MoneyGram and certified or cashier's check. Payment by check, via mail or phone, is the most common.

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?

The majority of Survey respondents (86.3%) state they do not charge fees for any type of payment. Of the 13.7% that state they do charge fees, 70% state the fees are associated with checks by phone. Questionnaire respondents state that law firms do inform consumers of the fee verbally at the time of payment.

- "The only service we use which will charge a fee to the consumer is Money Gram. We let them know about the fee at the time we are explaining the payment method. However, we also make sure to explain all forms of payments that do not charge a fee."

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?

The responding law firms that do charge fees state they train their staff on how to explain the fees to consumers, and none of the firms have experienced any claims of false or misleading statements in this regard.

Q111: 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?

With respect to fees for alternative payment methods, NARCA endorses a disclosure with respect to the cost and speed of alternative payment methods. Any disclosures should highlight the difference between a fee being paid directly to the agency vs. the cost to consumer for the use of a product or service, e.g., convenience fee vs. FedEx or Western Union. NARCA does not endorse a disclosure regarding "reversibility" of payment(s) given the potential to cause confusion to consumers as well as abuse by consumers to delay further collection efforts by paying, and then reversing payment.

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?

Section 808 of the FDCPA, 15 U.S.C. § 1692f, provides:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section
>
> > (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.
> >
> > (2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.
> >
> > (3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
> >
> > (4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
> >
> > (5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.
> >
> > (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
> >
> > > (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> > >
> > > (B) there is no present intention to take possession of the property; or
> > >
> > > (C) the property is exempt by law from such dispossession or disablement.
> >
> > (7) Communicating with a consumer regarding a debt by post card.
> >
> > (8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

Creating a rule that reiterates the examples set forth in section 808 of the FDCPA, 15 U.S.C. § 1692f, does not appear to provide any further guidance, making such a rule superfluous.

The second aspect of this question seeks to determine whether other examples of unfair conduct should be delineated by rule. The language of section 1692f clearly defines the parameters of lawful conduct, setting forth, *inter alia*, examples of unfair conduct such as collecting amounts not founded on contract or law, or conduct related to postdated checks. As noted in the response to Q92, above, the totality of circumstances of each case must be examined, negating the ability to develop a list of conduct that is unfair or unconscionable.

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?

NARCA supports any rule that clarifies the meaning of "amount owed." For instance, if a debtor chooses to pay with a "check by phone" for an additional fee, some would question whether that is compliant with the FDCPA. Clarification that these types of separate charges (made through a separate agreement) are permissible under the FDCPA would be helpful. Likewise, clarification should be made as to whether attorneys' fees or costs could be obtained through a negotiated settlement prior to judgment, as some cases have held that discretionary fees and costs may not be negotiated with a settlement prior to a judgment awarding such fees and costs.

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?

As in its response to Q114, above, NARCA supports any rule that clarifies the meaning of "amount owed."

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?

Questionnaire respondents report that the described scenario is very uncommon. None have experienced any issues in this regard except when the consumer fails to designate how the payment should be applied.

- “When a consumer has multiple accounts in our office, we always confirm which account he/she would like the payment posted to. Further, it is our policy not to negotiate or apply money to accounts that are either awaiting validation or in a disputed status.”
- “We can find no instances of a consumer with multiple debts disputing only one of them and making payments on others. If that arose, however, we would apply the payment as the consumer directs.”
- “These circumstances are handled on a case-by-case basis. We seek direction from the consumer as to the application of payments received among accounts in our office. If we cannot obtain clear instruction, we return the payment.”
- “To comply with the FDCPA and state law requirements, payments received from debtors that have multiple accounts with this office, or received on behalf of such debtors from third parties payers, must be applied in accordance with the instructions provided by the payer. Absent such instruction, payments will be applied to those files that have a judgment in order of judgment entry. Absent a file with a judgment, payments will be applied to the oldest file first. In no case may a payment be applied to a file where a known dispute exists, absent express instructions from the payer.”

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 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?

On average, according to Survey results, 8.4% of consumers claim they have already paid the debt and no longer owe but 88% of them are either incorrect or cannot provide any proof or documentation.

The Survey indicates that law firm practices vary slightly with regard to settlement of accounts and documentation, but are generally in accord with the following descriptions:

- “A settlement occurs when the consumer and client agree on the balance to be paid off. The consumer is then notified of the deadline to pay off the entire settled balance. The consumer is also notified that if the amount cannot be paid in full by that date, then the payments are considered partial payments and will be applied towards the original balance. Settlements can be satisfied by the consumer making one lump payment and paying the settlement balance in full or agreeing to a payment plan to have the balance paid by the deadline. Once suit has been filed, the consumer can also settle and pay off an agreed amount in one lump sum. However, if the consumer cannot pay in one large lump sum, a consent judgment may be entered into and the consumer can then make monthly payments. If the settlement was agreed upon after a different type of judgment

was entered, then a Satisfaction of Judgment is filed with the court once the agreed amount has been paid. The consumer gets a copy if the Satisfaction of Judgment notifying them that the judgment was satisfied. Receipts are given to the consumer with every cash payment and/or upon request."

- "When a collector identifies an account that is eligible for settlement an offer of settlement can be extended verbally to the Customer. The settlement terms are negotiated based on settlement authority given to our office by our Client or Forwarding Agency. Collectors are given a settlement authority and anything below that authority must be approved by a Collection Supervisor before the offer is agreed upon. If the Consumer offers a settlement below the authority provided by our Client/Forwarding Agency the collector would obtain settlement reasons and offer terms to have the offer submitted to our below blanket settlement email group. The Collection Manager and Collection Supervisors review the offers and make counter offers or submit offers to our Client/Forwarding Agency following their individual guidelines. Upon agreement of a settlement between our Office and the Consumer the collector would follow any client specific guidelines regarding giving a 1099-C disclosure. If our client/forwarding agency does not have specific guidelines regarding a 1099-C disclosure none will be given. The collector would clearly document the AS400 notes indicating the settlement agreement and if a 1099-C disclosure was given to the consumer. The collector would code the file with the settlement terms. The collector would notify a supervisor of the agreed upon settlement for the settlement approval to be placed on the file by the supervisor. A daily report is run every morning that identifies all the accounts coded as new settlements. This report is reviewed by a Supervisor every morning. Any specific client/forwarding agency reporting that needs to be done by client guidelines would be reviewed and done at that time. Upon the consumer's request the law firm will send a letter to the consumer that will recite that the account has been fully settled or paid in full. Additionally, the law firm will send releases of lien and satisfactions of judgment as appropriate."

The Survey shows that the most common arrangement for settlements is monthly payments over a period of one to three years, though several firms indicate lump sum settlements are the more common for their firms. The terms vary widely in terms of the average settlement amount (as a percentage of the total amount owed) based on whether the form of payment is lump sum or installment. Example settlement terms include:

- "20% lump sum; 20% payment in 3 payments or less; 60% payment plans (average plan is 24 months)."
- "If a lump sum, 70 to 80 percent of the amount due; if payments are arranged, generally 100 percent over not more than 36 months."
- "a. A lump sum settlement (often negotiated for a lesser amount to resolve the matter); or b. Periodic payment towards an agreed amount on a monthly basis, based upon the debtor's financial ability to pay."
- "The most common resolution calls for the consumer to repay the principal balance, plus court costs, with monthly installments over 12-48 months, depending on

financial ability. In cases of financial hardship, payment plan might be extended to 60 months and longer. The vast majority of these payment plans are interest free."

Change has been observed over the past three years with regard to settlements, and the responding law firms cite the following reasons:

- "Over the past three years, the national client community has determined that it would like to take on a more 'consumer-centric' approach to consumer debt collection. As such, clients have allowed our law firm greater settlement opportunity with respect to occasions of consumer hardship – whether it be temporary or permanent hardship. Additionally, clients have begun to allow consumers much longer time periods in which to pay the amount of the settlement in order to better accommodate the specific needs of a consumer."
- "The largest change is that since approximately 2009, most of our clients now have a formalized hardship policy."
- "Court costs are increasing so more clients are reluctant to file suit and want to reach some type of settlement pre-suit. Also the costs of frivolous law suits by the consumer bar."
- "Client desire to protect the brand has increased our settlement authority to offer lower deals."
- "Yes, more clients are fearful of suits from consumer attorney's and settle cases even when there are no substantive allegations."
- "Yes. The primary reason has been the recession. Clients are more amenable to compromising the balance owed, particularly by eliminating fees and interest. Clients are also more amenable to longer, interest free payment plans. Finally, more clients have rolled out specific hardship policies in recent years. Consumers that qualify for hardship programs have more opportunity for debt reduction or even forgiveness and more access to longer, interest fee repayment terms."

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**?

Attorneys engaged in debt collection should rely, at least, on their client's certification of the validity and enforceability of the debt. Lawyers engaged in debt collection are engaged in the practice of law.[28] On May 30, 2012, The New Jersey Supreme Court's committees on the

[28] Opinion 48 of the Committee On The Unauthorized Practice of Law and Opinion 725 of the Advisory Committee On Professional Ethics, 208 N.J.L.J.710 (June 4, 2012).

Unauthorized Practice of Law ("UPLC") and Advisory Committee on Professional Ethics ("ACPE") issued a joint opinion (hereinafter the "Joint Opinion") concerning the sending of collection letters by lawyers.[29]

The Joint Opinion provides that attorneys must exercise professional judgment in sending collection letters.[30] A lawyer exercises professional judgment by "independently evaluating collection demands and determining that proceedings to enforce collection are warranted before sending a debt collection letter on law firm letterhead."[31] Further, the Joint Opinion provides that a lawyer should "review the file" and have "made appropriate inquiry" as part of this process.[32] If such file review and appropriate inquiry are made by the lawyer, then the lawyer may permit his properly supervised staff to send collection letters.[33]

The Joint Opinion adopted ABA Informal Ethics Opinion 1368 "Mass Mailing of Form Collection Letters" (July 15, 1976)(hereinafter, "ABA Informal Ethics Opinion 1368") to determine the level of file review and appropriate inquiry required by attorneys engaged in debt collection.[34] Under ABA Informal Ethics Opinion 1368 an attorney acting as a debt collector 1) may send mass-produced collection letters without reviewing the accounts to determine their validity; and, 2) may rely on his client's certification that the accounts are valid, so long as the attorney is at least "familiar with the account," is involved with and directly supervises the process and exercises his independent professional judgment.

ABA Informal Ethics Opinion 1368 reinforces the basic role of attorneys as *advocates* of their client's interests. An attorney furthers the interests of justice by relying on her client's statements concerning the validity and enforceability of a debt in exercising her professional responsibilities.

ABA Informal Ethics Opinion 1368 also establishes that the appropriate professional judgment can be exercised when sending large numbers of collection letters if the attorneys who cause the letters to be sent remain directly involved in supervision of the collection process. This ensures that subsequent conduct, like the sending of subsequent demands, is accurate and reflects the present state of the collection efforts.[35]

The question as to what info is necessary after a dispute is raised is contingent on the nature of the dispute. It would be helpful if the consumer raising a specific dispute would be tasked with providing information as well. By way of example, a consumer claims the account was opened fraudulently. One indicia of fraud is when an account is sent to an address other than the "accused" consumers address. Therefore the consumer claiming fraud should be required to establish their mailing address during the time frame of the account.

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[29] *Id*.
[30] *Id*, at **6.
[31] *Id*.
[32] *Id*, at **5.
[33] *Id*.
[34] *Id*, at **3 (("The UPLC and ACPE agree with this ABA opinion.").
[35] *Id*.

In regard to what information is necessary to commence a lawsuit, there are numerous cases, which state "[A] debt may be properly pursued in court, even if the debt collector does not yet possess adequate proof of its claim." *Harvey v. Great Seneca Fin. Corp*., 453 F.3d 324, 333 (6th Cir. 2006); see also *Mello v. Great Seneca Fin. Corp*., 526 F. Supp. 2d 1024, 1030 (C.D. Cal. 2007). A lawyer representing a creditor should not be treated any different than any other attorney who may rely on their client's representations to initiate a law suit. A collection lawsuit is normally a book account, based on books and records, not opinions or events (such as tort claims). A collection attorney normally receives a summary of the books and records which establish the account and often times that will prove sufficient. Additional information may be necessary but that does not become evident unless and until a consumer responds to the lawsuit.

Although it varies by client, Questionnaire respondents report it is common to receive upon placement the application, billing/charge-off statements, affidavit of debt and contract terms. Some firms are provided less information at placement but obtain it upon request, in the event of a dispute or prior to filing suit. For purchased debt, the bill of sale and chain of title are typically provided.

- "All clients will provide information initially that enables our law firm to review the account to ensure appropriateness of opening the account with the law firm. This will include the consumer's Social Security number, consumer name and address, attorney information. Medical clients will provide the information pertaining to service dates and most provide written documentation at placement with full account information. Financial services company clients at placement will additionally provide information pertaining to the date that the account was open, the date and amount of last payment and the date and amount of charge-off. Debt buyer clients will additionally provide at placement information pertaining to the original creditor name and originator account number as well as the date that the client purchased the account. This initial information will enable the law firm to review and determine if post charge-off payments have been properly applied to you to the account balance; whether any post charge-off interest or other fees have been added to the balance (which our law firm prohibits per law firm policy and procedure); whether the account is within sixty days of the correct statute of limitations expiration; whether the consumer resides in a state in which the law firm in fact practices; whether attorney representation is present; whether the balance size is typical for the client. Some clients now provide FTP internet sites from which we may access further account documentation in a secure environment as needed. Other clients will send further paper documentation upon request."
- "Currently, most clients provide an electronic data file which contains the full account number, the brand name, the open date of the account, the charge-off date, the date of last payment and the amount of the last payment. Additionally, they provide the charge-off balance. They provide data as to interest accrued where the client accrues post-judgment interest. Many clients provide documents or access to secured document retrieval websites at time of placement."
- "In order to open a file in our office, the client must provide the consumer name & address, owner of the account and original creditor, date of last payment, total amount

owed and whether it is accruing interest, and whether there is already a judgment on the file. As for additional documentation and when provided, it depends on the court, client, and the type of account. We encourage all clients to provide original creditor billing statements, terms & conditions, application or promissory note, specific bill of sale, transaction history, etc."

- "Most clients make their documents available to us via a secure ftp site. On credit card, medical, and invoice accounts we usually receive periodic billing statements or invoices. Also, debt buyers provide a chain of title to reflect ownership of the account. On auto accounts, we will get a contract, transaction history, and deficiency notices. More clients are providing some documentation at placement of the account. For instance, with credit card accounts it is typical to receive a copy of the charge-off or final billing statement at placement of the account, with more documentation made available later if the account is disputed or if litigation is commenced."

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?**

All but one Questionnaire respondent report that they do not provide any explanation to consumers regarding the effect debt payments will have upon on credit reports, credit score and creditworthiness. The single law firm that does provide some explanation to consumers in this regard does require staff training.

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?

From the Questionnaire responses, virtually all law firms use third-party skip tracers and process servers. Additional vendors include letter vendors, scrub vendors (deceased, military, cell phone, and bankruptcy), credit reporting bureaus and local appearance counsel. The value of

these services is typically bases on a cost/benefit analysis which includes consideration of quality, quantity and compliance.

C. Time-Barred Debt

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?

NARCA respectfully objects to a proposed rule that requires an attorney debt collector to disclose when a debt is time-barred and that the attorney debt collector cannot lawfully sue to collect such a debt. Advising consumers of the consequences of making a payment on a time barred debt requires an attorney to violate his ethical duties towards his clients. It is unlikely that a debtor who has defaulted on a financial obligation would make payments after being advised he can escape his obligation by doing nothing, thus adversely affecting the attorney's client. Another issue is the fact that a debt may remain on a credit report long after its statute of limitations has run. Should a collection attorney be required to explain to a consumer the ramifications of not satisfying an outstanding financial obligation in this regard? By comparing the two scenarios it becomes apparent they represent competing concerns. A collection attorney does not represent the consumer and should not be forced to abandon his or her ethical responsibilities to the client.

NARCA also has concerns about non-attorney debt collectors making disclosures regarding time-barred debt. The determination as whether a debt is time-barred requires the analysis of a trained and licensed attorney who can perform a legal review of the contract, determine the appropriate case law regarding the choice of law, and assess whether the statute has otherwise been tolled. As noted by Questionnaire respondents:

- "If account is time barred we do not proceed to collect. The matter is closed to our client. We review for time limitation before communicating with debtors."
- "It is our policy to not collect or attempt to collect on time-barred debts."
- "We do not handle time-barred debt. Our clients do not forward time-barred debt to us."
- "We don't pursue time-barred debts and thus make no disclosures."

NARCA's *Ethical Aspirations*[36] and *Policy Positions*[37] provide that NARCA members should never knowingly file collection lawsuits beyond the applicable statute of limitations and members should maintain procedures to prevent the such filings on time-barred debt.

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[36] www.narca.org/resource/resmgr/about_narca/narca_ethical_aspirations_-_.pdf.

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?

Of the Survey respondents, 60.3% practice in states that have a provision for revival or time-barred debt, but cases that involve this issue comprise only 3.0% of their caseload (though some or all of the cases may have been revived prior to placement with the law firms).

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 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?

For the reasons stated in its response to Q133, above, NARCA respectfully objects to a proposed rule that requires an attorney debt collector 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.

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 timebarred, 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?

For the reasons stated in its response to Q133, above, NARCA respectfully objects to a proposed rule that requires an attorney debt collector to disclose information about the debt being timebarred, the right of the collector to sue, and the effect of making partial payment

The majority of Survey respondents (86.6%) do track their cases with regard to changes in statute of limitation status.

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

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[37] www.narca.org/resource/resmgr/about_narca/narcapolicypositions.pdf, adopted by the NARCA Board of Directors June 27, 2011.

disclosure during subsequent collection attempts? If so, when and how often should the disclosure be required?

For the reasons stated in its response to Q133, above, NARCA respectfully objects to a proposed rule that requires an attorney debt collector to disclose information about the debt being timebarred, the right of the collector to sue, and the effect of making partial payment

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?

For the reasons stated in its response to Q133, above, NARCA respectfully objects to a proposed rule that requires an attorney debt collector to disclose information about the debt being timebarred, the right of the collector to sue, and the effect of making partial payment.

Questionnaire respondents indicate that in states that allow for revival of time-barred debt, a written acknowledgement of the debt and/or promise to pay will generally suffice to revive time-barred debt.

The responding NARCA member law firms do not collect on time-barred debt and therefore do not have a policy or procedure for advising consumers that a partial payment can revive a time-barred debt.

D. Debt Collection Litigation Practices

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?

The Questionnaire indicates that the he majority of law firms (63%) have a formal policy to only file suit where the consumer lives unless there are multiple defendants to a contract that live in different jurisdictions. These firms all developed this policy internally, though several report it is also encouraged by their clients. The law firms that do not have this policy or have not adopted any formal policy nevertheless state that the overwhelming majority of law suits are filed where the consumer resides. This is supported by Survey responses that 93.4% of lawsuits are filed based upon the consumer's place of residence.

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?

The majority of firms, according to the Questionnaire, have not found the geographic size of judicial districts to be a problem for consumers due to the fact suit is usually brought in the judicial district where the consumer resides. In fact, Survey respondents quantify this as an issue in only 1.0% of cases. The occasional accommodations made by the courts typically consist of allowing video or telephonic participation.

Questionnaire respondents almost universally report that from their interaction with consumers, the most common reason for not appearing is because they know they owe the debt.

- "Consumers have indicated that they do not appear in court when they are not contesting the debt."
- "Through our interactions with non-appearing consumers, the most common reason given for not appearing in the litigation is that they admit they owe the dollar amount and they await court decision to give them direction on payments."
- "When we talk to debtors after the scheduled hearing [at which the debtor failed to appear] they typically tell us that they did not appear because they did not dispute the debt."
- "Most of the time, the consumer fails to appear because she does not dispute the debt and she has given up on trying to resolve it. This consumer is often pleasantly surprised when she learns that we are able to resolve the debt with a settlement or payment plan."

Q145: Are there any particular unfair, deceptive, or abusive practices related to choice of venue that the Bureau should address in proposed rules?

None of the responding law firms are aware of any unfair, deceptive or abusive practices that occur related to choice of venue. As explained by several firms:

- "We are members of our county and state collector organizations. As such, we are in contact with many law firms. We are not aware of any firms that use venue abuses. And why would they? The goal is to collect the debt, not get a judgment. The best way to collect is via communication with the consumer. So you file suit where they live, and are thus more likely to appear and talk."
- "You want to sue a debtor in the county where they reside so you can make contact and attempt to settle the debt. Also, judgment liens are valid against real estate only in the county where the debtor resides so you want the judgment to be entered in that county."

- “In the past firms have intentionally filed suit in precincts where they believe courts are friendlier to creditors regardless of whether the consumer lived in that precinct, but it has always been a minority practice. Tougher state rules and enforcement by the attorney general have ended this practice. Most of the firms who engaged in this practice in the past are no longer in business.”

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?

Survey responses provide the following data:

- Collection lawsuits filed per year (total for all respondents):
  - 2011 – 954,016
  - 2012 – 884,076
  - 2013 – 762,208
- Percentage of placements in which a lawsuit is filed: 67.9%

- Percentage of debt collection cases settled before a lawsuit has been filed: 7.5%
  - Percentage of respondents that state this has increased over the past 3 years: 45.5%
  - Percentage of respondents that state this has decreased over the past 3 years: 55.5%

- Of the consumer debt collection cases that settle before a lawsuit is filed, the average settlement amount as a percentage of the total amount owed: 68.3%

- Of the consumer debt collection cases that settle before a lawsuit is filed, the percentage of those cases pay in full according to the terms of the settlement agreement: 55.1%

- Percentage of debt collection cases settled after a lawsuit has been filed: 26.4%
  - Percentage of respondents that state this has increased over the past 3 years: 62.3%
  - Percentage of respondents that state this has decreased over the past 3 years: 37.7%

- Of the consumer debt collection cases that settle after a lawsuit is filed, the average settlement amount as a percentage of the total amount owed: 72.3%

- Of the consumer debt collection cases that settle after a lawsuit is filed, the percentage of those cases pay in full according to the terms of the settlement agreement: 54.8%

- Percentage of debt collection lawsuits filed in the past 3 years that resulted in default judgments: 70.7%
  - Percentage of respondents that state this has increased over the past 3 years: 29.6%
  - Percentage of respondents that state this has decreased over the past 3 years: 70.4%

Q147: Some States have adopted requirements for the information that must be set forth in debt 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?

NARCA respectfully discourages the Bureau from incorporating into proposed rules any requirements to complement states' pleading, motions, and supporting documentation requirements. The states' legislatures and judiciaries are in the best position to work with resident stakeholders to assess the adequacy of existing state rules and, when necessary, the appropriate solutions to inadequacies. Further, specific state statutes and rules are developed and incorporated with consideration as to how they fit into the states' entire statutory or regulatory framework. As such, piecemeal federal rulemaking addressing very specific issues may result in unintended consequences and conflicts. For these reasons, the Bureau should avoid interfering with states' established rules of civil procedure. .

Questionnaire respondents in Indiana, Michigan, California, Arizona Minnesota, Arkansas, Connecticut, New York City, Maryland, Texas, North Carolina, Pennsylvania, New Jersey, Delaware and Colorado report rule changes that require more information in pleadings. None have observed any increase in consumer participation.

Questionnaire respondents also report that the documentation requirements in non-contested (default) cases are generally governed by statute or state or local rules. Many jurisdictions require only a charge-off statement and sworn affidavit of debt, but most firms indicate they provide more documentation which can include monthly statements, statement of account, contract terms, military affidavit, date of last payment and, for purchased debt, name of the original creditor original account number and chain of title.

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?

The majority of law firms responding to the Questionnaire indicate they are not aware of attorneys asserting unfair or deceptive claims about consumer indebtedness in pleadings, motions, and related documents (e.g., affidavits) that they file in state debt collection litigation. The remaining firms indicate it is exceedingly rare and consumer assertions in this regard are seldom substantiated.

- "I do not see deceptive practices. I am also in the unique position of representing over 100 consumers in my practice, and this is not an issue."
- "I don't believe these claims are ever substantiated. Our traditional legal system contemplates disputes bout claims and is equipped to handle them."
- "Collectors tend to limit their factual statements to just the information contained in their data systems. The most common complaint is not so much about wrong information, as lack of information (i.e., name of original issuer, date of and balance at charge-off)."
- "Totally unaware of any such conduct. Clearly unethical and the State Bar would be a far more effective enforcement agency to thwart or sanction such conduct. Judges observing such conduct would certainly forward complaints to that State Bar agency. They, not the debtors would be the best observers of such misconduct."

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?

Approximately 25% of the Questionnaire respondents indicate they include no additional documents with their complaints as none are required or accepted in their jurisdictions. The majority of firms in other jurisdictions indicate they may provide other documentation which can include the contract, monthly statements, statement of account, contract terms, military affidavit, date of last payment and, for purchased debt, name of the original creditor original account number and chain of title.

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 activities directly related to such service. Should the Bureau address communications in formal legal actions in proposed rules? If so, how?

NARCA opposes any rule that would include within the definition of "communication" those documents that seek relief from a court, such as pleadings and motions. Although the Supreme

Court determined in *Heintz v. Jenkins*[38] that attorneys whose collection activities are limited to litigation are "debt collectors" under the FDCPA, the Court did not determine which activities of such attorneys fall within the scope of the Act or, more specifically, within the definition of "communication" set forth in 15 U.S.C. § 1692a(2).

Several concerns were raised in *Heintz* as to the application of the Act to litigation activities. For example, Section 1692c(c) might be invoked by a consumer in an attempt to stop the continuation of litigation by using a demand that communications cease in an attempt to prevent a collection attorney from continuing the prosecution of a collection suit. Because the issue before the Supreme Court was the "debt collector" status of the attorneys, rather than the "debt collection" nature of their activities the Court recognized the possibility that the Act might not apply to all litigation-related activities:

> Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.[39]

The Supreme Court has made it clear that the regulation of the practice of law generally has been left "exclusively" to the states.[40] Any attempt by the Bureau to regulate the content of pleadings would tread upon this long-established states' right. Moreover, it creates the potential for conflicts that could impair the functions of state courts. Collection pleadings and the civil procedures in collection cases vary markedly across the United States, from check-off forms in California to free-written pleadings in Texas to the entry of judgments by clerks (prothonotaries) instead of judges in Pennsylvania. The complete lack of uniformity across the country makes an overarching set of federal rules governing collection pleadings a formula for disaster. Any attempt to impose such regulation almost guarantees an immediate challenge to the validity of the rules in multiple jurisdictions.

Another consideration is that "[p]leadings are addressed to the court, and only demand that the court grant judgment. There is no demand on the opposing party."[41] At least one federal appellate court has recognized that the FDCPA does not extend to communications directed to a court.[42] Bureau-implemented rules under the FDCPA are not the appropriate mechanism to address communications between attorneys and courts.

Adequate procedures exist to address unfair, deceptive, and abusive practices in the conduct of litigation, particularly because pleadings are addressed to courts. Model Rule of Professional Conduct 3.3 permits an attorney to be punished for making false statements of law or fact to a tribunal, for concealment of material facts, and for failing to correct a material misstatement.

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[38] *Heintz v. Jenkins,* 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).
[39] *Id.,* at 296-97.
[40] *Leis v. Flint*, 439 U.S. 439, 442, 99 S. Ct. 698. 700, 58 L. Ed. 2d 717, 722 (1979).
[41] *George A. Fuller Co. v. Carpet Services, Inc.*, 823 S.W.2d 603, 605 (Tex. 1992), *citing Fibergrate Corp. v. Research-Cottrell, Inc.*, 481 F.Supp. 570, 572 (N.D. Tex. 1979).
[42] *See O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 941-944 (7th Cir. 2011).

Attorneys are subject not only to discipline but also to substantial monetary sanctions when their statements to courts are false or misleading, and courts have demonstrated a willingness to impose such sanctions. NARCA asserts that the courts are in the best position to regulate the pleadings that they consider and to punish through sanctions, disciplinary referrals, or both any false representations that are made in such pleadings.

Question 150 also asks about rules governing service of process. NARCA is not opposed to the creation of strong protections for all defendants in connection with service of process. However, this, too, is an area that should be a matter of state, not federal regulation. It certainly should not be the subject of rules implementing the FDCPA.

There is clear evidence of legislative intent that process service is outside the scope of the FDCPA. The Act expressly exempts from the definition of "debt collector" "any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;…"[43]

The use of the words "any person" gives rise to an exemption so broad that it could apply even to persons who would otherwise qualify as "debt collectors" under the Act. The Bureau should not ignore the sweeping scope of the "any person" text of the Act or, by rule, attempt to regulate those activities that Congress has exempted from the FDCPA.

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?

With regard to attorneys, NARCA does not recommend that the Bureau address any acts or practices in a proposed rule. The Fair Debt Collection Practices Act originally included an exemption for attorneys. In 1986, the FDCPA was amended to remove the attorney exemption. See Pub.L.No. 99-361, 100 Stat. 768, amending 15 U.S.C. 1692a(6). Although the exemption was removed in 1986, it was not until *Heintz v. Jenkins*, 514 U.S. 291, 298, 115 S.Ct. 1489, 1492-93, 131 L.Ed. 2d 395, 401-02 (1995), that it was determined that the FDCPA applies to a lawyer who regularly through litigation tries to collect consumer debts.

Several concerns were raised in *Heintz* as to the application of the Act to a litigating attorney. For example, Section 1692c(c) requires a debt collector not to communicate further with a consumer who notifies the debt collector that the consumer refuses to pay or who requests that the debt collector cease communication. The court noted that Section 1692c(c) has exceptions to permit communications to notify the consumer that the debt collector intends to invoke a specified remedy and that "[c]ourts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The court

[43] 15 U.S.C. § 1692a(6)(D).

found "it is easier to read 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself." Id. at 297.

E. Recordkeeping, Monitoring & Compliance

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?

NARCA opposes any Federal regulation that would require the licensing or registration of attorneys collecting consumer debts on the basis that lawyers are already subject to licensure by the state court in which the attorney is licensed to practice law. It would be contrary to centuries-old principles of federalism and separation of powers for an independent agency created by an Act of Congress to require an attorney to apply for a license to represent clients in collecting consumer debts.

The United States Supreme Court has explained the Constitutional limitations on Federal power in the arena of regulating lawyers and clarified that "the regulation of the practice of law generally has been left *exclusively* to the states."[44] Accordingly, any CFPB proposal that would require the registration or licensing of debt collection attorneys would violate the fundamental principle of federalism that leaves to the states the regulation of the practice of law. Any such rule would also usurp the judicial function of state courts which are deemed to have plenary and exclusive authority to regulate the practice of law. The preamble to the Model Rules of Professional Conduct adopted by the American Bar Association, in recognition of the power of state courts over lawyer regulation explains that "ultimate authority over the legal profession is vested largely in the courts." This authority is derived primarily from state constitutions that delegate the licensing of attorney and the regulation of practice of law to the judicial branch of the state court government.

There is also a distinction between attorneys and non-attorney debt collectors. As described above, attorneys are already licensed and regulated by the judiciary and this also requires that attorneys keep their contact information up-to-date. Attorneys may not practice in other states without becoming licensed, and if an attorney is disciplined in one state, he or she is obligated to disclose this to all other states where they are licensed or apply for licensure.

[44] *Leis v. Flint*, 439 U.S. 439, 442 (1979) (emphasis added).

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?

All but two Questionnaire respondents indicated their law firms retain copies of all records pertaining to a case. Two firms report they retain only copies of the litigation file, correspondence and collector notes.

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?

Almost one-half (43.8%) of the Questionnaire respondents keep records indefinitely in electronic format. These firms do so based on internal policy. The remaining firms maintain the records for a period of 5 to 10 years, with the average being 7 years. These firms base the retention period on statute, client requirements, internal policy or state ethics requirements.

V. Conclusion

NARCA appreciates this opportunity to provide the Bureau with comments on behalf of its member law firms and looks forward to further collaboration to ensure consumers are adequately protected without unduly burdening legitimate debt collection.

Respectfully Submitted,

Joann Needleman, President