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Bureau of Consumer Financial Protection
Docket No. CFPB-2013-0033

Introduction: The CFPB should resolve differences in FDCPA interpretation so that consumers and debt collectors alike are subject to the same compliance protocols in every federal or state district across the country. Resolving issues about which courts have differed will lead to better compliance and fewer lawsuits, and thus further the purpose of the FDCPA "to promote consistent State action to protect consumers against debt collection abuses." Some of these issues are mentioned below beginning with "NEW."

Q1. Only barebones information is transferred to the first debt buyer, typically under express disclaimer of the accuracy of the information or the validity of the debt. Often the purchase is made by a broker, which then enters it into the broker's database, manipulates the information, breaks it up, and resells it. An indirect debt buyer as a result has little or no reliable information when it buys the debt.

Q 4. Remarkably, a subsequent debt buyer is often *precluded* from access to the original creditor by the terms of the assignment contract. Without that access, a subsequent debt

[1] I am a lawyer in solo private practice in New Haven CT, restricted to consumer matters, preferably for persons who cannot afford to pay a lawyer. I have been closely involved with the development of FDCPA law since its inception, by litigating seminal cases, and as an editor of the National Consumer Law Center's comprehensive manual, "Fair Debt Collection Practices." Some cases I have been involved in include Heintz v. Jenkins, 514 U.S. 291 (1995); Hooks v. Forman, Holt, Eliades & Ravin, LLC , 717 F. 3d 382 (2d Cir. 2013); Ellis v. Solomon and Solomon, P.C., 591 F.3d 130, 135 (2d Cir. 2010); Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. 2002); Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Charles v. Lundgren & Associates, P.C., 119 F.3d 739 (9th Cir. 1997); Newman v. Boehm, Pearlstein & Bright, Limited, 119 F.3d 477 (7th Cir. 1997); Poirier v. Alco Collections, Inc., 107 F.3d 347 (5th Cir. 1997); Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Bentley v. Great Lakes Collection Bureau, Inc., 6 F.3d 60 (2d Cir. 1993); Clomon v. Jackson, 988 F.2d 1314, 1321 (2d Cir. 1993). In 2002, I received the prestigious Vern Countryman Award from the National Consumer Law Center "for excellence and dedication in the practice of consumer law on behalf of low-income consumers."

buyer either relies on default judgments, or brazenly submits false affidavits and testimony about the underlying debt. This is a scandal to our system of justice and engenders disrespect for the judicial system. Current debt buying practices are antithetical to real justice – as well as its appearance – even where there is no contractual bar to accessing admissible evidence; I am aware of a case where one debt buyer actually subpoenaed the original creditor to trial, but dropped the subpoena when the original creditor made it too expensive to get the creditor to testify.

Q 5. Information about disputes, attorney representation, and identity theft claims, should routinely be transferred with the account, but is not. . This routine and purposeful omission of material information when accounts are transferred cannot be tolerated.

Q 12. A central database would suffer from the same deficiencies as we have seen with sold accounts: software incompatibility with underlying records, incomplete underlying records. It seems to me that it also runs a high risk of identity theft and exposure of private information to scavengers.

Q 13. No.

Q 14. Notification to the consumer when a debt is sold could, at the least, alert the debt buyer that the consumer's address is no longer valid and possibly prevent some of the sewer service problems we have seen. Once an address is known to be invalid, the buyer could infer that the phone number now belongs to someone else, to prevent the problem of repeated calls to a number that is now with a different person.

Part III Validation notices

NEW: A distinct minority of lower courts has ruled that the consumer must comply with the dispute procedures of §1692g as a prerequisite to filing an FDCPA claim. See e.g. *Eide v. Colltech, Inc.*, 2013 WL 6499413 *7-8 (D. Minn. Dec. 11, 2013). Since this is outlier rule is contrary to the language, intent, and purpose of the FDCPA, the CFPB should clear this up.

Q 17. It is important to itemize the debt, especially since Congress intended to enable the consumer to dispute "any part of" the debt. Principal, interest (including rate of interest),

and other charges (late fees, collection charges) should be itemized. The date of last payment should be disclosed (sometimes that date is faked).

Q 19 The statutory language of the validation notice is at a reading level much too high for most consumers to understand. The notice should convey the information mandated by Congress prominently in plain language, in large type, on the front page, set off by typography, margins, or in a boxed area:

You can dispute this debt at any time, either orally or in writing.
If you write to us within thirty days of when you get this letter, regarding:

(1) A dispute or question about all or any part of the debt

(2) A request for the name and address of the original creditor

we will stop collecting until we mail you our response.
We will stop calling or writing you if you tell us in writing that you refuse to pay or want us to stop collecting.

(The above is at 6th grade reading level. The second subparagraph can be omitted if the recognizable original creditor [not servicer or debt buyer] is disclosed elsewhere)

Q 20 Yes, as set forth above

Q 21 No, too much information that may not be relevant detracts from the notice, as debt collectors are well aware.

Q 22 A separate statement is not desirable. Mailers may not enclose it, consumers may not read it; it may not be in plain language or sufficiently prominent.

Q 23. State law disclosures are usually on the reverse, and are not tailored to the recipient's state. They should be; this is easily done with current technology.

Q24. Often the dun has English on the front and Spanish on the reverse.

Q 26. No, and they should not be allowed to.

Q 27. I have not seen E-sign in collection matters. (Do you mean electronic checks or debts from a consumer's account?)

Q 28. Electronic communications risk disclosure to third parties and should not be allowed. Most consumers would view electronic duns as an invasion of privacy and offensive. Electronic communications with consumer's lawyer is appropriate.

Q.34 Any question about the account should be treated as a dispute. For instance, the consumer might say she is only an authorized user, or might want to know the basis for the interest rate charged, or might want information about how the account was transferred to the current creditor to make sure it is a valid collection. Such inquiries are effectively disputes.

NEW The CFPB can clear up the differing rulings about how precise the consumer has to be in order to dispute or request no further calls. The FDCPA does not require a consumer's refusal to pay to be unconditional, and allows consumers to express their wish to be left alone to be stated in the most general terms. See *Bishop v. I.C. Systems, Inc.*, 713 F. Supp. 2d 1361, 1367-68 (M.D. Fla. 2010) (finding that the "ordinary meaning [of "refuse"] does not encompass an unalterable rejection" and that the FDCPA "does not require that the consumer use any specific language or `magic words' to tell a debt collector to cease communication.").

Q. 35. The consumer should not have to provide information, which she may not have if the account is an identity theft account. The creditor/ collector is in the best position to verify the account, and would have the burden of proof in any litigation.

Q.39-41 Collectors take full advantage of a self-serving narrow reading of the *Chaudhry* case cited in your fn 118, divorced from the factual underpinnings of that opinion. Most collectors simply look at their own computer records when required to provide verification, a process that of course merely begs the question whether the computer record being disputed is in fact accurate or even reliable. Instead, collectors should go back to the original creditor and get documentation, as actually happened in *Chaudhry* itself. Automated computer to computer investigation has proven to be a distinct failure under the FCRA and should be prohibited in the FDCPA context as well.

If the consumer has made a specific dispute, or raised a specific question, the collector's verification must be directly responsive to that dispute or question.

Q 42. To the extent that a debt collector has reported an account to the credit bureaus, it should be required to also report a dispute. Collectors have opened a loophole in §1692e(8) by claiming that they do not have to update the report if there is a dispute. That enables them to engage in misleading omissions by "parking" the debt as though it is undisputed -- which harms the consumer's ability to get credit.

NEW: In addition, some collection agencies leave the report on the bureaus even after they are no longer authorized to collect the account. Collectors should remove accounts that the creditor has withdrawn from placement. §1692e(9).

NEW: A recent new outlier opinion [*McIvor v. Credit Control Services, Inc.,* --- F.Supp.2d ----, 2013 WL 6596825 (D. inn. December 17, 2013)] improperly nullifies §1692e(8) when collectors respond to a credit bureau's FCRA investigation request. First, all authorities are otherwise unanimous that credit reporting is debt collection, and this court's erroneous conclusion that the collector's participation in the credit reporting system was not done "in connection with the collection of a debt" is unprecedented. Second, materiality is not in play when, as in this case, the omitted information is an FDCPA-mandated disclosure, as was held by the 4th Circuit in *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365 (4th Cir. 2012). Even then, the court's conclusion that requiring the defendant to note the dispute was not important or therefore material because the CRA already knew from the consumer that she disputed the debt was made in ignorance of the interplay between § 1692e(8) and § 1681c(f) of the FCRA, which places an additional reporting duty on the CRA when it learns from the furnisher – as opposed to from the consumer – that the debt is disputed.

NEW: If the creditor is reporting the account, a collector should not also report it. Double reporting is unfair to the consumer and misleading about his credit worthiness.

Q 43. The CFPB should enforce the plain language of §1692g and endorse the position of the FTC and of the overwhelming majority of cases that each debt collector and each lawyer for the debt collector must provide the §1692g validation notice. *Robinson v. Nationstar Mortgage, L.L.C.*, 2012 WL 5596421 (S.D. Ohio Nov. 15, 2012).

> Section 1692g(a) requires the initial communication from each debt collector—not just the first debt collector—to comply with the disclosure requirements. ‘‘It is implausible to think that Congress, concerned with ‘dunning the wrong person,’ would limit disclosure requirements to a narrow range of debt collectors-those that are the first to seek recovery on a given debt. Instead, an interpretation that requires all debt collectors to comply with the validation and disclosure requirements best promotes the goal of protecting cosumers.

Lee v. Cohen, McNeile &Pappas, P.C. 520 Fed.Appx. 649, 651, 2013 WL 1240812 10th Cir. 2013), reached the wrong result, harmful to consumers and contrary to the language, intent and purpose of the FDCPA. Even if collectors were to convey information that the debt is disputed, it may be that no one has responded with verification to the consumer (because of the judicial gloss allowing them to stop collecting instead of verifying) so each collector must give the notice per statute. Or, the debt may have been sold (sometimes more than once) which underscores the importance of each collector providing the validation notice and the identity of the current creditor.

Q. 45: Collectors typically provide the very minimum that they can get away with: “the amount being demanded is the amount the creditor claims is owed” (irrespective of the nature of the dispute) and rarely provide documentation. Collection lawyers are more likely to provide documentation.

Q.44. No, consumers are usually sincere about disputes, this gives furnisher too much discretion to abuse the situation.

Q 46 If there is a dispute, collectors should provide whatever documentation is requested, typically a signature card or periodic statements, and information as to what part of the debt represents interest, late or overlimit charges, cash advances or purchases. The last billing statement would not verify most debts, since it will not disclose purchases or charges that could be disputed, and will not show the “consumer” nature of the debt --- which those who sue the consumer often feign ignorance of. Nor will it show the date of the last payment (which is sometimes faked and therefore disputable).

Q 48. Mail is mandated by statute and should not be changed.

Q 49: Collectors should always convey the dispute to the creditor, either as part of the investigation process, or as part of their returning the account to the creditor. Failure to do so should be a violation of §1692e(8).

Q 50 Do third-party collectors typically return the account to the debt owner when it is disputed, without attempting to verify it? Yes, and also without telling the owner that it is disputed. The consumer will then have to re-dispute with the next collector. That contravenes the purpose of §1692g and should be prohibited.

Q 51. No, they just stop collecting without alerting the creditor. The consumer should have some closure. The FDCPA does not contemplate the alternative of stopping collecting, which is a judicial gloss.

Q 52. Yes. The owner of the debt or the collector must be required to inform debt buyers and new collectors that it is an unverified disputed debt when it is sold or re-placed.

Q 53 Collectors often refrain from reporting during the 30 day window. That should be standard procedure to avoid the abuse that arises from not updating the report as an excuse to leave a debt on the credit report as undisputed.

Q 54 New technologies allow a collector to spoof telephone numbers, which is a misleading and deceptive tactic to get the consumers to answer a call from someone they do not want to talk to. Local numbers are often spoofed, and caller ID names are likewise spoofed. Spoofing should be strictly forbidden; since it is intentional misconduct, spoofing is probably a violation of §1692d(5) and §1692e(9) by analogy.

Q58: How frequently do debt collectors communicate with third parties about matters other than the location of the consumer? What other topics are discussed and for what reason? What are the potential risks to consumers or third parties? Would additional regulation to address this issue be useful? Collectors talk to third parties about the debt regularly and ask third parties to pay consumer debt. Or they ask employers about salary, length of employment, and other such matters that are not part of location information.

Q59: What should standard be for when a debt collector's belief about a third party's erroneous or incomplete location information is reasonable? Location information should be limited to home address and telephone number. There is no reason to have a

workplace telephone unless provided **by** consumer with a request to call there.
There is no reason to call anyone more than once. Third parties may not want to disclose location information, as is their right. I am currently getting my phone tied up by at least three recorded calls per day, every day, even though I do not recognize the name of the person they are calling for.

Q60: Some individuals employed by debt collectors use aliases to identify themselves to third parties when seeking location information about a consumer. Should this practice be addressed in a rulemaking? Since some states prohibit aliases, the law should be uniform nationally. No aliases.

Q61: Should debt collectors identify their employers during location communications?

Not unless asked

Q62: How should restriction about the name of the collector on the envelope apply to technologies like email, text message, or fax?

NEW: The courts have loosely interpreted the otherwise strict prohibition barring extraneous matter on the envelope. Collectors should not be able to use "Telegram" or Revenue Department, or any of the warnings typically found on tax refund envelopes or other official documents. *Schweizer v. Trans Union Corp.*, 136 F.3d 233 (2d Cir. 1998); *Johnson v. NCB Collection Servs.*, 799 F. Supp. 1298 (D. Conn. 1992). The judicially created so-called "benign language" exception to the prohibition is a formula for unertainty and an invitation to abuse and should be eliminated.

NEW: "Communication" as defined in *Marx v General Revenue Corp.*, 668 F. 3d 1174, 1177 (10th Cir. 2011) completely vitiates the intent and purpose of §804, as well as several other sections of the FDCPA. The definition would allow third party communication as long as no debt is mentioned: leaving messages with relatives or neighbors asking for a return call would be permissible – even though the FTC Staff Commentary long since precluded this evasion. The CFPB's public position agrees, and is well stated in your Amicus Brief of Jan. 6, 2012 in the *Marx* case. Please resolve this issue authoritatively.

Q63: Should collectors use screening technology before relying on an area code to

determine a consumer's time zone? Yes. But surely they know from the address what the consumer's time zone is.

Should collectors be allowed to rely on information provided by consumers at the time they applied for credit, such as when a consumer provides a phone number identified as a "home" number or a "mobile" phone number on an initial credit application without screening the area code? No. People move frequently. The information at the time they apply for credit is likely to be the same as when they are in collection.

Q64: Should collectors assume that the consumer's mailing address on file with the collector indicates the consumer's local time zone? Yes

Q65: A main purpose of designating certain hours in the FDCPA as presumptively convenient apparently was to prevent the telephone from ringing while consumers or their families were asleep. Do similar concerns exist for other technologies? Should any distinction be made between the effect of a telephone ringing and an audio alert associated with another type of message delivery, such as email or text message, if a mobile phone is on during the night? No distinction.

Q66: Should a limitation on usual times for communications apply to those sent via email, text message, or other new media? Yes, except that no such communications should be allowed absent explicit and knowing consent of the consumer.

Should it matter whether the consumer initiates contact with the collector via that media? No

Q67: Is there a general principle that can guide the incorporation of standards on unusual times for communications to newer technologies? Technology allows collectors to know whether the phone is a land line or a mobile phone.

Q68: With the advent of mobile phones, consumers often receive calls at places other than at home or at work. Under what circumstance do collectors know, or should know, that the consumer is at one of the types of places listed below?

Q69: Other than hospitals, churches, courts, funeral homes, day care centers, military combat zones, what places would be inconvenient for consumers to be contacted? Restaurants, schools, shopping areas

Q70: Under what circumstances are communications at a consumer's place of employment inconvenient, even if the employer does not prohibit the receipt of such communications?

Always inconvenient, interrupts work flow, embarrasses or scares the consumer, unless consumer specifically asks to be called there

Q71: Do employers typically distinguish, in their policies regarding employee contacts at work, between collection communications and other personal communications? No

Q72: Can collectors reliably determine consumers' employers and their policies with regard to receiving communications at work No.

Q73: The FDCPA's restriction on contacting consumers represented by attorneys does not apply if "the attorney fails to respond within a reasonable period of time." How do collectors typically calculate a "reasonable period of time" for this purpose, and does the answer vary depending on particular circumstances? It depends on what response they want. If they are just calling to annoy the attorney and the attorney has told them client disputes or refuses to pay, there is no possible good reason to call or communicate with attorney except as an excuse to start harassing the debtor again.

Q74.

NEW. Clarification is needed about when a debt collector "knows" a consumer is represented by an attorney. Collectors should be able to communicate with anyone the consumer identifies as her attorney, or with anyone who claims to be an attorney, without further proof and without liability. Collectors should be mandated to notate the account with the name address or phone number of anyone claiming to be the consumer's attorney. That a person is an attorney is easy to verify at the time or later.

Debt collectors often claim to need a "power of attorney" in order to communicate with me about a client's account. Normally lawyers do not have or need formal "powers of attorney." Collectors should be forbidden from asking for more than the FDCPA allows; it is merely an excuse to continue to contact the consumer.

NEW: Communications to the lawyer are necessarily aimed at the consumer, and the lawyer is accordingly obligated to convey them to the client. When the communication is

false, misleading, or threatening or demands an amount not owing, the fact that the communication is directed to the attorney should not exonerate the collector. The CFPB should resolve the split in the Circuits represented by *Sayyed v. Wolpoff & Abramson,* 485 F.3d 226 (4th Cir.2007), answering yes to liability, with *Guerrero v. RJM Acquisitions LLC,* 499 F.3d 926 (9th Cir.2007) (per curiam), and *Kropelnicki v. Siegel,* 290 F.3d 118, 128 (2d Cir.2002), both answering no; and *Evory v. RJM Acquisitions Funding L.L.C.* 505 F.3d 769, 772 (7th Cir 2007) (answering maybe). Your December 2011 opposition to certiorari in *Fein Such, Kahn and Shepard, P.C. v. Allen*, 2011 WL 6780149, comports with the FDCPA and should be officially adopted.

Q77-80

A creditor of a decedent should be able to contact the widow or widower for location information only, in writing only, and with the request being limited to the identification of the deceased's executor, administrator, or lawyer.

Upon receipt of proper contact information, if the debt was disputed, the collector must reveal that fact to the person who has authority to use the decedent's assets to pay the debt in accordance with §1692e(8). Initial communications about the debt to the proper party, if allowed, MUST disclose the dispute right under §1692g.

The FTC adopted a fuzzy Enforcement Policy allowing third party contact concerning decedent's debts which would otherwise be prohibited. 76 Fed. Reg. 44,915 (July 27, 2011). That Policy is harmful. The CFPB should circumscribe or eliminate that source of obviously problematical contacts.

In a 2012 case of mine, the creditor and the collector both emphasized to the children that paying their deceased father's debt was "the right thing to do." So they did, even though they did not think it was owed. And they both crowed delightedly that the children could not sue under §1692c! That is a large loophole, if it exists.

First, there should be some recourse for the third party who was contacted, to ensure that the third party is not contacted about the decedent's debt in the first place. §1692c(c) does not presently provide a cause of action for a third party to whom the collector lies in calls for someone else's debt. *Todd v Collecto, Inc.,* __ F.3d __ (7th Cir. Oct. 2, 2013).

Thus, calls to an unobligated third party should be expressly declared actionable, perhaps under §1692e(5) (threat to take unlawful action) or, if not owed or disputed, 1692e(2(A). Second, initial communications about the debt to a third party, if allowed, MUST disclose the dispute right under §1692g, and disclose whether the decedent disputed the account.

Q 81. Collectors are eager to discuss an account with a third party who wants to pay it, to help a son, daughter or parent. Sometimes the collector calls the Mom, other times the Mom calls in when a dun is directed to Mom's address and opened by her. In either case, the collector must get direct explicit permission from the consumer before talking with the third party. Preferably, all arrangements must be made by the third party *through* the consumer. The consumer may dispute the debt, or may not want a third party to pay it for her. Collectors should not "end run" around the consumer.

I had one case where the Mom paid the son's debt and later discussed it with him and found out he did not owe it. I had another case where the collector claimed consent to get the Mom to pay, but the consumer said she did not consent. "Implied consent" is subject to fabrication.

Q82: How should a rule treat recorded messages, if at all? What benefits do recorded messages (as distinct from live phone calls) offer to debt collectors or consumers? Limit to no more than once a week

Q 84: Should collectors be permitted to ask consumers to opt out of receiving future mini-Miranda warnings? No

Q85: What would be the costs and benefits for collectors in transmitting caller-ID information? Collectors should not be allowed to use deceptive caller ID's. Spoofing numbers or IDs is far too common. Technology allows a collector to spoof telephone numbers, a misleading and deceptive tactic to get the consumer to answer a call from someone he does not want to talk to. Local numbers are often spoofed, and caller ID names are likewise spoofed. Spoofing should be strictly forbidden; since it is intentional, spoofing is a violation of §1692d(5) and §1692e(9) by analogy.

Q86: Should debt collectors be prohibited from blocking or altering the telephone number or identification information transmitted when making a telephone call, for example by

blocking the name of the caller's phone number? Yes. Consumers should have a choice whether to answer the phone; see response to Q 85.

Q87: Should the email provider's privacy policy affect whether collectors send emails to that account? For instance, where a collector knows or should know that an employer reserves the right to access emails sent to its employees, should the collector be prohibited from or limited in its ability to email a consumer at the employer-provided email address? Absolute bar on emails to employment address

Q88: What third-party disclosure issues arise from providing FDCPA section 807(11)'s mini-Miranda via email, text message, or other means of electronic communication? Possibility of third party access and disclosure of debt.

Part IV (E) §805(c)

NEW: The plain language of the FDCPA does not allow a collector to ask for payment after receiving a "cease" letter. The CFPB should confirm the plain language of the statute and the position of the FTC Staff Commentary, and disavow the judicially created exception in *Lewis v. ACB Business Services, Inc.,* 135 F.3d 389, 399 (6th Cir. 1998) (rejecting the FTC's interpretation).

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? Subsection (5) should have a presumption that unanswered calls are intended to annoy if more than once a day and answered calls if more than once a week. Absent special or changed circumstances, any collector who persists in calling a consumer after having spoken to her and having been informed that she cannot or will not pay can only be for the purpose of harassment and abuse; this general rule must be made clear.

Q93: Should the Bureau include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as abusive conduct by third- party debt collectors? Yes! Long overdue. p. 7-8. Your discussion of "outsourcing"

by creditors identifies a significant loophole in the FDCPA. The creditor who uses a collection agency as an "in-house" department insulates itself as well as the collection agency from liability. That creditor should be defined as subject to the FDCPA so as not to immunize the collection agency pretending to be the creditor. Perhaps § 1692e(9) or (10) could be the vehicle for this.

Likewise, the CFPB should endorse the unanimous rule that bad debt buyers and post-default debt servicers are subject to the FDCPA.

Q97: Should the Bureau imitate Mass. and provide bright line prohibitions on repeated communications? If so, what should the rules be? Yes. See response to Q 92 above.

Q98: What are the costs and benefits to consumers and collectors of using predictive dialers? No benefits to consumers. Dead space when they pick up

Q99: Should there be standards limiting call abandonment or dead air for debt collection calls, similar to the standards under the FTC's Telemarketing Sales Rule? Yes

Q 100 Sections 1692e(1) and (9) have not been enforced. Collectors use their state name in their title, or the word "State" or "U.S." or "United States." That is deceptive and must be stopped.

NEW. Section 1692e(3) should preclude a law firm from sending a demand letter on law firm letterhead into a state where it does not practice law. A consumer naturally perceives that a law firm can and will sue. The "Greco" disclaimer does nothing to lessen this misperception; in fact, a disclaimer just enhances or reinforces the perception.[2] Here again, the law as to the effect of such a disclaimer is applied differently in different areas of the country and needs to be uniformly and authoritatively resolved, whether the dun comes from inside or outside the consumer's jurisdiction.

NEW. The interpretation of § 1692e(5) is in disarray. A minority of courts say that it outlaws only the "threat" to take illegal action, but not the action itself. The CFPB should clarify that the illegal action also violates that subsection – or specify that it does violate.

[2] "In the context of the letter, the threat of a lawsuit instigated by Great Lakes is strengthened by the statement: 'No legal action *has been* or *is now being* taken against you.' (emphasis added)." *Bentley v. Great Lakes Collection Bureau,* 6 F.3d 60, 63 (2d Cir. 1993).

§1692e generally and §1692e(10) specifically as well as §1692d? and §1692f as applicable.

NEW: If a collection agency is using a fictitious or d/b/a name, identification of the entity may be difficult. Thus the CFPB should reject the judicial gloss on § 1692e(14) which allows a collector to use any fictitious name anywhere as long as it is registered somewhere. *Boyko v. Am. Int'l Group, Inc.,* 2012 WL 2132390 (D.N.J. June 12, 2012). One collection agency has an AZ license to use a trade/fictitious name in AZ, but is collecting in other states under that obscure and hard to identify name as well.

Section 1692e(16) is also not enforced. A number of collectors' names include variations on "credit bureau."

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 of different methods? Yes, and the speed. There should always be a no-fee method of payment.

Q113: Should the Bureau include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as unfair or unconscionable by third-party debt collectors? Yes. See response to Q93 above.

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? Some courts do not think that one can assert an e violation if there is an f violation. The provisions are intended to overlap and the CFPB should make it clear that they do.

NEW: You asked no question about 808(6) but it should expressly prohibit judicial action as well (wrongful garnishment for instance).

NEW: §1692f(7) was based on postcards that say, "you have won a prize" or something to get the consumer to call back, especially if the collector did not have a good phone number. However, based on the new dispute about what is a "communication" the section would seem to allow such post cards if no debt is mentioned. Clarify that as long as it is

part of a collection initiative, whether the debt is mentioned or not, post card communications are prohibited.

Q120: all payments should be applied per the consumer's direction, even if undisputed. Consumer may wish to pay a certain account first.

Q121: Should proposed rules require that payments be applied according to specific standards in the absence of an express consumer request or require a collector to identify the manner in which a payment will be applied? First to principal Should proposed rules require that the payment be applied on or as of the date received or at some other time? Yes.

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? Very rare Should such documentation be required under proposed rules? Yes, before the consumer pays. Any agreement should be in writing before the consumer pays. Are there any State or local laws that are useful models to consider?

Q123: Should the Bureau's proposed rules impose standards for the substantiation of common claims related to debt collection? If so, what types of claims should be covered and what level of support should be required for each such claim? Consumer's actual (not electronic) signature on any document that is the basis for a claim.

Q124: Should the information or documentation substantiating a claim depend upon the type of debt to which the claim relates (*e.g.*, mortgage, credit card, auto, medical)? NO

Q125: Should the information or documentation expected to substantiate a claim depend on the stage in the collection process (*e.g.*, initial communication, subsequent communications, litigation) and if so, why? It should depend on whether consumer disputes, and should be invariably required in litigation.

Q126: What information do debt collectors use and should they use to support claims of

indebtedness a) prior to sending a validation notice; none, no problem here except with ID theft, similar names, Jr and Sr, etc

b) after a consumer has disputed the debt should provide full verification including itemization of all interest, costs and fees. At present the *Chaudhry* decision has been wrongly applied to allow virtually nothing by way of verification; c) after a consumer has disputed the debt and it has been verified; and d) prior to commencing a lawsuit to enforce a debt?

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: a) the consumer's credit score will improve if the consumer pays the debt; b) payment of the debt will result in the collection trade line being removed from a consumer's credit report; c) the consumer's creditworthiness will improve if the consumer pays the debt; Credit Reporting is a powerful incentive to pay, but the representations are nothing but guesswork. Collector should not make any representations about credit report unless they are going to remove the debt from credit reporting if paid and d) the collector will furnish information about a consumer's debt to a CRA? The latter is usually true, but should not be done until the dispute period has passed. Also a collector should be required to update the report to note the dispute. At present they can just let the debt sit there undisputed and not update the report.

NEW: Collection agencies may not be familiar with their FACTA obligations as to ID theft, so you should include their FACTA obligations in any rulemaking. 15 U.S.C. § 1681m(g). My client disputed an identity theft account, but the creditor sent the same account out to another debt collector.

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? Lots of services, printing, mailing, call operations, skip tracing, networks such as NAN or YGC. Some collection agencies are "in bed" with debt settlement companies. Some even use fake messages from a third party to get a consumer to call back. *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142 (9th Cir. 1998).

Q129: Are there specific acts or practices by service providers that should be specified in proposed rules as constituting unfair, deceptive, or abusive acts or practices in connection with the collection of debts? Yes, they should not do anything debt collector cannot do, and the collector should be also liable for their vendor's violations so as to ensure care in selecting vendors.

Q130: Who provides substantial assistance to debt collectors? Is the assistance provided to first-party collectors the same as the assistance provided to third-party collectors? Some collection agencies pretend they are the creditor with the creditor's full knowledge.

Q133: Yes, such disclosure should be made in each communication whenever the charge off date is more than six years before the date of the communication.

NEW: The FTC mandated disclosure is deceptive when it allows the collector to say it "may" continue to report the debt, which gives the impression that the reporting "may" go on for years, when the FCRA limitation is probably only a few months away. So the debt collector should only refer to credit reporting if it actually has already reported or actually will report. See e.g. *Gonzales v. Arrow Financial Services, LLC*, 660 F.3d 1055 (9th Cir. 2011).

Also, the mandatory disclosure should be simplified for readability:

Where the reporting period is still running: **The law limits how long you can be sued on a debt. Your debt is so old we can't sue you for it. Whether or not you pay the debt, we will report it to the credit bureaus for a few more months.**

Where the reporting period has expired: **The law limits how long you can be sued on a debt. Your debt is so old we can't sue you for it. We will not report it to any credit bureau.**

Q137: Should the Bureau require debt collectors seeking 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? Yes.

I commend for your consideration the following state model:

> N.C. Gen. Stat. § 75-55. Unconscionable means.
>
> No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:
>
> (1) Seeking or obtaining any written statement or acknowledgment in any form [including a partial payment] containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

I would add the bracketed material, to insure that solicitation of a small "good faith" payment does not revive the debt either.

Q138: Some debts may become time barred after collectors have sent validation notices to consumers. Should the collector be required to disclose information about the debt being time-barred? Not if they have stopped collecting. But if the consumer offers payment after the time bar has passed, collectors must make the time-barred disclosures before the consumer actually agrees to make the time-barred payment.

Q139: A substantial period of time may transpire between the time of the first disclosure that debt is time barred and of the consequence of making a partial payment and subsequent collection attempts. Should collectors be required to repeat the partial payment disclosure during subsequent collection attempts? Yes.

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? Some state laws allow just an acknowledgement to revive the statute.

Part VII.A

NEW: The CFPB should adopt a definition of "judicial district" to resolve disputes

among the circuits as to venue, most recently represented by *Suesz v. Med-1 Solutions, LLC* , 734 F.3d 684 (7th Cir. 2013). I suggest "the proper court closest to the consumer's residence."

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? Communications in formal legal actions may not be deceptive as to the existence or nature of the debt and as to the possible recovery (interest, attorney fees, etc)

Q. 151. NEW: Some courts have ruled that one cannot claim that the same act violates both §1692e and §1692f. Such a posture does not comport with the language or intent of the FDCPA. The CFPB should clear this up, particularly since violating multiple sections (the nature of the violation) is part of the calculation of statutory damages:

Q 159. State collection agency registration laws are helpful to the consumer in identifying a collection agency and whether it is legitimate. State regulators are often helpful in addressing unlawful collection practices affecting citizens of that state.

The CFPB might establish a central database which collects state registration information or points consumers to the location in each state where licensees may be found.

Debt buyers MUST be licensed so that consumers can identify and contact the debt buyer. Too often debt buyers are intentionally obscure.

Q 160. The national mortgage registry distances and insulates entities from state regulatory scrutiny. It is a bad idea and should not be adopted for collection agencies.

Q 161-62. If a collector reports accounts to the credit bureaus, it must keep the records of those accounts for the entire time the account is reported. If it does not report accounts, records should be kept for 7 years. Storage is unlimited and cheap. I have seen "zombie debts" that have already been paid, so it is particularly important for a consumer to be able to go back to the collector or buyer and get confirmation of the payment. Of course, if applicable, records should be kept for the duration of any lawsuit relating to the

account or to the form letter used on the account. I frequently see accounts that have been disputed returned by the creditor to the same collection agency. That collection agency should have the capability of cross checking its own stored records to make sure that it is not collecting again on a disputed account.

NEW: Courts are at odds regarding the one-year statute of limitations for suit under the FDCPA. The one-year statute should run from each discrete act that violates the law. Collectors should not be immunized (get a free pass) by the fact that their first violation is outside the statute of limitations, if there are separate acts within the one-year statute that violate the law (weight of authority). Compare *Purnell v. Arrow Financial Services, LLC*, 303 Fed.Appx. 297, 2008 WL 5235827 (6th Cir. 2008) (adopting the majority separate, discrete violation rule) with *Wilhelm v. Credico, Inc.*, 455 F. Supp. 2d 1006, 1008-09 (D.N.D. 2006) (rejecting the rule and limiting the limitations period to when the initial violation accrued notwithstanding the continued series of violations), rev'd on other grounds 519 F.3d 416 (8th Cir. 2008). There is no reason that a Congressional enactment should be applied differently in different jurisdictions.

NEW: Other unsettled areas of the FDCPA that need resolution include the applicability of the FDCPA to in rem procedures, such as foreclosure (your *Birster* amicus brief) and evictions (discussed in *O'Connor v Nantucket Bank,* 2014 WL 198347 (D. Mass. Jan. 13, 2014).

Thank you for your consideration of these comments and suggestions. Please feel free to communicate with me about any questions or concerns.

Respectfully,