

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Part 1006**

**[Docket No. CFPB-2013-0033]**

**RIN 3170-AA41**

**Debt Collection (Regulation F)**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** The Consumer Financial Protection Bureau (the Bureau) is seeking comment, data, and information from the public about debt collection practices. Debt collection affects a significant number of consumers and the Bureau is considering proposing rules relating to debt collection. Therefore, the Bureau is interested in learning through responses to this advance notice of proposed rulemaking (ANPR) about the debt collection system, about consumer experiences with the debt collection system, and about how rules for debt collectors might protect consumers without imposing unnecessary burdens on industry.

The Fair Debt Collection Practices Act (FDCPA) was passed in 1977 and the Bureau is the first Federal agency to possess the authority to issue substantive rules for debt collection under this statute. The Bureau may also address concerns related to debt collection using its authority under the Dodd-Frank Act to issue regulations concerning unfair, deceptive, and abusive acts or practices and to establish disclosures to assist consumers in understanding the costs, benefits, and risks associated with consumer financial products and services.

**DATES:** Comments on this ANPR must be received by [INSERT 90 DAYS FROM

PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by Docket No. CFPB-2013-0033 or Regulatory Identification Number (RIN) 3170-AA41, by any of the following methods:

- *Electronic:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail/Hand Delivery:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552.

*Instructions:* All submissions must include the agency name and docket number or RIN.

Please include the question number(s) to which your comment pertains. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by calling (202) 435-7275.

All comments submitted through the formal means described above, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

*E-Rulemaking Initiative:* The Bureau is working with the Cornell e-Rulemaking Initiative (CeRI) on a pilot project, RegulationRoom ([www.RegulationRoom.org](http://www.RegulationRoom.org)), that uses web technologies and approaches to enhance public understanding and effective participation. This ANPR on debt collection is a focus of the project. RegulationRoom is set up to make it easier

for consumers and others to understand what the Bureau is considering, to share their information, experiences, and concerns, and to discuss possible ideas and solutions. Note that RegulationRoom is not an official United States Government website. Although comments made on that site are not formal comments like those submitted through the means identified above, the discussion on RegulationRoom will be captured through a detailed summary, which participants will have the chance to review and suggest revisions. This summary will be filed as a formal comment on Regulations.gov. For questions about this project, please contact Whitney Patross, Counsel, Office of Regulations, at (202) 435-7700.

**FOR FURTHER INFORMATION CONTACT:** Krista Ayoub and Pavneet Singh, Senior Counsels; or Kristin McPartland, Lauren Weldon, and Evan White, Counsels; Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552, at (202) 435-7700.

**SUPPLEMENTARY INFORMATION:**

This ANPR seeks data and other information to assist the Bureau in developing proposed rules for debt collection. Part I provides a general overview of debt collection, consumer protection problems in debt collection, and government authority and activities to address these problems.

Parts II and III of the ANPR principally focus on the quantity and quality of information in the debt collection system. Part II solicits information on the transfer of information and access to information upon sale or placement of debts. Part III seeks information regarding validation notices, disputes, investigations, and verification of disputes.

Parts IV, V, and VI primarily concern the conduct of collectors in interacting with consumers in trying to recover on debts through the collection process. Part IV requests

information about collector communications seeking location information about consumers, interacting with consumers themselves, disclosing debts to third parties, and newer technologies. This part includes issues concerning sections 804 and 805 of the FDCPA. Part V asks for information about unfair, deceptive, and abusive acts and practices, including issues concerning sections 806, 807, and 808 of the FDCPA. Part VI addresses issues relating to the collection of debts that are beyond the statute of limitations.

Parts VII and VIII predominantly address debt collection activities that implicate issues relating to State law. Part VII requests information about debt collection litigation, most of which occurs in State courts. Part VIII raises questions about exemptions under Federal law for State debt collection systems under section 817 of the FDCPA, as well as for private entities that operate bad check diversion programs under contracts with State and local district attorneys under section 818 of the FDCPA.

Finally, Part IX solicits information concerning recordkeeping, monitoring, and compliance.

While the Bureau encourages all commenters to read and respond to the entire ANPR, we provide the outline above to assist commenters in identifying the sections most relevant to their interests and knowledge. The Bureau also invites consumers, consumer service organizations, creditors, collectors, or other interested parties to file comments describing the practical experiences that they have had or observed in the area of consumer debt collection, even if it is not apparent to which particular question those experiences are closely related. In particular, Parts III and VII may be of most interest to consumers, who may be able to offer insight on their experiences and expectations with respect to debt collection communications and interactions with debt collection litigation.

## **I. Debt Collection and Consumer Protection**

### *A. Consumer Debts*

A debt is commonly understood to be an obligation by a consumer to pay its owner; these obligations frequently arise out of an extension of credit. Consumers have many debts in collection and may have many different types of debts in collection. In 2011, for example, a national trade association of collectors reported that the most frequent debts on which collectors seek to recover from others include medical and other health-related debts (36%), credit card debts (20%), telecom debts (13%), and student loan debts (12%).<sup>1</sup>

Owners of debts include original creditors as well as those who buy debts from original creditors and from others. Some consumers are unable or unwilling to pay debts at the time when payment is required. Owners of debts who are not paid typically deem, for various reasons, that the consumer is in default after a period of time and therefore place the debt in collection. Owners either use their own collectors to recover in their own names on these defaulted debts (first-party debt collectors) or they place the debts with collection firms or law firms that specialize in the collection of defaulted debt (third-party debt collectors).

Collection of consumer debts serves an important role in the functioning of consumer credit markets by reducing the costs that creditors incur through their lending activities.<sup>2</sup> Collection efforts directly recover some amounts owed to owners of debts and may indirectly support responsible borrowing by underscoring the obligation of consumers to repay their debts and by incenting consumers to do so.<sup>3</sup> The resulting reductions in creditors' losses, in turn, may

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<sup>1</sup> ACA International, *2011 Top Collection Markets Survey: For Period: Jan. 1, 2010 – Dec. 31, 2010* at 9 (2011), available at <http://www.acainternational.org/files.aspx?p=/images/12980/2011topmarketsurvey-electronic.pdf>.

<sup>2</sup> U.S. Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2013* at 9 (Mar. 20, 2013), available at [http://files.consumerfinance.gov/f/201303\\_cfpb\\_March\\_FDCPA\\_Report1.pdf](http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf) (2013 FDCPA Annual Report); U.S. Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* at 11 (Jan. 2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> (2013 FTC Debt Buyer Report).

<sup>3</sup> *2013 FDCPA Annual Report* at 9.

allow them to provide more credit to consumers at lower prices.<sup>4</sup> Collection activities can also lead to repayment plans or debt restructuring that enable consumers to gradually make payments and resolve their debts.

While debt collection can benefit consumers by reducing the price and increasing the availability of credit, in the absence of legislation and regulation many consumers may be subject to debt collection efforts that raise consumer protection concerns. Typically, competition in markets will incentivize firms to provide products and services on terms that consumers favor, but this competition may not be effective with regard to collections practices. Once a debt has gone into collection, consumers cannot choose their collector; the relevant choice for the consumer came when deciding from which firm to purchase or borrow. If firms' collection practices – or the practices of third-party collectors employed by the creditors or the buyers to whom creditors sell debt – played an important role in consumers' borrowing or purchasing decisions, then this competition would impose some discipline on firms to reduce overly aggressive tactics. When consumers make borrowing or purchasing decisions, however, they may not be focused on the risk that they will default. As a result, a consumer's decision to obtain credit from a particular creditor is unlikely to be influenced by the identity of the collector that might eventually collect on the debt if the consumer defaults. Indeed, it is unlikely that the consumer and perhaps even the creditor could know the identity of the future third-party collector. Firms therefore have a limited incentive to engage in less aggressive tactics if those tactics lead to increased recovery of debts. This effect may be exacerbated in the case of third-party collectors or debt buyers if consumers do not associate their treatment by the collector or debt buyer with the original creditor.

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<sup>4</sup> 2013 FDCPA Annual Report at 9.

## *B. Debt Collection Industry*

Debt collection is currently a multi-billion dollar industry composed of first-party collectors, third-party collectors, debt buyers, collection law firms, and a wide variety of related service providers. The Bureau understands that, over the past few decades, the debt collection industry has experienced dramatic growth along with significant evolution in business practices.

When a consumer defaults on a debt, the first efforts to collect on that debt are often made by the creditor itself, either through in-house collectors or others collecting in the name of the creditor. In either case, first-party collections are largely exempt from the FDCPA. These collections presumably constitute a significant segment of the debt collection market, with one industry source estimating revenues to collection companies acting in the name of first-party collectors to have been around \$2 billion in 2011.<sup>5</sup>

If the creditor or other owner of the debt decides not to collect on the debt itself, it may engage a third-party debt collector to try to recover on the debt in the collector's own name rather than in the name of the creditor or other owner of the debt. In 2010, there were more than 4,000 third-party debt collection firms that employed more than 140,000 people.<sup>6</sup> These third-party collection firms had reported revenue of \$11.7 billion in 2010.<sup>7</sup>

An original creditor or subsequent debt purchaser may choose to "outsource" its collections to a third party to collect in the third party's name for several reasons. Third-party collectors may possess capabilities and expertise in collections that the creditors' in-house operations lack. Typically, third-party collectors are paid on a contingency basis, usually a

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<sup>5</sup> Kaulkin Ginsberg, *Executive Summary: The Kaulkin Report: The Future of Receivables Management at x* (Kaulkin-Ginsberg Company 7th ed. 2007), available at <http://www.insidearm.com/wp-content/uploads/The-Kaulkin-Report-7th-Ed-Executive-Summary.pdf>.

<sup>6</sup> Robert Hunt, Fed. Reserve Bank of Pa., *Understanding the Model: The Life Cycle of a Debt* at 10 (2013), available at <http://www.ftc.gov/bcp/workshops/lifeofadebt/UnderstandingTheModel.pdf> (presented at the FTC-CFPB Roundtable).

<sup>7</sup> *Id.*

percentage of recoveries. This transfers collections expenses from the debt owner or creditor to the third party, with the result that the debt owner or creditor may recover some of what it is owed but without assuming risk that its in-house collections expense would be unproductive. Additionally, using third parties may allow debt owners and creditors to expand collection capacity during down-cycles in the economy (when the number of debts in collection increases) without having to hire or invest in additional systems or higher additional collectors on a short-term basis. Finally, an original creditor or debt owner may determine that a customer in default is no longer one with whom it is likely to maintain a long-term business relationship and thus may choose to devote its customer service efforts toward paying or prospective customers.

Debt collectors typically contact consumers to try to recover on debts, but if these efforts are unsuccessful, debt owners may decide to file an action in court to try to recover the debt. Most debt collection litigation is filed in State and local courts, and, therefore, owners of debts often retain law firms and attorneys that specialize in debt collection and are familiar with these courts and State and local requirements to act on their behalf. The use of debt collection litigation to recover on debts has grown to become a critical part of the debt collection industry, with collection law firms having an estimated \$2.4 billion in revenues from collections in 2011.<sup>8</sup>

While third-party collection agencies have been increasing in size in recent years, third-party debt collection continues to include a significant number of smaller entities.<sup>9</sup> Several factors account for this level of industry fragmentation. First, debt collection has historically been subject to low barriers to entry; and while debt collection relies on an array of data

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<sup>8</sup> Kaulkin Ginsberg, *Executive Summary: The Kaulkin Report: The Future of Receivables Management* (Kaulkin-Ginsberg Company 7th ed. 2007), available at <http://www.insidearm.com/wp-content/uploads/The-Kaulkin-Report-7th-Ed-Executive-Summary.pdf>.

<sup>9</sup> Robert Hunt, Fed. Reserve Bank of Pa., *Understanding the Model: The Life Cycle of a Debt* at 10 (2013), available at <http://www.ftc.gov/bcp/workshops/lifeofadebt/UnderstandingTheModel.pdf> (presented at the FTC-CFPB Roundtable).

processing and communications technologies, the cost of investing in these technologies has steadily declined. Secondly, some collection firms specialize regarding the types of debt they collect. For example, some firms specialize in the collection of student loans, while others may specialize in collection of medical debt.

A third source of industry fragmentation may be that many businesses that use debt collection services, such as utilities and medical providers, serve local markets and may prefer to rely on collectors who are based in, and familiar with, their local markets. Utilities and medical providers' collection practices, in particular, may be subject to regulation at the State or even local level, and thus require collectors who are sensitive to these requirements.

A final source of collections industry fragmentation may be due to the fact that a considerable amount of debt collection activity, including direct collection from consumers as well as debt litigation, is conducted by law firms, which similarly operate within local and State jurisdictions.

Additionally, the advent and growth of debt buying has been called "the most significant change in the debt collection business in the past decade."<sup>10</sup> Debt buyers purchase defaulted debt from original creditors or other owners of debt and thereby take title to the debt. They seek to collect on purchased debts themselves, place them with third-party collectors, or sell them to other debt buyers. Credit card debt comprises a large majority of the debt that debt buyers

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<sup>10</sup> U.S. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change – A Workshop Report* at iv (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

purchase.<sup>11</sup> Although over 500 debt buyers are currently active, the market is fairly concentrated, with about 10 firms purchasing a large proportion of the debt that is sold.<sup>12</sup>

Creditors who sell their uncollected debt to debt buyers receive a certain up-front return, with these debts typically sold at prices that are a small fraction of the face value of the debt they are owed. The debt buyer assumes the risk that it may recover less than it paid to acquire the debt and collect on it (including litigation costs, if applicable).

While all collectors have an incentive to minimize their costs and maximize their recoveries to increase their profits, their strategies and methodologies may vary considerably based on a number of factors. Types of debts may differ widely in amount or in the amount or type of information available to collectors about them, as discussed further below. For example, a majority of medical, utility, and telecommunications debts in collection are for small amounts and may not warrant the high cost of seeking to locate or contact the consumer; consequently some collectors simply report these items to consumer reporting agencies (CRAs) and wait for the consumer to contact the collector after discovering the item on a credit report.

Some types of debts are subject to statutory or regulatory requirements that may affect how the collector tries to recover on them. Privacy protections may impact how collectors seek to recover on medical debt, for example. The availability of administrative wage garnishment and tax refund intercepts likewise may affect how collectors try to recover on Federal student loans.

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<sup>11</sup> U.S. Gov't Accountability Office, GAO-09-748, *Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* (2009), available at <http://www.gao.gov/new.items/d09748.pdf>.

<sup>12</sup> Robert Hunt, Fed. Reserve Bank of Pa., *Understanding the Model: The Life Cycle of a Debt* at 18 (2013), available at <http://www.ftc.gov/bcp/workshops/lifeofadebt/UnderstandingTheModel.pdf> (presented at the FTC-CFPB Roundtable).

For some debts, changes in the consumer’s situation may warrant a change in the collector’s recovery strategy. For example, a consumer that was unable to pay a debt due to unemployment may find a job. Thus, some collectors purchase information about consumers from CRAs and other third parties to track whether the consumers’ circumstances have changed, indicating new ability to pay past debts they still owe.

To assist them in developing efficient and effective means of collecting on debts, collectors may obtain goods and services from a wide range of other businesses. Skip-tracing companies, for instance, provide contact information for consumers and may screen accounts to determine if consumers have declared bankruptcy or have died. Technology firms provide auto-dialers and related software programs to help debt collectors place calls to consumers. Print shops prepare and mail validation notices and other written communications from collectors to consumers. Collectors may furnish information about their experience with the debts about consumers to CRAs and these agencies may, in turn, provide collectors with consumer reports for use in connection with collections.

### *C. FDCPA Protection for Consumers*

The Federal and State governments historically have sought to protect consumers from harmful practices of collectors. From 1938 to 1977, the Federal government primarily protected consumers through Federal Trade Commission (FTC or Commission) enforcement actions against collectors who engaged in unfair or deceptive acts and practices in violation of section 5 of the FTC Act. Despite such efforts, Congress found in 1977 that “there [was] abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,” and that these practices “contribute[d] to the number of personal bankruptcies, to

marital instability, to the loss of jobs, and to invasions of individual privacy.”<sup>13</sup> Congress also found that “existing laws and procedures for redressing these injuries [were] inadequate to protect consumers.”<sup>14</sup>

In light of these findings, Congress enacted the FDCPA. Among other things, the FDCPA was enacted to “eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.”<sup>15</sup> To achieve these purposes, among other things, the FDCPA: (1) prohibits debt collectors from engaging in abusive, deceptive, or unfair practices; (2) imposes restrictions on debt collectors’ communications with consumers and on their communications with others; and (3) mandates a debt dispute process that includes certain protections for consumers and obligations for collectors.

The FDCPA, however, does not apply to all collectors of debts. The statute generally covers the collection activities of third-party collectors for debts in default at the time they are obtained. In addition, a creditor can be treated as a debt collector under the FDCPA with respect to debts that were in default when it obtained them, or when a creditor collects under names other than its own.

#### *D. Continued Consumer Problems and Government Responses*

Despite the enactment and enforcement of the FDCPA and other measures,<sup>16</sup> significant

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<sup>13</sup> Fair Debt Collection Practices Act, Public Law 95–109, 91 Stat 874 (FDCPA), 15 U.S.C. 1692(a).

<sup>14</sup> FDCPA section 802(b), 15 U.S.C. 1692(b).

<sup>15</sup> FDCPA section 802(e), 15 U.S.C. 1692(e).

<sup>16</sup> In 1984, the FTC issued its Credit Practices Rule under the FTC Act, which addressed a few unfair or deceptive acts or practices that relate to consumer credit, but which have application in the context of debt collection. *Trade Regulation Rule: Credit Practices*, 49 FR 7740 (Mar. 1, 1984). The Board of Governors of the Federal Reserve System (Board), the Federal Home Loan Bank Board (FHLBB) (predecessor to the former Office of Thrift Supervision), and National Credit Union Administration (NCUA) followed suit with similar rules. *Unfair or Deceptive Acts or Practices; Credit Practices*, 50 FR 16696 (Apr. 29, 1985) (Board); *Consumer Protections; Unfair or Deceptive Credit Practices*, 50 FR 19325 (May 8, 1985) (FHLBB); *Federal Credit Union; Prohibited Lending Practices*, 52 FR 35060 (Sept. 17, 1987) (NCUA).

consumer protection problems related to debt collection have persisted. For many years, consumers have submitted more complaints to the FTC about debt collectors than any other single industry.<sup>17</sup> The Bureau began accepting debt collection complaints on July 10, 2013. As of November 1, 2013, the Bureau is receiving comparable levels of debt collection and mortgage complaints in terms of daily complaint volume, with each accounting for approximately thirty percent of daily volume.

Consumer complaints relate to a wide variety of debt collection acts and practices. Consumers most commonly complain to the FTC that collectors harass them, demand amounts that consumers do not owe, threaten dire consequences for non-payment, or fail to send required notices.<sup>18</sup>

Not only do consumers complain about debt collectors, but they also file thousands of private actions each year against debt collectors that allegedly have violated the FDCPA. The number of these actions filed in Federal district court increased from 3,215 in 2005 to 11,811 in 2011, with increases observed each year.<sup>19</sup> While the number of these actions appeared to level off in 2012,<sup>20</sup> the continued number of such actions filed each year demonstrates that a significant number of consumers allege that debt collectors are violating the FDCPA.

Other sources report different but no less serious consumer protection problems in debt

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<sup>17</sup> In 2010, for example, the FTC received 141,285 total complaints about collectors, representing 27 percent of all complaints received by the FTC. U.S. Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2012* at 6 (2012), available at [http://files.consumerfinance.gov/f/201203\\_cfpb\\_FDCPA\\_annual\\_report.pdf](http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf). In 2011, the FTC received 142,743 total complaints about collectors, representing 27 percent of all complaints. *Id.* In 2012, the FTC received 125,136 total complaints about collectors, representing 24 percent of all complaints received by the FTC. U.S. Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2013* at 14 (2013), available at [http://files.consumerfinance.gov/f/201303\\_cfpb\\_March\\_FDCPA\\_Report1.pdf](http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf).

<sup>18</sup> 2013 FDCPA Annual Report at 7-9.

<sup>19</sup> Blog Post, J. Gordon, *FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap* (Jan. 12, 2012), available at <http://accountsrecovery.net/profiles/blogs/fdcpa-and-other-consumer-lawsuit-statistics-full-year-2011-recap>.

<sup>20</sup> P. Lunsford, *FDCPA Lawsuits Filed by Consumers Decline 7 Percent in 2012* (Jan. 17, 2013), available at <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/fdcpa-lawsuits-filed-by-consumers-decline-7-percent-in-2012/>.

collection. For instance, some consumer advocates have highlighted issues in debt collection litigation, including problems with inadequate service of process, insufficient evidence accompanying complaints, and high rates of default judgment.<sup>21</sup>

In response to these consumer protection concerns, Federal and State officials have made debt collection a top priority. In October 2012, for example, the Bureau used its enforcement authority under the Dodd-Frank Act to bring its first enforcement action involving debt collection practices, requiring three bank subsidiaries to refund an estimated \$85 million to approximately 250,000 customers for several distinct illegal credit card practices, including deceptive debt collection.<sup>22</sup> In 2012, the FTC also brought or resolved seven debt collection cases, matching the highest number of debt collection cases that it has brought or resolved in any single year.<sup>23</sup> States likewise have continued their traditional vigorous law enforcement activities involving a broad range of conduct by debt collectors.

The Bureau has also become the first Federal agency to routinely supervise debt collectors.<sup>24</sup> In addition to its supervisory activities involving certain creditors collecting on their own debts, in October 2012 the Bureau issued its Larger Participant Rule,<sup>25</sup> establishing supervisory authority over approximately 175 debt collectors accounting for over 60 percent of

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<sup>21</sup> See, e.g., Susan Shin & Claudia Wilner, New Econ. Project, *The Debt Collection Racket in New York* (2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>; Rachel Terp & Lauren Bowne, East Bay Commty. Law Ctr., *PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now* (2011), available at [http://www.defendyourdollars.org/pdf/Past\\_Due\\_Report\\_2011.pdf](http://www.defendyourdollars.org/pdf/Past_Due_Report_2011.pdf); Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts* (2010), available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>.

<sup>22</sup> Press Release, U.S. Bureau of Consumer Fin. Prot., *CFPB Orders American Express to Pay \$85 Million Refund to Consumers Harmed by Illegal Credit Card Practices* (Oct. 1, 2012), available at <http://www.consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/>.

<sup>23</sup> 2013 FDCPA Annual Report at 28.

<sup>24</sup> Note that collectors of debts also may be subject to licensing, registration, supervision, and other oversight under State law.

<sup>25</sup> *Defining Larger Participants of the Consumer Debt Collection Market*, 77 FR 65775 (Oct. 31, 2012), 12 CFR 1090.

the industry's annual receipts.<sup>26</sup> On July 10, 2013, the Bureau held a field hearing in Portland, Maine, during which it announced guidance in the form of two supervisory bulletins, one that addresses unfair, deceptive, and abusive acts and practices in debt collection activities generally<sup>27</sup> and one that specifically addresses representations regarding credit reports and credit scores during the debt collection process.<sup>28</sup> At the field hearing, the Bureau also announced that it was accepting debt collection complaints and released template letters to assist consumers when corresponding with debt collectors.<sup>29</sup>

Finally, Federal agencies have engaged in extensive efforts to identify consumer protection problems and potential solutions relating to debt collection. In 2009, for example, the FTC issued a report, "Collecting Consumer Debts: The Challenges of Change" (2009 FTC Modernization Report), which discussed a range of critical consumer protection issues thirty years after the enactment of the FDCPA.<sup>30</sup> In 2010, the FTC issued another report, "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration" (2010 FTC Litigation and Arbitration Report), which identified consumer protection issues and possible

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<sup>26</sup> Note that the Larger Participant Rule does not delineate the scope of the FDCPA, provisions of the Dodd-Frank Act related to consumer debt collection activities, or any other Federal consumer financial law. Activities that the Bureau chose to exclude from the defined consumer debt collection market in the Larger Participant Rule may nonetheless qualify as "collecting debt" within the meaning of the Dodd-Frank Act and may constitute consumer financial products or services.

<sup>27</sup> U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_unfair-deceptive-abusive-practices.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf).

<sup>28</sup> U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-08, Representations Regarding Effect of Debt Payments on Credit Reports and Scores* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_collections-consumer-credit.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf).

<sup>29</sup> See, e.g., U.S. Bureau of Consumer Fin. Prot., *How Can I Stop Debt Collectors from Contacting Me?*, available at <http://www.consumerfinance.gov/askcfpb/1405/how-can-i-stop-debt-collectors-contacting-me.html> (last updated July 12, 2013); U.S. Bureau of Consumer Fin. Prot., *I've Been Contacted by a Debt Collector and Need Help Responding. How Do I Reply?*, available at <http://www.consumerfinance.gov/askcfpb/1695/ive-been-contacted-debt-collector-and-need-help-responding-how-do-i-reply.html> (last updated July 10, 2013); Blog Post, U.S. Bureau of Consumer Fin. Prot., *New Ways to Combat Harmful Debt Collection Practices*, available at <http://www.consumerfinance.gov/blog/debtcollection/> (last updated July 10, 2013).

<sup>30</sup> U.S. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change – A Workshop Report* at iv (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

responses related to debt collection litigation and arbitration.<sup>31</sup> In 2011, the FTC held a workshop to consider the impact of technological advances on the debt collection system, during which participants discussed, among other things, the ways in which changing technology affects debt collector communications.<sup>32</sup> In January 2013, the FTC issued “The Structure and Practices of the Debt Buying Industry” (2013 FTC Debt Buyer Report), which examined the manner and flow of information from creditors and other owners of debts to debt buyers, among other issues.<sup>33</sup> Most recently, in June 2013, the Bureau and the FTC held a joint FTC-CFPB Roundtable (FTC-CFPB Roundtable or Roundtable) on data integrity and information flows in debt collection.<sup>34</sup>

#### *E. Federal Debt Collection Rulemaking*

##### *1. Rulemaking Authority*

From the FDCPA’s enactment in 1977 until its amendment by the Dodd-Frank Act in 2010, the FDCPA expressly prohibited the FTC and any other agency with enforcement responsibility from issuing implementing rules with respect to the collection of debts by debt collectors.<sup>35</sup> In 2010, the Dodd-Frank Act authorized the Bureau to “prescribe rules with respect to the collection of debts by debt collectors, as defined in [the FDCPA].”<sup>36</sup>

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<sup>31</sup> U.S. Fed. Trade Comm’n, *Repairing a Broken System* (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

<sup>32</sup> Additional information about the Workshop is available at <http://www.ftc.gov/bcp/workshops/debtcollectiontech>.

<sup>33</sup> U.S. Fed. Trade Comm’n, *The Structure and Practices of the Debt Buying Industry* (2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>.

<sup>34</sup> Additional information about the Roundtable is available at <http://www.ftc.gov/bcp/workshops/lifeofadebt>.

<sup>35</sup> 15 U.S.C. 1692l(d). During that time period, the FDCPA required the FTC by regulation to exempt from the requirements of the FDCPA any class of debt collection practices within any State if the FTC determined that under the law of that State that class of debt collection practices was subject to requirements substantially similar to those imposed by the FDCPA, and that there was adequate provision for enforcement. 15 U.S.C. 1692o. The FTC issued its rule on State exemptions in 1979. *Fair Debt Collection Practices; Procedures for State Application for Exemption*, 44 FR 21005 (Apr. 9, 1979) (Interim rule promulgating 16 CFR pt. 901). Maine applied for and received such an exemption from the FTC, effective March 26, 1996. *Exemption from Sections 803-812 of the Fair Debt Collection Practices Act granted to State of Maine*, 60 FR 66972 (Dec. 27, 1995).

<sup>36</sup> Section 814(d) of the FDCPA, 15 U.S.C. 1692l(d), as amended by section 1089 of the Dodd-Frank Act. The Dodd-Frank Act expressly excludes certain motor vehicle dealers from the scope of the Bureau’s rulemaking

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.”<sup>37</sup> Such rules “may include requirements for the purpose of preventing such acts or practices.”<sup>38</sup>

Section 1032 of the Dodd-Frank Act also grants the Bureau 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.”<sup>39</sup> “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.”<sup>40</sup> The Bureau may include in such rules a model form that may be used at the option of the covered person for provision of the required disclosures and provide a safe harbor.<sup>41</sup> Such model forms must be validated through consumer testing.<sup>42</sup>

Further, the Bureau has the authority to “prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes

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authority. *See* section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519. The Dodd-Frank Act also transferred the FTC’s rule writing authority with respect to State exemptions to the Bureau. *See* section 817 of the FDCPA, 15 U.S.C. 1692o, as amended by section 1089 of the Dodd-Frank Act. The Bureau restated the FTC’s rule in 2011. *Fair Debt Collection Practices Act (Regulation F)*, 76 FR 78121 (Dec. 16, 2011). The FTC rescinded its rule in 2012. *Rescission of Rules*, 77 FR 22200 (Apr. 13, 2012).

<sup>37</sup> Section 1031(b) of the Dodd-Frank Act, 12 U.S.C. 5531(b).

<sup>38</sup> *Id.*

<sup>39</sup> Section 1032(a) of the Dodd-Frank Act, 12 U.S.C. 5532(a).

<sup>40</sup> Section 1032(c) of the Dodd-Frank Act, 12 U.S.C. 5532(c).

<sup>41</sup> Section 1032(b) of the Dodd-Frank Act, 12 U.S.C. 5532(d).

<sup>42</sup> Section 1032(b) of the Dodd-Frank Act, 12 U.S.C. 5532(b).

and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”<sup>43</sup>

“Federal consumer financial laws” include the FDCPA and other statutes enumerated in the Dodd-Frank Act, as well as the rules to implement these statutes.<sup>44</sup>

The Bureau can exercise the Dodd-Frank Act rulemaking authority above with regard to any “covered person or service provider.”<sup>45</sup> “Covered person” is defined as “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.”<sup>46</sup> “Covered persons” for purposes of the Dodd-Frank Act includes first-party collectors and third-party collectors who are collecting or attempting to collect on debts that arise out of consumer credit transactions.<sup>47</sup> “Service provider” is generally defined as “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service.”<sup>48</sup>

In addition, the Bureau has the authority to, after considering enumerated factors,<sup>49</sup>

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<sup>43</sup> Section 1022(b) of the Dodd-Frank Act, 12 U.S.C. 5512(b).

<sup>44</sup> Section 1002(14) of the Dodd-Frank Act, 12 U.S.C. 5481(14).

<sup>45</sup> Section 1031(b) of the Dodd-Frank Act, 12 U.S.C. 5531(b).

<sup>46</sup> Section 1002(6) of the Dodd-Frank Act, 12 U.S.C. 5481(6). However, a person is not a “service provider” solely by virtue of offering or providing to a covered person “(i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.” *Id.*

<sup>47</sup> “Consumer financial product or service” under the Dodd-Frank Act means any “financial product or service,” either offered or provided for use by consumers primarily for personal, family, or household purposes, or, as applicable, delivered, offered, or provided in connection with a consumer financial product or service. Section 1002(5) of the Dodd-Frank Act, 12 U.S.C. 5481(5). “Financial product or service” includes “extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extension of credit (other than solely extending commercial credit to a person who originates consumer credit transactions).” Section 1002(15)(A)(i) of the Dodd-Frank Act, 12 U.S.C. 5481(15)(A)(i); *see* Section 1002(7) of the Dodd-Frank Act, 12 U.S.C. 5481 (defining “credit” as “the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.”) “Financial product or service” also includes “collecting debt related to any consumer financial product or service.” Section 1002(15)(A)(x) of the Dodd-Frank Act, 12 U.S.C. 5481(15)(A)(x).

<sup>48</sup> Section 1002(6) of the Dodd-Frank Act, 12 U.S.C. 5481(26).

<sup>49</sup> These factors include the total assets of the class of covered persons, the volume of transactions involving consumer financial products or services in which the class of covered persons engages, and existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions

“conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services from any provision of this title, or from any rule issued under this title, as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title [title X of the Dodd-Frank Act].”<sup>50</sup>

## *2. Federal Debt Collection Rulemaking Proceeding*

The Bureau is issuing this ANPR to request information on a wide range of debt collection practices and issues and to explore potential debt collection rulemaking proceedings and other actions that the Bureau could take to improve the systematic performance of the debt collection market. The Bureau believes this information will be useful for several reasons. First, significant consumer protection problems relating to debt collection appear to persist despite various vigorous government enforcement, supervision, policy development, and educational efforts. While the Bureau is active in these efforts, the Bureau believes it is appropriate to explore ways in which the new rulemaking authorities afforded by the Dodd-Frank Act could be used to address some of the longstanding problems discussed above.

Second, there have been technological developments, such as email and text messaging, since the enactment of the FDCPA. These new communication tools have created uncertainty as to the applicability of the FDCPA in various contexts. Rulemaking permits the Bureau to consider these technological issues in a comprehensive and careful manner, fostering the considered development of standards that provide adequate protection for consumers while reducing uncertainty for collectors.

Third, the Bureau believes it is important to examine whether rules covering the conduct of creditors collecting in their own names on their own debts that arise out of consumer credit

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provide consumers with adequate protections. Section 1022(b)(3)(B) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(3)(B).

<sup>50</sup> Section 1022(b)(3)(B) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(3).

transactions are warranted. As discussed above, Congress excluded such creditors from the FDCPA in 1977, but it gave the Bureau authority under the Dodd-Frank Act in 2010 to prescribe rules applicable to creditors. Congress excluded such creditors in 1977 because it concluded that the risk of reputational harm would be sufficient to deter creditors from engaging in harmful debt collection practices.<sup>51</sup> However, experience since passage of the FDCPA suggests that first-party collections are in fact a significant concern in their own right. For instance, the FTC receives tens of thousands of debt collection complaints each year concerning creditors.<sup>52</sup> The Bureau likewise has brought a debt collection enforcement action against a creditor,<sup>53</sup> and it recently issued a supervisory bulletin emphasizing that collectors, including creditors, need to ensure that they are not engaging in unfair, deceptive, or abusive, acts and practices in violation of the Dodd-Frank Act.<sup>54</sup> Moreover, many States have enacted consumer protection statutes that apply to the collection activities of creditors,<sup>55</sup> with some of these statutes enacted after Congress

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<sup>51</sup> As early as two years after the FDCPA’s enactment, the FTC submitted a report to Congress finding that “there is little difference between the practices employed by certain creditors and those employed by debt collection firms. Indeed, there evidence that the collection practices of creditors may be more egregious than those practices engaged in by debt collection firms.” U.S. Fed. Trade Comm’n, *1979 FDCPA Annual Report* at 7 (1979). The FTC therefore “urge[d] the Congress to reconsider its decision to exempt creditors from the provisions of the Fair Debt Collection Practices Act.” *Id.*

<sup>52</sup> In 2012, the FTC received 22,353 complaints about first-party collectors, representing 4.3 percent of all complaints received. In 2011, the FTC received 25,506 complaints about first-party collectors, representing 4.9 percent of all complaints received. In 2010, the FTC received 31,952 complaints first-party collectors, representing 6.2 percent of all complaints received. U.S. Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2013* at 14 (2013), available at [http://files.consumerfinance.gov/f/201303\\_cfpb\\_March\\_FDCPA\\_Report1.pdf](http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf); U.S. Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2012* at 7 (2012), available at [http://files.consumerfinance.gov/f/201203\\_cfpb\\_FDCPA\\_annual\\_report.pdf](http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf).

<sup>53</sup> See <http://www.consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/>.

<sup>54</sup> See U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_unfair-deceptive-abusive-practices.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf). See also U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-08, Representations Regarding Effect of Debt Payments on Credit Reports and Scores* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_collections-consumer-credit.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf).

<sup>55</sup> See, e.g., Cal. Civ. Code §§1788 - 1788.33, 1812.700 – 1812.072; Colo. Rev. Stat. §§ 5-1-101 – 5-12-105, 12-14-101 – 12-14-137; Conn. Gen. Stat. §36a-647; Fla. Stat. §§559.55 – 559.785; Haw. Rev. Stat. §§443B-1, 480D – 480D-5; Kan. Stat. Ann. §16a-5-107; N.Y. Gen. Bus. Law §§600 – 604b; Okla. Stat. §14A, 5-107; Tex. Fin. Code

excluded creditors in the FDCPA. In addition to seeking input on whether any proposed rules should cover creditors, the Bureau seeks input on the basic premise that it should generally seek to harmonize any rules it develops for third-party collectors and first-party collectors, except to the extent that the law, facts, or policy considerations warrant different treatment.

### *3. Scope of Proceeding*

In this ANPR, the Bureau seeks information to help it determine what rules and other Bureau actions, if any, would be useful under the FDCPA and the Dodd-Frank Act. The Bureau has not yet decided the precise scope and nature of rulemaking(s) it may conduct concerning debt collection. 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 would be to protect consumers, yet not impose undue or unnecessary burdens on the industry.

The Bureau is also interested in receiving information bearing on how proposed rules should define and use relevant terms. The FDCPA defines terms such as “communication,”<sup>56</sup> “creditor,”<sup>57</sup> “debt,”<sup>58</sup> and “debt collector.”<sup>59</sup> The FDCPA also uses terms such as “regularly collects or attempts to collect”<sup>60</sup> and “in default.”<sup>61</sup> For example, one influential FTC staff opinion letter addressed when an account goes into “default” and when a collection agency’s employees become the creditor’s de facto employees.<sup>62</sup> Many court decisions and agency documents interpret the FDCPA’s terms to establish important parameters for the FDCPA.

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<sup>56</sup> Ann. §§392.001 – 392.404, 396.001 – 393.353; Vt. Stat. Ann. tit. 9, §2451a – 2461; Wis. Stat. Ann. §427.101 – 427.105.

<sup>57</sup> Section 803(2) of the FDCPA, 15 U.S.C. 1692a(2).

<sup>58</sup> Section 803(4) of the FDCPA, 15 U.S.C. 1692a(4).

<sup>59</sup> Section 803(5) of the FDCPA, 15 U.S.C. 1692a(5).

<sup>60</sup> Section 803(6) of the FDCPA, 15 U.S.C. 1692a(6).

<sup>61</sup> Section 803(6)(F)(iii) of the FDCPA, 15 U.S.C. 1692a(6)(F)(iii).

<sup>62</sup> Letter from Thomas Kane, Attorney, U.S. Fed. Trade Comm’n, to Richard de Mayo, President & CEO, TSYs Total Debt Management, Inc. (May 23, 2002), available at <http://www.ftc.gov/os/statutes/fdcpa/letters/demayo.htm>.

Likewise, the Dodd-Frank Act defines terms such as “consumer financial product or service”<sup>63</sup> and “credit”<sup>64</sup> and uses terms such as “extending credit and servicing loans”<sup>65</sup> and “collecting debt related to any consumer financial product or service.”<sup>66</sup>

The way in which proposed rules might define “collectors” would be critical to determining the scope of the proposed rules. The Bureau is especially interested in information bearing on whether a rule under the Dodd-Frank Act would be useful to protect consumers from the conduct of creditors collecting in their own names on debts arising out of consumer credit transactions.<sup>67</sup> In particular, the Bureau seeks comment on whether proposed rules should exclude certain types of debts or subject them to different requirements. Some debt collection that is subject to the FDCPA may not be subject to the Dodd-Frank Act’s prohibition against unfair, deceptive, or abusive acts or practices and thus could be addressed in a proposed FDCPA rule but not a proposed Dodd-Frank Act rule. For example, in its Larger Participant Rule, the Bureau noted that some medical debt (*i.e.*, that which did not arise from an extension of credit within the meaning of the Dodd-Frank Act), might not involve a consumer financial product or service.<sup>68</sup> Municipal debts (*e.g.*, tickets and fines) and some other types of debts that may not arise out of an extension of credit may raise similar issues. The Bureau seeks factual information regarding different types of debts in collection to help it determine which debts involve a consumer financial product or service.

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<sup>63</sup> Section 1002(5) of the Dodd-Frank Act, 12 U.S.C. 5481(5).

<sup>64</sup> Section 1002(7) of the Dodd-Frank Act, 12 U.S.C. 5481(7).

<sup>65</sup> Section 1002(15)(A)(i) of the Dodd-Frank Act, 12 U.S.C. 5481(15)(A)(i).

<sup>66</sup> Section 1002(15)(A)(x) of the Dodd-Frank Act, 12 U.S.C. 5481(15)(A)(x).

<sup>67</sup> Note that in 2009, the FTC said that, because “neither consumer advocates nor industry representatives [at the FTC’s 2007 debt collection workshop] recommended that the FDCPA be generally expanded to cover creditors,” “there is no basis in the workshop record for the Commission to assess the costs and benefits of such an expansion of FDCPA coverage, including how such an expansion would affect entities like national banks that are subject to regulation by other federal agencies.” *2009 FTC Modernization Report* at 2 n.1.

<sup>68</sup> *Defining Larger Participants of the Consumer Debt Collection Market*, 77 FR 65775, 65778 n.28, 65779 (Oct. 31, 2012) (promulgating 12 CFR pt. 1090).

The Bureau acknowledges that there are avenues other than rulemaking through which to change or clarify the standards applicable to the collections process. The statutory standards governing how collectors must act in seeking to recover on debts have remained largely unchanged since the FDCPA was enacted in 1977. Further, certain changes that would be beneficial to consumers may be attainable only through statutory revisions. Others may be best effectuated by issuing guidance. The Bureau therefore encourages commenters to provide comment on where rulemaking provides the preferred means of addressing a particular issue and where statutory changes<sup>69</sup> or guidance would be a better approach. Finally, the Bureau seeks information about market initiatives or other ways in which tools are already being implemented to improve the debt collection marketplace.

The Bureau also recognizes that industry, academics, or others may have already conducted consumer testing or other research that is relevant to the topics addressed in this proceeding. The Bureau invites comment on any consumer testing or other research concerning consumer understanding or disclosures that has been undertaken. The Bureau also invites comments on any model notices that industry organizations, consumer groups, academics, or governmental entities have developed. Such information would augment consumer testing the Bureau plans to do in connection with validation notices and other required disclosures.

## **II. Transfer and Accessibility of Information Upon Sale and Placement of Debts**

This Part addresses transfers of information related to debt when debts are sold or placed for collection with third parties. This Part seeks information to assist in the development of proposed rules for creditors, debt buyers, and third-party collectors to create a comprehensive

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<sup>69</sup> The Bureau notes that under section 815(a) of the FDCPA, it is required to file annual reports with the Congress “concerning the administration of its functions under [the FDCPA], including such recommendations as the Bureau deems necessary or appropriate.” 15 U.S.C. 1692m(a). Comments could be useful to the Bureau in fulfilling this statutory requirement.

and coherent system for information about debts. Incentives in the marketplace may not be sufficient in some circumstances<sup>70</sup> to result in collectors having adequate information. A comprehensive and coherent system for information about debts would make it more likely that those who demand that consumers pay debts have accurate and complete information bearing on claims of indebtedness. Having accurate and complete information, in turn, would facilitate disclosing information to consumers through validation notices and other methods, as well as assist in preventing false or misleading claims as to who owes debts and how much is owed.

#### *A. Information Transferred Between Debt Owners and Debt Buyers or Third-Party Collectors*

Debt owners, collectors, consumer advocates, and the FTC have all raised concerns about the adequacy of information transferred with debts when debts are placed with a collector or sold to a debt buyer. In the 2009 FTC Modernization Report, the Commission identified problems with the flow of information in the debt collection system as a significant issue, noting repercussions from these problems for both debt collectors and consumers.<sup>71</sup> The FTC also observed that technological innovations over the past thirty years have exponentially increased the ability of creditors and debt collectors to obtain, store, and transfer data about consumers and their debts.<sup>72</sup>

The Bureau believes that improving the integrity and flow of information within the debt collection system is of critical importance. In addition to the FTC's work, consumer groups have

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<sup>70</sup> For example, debt collectors seeking to maximize profits may not acquire sufficient information about the amount of debts. Owners of debts might be able to create or compile additional information that would allow debt collectors to accurately calculate the outstanding balance on debts in all, or virtually all, circumstances. Collectors nevertheless may not acquire this information for various reasons. Collectors often may accept payments for debts that are substantially less than the outstanding balance, so it may not benefit collectors substantially to have additional information that allows them to determine the precise amount of the balance of debts. Even if collectors would benefit from additional information that permits them to calculate the outstanding balance more accurately, the cost to the collector of acquiring this additional information may still exceed its benefit to the collector, while if the benefits to consumers were considered the overall value of the information may exceed the cost.

<sup>71</sup> 2009 FTC Modernization Report at 21-24.

<sup>72</sup> *Id.* at 17.

also raised concerns about the lack of information available to debt buyers and third-party collectors.<sup>73</sup> Consumer groups have shed light on the impact that the lack of information has on debt collection litigation, a topic discussed in greater depth in Part VII.<sup>74</sup> Concerns about the adequacy of information available to participants in the system served as the impetus for the recent FTC-CFPB Roundtable that examined the integrity and flow of debt-related information throughout the debt collection system.

With respect to the placement of debts with third-party collectors, participants at the Roundtable stated that the amount of information provided by a debt owner placing a debt with a collector may vary significantly depending on the sophistication of the debt owner and the collector.<sup>75</sup> More sophisticated debt owners and collectors typically share information through electronic interfaces that allow both parties to access data maintained or submitted by either party.<sup>76</sup>

With respect to debt sales, the FTC noted in its 2013 Debt Buyer Report that in addition to the information the FDCPA currently requires debt collectors to include with the validation notices, debt buyers typically receive or are aware of the name of the original creditor,<sup>77</sup> as well as other information such as the original creditor's account number, the debtor's Social Security

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<sup>73</sup> E.g., Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts* at 22 (2010), available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>; Legal Aid Society, et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* at 5 (2010), available at [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf).

<sup>74</sup> See, e.g., New York Appleseed, *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases* at 20, available at <http://ftc.gov/os/comments/debtcollectroundtable3/545921-00031.pdf> (only 1 percent of complaints reviewed "included any documents relating to proof of the underlying agreement"); *Debt Deception* at 6, 10 (suggesting that 35 percent of debt buyer cases were meritless).

<sup>75</sup> U.S. Bureau of Consumer Fin. Prot. & U.S. Fed. Trade Comm'n, *Roundtable on Data Integrity in Debt Collection: Life of a Debt* at 109 (June 6, 2013) (*Transcript of 2013 FTC-CFPB Roundtable*).

<sup>76</sup> *Id.*

<sup>77</sup> 2013 *FTC Debt Buyer Report*, at ii. Under the FDCPA, debt collectors are required to provide the name and address of the original creditor if different from the current creditor to any consumer who requests such information in writing within 30 days of receipt of the validation notice. 15 U.S.C. 1692g(a)(5).

number, the date of last payment, and the date of charge-off.<sup>78</sup> The Commission’s report also examined the transfer and availability of debt-related documents (sometimes referred to as “media”) when debts are purchased. Examples of such documentation might include electronic copies of original signed agreements, periodic statements, or payment receipts. According to the report, debt buyers obtain few, if any, underlying documents about a debt at the time of purchase.<sup>79</sup> Debt buyers are sometimes able to obtain account documentation for the debts they purchase, but debt sellers often limit or charge for access to those documents.<sup>80</sup> In the absence of this information, debt buyers may try to collect from the wrong consumer or collect the wrong amount.

In sum, it is widely recognized that problems with the flow of information in the debt collection system is a significant consumer protection concern. At the Roundtable, many participants expressed support for national standards related to what information should be transferred with a debt.<sup>81</sup> However, various participants expressed different ideas about what specific information should be transferred.<sup>82</sup> The Bureau is considering using its rulemaking authority to develop requirements related to the transfer of specified information or documents as part of the sale of a debt or the placement of a debt with a third-party collector.

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

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<sup>78</sup> 2013 *FTC Debt Buyer Report* at 34-35. However, the FTC further noted that, in its experience, debt buyers generally do not include these types of information in their validation notices. *Id.* at 36

<sup>79</sup> *Id.* at 35-36.

<sup>80</sup> *Id.* at 39-40.

<sup>81</sup> *Transcript of 2013 FTC-CFPB Roundtable* at 103, 119, 144, 159, 171, 174, 196.

<sup>82</sup> *Id.* at 26-37.

activities and provide to debt owners?

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

Q3: The OCC recently released a statement of best practices in debt sales which recommends that national banks monitor debt buyers after sales are completed “to help control and limit legal and reputation risk.”<sup>83</sup> What monitoring or oversight of debt buyers do creditors currently undertake or should they undertake after debt sales are completed or after debts are placed with third parties for collection?

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

#### Information Related to FDCPA Provisions.

Q5: To what extent do debt owners transfer or make available to debt buyers or third-party collectors information relating to: disputes<sup>84</sup> (e.g., that a debt had been disputed, the nature of the dispute, whether the debt had or had not been verified, the manner in which it was verified, and any information or documentation provided by the consumer with the dispute); unusual or inconvenient places or times<sup>85</sup> for communications with the consumer (e.g., at the

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<sup>83</sup> Office of the Comptroller of the Currency, Statement of the Office of the Comptroller of the Currency Provided to the Subcommittee on Financial Institutions and Consumer Protection Senate Committee on Banking, Housing, and Urban Affairs, *Shining a Light on the Consumer Debt Industry* at 12 (July 17, 2013), available at <http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf>.

<sup>84</sup> Information about the requirements related to disputes under both the FDCPA and FCRA are discussed below in Part III.B.

<sup>85</sup> Collection at inconvenient places and times is discussed below in Part IV.C.

consumer's place of employment);<sup>86</sup> cease communications requests;<sup>87</sup> or attorney representation<sup>88</sup>? What would be the benefits and costs of debt buyers and third-party collectors obtaining or obtaining access to this information upon sale or placement of the debt? To what extent do third-party debt collectors provide this information to debt owners? What would be the costs and benefits of third-party collectors providing this information to debt owners?

Additional Information.

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

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

Documentation (Media).

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

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<sup>86</sup> Collectors contacting consumers at work is discussed below in Part IV.C.

<sup>87</sup> Cease communications requests are discussed below in Part IV.E.

<sup>88</sup> Collector communications with consumers represented by counsel is discussed below in Part IV.C.

hinder debt collectors from accessing documentation?

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

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

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

Technological Advances. In the 2009 FTC Modernization Report, the Commission noted that increases in data storage capacity can enable document sharing between creditors and collection agencies, or between creditors and debt buyers.<sup>89</sup> A number of commenters at the recent FTC-CFPB Roundtable also pointed to technological advances as a means to better enable

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<sup>89</sup> 2009 *FTC Modernization Report* at 17-18.

creditors, debt collectors, and debt buyers to share information and documentation.<sup>90</sup> At the same time, centralizing such consumer data raises potential data privacy and security risks, as well as the costs of transferring documents and other information.<sup>91</sup>

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

*B. Information Debt Owner, Debt Buyer, or Third-Party Collector Provides to Consumer Upon Sale or Placement of Debt*

The FDCPA does not currently require any notification to consumers at the time that a consumer's debt is sold or placed with a third party for collection. Instead, consumers often become aware that their debts have been sold or placed with a third party for collection because they receive a communication to collect the debt or a written validation notice from the debt buyer or third-party collector. Consumers may have difficulty recognizing a debt or knowing whom to pay because a debt may be sold and resold multiple times or placed for collection

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<sup>90</sup> Transcript of 2013 FTC-CFPB Roundtable at 103-04, 120-21, 130-31, 135.

<sup>91</sup> 2009 FTC Modernization Report at 23.

multiple times with different third-party collectors, with the result that a consumer may receive communications from several debt collectors, possibly naming several debt owners, over a period of several years. Some commenters have suggested that one way to mitigate that confusion would be to require notification to the consumer when a debt is sold or placed for collection.

Q13: Do debt owners, buyers of debt, or third-party collectors currently notify consumers upon sale or placement of a debt, other than through the statutorily-required validation notices or through required mortgage transfer notices?<sup>92</sup>

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

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

### **III. Validation Notices, Disputes, and Verifications (Section 809 of the FDCPA)**

This Part seeks information related to the validation notices provided to consumers and

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<sup>92</sup> Federal consumer financial laws currently require notices to consumers of mortgage transfers. Under the Truth in Lending Act's (TILA's) implementing Regulation Z, a mortgage transfer notice must be sent by each covered person. The transfer notice must include the date of the transfer, contact information for the covered person and an agent or party authorized to receive notice of the right to rescind or resolve issues concerning the consumer's payments on the loan, and whether ownership is or may be recorded in public records or has not been recorded in public records. 12 CFR 1026.39. Further, under the Real Estate Settlement Procedures Act's (RESPA's) implementing Regulation X, a mortgage servicer transfer servicing notice must be sent both by the transferor prior to the transfer, and by the transferee after the transfer (though they can be combined in one notice). That servicing transfer notice must include the effective date of the transfer, the contact information for both servicers, the date on which the transferor will cease accepting payments, and other statements of the consumer's rights. 12 CFR 1024.21. The Regulation Z and Regulation X notices can be combined where applicable. 12 CFR pt. 1026, Supp. I, Comment 1026.39(b)(1)-1.

the obligations of debt collectors with respect to consumer disputes. Part III.A discusses the content, form, and delivery of validation notices under the FDCPA. Part III.B solicits comment on the FDCPA dispute process, including the process to submit disputes, the requirements of investigations, and the processes used to verify debts.

#### *A. Validation Notices*

FDCPA section 809(a) generally requires a debt collector, within five days of the first communication with a consumer in connection with the collection of any debt, to provide the following information in writing to the consumer:

1. The amount of debt;
2. The name of the creditor to whom the debt is owed;
3. A statement that unless the consumer disputes the validity of the debt or any portion of it within 30 days after receipt of the notice, the debt will be considered to be valid by the debt collector;
4. A statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion of it, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and will mail a copy of such verification or judgment to the consumer;
5. A statement that upon written request within 30 days of the notice, the collector will provide the name and address of the original creditor, if different from the current creditor.

The above notice is typically referred to as the “validation notice” or “g notice” (since the notice requirement is codified at 15 U.S.C. 1692g). Under FDCPA section 809(a), a debt collector is not required to provide this validation notice in writing within five days of the first

communication with a consumer in connection with the collection of any debt if (1) the debt collector provided the information that is required in the validation notice in the initial communication to the consumer; or (2) the consumer has paid the debt.<sup>93</sup>

The legislative history of FDCPA section 809 indicates that the principal purpose for the validation notice and related dispute rights was to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.”<sup>94</sup> Through FDCPA section 809, Congress intended to provide consumers with a means of addressing such mistakes by requiring collectors to provide debtors with some basic information about the alleged debt and about the consumer’s right to dispute it. In addition, validation notices educate consumers about their FDCPA rights.<sup>95</sup>

#### *1. Information in Validation Notices Related to Recognizing the Debt*

Debt collectors must disclose two pieces of information about the specific debt in validation notices: (1) the name of the creditor to whom the debt is owed, and (2) the amount of the debt. Concerns have been raised by the FTC and consumer groups that this information is not sufficient in many cases to allow consumers to recognize whether the debts being collected are their own because consumers may not recognize the name of the debt buyer that currently owns the debt. In addition, the amount of the debt shown on the validation notice may not be recognizable to consumers because it may differ from the amount of debt that was disclosed on the last periodic statement or billing statement sent by the original creditor because original creditors, debt collectors, and debt buyers sometimes add fees and interest to the amount of the

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<sup>93</sup> 15 U.S.C. 1692g(a).

<sup>94</sup> S. Rept. 382, 95th Cong. at 4 (1977).

<sup>95</sup> *Jacobson v. Healthcare Fin. Services, Inc.*, 516 F.3d 85, 95 (2d Cir. 2008) (validation notices “make the rights and obligations of a potentially hapless debtor as pellucid as possible”); see also *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000); *Miller v. Payco-Gen. Am. Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991); *Swanson v. S. Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988).

debt that appeared on the last periodic statement, billing statement, or other documentation that consumers received.

*a. Current Owner of the Debt*

As discussed above, under FDCPA section 809(a), a debt collector must disclose in the validation notice the name of the current owner of the debt.<sup>96</sup>

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?

*b. Itemization of Total Amount of Debt*

As discussed above, the amount of the debt shown on the validation notice may not be recognizable to consumers because original creditors, debt collectors, and debt buyers sometimes add fees and interest to the amount of the debt that appeared on the last periodic statement, billing statement, or other documentation that consumers received. In its 2009 Modernization Report, the FTC recommended that debt collectors be required to include in all validation notices an itemization of the total debt using the following categories: (1) principal; (2) total of all interest; and (3) total of all fees and other charges added. The FTC concluded that this itemization would benefit consumers and debt collectors, insofar as consumers would be more likely to recognize debts they have incurred and to identify debts that are not theirs. Once they recognize a debt, consumers might be more willing to discuss payment arrangements. The FTC also stated that debt buyers, in particular, would benefit from obtaining such an itemization of debts they purchase because they must distinguish between principal and interest to prepare

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<sup>96</sup> 15 U.S.C. 1692g(a).

Form 1099-C's to comply with section 6050P of the Internal Revenue Code.<sup>97</sup>

For certain types of debts, such as closed-end mortgage loans, the amount of outstanding principal is disclosed on periodic statements for those loans.<sup>98</sup> For other types of debts, such as credit card debts, consumers may not understand the term “principal” and how it relates to amounts shown on periodic statements or billing statements provided by the original creditor.<sup>99</sup>

The Bureau specifically solicits comments on the alternatives discussed below for itemizing the total amount of debt. The Bureau also solicits comments on whether there are other alternatives it should consider. For each alternative, the Bureau solicits comment on the benefits and costs of providing each itemization, including the costs for creditors and debt collectors in tracking or collecting data and in providing this itemization on the validation notice. The Bureau also solicits comment on: (1) the types of debts for which or situation in which each alternative would be most useful to consumers and (2) how relevant terms for each alternative should be defined.

*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 after the date of charge-off or default; and (4) any payments or credits received after the date of charge-off or default.

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<sup>97</sup> 2009 FTC Modernization Report at 29-30.

<sup>98</sup> For example, beginning January 10, 2014, creditors, assignees, and servicers generally will be required under Regulation Z to provide periodic statements for most closed-end consumer mortgage loans secured by a dwelling. 12 CFR 1026.41; 78 FR 10902, 11007 (Feb. 14, 2013). The periodic statements for these loans must include the outstanding principal on the loan. 12 CFR 1026.41(d)(7)(i); 78 FR 10902, 11007 (Feb. 14, 2013).

<sup>99</sup> For example, for credit card accounts or other open-end credit, whether a charge is “interest” or a “fee” or “principal” may change over time, depending on whether the interest or fee is capitalized. For credit card accounts, if interest or fees charged in a billing cycle are not paid by the end of the billing cycle, these charges typically are added to the outstanding balance as principal. Creditors typically do not label the outstanding account balance on periodic statements given for credit card accounts or other open-end credit using the term “principal.”

*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.

*Other alternatives.*

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

*c. Additional Information*

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

- The name and address of the alleged debtor to whom the notice is sent
- The names and addresses of joint borrowers
- A partial Social Security number of the alleged debtor
- The account number used by the original creditor or a truncated version of the

- account number
- Other identifying information
  - The name of the original creditor (if different from current owner)
  - The name of the brand associated with the debt, where different from the original creditor (*e.g.*, the name of a retail partner on a private label or co-branded credit card, or the name of the person providing the periodic statement for closed-end mortgages)
  - The name of the doctor, medical group, or hospital for medical bills ancillary to their provision of services (*e.g.*, a testing laboratory)
  - Type of debt (*e.g.*, student loan, auto loan, etc.)
  - Date and amount of last payment by the consumer on the debt
  - Copy of last periodic statement

To what extent is this information available to debt collectors and debt buyers and what would be the cost of requiring that it be included in the validation notice? What privacy concerns would be implicated by providing any of this information (*e.g.*, the name and addresses of joint borrowers, partial Social Security numbers, and account numbers) and how might the Bureau address such concerns?

## *2. Statements of Consumers' Rights Set Forth in the FDCPA*

Under FDCPA section 809(a), debt collectors must disclose in the validation notice two statements regarding the consumer's right to dispute the debt. Specifically, the validation notice must include a statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion of it, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and will mail a copy of

such verification or judgment to the consumer. The validation notice must also include a statement that unless the consumer disputes the validity of the debt or any portion of it within 30 days after receipt of the notice, the debt collector will consider the debt valid.

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.

The FDCPA does not require debt collectors to notify consumers that: (1) disputing a debt will suspend collection until it is verified, and (2) consumers can request that collectors cease communicating with them. In its 2009 Modernization Report, the FTC noted that few, if any, debt collectors appear to voluntarily disclose this information to consumers.<sup>100</sup>

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?

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.

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<sup>100</sup> 2009 FTC Modernization Report at 26.

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?<sup>101</sup>

### *3. Format and Delivery of Validation Notices*

#### *a. Format*

FDCPA section 809(a) does not impose formatting requirements for validation notices, such as form, sequence, location, grouping, segregation, or type-size requirements for the information in the notice.<sup>102</sup> In addition, FDCPA section 809(a) does not expressly prohibit debt collectors from adding language to the written validation notice with the mandatory disclosures. Nevertheless, FDCPA section 809(b) expressly states that “[a]ny collection activities and communication during the 30-day period [to dispute the debt] 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.”<sup>103</sup>

Debt collectors typically add language to the written validation notice along with the mandatory disclosures, such as a demand for payment.

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?

#### *b. Foreign Language Notices*

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<sup>101</sup> See 12 CFR pt. 1022, App. K for an example of a stand-alone document summarizing rights under the FCRA.

<sup>102</sup> The FTC in its Commentary indicated that an illegible notice, however, does not comply with FDCPA section 809. FTC Commentary section 809(a), comment 3.

<sup>103</sup> 15 U.S.C. 1692g(b).

According to the U.S. Census, approximately 34 million Americans speak Spanish at home. Of those, approximately 10 million speak English less than “well,” making it the largest linguistic population with limited English proficiency (LEP) in the United States.<sup>104</sup> Many other LEP consumers speak languages at home other than Spanish, but no other individual language is nearly as prevalent.<sup>105</sup>

Recognizing that only providing forms and notices in English may impede these populations’ ability to understand written material, some financial service providers, including debt collectors, apparently provide forms and notices in languages other than English. For example, some providers will convey disclosures to a consumer in Spanish if the consumer initiated the credit application in Spanish. Other providers may allow consumers to choose the language they would like to use in communicating with collectors.

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

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

*c. Method of Delivery of Validation Notices*

*(1) Electronic Delivery of the Validation Notice*

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<sup>104</sup> See U.S. Census Bureau, *Language Use*, available at <http://www.census.gov/hhes/socdemo/language/>.

<sup>105</sup> For example, LEP consumers speaking Chinese, Korean, and Vietnamese, the next three largest LEP linguistic populations, number in the hundreds of thousands. *Id.*

The Electronic Signatures in Global and National Commerce Act (E-Sign Act) prescribes a procedure by which firms may provide to consumers electronically disclosures that are required to “be provided or made available to a consumer in writing.” In essence, that statute requires affirmative consent from consumers to receiving disclosures electronically after they demonstrate they can access the disclosure electronically and after they have been informed of their right to a paper copy.<sup>106</sup> The statute also gives Federal regulatory agencies the ability to interpret, within certain limits, the E-Sign Act with respect to other statutes over which they have rulemaking authority.<sup>107</sup>

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

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

*(2) Consumers’ Use of Electronic Means to Fulfill Writing Requirements for Exercising Rights*

*Described in Validation Notice*

To be effective under FDCPA section 809(a)(4), a consumer’s right to dispute the debt

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<sup>106</sup> 15 U.S.C. 7001(c)(1).

<sup>107</sup> 15 U.S.C. 7004(b).

must be exercised in writing.<sup>108</sup> Likewise, under FDCPA section 809(a)(5), the collector must provide the consumer with the name of the original creditor only if the consumer submits a written request within 30 days after receiving a validation notice.<sup>109</sup> Also, under FDCPA section 805(c), consumers can request in writing that collectors cease communicating with them. The purpose of requiring that such communications be in writing appears to be to establish a written record of the request.

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

*(3) Consumer Testing of Validation Notices*

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

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

*B. Disputes and Verification*

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<sup>108</sup> 15 U.S.C. 1692g(a)(4).

<sup>109</sup> 15 U.S.C. 1692g(a)(5).

The adoption of standards for transferring information about debts and for compiling and presenting clarified and enhanced validation notices may make it more likely that collectors will try to collect the correct amounts from the correct consumers. Currently, there are many circumstances in which consumers deny or question that they are the debtor, that they owe the debt, or that the amount sought is accurate, as evidenced by the significant volume of these complaints to the FTC and the Bureau.

Under the FDCPA, consumers have the right to dispute and receive verification of the debts that collectors attempt to collect and many consumers exercise this right.<sup>110</sup> Section 809(b) of the FDCPA provides that if a consumer disputes a debt in writing within 30 days of receiving the validation notice, a debt collector must stop collection of the debt until the collector obtains verification of the debt or a copy of a judgment against the consumer and mails it to the consumer.<sup>111</sup> The FDCPA does not elaborate on the standards for investigating a dispute, nor does it expressly define what constitutes “verification of the debt.”

The Bureau is interested in information bearing on the adequacy of current practices to investigate collection disputes and verify the debt under the FDCPA. According to the 2009 FTC Modernization Report, “many collectors currently do little more to verify debts than confirm that their information accurately reflects what they received from the creditor,” which is

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<sup>110</sup> 15 U.S.C. 1692g. Although the Bureau is not aware of any comprehensive data regarding what percentage of debts are disputed, the data available indicate that a significant number of consumers avail themselves of their FDCPA dispute rights each year. In its 2013 Debt Buyer Report, the FTC found that consumers disputed 3.2 percent of all accounts on which debt buyers attempted to collect themselves. The FTC noted that this dispute figure likely underestimated the prevalence of information problems, but that if it were applied across the entire debt buying industry, it would result in about one million disputed debts per year. *2013 FTC Debt Buyer Report* at iv. The total number of disputed debts for the entire debt collection industry is likely to be substantially higher because it would include disputes of debt on which third-party collectors, not just debt buyers, seek to recover.

<sup>111</sup> 15 U.S.C. 1692g(b). Notably, the FDCPA contains other provisions related to consumer disputes that are not dependent upon when the debt was disputed or whether the dispute was made in writing. For example, section 807(8) requires that a debt collector communicate that a debt is disputed if it shares credit information about that debt, and section 810 provides that if a consumer owes multiple debts and makes a single payment, a debt collector cannot apply the payment to a disputed debt. 15 U.S.C. 1692e(8), 1692h. In addition to obligations under the FDCPA related to disputes, debt collectors that furnish information on debts to CRAs are also subject to dispute obligations under the FCRA, which imposes different requirements than the FDCPA.

unlikely to reveal whether collectors are trying to collect from the wrong consumer, collect the wrong amount, or otherwise misrepresent the debt.<sup>112</sup> The FTC further noted that to verify a debt, some debt collectors only provide consumers with a written statement that the amount being demanded is what the creditor claims is owed. To address these concerns, the FTC recommended that if a consumer disputes a debt, the debt collector should be required to undertake a “reasonable” investigation that is responsive to the specific dispute raised by the consumer.<sup>113</sup> At the recent FTC-CFPB Roundtable, a number of participants raised similar concerns about the limited investigations collectors conduct when consumers dispute debts.<sup>114</sup>

### *1. Definition, Types, and Timing of Disputes*

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?

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

Q33: What data or other information are available regarding how disputed debts are

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<sup>112</sup> *2009 FTC Modernization Report*, at v.

<sup>113</sup> *Id.* Recent FTC consent orders have also addressed the issue of how collectors subject to such orders must investigate debt disputes in the future. For example, the FTC’s recent *Expert Global Solutions* consent order defines how the debt collector defendant must conduct each investigation, and includes consideration of specific information from the original creditor, the alleged debtor, third parties such as skip tracers, and from its own systems. Stipulated Order at 5-6, *United States v. Expert Global Solutions, Inc.*, No. 3-13CV2611-M (N.D. Tex. Jul. 16, 2013), available at <http://www.ftc.gov/os/caselist/1023201/130709ncoorder.pdf>. The *Asset Acceptance* consent order also stipulates certain requirements for completing an investigation, such as considering whether “other accounts in a particular portfolio have been disputed by consumers for similar reasons at disproportionately high rates” or whether “a disproportionately high number of accounts in a particular portfolio have been supplemented by data from third-party sources.” Consent Decree at 9, *United States v. Asset Acceptance, LLC*, No. 8:12-CV-182-T-27EAJ (M.D. Fla. Jan. 30, 2012), available at <http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf>.

<sup>114</sup> Transcript of the 2013 FTC-CFPB Roundtable at 189, 191, 204.

resolved? What percentage of disputed debts are verified? What percentage of debt disputes are never investigated? Where disputes are investigated, what percentage of the investigations reveal that there was an error?

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?

*Dispute Requirements*

Regulation V sets standards for the consumer’s direct dispute notice under the FCRA. This notice must include: (1) sufficient information to identify the account or other relationship that is in dispute; (2) the specific information that the consumer is disputing and an explanation of the basis for the dispute; and (3) all supporting documentation or other information reasonably required by the furnisher to substantiate the basis of the dispute.<sup>115</sup>

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?

Types of Disputes. Consumers apparently dispute debts for various reasons, such as disputing that they are the debtor or the amount of the debt. With respect to the amount of the debt, the consumer also might dispute more specific issues relating to the debt owed, such as the charges comprising a credit card balance, the fees applied after default, the application of past

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<sup>115</sup> 12 CFR 1022.43(d).

payments, or the interest calculation.

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)?

*Timing.* Although a consumer can dispute a debt at any time, only a written dispute sent within 30 days of receipt of the validation notice triggers a debt collector's requirement to stop collection activities and provide verification of the debt. The FDCPA does not impose a time limit for a debt collector to respond to a dispute; it only requires that the collector must cease collection until it provides verification of the debt. At the recent FTC-CFPB Roundtable, some industry participants stated that debt collectors typically honor disputes that are received after the 30-day time period by stopping collection on the account, although it was unclear the extent to which those disputes are investigated or the debts verified.<sup>116</sup>

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?

Q38: How long does it typically take after a debt has been disputed for the collector to

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<sup>116</sup> Transcript of 2013 FTC-CFPB Roundtable at 183.

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?

## 2. *Investigation of Disputed Debts*

Under section 809(b) of the FDCPA, after receiving a consumer dispute, a debt collector may either cease collection efforts without investigation or may investigate the dispute with the intent of providing verification to the consumer.<sup>117</sup> The FDCPA does not detail how a collector must investigate a dispute. Several commenters have raised concerns that some debt collectors state that they have verified the debt to the extent the FDCPA requires<sup>118</sup> when, in fact, the collector has done little or nothing to investigate the disputes and verify the debts.

The FTC has recommended that debt collectors be required to conduct “reasonable” investigations under the FDCPA, noting that such a standard would be consistent with the FCRA.<sup>119</sup> In the FTC’s view, adopting a “reasonable investigation” standard would decrease consumer concerns about mistaken collection attempts, but also respond to collection industry requests for flexible standards.<sup>120</sup>

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

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<sup>117</sup> 15 U.S.C. 1692g(b).

<sup>118</sup> See, e.g., *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999) (“[V]erification of debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed. . . . 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.’”)

<sup>119</sup> 2009 FTC Modernization Report at 33.

<sup>120</sup> *Id.* at 34.

records? Are the steps debt collectors are taking adequate?

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?

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.

FCRA Obligations. In addition to their obligations under the FDCPA, debt collectors who furnish information to CRAs are subject to obligations to investigate disputes submitted directly to them by consumers (“direct disputes”)<sup>121</sup> and submitted to them through CRAs.<sup>122</sup>

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<sup>121</sup> 12 CFR 1022.43.

<sup>122</sup> 15 U.S.C. 1681s-2(b). Although section 623(b)(1)(A) does not specifically state that a furnisher must conduct a “reasonable” investigation upon learning of a dispute from a CRA, courts applying the provision have consistently adopted a “reasonable investigation” standard. *See, e.g., Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009); *Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir. 2005); *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004); *King v. Asset Acceptance, LLC*, 452 F. Supp. 2d 1272, 1278 (N.D. Ga. 2006).

The FCRA contains an exception from the investigation requirement for certain disputes that are deemed “frivolous and irrelevant,” an exception for which there is no parallel in the FDCPA. A debt collector may treat a FCRA dispute submitted by a consumer directly to the collector as “frivolous and irrelevant” if the consumer does not provide sufficient information to investigate the dispute, the dispute is substantially the same as a previously submitted dispute that has already been investigated, or it falls within one of several other exceptions, including an exception for disputes the furnisher reasonably believes are submitted or prepared by a credit repair organization.<sup>123</sup> If the direct dispute is treated as frivolous and irrelevant, the FCRA and Regulation V require the collector to provide the consumer with a notice of that determination.<sup>124</sup>

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?

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

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<sup>123</sup> 15 U.S.C. 1681s-2(a)(8)(F)-(G); 12 CFR 1022.43(b), (f). The FCRA also contains an exception from the investigation requirements for disputes submitted to CRAs that are deemed “frivolous and irrelevant.” 15 U.S.C. 1681i(a)(3).

<sup>124</sup> 15 U.S.C. 1681s-2(a)(8)(F); 12 CFR 1022.43(f). Similarly, when a CRA treats a dispute as “frivolous and irrelevant,” the FCRA requires the CRA to provide the consumer with a notice of that determination. 15 U.S.C. 1681i(a)(3)(B).

available as to the number of repeat disputes or disputes from credit repair organizations that debt collectors receive?

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?

### 3. *Verification of Disputed Debts*

Congress intended the dispute and verification process in FDCPA section 809(b) to address the problem of debt collectors collecting from the wrong person or collecting the wrong amount.<sup>125</sup> As noted above, the FDCPA does not define what constitutes proper verification of a debt, and some commenters have interpreted court decisions as holding that section 809(b) does not require debt collectors to undertake substantial efforts to verify a disputed debt.<sup>126</sup> In one case addressing this issue, *Chaudhry v. Gallerizzo*, the Fourth Circuit stated that “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.”<sup>127</sup> Based upon this statement, some debt collectors believe that verification requires nothing more than providing consumers with a written statement that the amount being demanded is the amount the creditor claims is owed.<sup>128</sup> However, other commenters have pointed out that, in the *Chaudhry* case, the debt collector had already verified the amount of the debt with the creditor; broken out that amount into principal, interest, and

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<sup>125</sup> See S. Rept. 382, 95th Cong., at 4 (1977); 94 Cong. Rec. H7789 (1976).

<sup>126</sup> See 2009 FTC Modernization Report at 31.

<sup>127</sup> Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999).

<sup>128</sup> 2009 FTC Modernization Report at 32.

inspection fees; and forwarded bank summaries of consumers' loan transactions that included a description of and the date of each transaction.

In the 2009 FTC Modernization Report, the Commission noted that some debt collectors currently respond to verification requests only by confirming in writing that the amount demanded is what the creditor claims is owed.<sup>129</sup> A number of consumer advocates have recommended that debt collectors should be required to provide consumers with verification that is responsive to the consumer's specific dispute.<sup>130</sup> For example, if a consumer raises a claim of identity theft, the debt collector should provide verification that relates to the consumer's identity. Some debt collection industry representatives have stated that any requirements to provide more substantial verification should be flexible enough to account for different types and ages of consumer debt.

Under the FCRA, if a consumer continues to dispute information appearing in her consumer report with a CRA after an investigation is completed, the consumer may file a brief statement with the CRA setting forth the nature of the dispute.<sup>131</sup> Under the FCRA, a CRA is required to include this statement or a clear and accurate summary of the statement in any subsequent reports about the consumer.<sup>132</sup>

**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?

**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?

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<sup>129</sup> *Id.* at 32.

<sup>130</sup> *Id.* at 33.

<sup>131</sup> 15 U.S.C. 1681i(b).

<sup>132</sup> 15 U.S.C. 1681i(c).

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

Q48: Section 809(b) of the FDCPA states that verifications must be “mailed” to the consumer.<sup>133</sup> 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)?

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?

Unverified Debts. The 2013 FTC Debt Buyer Report found that debt buyers did not verify nearly 50 percent of disputed debts.<sup>134</sup> The following types of debts were less likely to be verified than others: medical, telecommunications, and utility debts; debts purchased from another debt buyer rather than from the creditor; and debts more than six years old. In comparison, credit card debt, debt purchased from the creditor rather than from another debt buyer, and debt less than three years old were more likely to be verified.<sup>135</sup> The study also found that at least some debt buyers sold a small percentage of debt with unresolved disputes.<sup>136</sup> One

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<sup>133</sup> 15 U.S.C. 1692g(b).

<sup>134</sup> 2013 FTC Debt Buyer Report at 40.

<sup>135</sup> *Id.* at 40-41.

<sup>136</sup> *Id.* at 41.

participant at the recent FTC-CFPB Roundtable stated that many creditors and collectors refrain from selling or collecting on any debts with unresolved disputes.<sup>137</sup> The Debt Buyers Association has commenced a certification program that prohibits the sale of disputed debts that are unresolved.<sup>138</sup> Under the FCRA, debt owners are prohibited from selling a debt or placing it for collection if a CRA notifies the owner that the debt resulted from identity theft.<sup>139</sup> The FCRA also contains a prohibition on furnishing information related to an account disputed by a consumer without noting for the CRA that such information is disputed.<sup>140</sup>

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?

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?

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

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<sup>137</sup> Transcript of 2013 FTC-CFPB Roundtable at 224.

<sup>138</sup> DBA Int'l, *DBA Int'l Debt Buyer Certification Program, Certification Standards Manual* at 8, available at <http://www.dbainternational.org/certification/certificationstandards.pdf>.

<sup>139</sup> FCRA section 615(f), 15 U.S.C. 1681m(f).

<sup>140</sup> FCRA section 623(a)(3), 15 U.S.C. 1681s-2(a)(3).

and benefits of such restrictions or conditions?

#### *4. Reporting of Un-Validated Debts*

Section 809(b) of the FDCPA provides for a 30-day window after the collector first contacts the consumer about the alleged debt in which the consumer may dispute or request verification of the debt.<sup>141</sup> The FTC’s Staff Commentary states that collectors may report a debt to a CRA within the 30-day window, as long as the consumer has not yet disputed the debt.<sup>142</sup>

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

### **IV. Debt Collection Communications (Sections 804 and 805 of the FDCPA)**

Many provisions of the FDCPA regulate debt collectors’ communications with consumers and third parties. For example, debt collectors are generally prohibited from contacting consumers at unusual times or places, from disclosing collection-related information to third parties, and from communicating with consumers that have asked the collector to cease communications.<sup>143</sup> The FDCPA also governs communications in which a debt collector seeks location information about a consumer from a third party.<sup>144</sup> These provisions focus on preventing consumer harm in debt collection communications.

Despite the FDCPA’s protections, consumers still consistently report abuses focusing on debt collection communications. For example, the FDCPA prohibits collectors from calling consumers “repeatedly or continuously with intent to annoy, abuse, or harass any person at the

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<sup>141</sup> 15 U.S.C. 1692g(b).

<sup>142</sup> FTC Staff Commentary on FDCPA section 809(b), comment 1. At least one State, Colorado, prohibits collectors from reporting a debt to a CRA during the 30-day validation period. *See Colo. Rev. Stat. 12-14-108(1)(j).* The reasoning behind such a statute apparently is that such a prohibition gives consumers the opportunity to dispute debts before they are reported and appear on their credit reports. The Colorado statute provides some exceptions, such as when the consumer’s last known address is known to be invalid.

<sup>143</sup> 15 U.S.C. 1692c(a)(1), (b), (c).

<sup>144</sup> 15 U.S.C. 1692b.

called number.”<sup>145</sup> Nevertheless, the most frequent debt collection-related complaint in the FTC’s Consumer Sentinel database is that a collector is calling repeatedly or continuously, conduct in which collectors may be engaged to annoy, abuse, or harass the recipients of these calls.<sup>146</sup> A 2009 survey conducted by Ohio University similarly found that approximately one-third of survey respondents had received multiple calls from a debt collector in a pattern that seemed to them to be harassment.<sup>147</sup> Other communications-related concerns include calling hours, communications at the workplace, and inappropriate communications with friends and family. Consumers also file many lawsuits alleging that collectors have engaged in communication practices that are prohibited by the FDCPA.

The Bureau seeks comment on how rulemaking with respect to communications in debt collections could help both consumers and the industry. Part IV.A discusses recent advances in communications technologies, including social media, and their potential implications for debt collection practices. Part IV.B discusses communications soliciting location information from third parties about consumers, including when collectors may reinitiate contact with a third party and how collectors identify themselves in location communications. Part IV.C discusses issues regarding communications between debt collectors and consumers, including the times and places that are unusual or inconvenient for consumers, and issues specific to military servicemembers. Part IV.D addresses communications between debt collectors and third parties, including issues regarding decedent debt, caller ID, and recorded messages. Finally, Part IV.E discusses the right for consumers to cease communications from a debt collector, including the

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<sup>145</sup> Section 806(5) of the FDCPA, 15 U.S.C. 1692d(5).

<sup>146</sup> 2013 *FDCPA Annual Report* at 16-17.

<sup>147</sup> Scripps Survey Research Ctr., Ohio Univ., *Survey: SHOH42* (Sept. 26, 2009), available at <http://www.newspolls.org/surveys/SOH42/22540> (Question: Have you or your family ever received multiple calls from a debt collection agency, so many that it seemed to you to be harassment? Answers: Yes 32%; No 66%; Don’t know 2%).

consumer's ability to limit communications to certain media or certain times of day.

#### A. *Advances in Communications Technologies*

The debt collection landscape has changed dramatically since the FDCPA was enacted in 1977. Perhaps the greatest transformations have occurred in the technologies that debt collectors and debt owners use to communicate with consumers. The statute itself contemplates communications via telephone, postal mail, and telegraph, but it does not reflect the advent of the internet, smartphones, autodialers, fax machines, and social media. These newer technologies present new challenges and new opportunities.<sup>148</sup> The challenges often arise when attempting to apply the FDCPA's prohibitions to a technology that was not envisioned at the time of its enactment and may not easily fit its statutory framework. Nonetheless, these technologies also create new opportunities for consumers, debt collectors, and debt owners to communicate in ways that may be more convenient and less costly than prior methods.

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

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<sup>148</sup> In 2009, the FTC published a report that focused in part on the issues raised by changes in debt collection technologies. *See 2009 FTC Modernization Report.*

be the potential costs and benefits of such regulations?

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

Q56: What complications or compliance issues do social media present for consumers or collectors in the debt collection process? How, if at all, should collector communications via social media be treated differently from other types of communications under debt collection rules? What privacy concerns are raised by various social media platforms?

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

#### *B. Communications to Locate Debtors (Section 804 of the FDCPA)*

Collectors are generally prohibited from communicating with third parties regarding the collection of a debt, but one exception is location communications.<sup>149</sup> Location communications are permitted under FDCPA section 804 and used by collectors to obtain or update contact information for consumers. That section, for instance, requires a debt collector making location

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<sup>149</sup> 15 U.S.C. 1692c(b).

calls to “identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer” but not state that the consumer owes any debt.<sup>150</sup> Collectors are also limited to one location communication with a person unless, *inter alia*, “the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.”<sup>151</sup>

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?

Q59: What would be the costs and benefits of setting a standard for when a debt collector’s belief about a third party’s erroneous or incomplete location information is reasonable? If a standard would be useful, what standard would be appropriate?<sup>152</sup>

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

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<sup>150</sup> 15 U.S.C. 1692b(1), (2).

<sup>151</sup> 15 U.S.C. 1692b(3).

<sup>152</sup> A recent FTC consent order provided standards governing when the debt collector subject to the order has a “reasonable belief” that a third party’s prior statements are “erroneous or incomplete.” That order required that, to establish such a belief, the defendant debt collector must have:

(1) conducted a thorough review of all applicable records, documents, and database entries for the alleged debtor Defendants are trying to reach to search for any notations that indicate that the alleged debtor cannot be reached at that telephone number or that the person does not have location information about the alleged debtor Defendants are trying to reach; and (2) obtained and considered information or evidence from a new or different source other than the information or evidence previously relied upon by Defendants in attempting to contact the alleged debtor Defendants are trying to reach and such information or evidence substantiates Defendants’ belief that the person’s earlier statements were erroneous or incomplete and that such person now has correct or complete location information.

Q61: Under FDCPA section 804(1), debt collectors are permitted to identify their employers during location communications only if the recipient of the communication expressly requests that information. Does providing the true and full name of the collector's employer upon request risk disclosing the fact of the alleged debt to a third party? If so, how could the risk be minimized? What would be the costs and benefits of minimizing or otherwise addressing this risk?

Q62: FDCPA section 804(5) bars a debt collector from using any language or symbol on an envelope or elsewhere in a written communication seeking location information if the name indicates that the collector is in the debt collection business or that the communication relates to the collection of the debt.<sup>153</sup> How should such a restriction apply to technologies like email, text message, or fax?

*C. Communications with Consumers (Section 805(a) of the FDCPA)*

*1. Unusual or Inconvenient Times*

*a. Traditional Communications Technologies (Phones)*

Section 805(a) of the FDCPA sets parameters on collector communications with consumers, including a bar on contacting consumers at “any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.”<sup>154</sup> The statute further states, “In the absence of knowledge to the contrary, a collector shall assume that a convenient time for communicating with a consumer is” between 8:00 a.m. and 9:00 p.m., local time in the consumer’s location.

The advent of mobile phones complicates the determination of what times are unusual or inconvenient. Mobile phones are increasingly the prominent mode of telephone

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<sup>153</sup> 15 U.S.C. 1692b(5).

<sup>154</sup> 15 U.S.C. 1692c(a)(1).

communications.<sup>155</sup> With landline phone numbers, a collector can generally determine the consumer's time zone using the area code for the number (call forwarding is one exception). But consumers may take mobile phones anywhere and travel to different time zones is not uncommon. In addition, many consumers now keep their mobile phone number when they move, so that the area code for their mobile phone does not match the area code of their current residence. Collectors that use area codes or home addresses to determine convenient calling hours therefore may inadvertently call earlier or later than the law permits. In the 2009 FTC Modernization Report, the FTC recommended that collectors be permitted to assume, for the purposes of determining appropriate calling hours, that the consumer was located in the same time zone as her home address.<sup>156</sup>

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

Q64: Should collectors assume that the consumer's mailing address on file with the collector indicates the consumer's local time zone? If the local time zone for the consumer's mailing address and for the area code of the consumer's landline or mobile telephone number conflict, should collectors be prohibited from communicating during any inconvenient hours at

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<sup>155</sup> Eighty-nine percent of U.S. households now own a mobile phone, up from 36% in 1998, while 71% of households own a landline, down from 96% in 1998. Moreover, mobile-only households are on the rise among younger households, with about two-thirds of households led by people ages 15 to 29 having only mobile phones. Jeffrey Sparshott, *More People Say Goodbye to Landlines*, Wall St. J., Sep. 6, 2013, at A5.

<sup>156</sup> 2009 FTC Modernization Report at vi.

any of the potential locations, or should one type of information (*e.g.*, the home address) prevail for determining the consumer's assumed local time zone?

*b. Newer Communications Technologies (Email and Text Message)*

The legislative history of the FDCPA indicates that the restrictions on convenient hours in section 805(a)(1) were intended to apply principally, or perhaps exclusively, to telephone communications rather than postal mail.<sup>157</sup> Newer technologies like email and text messages present challenges in applying section 805(a)(1) because the technologies themselves are hybrids between the textual nature of postal mail and the immediate delivery of telephone calls (as with faxes). For email, recipients arguably do not receive their messages until they affirmatively check their email account, thus allowing consumers to control when they view new messages. However, some consumers have devices that notify them when the email is delivered to their email provider, such as a smartphone that makes a sound upon the delivery of an email. The extent to which the receipt of an email occurs at an unusual or inconvenient time may therefore differ greatly among consumers.

Text messaging presents similar but distinct issues. Text messages arrive primarily over telephones, whereas emails can arrive on any device with an internet connection. As with email, a consumer may not view a text message until long after it was delivered to her phone, but many consumers are alerted when a text message arrives, often by an audio alert.

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

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<sup>157</sup> See, *e.g.*, S. Rept. 382, 95th Cong., at 2 (1977); 123 Cong. Rec. S13851, 13854 (daily ed. Aug. 5, 1977); H. Rept. 5294, 95th Cong., (1977) (prior version of the bill specifying that the hours restriction applied to telephone calls).

of message delivery, such as email or text message, if a mobile phone is on during the night?

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

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

## *2. Unusual or Inconvenient Places*

*Inconvenient Places.* The Bureau seeks comment about the types of places, if any, that are unusual or that collectors know or should know to be inconvenient for them to contact consumers.

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

- Hospitals, emergency rooms, hospices, or other places of treatment of serious medical conditions
- Churches, synagogues, mosques, temples, or other places of worship
- Funeral homes, cemeteries, military cemeteries, or other places of burial or grieving
- Courts, prisons, jails, detention centers, or other facilities used by the criminal justice system
- Military combat zones or qualified hazardous duty postings
- Daycare centers

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

Q70: Under what circumstances are communications at a consumer's place of employment inconvenient, even if the employer does not prohibit the receipt of such communications? What would be the potential costs and benefits of prohibiting communications at a consumer's place of employment due to inconvenience, assuming that the collector knows or should know the consumer's location? To what extent does the inconvenience depend on the nature of the consumer's workplace or on the consumer's type of employment at that workplace?

*Place of employment communications.* Under FDCPA section 805(a)(3), a collector may not contact a consumer at his place of employment if the collector knows or has reason to know that his employer prohibits the consumer from receiving such communication.<sup>158</sup>

Q71: Do employers typically distinguish, in their policies regarding employee contacts at work, between collection communications and other personal communications? Are employers'

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<sup>158</sup> 15 U.S.C. 1692c(a)(3).

policies concerning receipt of communications usually company-wide, specific to certain job types, or specific to certain individuals?

Q72: Collectors may have many accounts with consumers employed by the same large employer, such as a national chain store, and this may enable collectors to become familiar with the employers' policies regarding receipt of personal or collection communications in the workplace. Can collectors reliably determine consumers' employers and their policies with regard to receiving communications at work? If so, what would be the costs and benefits of requiring that collectors cease communications at work for all consumers working for a certain employer if collectors are informed by one (or more) consumer(s) that the employer does not permit personal communications for any of its employees overall, or at a particular location or job type (*e.g.*, retail premises employers)? What would be the costs and benefits of requiring that collectors cease communication at work if they learn of the employer's policy through other means, such as the policy being posted on the employer's website?

### *3. Consumers Represented by Attorneys*

The FDCPA provides that “[w]ithout the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.”<sup>159</sup> Collectors are also prohibited from making location communications concerning represented consumers unless the attorney fails to respond within a reasonable period of time to the communications from the debt

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<sup>159</sup> 15 U.S.C. 1692c(a)(2).

collector.<sup>160</sup>

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."<sup>161</sup> How do collectors typically calculate a "reasonable period of time" for this purpose, and does the answer vary depending on particular circumstances?

Q74: How common is it for consumers to be represented by attorneys on debts? When consumers have multiple debts, do attorneys usually represent them on one debt, all debts, or some number of debts less than the total? How often do consumers with debts change their attorney?

#### *4. Servicemember Issues*

Credit applications for servicemembers may sometimes require them to provide contact information for their commanding officers. These applications may also request or require that servicemembers provide some form of consent allowing debt owners to contact their commanding officers with respect to the debt. When a servicemember signs such an application, some collectors may believe that communications to commanding officers are not subject to the prohibition on communication with third-parties under FDCPA section 805(b). Nonetheless, servicemembers may report that these communications are inconvenient, annoying, or harassing, or may harm their reputations at work.

Q75: How prevalent is the practice of requesting or requiring, as part of a credit application or credit contract, contact information and consent to contact a servicemember's commanding officer or other third parties? Are such consent agreements to contact a consumer's employer or boss as common among civilian consumers? How frequently do debt collectors

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<sup>160</sup> 15 U.S.C. 1692b(6).

<sup>161</sup> *Id.*

actually contact servicemembers' commanding officers or other third parties identified in credit contracts? Are servicemembers harmed in unique ways by communications with their commanding officers? Relatedly, do such harms suggest solutions that are unique to servicemembers, either in the disclosures they receive as part of credit applications or regarding limits on communications with commanding officers?

Collectors may communicate with spouses while servicemembers are deployed to combat zones or qualified hazardous duty areas.<sup>162</sup> Collectors may ask military spouses to pay the debts of these consumers during periods when it is difficult for the spouse to contact these consumers, or when such contact may interfere with combat readiness. Alternatively, collectors may contact military spouses during the potentially sensitive period immediately following the death of a servicemember serving in a combat zone or qualified hazardous duty zone, with the hope of obtaining payment from the spouse's military death gratuity.

Q76: How common are the practices mentioned above?

*D. Communications with Third Parties (Section 805(b) of the FDCPA)*

FDCPA section 805(b) bars communication with most third parties absent prior consent of the consumer provided directly to the debt collector, express permission of a court, or as reasonably necessary to effectuate a postjudgment judicial remedy.<sup>163</sup> Communications with the consumer, the consumer's attorney, a CRA if otherwise permitted by law, the creditor, the attorney of the creditor, and the attorney of the debt collector are not subject to the bar in section 805(b). The purpose of this provision is to protect the privacy of consumers' personal and financial affairs.<sup>164</sup>

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<sup>162</sup> See Part IV.D's discussion of spouses.

<sup>163</sup> 15 U.S.C. 1692c(b).

<sup>164</sup> See, e.g., S. Rept. 382, 95th Cong., at 4 (1977) ("[T]his legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons . . . .

## *1. Definition of “Consumer”*

The FDCPA’s definition of “consumer” is “any natural person obligated or allegedly obligated to pay any debt.”<sup>165</sup> In addition, for the purposes of FDCPA section 805, “consumer” is defined as including “the consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator.”<sup>166</sup> The Bureau seeks comment on the following questions related to the FDCPA’s definition of “consumer.”

Q77: During a consumer’s lifetime, a collector can communicate with a consumer’s spouse about the consumer’s debt. When a consumer dies, the FDCPA does not specify whether a consumer’s surviving spouse continues to be the consumer’s “spouse,” such that collectors may continue to contact the person without violating section 805(b). How often do collectors contact surviving spouses and what is the effect of such contacts? What would be the potential costs and benefits of regarding surviving spouses as “spouses” under section 805(b)?

Q78: Are there circumstances under which a collector should not be permitted to contact a consumer’s spouse, for example, the individuals are estranged or the consumer has obtained a restraining order against her spouse? How frequently do these circumstances occur? What would be the costs and benefits of prohibiting or limiting communications with a consumer’s spouse upon the consumer’s request?

Q79: The FDCPA permits collectors to communicate with “executors” and “administrators” about a decedent’s debts. State laws may allow individuals other than those with the status of “executor” or “administrator” under State law, for example, “personal representatives,” to pay the debts of a decedent out of the assets of the decedent’s estate. How

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[T]his legislation adopts an extremely important protection . . . : it prohibits disclosing the consumer’s personal affairs to third persons. . . . Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.”).

<sup>165</sup> 15 U.S.C. 1692a(3).

<sup>166</sup> 15 U.S.C. 1692c(d).

frequently do collectors contact individuals who are not “executors” or “administrators” but still have the authority under State law to pay the debts of decedents out of the assets of decedents estates? What is the effect of these contacts? What would be the potential costs and benefits of treating any person who has the authority to pay the debts of the decedent out of the assets of the estate as “executors” or “administrators?”<sup>167</sup> To what extent do spouses, executors, and administrators pay decedents’ debts out of their own assets? Do collectors state or imply that such parties have an obligation to pay these debts?

Q80: Do owners of debts or collectors inform executors and administrators when collecting on debt that was disputed by the decedent prior to the decedent’s death?

Q81: A third party who is not a “consumer” under FDCPA section 805(d) may know details about the consumer’s debt and contact a debt collector to settle a consumer’s debt. For example, the parent of a non-minor child may reach out to a collector to assist with the child’s debt. How often are such contacts made? Should collectors be permitted to assume that the consumer has consented to the third-party contact, where a third party already knows about the consumer’s debt and is offering to repay the debt? When would it be appropriate to allow collectors to rely on this theory of implied consent?

## 2. Recorded Messages

Communications by telephone remain the most common form of consumer contact in debt collections. Telephones themselves were one of the communications technologies Congress addressed when the FDCPA was enacted in 1977. However, over the years, phone technology has changed dramatically, from landlines to mobile phones and then to smart phones. In addition

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<sup>167</sup> The FTC previously issued a Policy Statement providing that the agency will not take enforcement action under the FDCPA against collectors that communicate with someone who is authorized to pay a decedent’s debts from the estate of the deceased even if that person is not officially designated as an “executor” or “administrator.” *Statement of Policy Regarding Communications in Connection With the Collection of Decedents’ Debts*, 76 FR 44915 (July 27, 2011).

to voice calling, the ability to record voice messages for others to retrieve at a later date is commonplace (e.g., voicemails). Many phones also allow consumers to see the caller's phone number, and sometimes other information about the caller, before answering.

When collectors leave recorded messages, they must identify themselves in the communication but they also must refrain from disclosing information about debtors to third parties. FDCPA section 806(6) prohibits debt collectors from placing telephone calls without meaningful disclosure of their identity.<sup>168</sup> Section 807(11) of the FDCPA also requires that collectors disclose in their initial communications with consumers, including telephone calls, that they are trying to collect a debt and that any information they obtain will be used for that purpose.<sup>169</sup> For many years, collectors did not include the information set forth in FDCPA sections 806(6) and 807(11) in recorded messages that they left on voicemails or answering machines.<sup>170</sup> However, in 2006, a Federal district court in *Foti v. NCO Financial Systems, Inc.*, held that a collector's telephone message is a "communication" within the meaning of the FDCPA, thereby requiring that these messages include the information set forth in FDCPA sections 806(6) and 807(11).<sup>171</sup> Other courts have reached the same conclusion as *Foti*.<sup>172</sup>

Collectors believe that *Foti* creates a dilemma. On the one hand, if recorded messages are "communications,"<sup>173</sup> then collectors must identify themselves as a debt collector. On the

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<sup>168</sup> 15 U.S.C. 1692d(6).

<sup>169</sup> 15 U.S.C. 1692e(11).

<sup>170</sup> For example, collectors would often leave messages stating, "This is John Smith calling for Nancy Jones about an important business matter. Please call me back at 555-5555."

<sup>171</sup> 424 F. Supp. 2d 643 (S.D.N.Y. 2006) (denying collector's motion to dismiss).

<sup>172</sup> See, e.g., *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104 (C.D. Cal. 2005) (denying collector's motion for summary judgment); *Costa v. Nat'l Action Fin. Services*, 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007) (denying collector's motion for summary judgment); *Berg v. Merchants Ass'n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1340-41 (S.D. Fla. 2008) (denying a collector's motion to dismiss); *Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008) (granting consumer's motion for summary judgment), *aff'd on other grounds*, 584 F.3d 1350 (11th Cir. 2009).

<sup>173</sup> Some collectors argue that messages that do not reference the debt or the fact that the message is from a debt collector are not "communications" because they do not convey information regarding a debt, as required by the definition of "communication" under FDCPA section 803(2).

other hand, if they leave that information in a recorded message, they risk disclosing such information to a third party who may hear the message, which could violate FDCPA section 805(b).

Courts and other observers have noted that collectors can avoid both forms of liability by simply refraining from leaving recorded messages altogether.<sup>174</sup> Some collectors argue that this would impose high costs, by limiting their ability to reach many consumers, such as those that work night hours (given the calling-time restrictions in FDCPA section 805(a)(1)), those that do not answer calls from unfamiliar numbers, or those for whom collectors have the wrong mailing address. It could also cause harm if consumers do not learn that their debts are in collection and debt collectors furnish information about these debts to CRAs or file law suits to collect.

In its 2009 Modernization Report, the FTC acknowledged the challenges that *Foti* and similar cases create for collectors and stated that it would be beneficial to clarify the law relating to collectors leaving recorded messages.<sup>175</sup>

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?

Q83: What would be the costs and benefits of allowing the following approaches to leaving recorded messages?

- When leaving recorded messages on certain media where there is a plausible risk of third-party disclosure, the collector leaves a message that identifies the consumer by name but does not reference the debt and does not state the mini-Miranda warning.

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<sup>174</sup> See, e.g., *Mark v. J.C. Christensen & Assocs., Inc.*, Civil No. 09-100 ADM/SRN, 2009 WL 2407700, at \*5 (D. Minn. Aug. 4, 2009); *Berg v. Merchants Ass'n Collection Division, Inc.*, 586 F. Supp. 2d 1336, 1343 (S.D. Fla. 2008); *Leyse v. Corporate Collection Services*, No. 03 Civ 8491 (DAB), 2006 WL 2708451, at \*5 (S.D.N.Y. Sept. 18, 2006).

<sup>175</sup> 2009 FTC Modernization Report at 49.

- The collector leaves a recorded message identifying the consumer by name and referring the consumer to a website that provides the mini-Miranda warning after verifying the consumer's identity.
- The collector leaves a recorded message identifying the consumer by name, but only on a system that identifies (*e.g.*, via an outgoing greeting) the debtor by first and last name and does not identify any other persons.
- The collector leaves a recorded message that identifies the consumer by name and includes the mini-Miranda warning but implements safeguards to try to prevent third parties from listening.<sup>176</sup>
- The collector leaves a recorded message that indicates the call is from a debt collector but does not identify the consumer by name.
- The collector leaves a message that does not contain the mini-Miranda warning, but only after the consumer consents to receiving voice messages without the mini-Miranda warning.

Q84: Some of the proposed solutions described above would permit a collector to leave a recorded message without leaving the mini-Miranda warning. Should collectors be permitted, in their communications with consumers, to ask consumers if they will opt out of receiving future

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<sup>176</sup> ACA International, a debt collection trade association, developed a model message designed to address the *Foti* dilemma. The message provides the required disclosures only after asking third parties to stop listening and providing time for execution of those directions: “This message is for [ ]. If you are not [ ] or their spouse, please delete this message. If you are [ ] or their spouse, please continue to listen to this message. By continuing to listen to this message, you acknowledge that you are the right party. You should not listen to this message so that other people can hear it, as it contains personal and private information. There will be a three second pause in the message to allow you to listen to the message in private. (Pause.)” A 2010 survey of ACA’s members found that 47 percent used its proposed message, while 39 percent did not, and 14 percent left no messages whatsoever. However, collectors note that these messages may prove too complicated to execute, their length may prove expensive, and their efficacy, in the end, may not convince courts, due to the continued risk that third parties can listen in. See, e.g., *Leahy v. Franklin Collection Serv., Inc.*, 756 F. Supp. 2d 1322, 1327 (N.D. Ala. 2010) (denying a collector’s motion to dismiss in which it had argued that the ACA message did not violate FDCPA section 1692c(b)); *Berg v. Merchants Ass’n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1343 (S.D. Fla. 2008) (denying a collector’s motion to dismiss).

mini-Miranda warnings? If consumers are permitted to opt out of receiving future mini-Miranda messages, what factors or limitations, if any, should limit consumers' right to opt out? Should consumers be allowed to opt out both in writing and orally? Should the opt-out provision extend to mini-Miranda warnings given in other communications besides recorded messages?

### *3. Caller Identification (“Caller ID”)*

Caller-ID technologies transmit certain information along with a telephone call that allows recipients of calls to view callers' telephone numbers and sometimes also their names. Some telephones display all or part of such information while others, such as many landlines, do not. A 2004 survey by the Pew Research Center indicated that approximately half of phone owners had some form of caller ID.<sup>177</sup>

Caller-ID technologies present certain compliance issues for debt collectors. For instance, FDCPA section 807(14) requires that debt collectors use the “true name” of their business. However, a debt collector may be concerned that using the name of the collector's employer in caller ID risks causing a disclosure of the consumer's debt to a third party or disclosure of the identity of the collector's employer without an express request under FDCPA sections 805(b) or 804(1). Alternatively, a debt collector may be concerned that changing how the name of its business is displayed via caller ID risks making a false representation or using a deceptive means, using a false name, or failing to make meaningful disclosure of the caller's identity under FDCPA sections 806(6), 807(10), or 807(14).

Debt collectors sometimes change the telephone number displayed via caller ID. For instance, when callers use certain voice-over-IP (VOIP) services, the phone number displayed to the recipient may have a local area code. Collectors may intend this result because they believe

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<sup>177</sup> See Pew Research Ctr., *Polls Face Growing Resistance, But Still Representative Survey Experiment Shows* (2004), available at <http://www.people-press.org/2004/04/20/polls-face-growing-resistance-but-still-representative/>.

that consumers are more likely to pick up a local phone call, or it may be an unintended result of the telephone services collectors use. Callers sometimes block the caller-ID phone number altogether so that the recipient is unaware of the caller's identity. Debt collectors may be concerned that blocking or changing the phone number displayed via caller ID risks making a false representation or using a deceptive means under FDCPA section 807(10).<sup>178</sup> The FTC considered similar issues in its Telemarketing Sales Rule and its 2009 Modernization Report, but it did not make any specific recommendations in the debt collection context.<sup>179</sup>

Q85: What would be the costs and benefits for collectors in transmitting caller-ID information? In addition to the benefit of consumers being able to screen calls, how do consumers benefit from receiving caller-ID information? Do space limitations constrain the ability of collectors to disclose information (*e.g.*, the collector's identity) via caller ID? What are the risks of third-party disclosure by caller ID? The Bureau is particularly interested in data showing how many consumers currently use telephones that provide technologies such as caller ID, and whether these technologies display for consumers only a telephone number or whether they display additional information, such as the name of the caller. How can collectors use these technologies to minimize third-party disclosure risks while still providing consumers with relevant, truthful, and non-misleading information?

Q86: Should debt collectors be prohibited from blocking or altering the telephone number

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<sup>178</sup> See, e.g., *Knoll v. Allied Interstate, Inc.*, 502 F. Supp. 2d 943, 945 (D. Minn. 2007) (denying motion to dismiss where collector displayed caller ID as “Jennifer Smith”). But see *Glover v. Client Services, Inc.*, No. 1:07-CV-81, 2007 WL 2902209 (W.D. Mich. Oct. 2, 2007) (granting motion to dismiss where collector displayed caller ID as “unavailable”).

<sup>179</sup> The FTC’s Telemarketing Sales Rule concluded that telemarketers should be prohibited from blocking, circumventing, or altering the transmission of caller-ID information. 68 FR 4580, 4623-4627 (Jan. 29, 2003). The FTC reasoned that transmission of caller-ID information was inexpensive and was not a technical impossibility and that doing so provided many benefits, including privacy protections for consumers, increased accountability in telemarketing, and increased information for law enforcement groups. The FTC recognized in its 2009 Modernization Report that prohibiting debt collectors from blocking, circumventing, or altering the transmission of caller-ID information would provide similar benefits in the debt collection context. *2009 FTC Modernization Report* at 54-55.

or identification information transmitted when making a telephone call, for example by blocking the name of the company or the caller's phone number or by changing the phone number to a local area code? What technological issues might complicate or ease compliance with regulation regarding caller-ID technologies?

#### *4. Newer Technologies*

Some new methods of communication appear to present greater privacy risks than do telephone or postal communications. Email, for example, is a service consumers often access through a provider, such as an employer or outside company (*e.g.*, Google, Microsoft, Yahoo). These providers, including employers, may retain rights to access the emails of their users. If employers or other email providers retain the ability to access an email account, the likelihood increases that debt collection emails sent to those accounts may be read by third parties. Joint users of email accounts also may be able to read each other's email messages, including any that debt collectors send.

Emails may also pose risks of third-party disclosure because they may be publicly viewable by anyone near the display screen. Even when consumers check their email using a smartphone, nearby onlookers may have the opportunity to see communications from debt collectors, especially when consumers have their smartphones configured to conspicuously display the subject and sender of the message upon receipt. A similar concern exists for text messages, which are often displayed on the public-facing screens of mobile phones.

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

prohibited from using an employer-provided email address if a collector is unsure whether an employer or other third party has access to email sent to a consumer? How difficult is it for collectors to discern whether an email address belongs to an employer?

Newer technologies also raise an issue similar to the *Foti* dilemma relating to the requirement to provide the mini-Miranda and the simultaneous prohibition against third-party disclosures.<sup>180</sup> All collection communications, including those made via new communication technologies, are subject to the requirements of FDCPA section 807(11), which requires that collectors clearly disclose in both initial and subsequent communications that the communication is from a debt collector.<sup>181</sup> Debt collectors may be concerned that this requirement is in tension with the prohibition on third-party disclosure under FDCPA section 805(b).<sup>182</sup> To prevent such disclosures with traditional communication technologies, FDCPA section 808(8) prohibits the use of debt-collection-related language or symbols on the envelope of any communication, such as a communication through postal mail or telegram.<sup>183</sup> The Bureau seeks comment on whether analogous prohibitions might be useful to prevent third-party disclosures in the sending of emails, text messages, or other communications made via newer technologies.

**Q88:** What third-party disclosure issues arise from providing FDCPA section 807(11)'s mini-Miranda via email, text message, or other means of electronic communication? Are an email's subject line and sender's address akin to the front of an envelope mailed by post, and should it be subject to the same restrictions? Should the restrictions apply to the sender's name on a text message or to the banner line on a fax?

#### *E. Ceasing Communications (Section 805(c) of the FDCPA)*

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<sup>180</sup> See, e.g., Complaint at ¶ 15, *United States v. Nat'l Atty. Collection Servs., Inc.*, No. CV13-06212 (C.D. Cal. Aug. 23, 2013), available at <http://www.ftc.gov/os/caselist/1223032/130925naccmpt.pdf>.

<sup>181</sup> 15 U.S.C. 1692e(11).

<sup>182</sup> See 15 U.S.C. 1692c(b).

<sup>183</sup> 15 U.S.C. 1692f(8).

The structure of the FDCPA raises the question of whether consumers may set the conditions under which collectors communicate with them. First, FDCPA section 805(c) affords consumers the right to cease communications from collectors, with limited exceptions, if consumers notify the collectors in writing.<sup>184</sup> Second, as discussed above, FDCPA section 805(a) prohibits collectors from communicating with consumers at unusual or inconvenient times or places, from communicating with a consumer represented by an attorney, and from communicating with the consumers at their places of employment where the consumer's employer prohibits such communications.<sup>185</sup>

The express language of the FDCPA does not provide consumers with the right to restrict collector communications to a particular medium or a particular time or place. However, because consumers have the right to cease collector communications and the apparent right to declare certain times or places inconvenient, some argue that consumers do or should have the right to limit communications to certain media or to certain times or places. Others may respond that the FDCPA does not confer such a right on consumers and, if it is interpreted to, this would impose undue or unreasonable burdens on collectors.

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

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<sup>184</sup> 15 U.S.C. 1692c(c).

<sup>185</sup> 15 U.S.C. 1692c(a).

communications from debt collectors?

Q90: Other Federal consumer financial laws, as defined in section 1002(14) of the Dodd-Frank Act, may require collectors to provide certain notices or disclosures to consumers for a variety of purposes, raising potential conflicts in cases in which consumers have made a written request that collectors cease communications.<sup>186</sup> For example, the 2013 RESPA and TILA Servicing Final Rules require mortgage servicers to provide certain disclosures to borrowers, while the FDCPA may prohibit communications with those same consumers where the servicer falls within the FDCPA's definition of a debt collector and the consumer has requested that the servicer cease communications. The Bureau recently concluded that, in most cases, servicers that fall within the FDCPA's definition of debt collector are required to engage in certain communications required by Regulations X and Z, notwithstanding a consumer's cease communications request under the FDCPA.<sup>187</sup> However, two of the provisions under Regulations X and Z exempt such servicers from certain communications requirements in cases where the consumer has validly requested that communications cease under the FDCPA.<sup>188</sup> How often do debt collectors provide notices or disclosures to consumers required by other Federal consumer financial laws? What would be the advantages and disadvantages to consumers of receiving these notices and disclosures notwithstanding their cease communication requests?

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

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<sup>186</sup> See, e.g., U.S. Fed. Trade Comm'n, *Anderson/Beato Advisory Opinion* (June 23, 2009), available at <http://www.ftc.gov/os/statutes/andersonbeatoletter.pdf>.

<sup>187</sup> U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-12, Implementation Guidance for Certain Mortgage Servicing Rules* (Oct. 15, 2013), available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

<sup>188</sup> *Interim Final Rule, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, 78 FR 62993 (Oct. 23, 2013), available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_interim.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_interim.pdf).

person within a certain time period.<sup>189</sup> 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?

## **V. Unfair, Deceptive, and Abusive Acts and Practices (Sections 806, 807, 808, 810, and 812 of the FDCPA)**

Congress enacted the FDCPA in response to the “abundant evidence of the use of abusive, deceptive, and unfair practices by many debt collectors.”<sup>190</sup> A main purpose of the FDCPA’s provisions, therefore, is to prohibit the use of such practices.<sup>191</sup> FDCPA section 806 prohibits “any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.”<sup>192</sup> FDCPA section 807 also bars the use of any “false, deceptive, or misleading representation or means in connection with the collection of any debt.”<sup>193</sup> FDCPA section 808 further prohibits the use of “unfair or unconscionable means to collect or attempt to collect any debt.”<sup>194</sup>

The Dodd-Frank Act authorizes the Bureau to prescribe rules that identify 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, including collecting debt related to and delivered in connection with a consumer financial product or service.<sup>195</sup> The Act does not describe when the Bureau may declare an act or practice to be “deceptive.” However, the Dodd-Frank Act permits the Bureau to declare an act

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<sup>189</sup> New York City Admin. Code § 2-194.

<sup>190</sup> 15 U.S.C. 1692(a).

<sup>191</sup> 15 U.S.C. 1692(e); *See also F.T.C. v. LoanPointe, LLC*, No. 12-4006, 2013 WL 1896820, \*6 (10th Cir. May 8, 2013) (“The FDCPA was expressly designed to curb the harms of abusive debt collection practices.”); *Schlegel v. Wells Fargo Bank, NA*, No. 11-16816, 2013 WL 3336727 (9th Cir. July 3, 2013); *Mellentine v. Ameriquest Mortg. Co.*, No. 11-2467, 2013 WL 560515 (6th Cir. Feb. 14, 2013).

<sup>192</sup> 15 U.S.C. 1692d.

<sup>193</sup> 15 U.S.C. 1692e.

<sup>194</sup> 15 U.S.C. 1692f.

<sup>195</sup> 12 U.S.C. 5531(b).

or practice to be “unfair” if it has a reasonable basis to conclude that it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers [and] such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”<sup>196</sup> In determining if an act or practice is unfair, the Bureau “may consider established public policies as evidence to be considered with all other evidence,” but “[s]uch public policy considerations may not serve as a primary basis for such determination.”<sup>197</sup> The Act also authorizes the Bureau to declare an act or practice to be “abusive” if the act or practice:

- (1) [M]aterially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- (2) [T]akes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.<sup>198</sup>

The FDCPA provides numerous specific examples of each category of “harassment or abuse,” “false or misleading representations,” or “unfair practices,” but the language of the FDCPA also expressly states that these examples do not limit the general application of these categories.<sup>199</sup> Courts have thus found other types of conduct to be included within these categories, including some conduct that violates other sections of the FDCPA.<sup>200</sup>

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<sup>196</sup> 12 U.S.C. 5531(c)(1)(A)-(B).

<sup>197</sup> 12 U.S.C. 5531(c)(2).

<sup>198</sup> 12 U.S.C. 5531(d)(1)-(2).

<sup>199</sup> 12 U.S.C. 1692d, 1692e, 1692f.

<sup>200</sup> See, e.g., *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994) (holding that a violation of the FDCPA section 805(a) may also constitute an abusive practice under the FDCPA); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1178 (11th Cir. 1985) (holding that FDCPA section 1692d is not limited to the enumerated conduct it

Unfair, deceptive, or abusive conduct that violates the FDCPA or the Dodd-Frank Act has been and will remain a focus of Bureau supervision and enforcement activity. Indeed, the Bureau recently issued two supervisory bulletins providing guidance to promote compliance with these laws.<sup>201</sup> Although such conduct is unlawful under these statutes, incorporating debt collection provisions into rules relating to unfair, deceptive, or abusive conduct could provide greater clarity and specificity. Greater clarity and specificity as to prohibited conduct could make it easier for collectors and others to know what they must do to comply with the law. Rules that provide greater clarity and specificity as to prohibited conduct also could simplify law enforcement actions against those who do not comply.

#### A. *Abusive Conduct (Section 806 of the FDCPA)*

A stated purpose of the FDCPA is “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”<sup>202</sup> Although the FDCPA does not define the term “abusive,” FDCPA section 806 prohibits debt collectors from engaging in any conduct “the natural consequence of which is to harass, oppress, or abuse any person in collection of a debt.”<sup>203</sup> The FDCPA also sets forth six specific examples of conduct that is harassing,

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proscribes); *United States v. Cent. Adjustment Bureau, Inc.*, 667 F. Supp. 370, 375 (N.D. Tex. 1986) *aff’d as modified*, 823 F.2d 880 (5th Cir. 1987) (holding that making calls to a debtor at inconvenient times, at debtor’s place of work, or contacting third parties about debt without debtor’s consent constitutes abusive, deceptive, and unfair debt collection); *see also McVey v. Bay Area Credit Serv.*, 4:10-CV-359-A, 2010 WL 2927388, at \*2 (N.D. Tex. July 26, 2010); *Arteaga v. Asset Acceptance, LLC*, 733 F. Supp. 2d 1218, 1228 (E.D. Cal. 2010); *Pittman v. J.J. Mac Intyre Co. of Nevada, Inc.*, 969 F. Supp. 609, 612 (D. Nev. 1997).

<sup>201</sup> See U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_unfair-deceptive-abusive-practices.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf); U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-08, Representations Regarding Effect of Debt Payments on Credit Reports and Scores* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_collections-consumer-credit.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf).

<sup>202</sup> 15 U.S.C. 1692(e).

<sup>203</sup> 15 U.S.C. 1692d.

oppressive, or abusive. The Dodd-Frank Act does not expressly prohibit conduct that is harassing or oppressive, but it does authorize the Bureau to prescribe rules barring “abusive” acts or practices in specified circumstances.<sup>204</sup>

### *1. General Abusive Conduct Questions*

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?

Q93: Should the Bureau include in proposed rules prohibitions on first-party debt collectors engaging in the same conduct that such rules would bar as abusive conduct by third-party debt collectors? What considerations, information, or data support or do not support the conclusion that this conduct is “abusive” under the Dodd-Frank Act? Does information or data support or not support the conclusion that this conduct is “unfair” or “deceptive” conduct under the Dodd-Frank Act?

### *2. Specific Section 806 Prohibition Questions*

Q94: FDCPA section 806(3) enjoins debt collectors from “the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of 603(f) or 604(a)(3) of [the Fair Credit Reporting Act].” Should the Bureau clarify or supplement this prohibition in proposed rules? If so, how? The Bureau notes that in communicating with debtors through social media, the use of this media

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<sup>204</sup> 12 U.S.C. 5531(d)(1)-(2).

might cause collectors to make known the names of debtors to others using that medium. Should the Bureau include in proposed rules provisions setting forth what constitutes the publication of a list of debtors in the context of newer communications technologies, such as social media? If so, what should these provisions prohibit or require and why?

Q95: FDCPA section 806(5) bars debt collectors from “causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” Should the Bureau clarify or supplement this prohibition in proposed rules? If so, how?

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.<sup>205</sup> 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.<sup>206</sup> 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?

Q97: At least one State has codified bright-line prohibitions on repeated communications. Massachusetts allows only two communications via phone — whether phone calls, texts, or audio recordings — in any seven-day period.<sup>207</sup> The prohibition is stricter for phone calls to a work phone, allowing only two in any 30-day period. If the Bureau provides bright-line standards in proposed rules, what should these standards include? Should there be a prohibition

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<sup>205</sup> Compare *Tucker v. CBE Group, Inc.*, 710 F. Supp. 2d 1301, 1303 (M.D. Fla. 2010) (granting summary judgment finding no violation with 57 calls to non-debtor, including 7 on one day, only 6 messages left in total), with *Sanchez v. Client Services, Inc.*, 520 F. Supp. 2d 1149, 1161 (N.D. Cal. 2007) (denying summary judgment where there were 54 calls and 24 messages in a 6-month period, including 17 calls in one month and 6 calls in one day).

<sup>206</sup> E.g., *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 873 (D.N.D. 1981) (violation where collector immediately called back after plaintiff hung up).

<sup>207</sup> 940 Code of Mass. Regulations 7.04(1)(f).

on repetitious or continuous communications for media other than phone calls and should that prohibition be in addition to any proposed restriction on phone calls? Should all communications be treated equally for this purpose, regardless of the communication media, such that one phone communication (call or text), one email, or one social networking message each count as “one” communication? What time period should be used in proposed rules in assessing an appropriate frequency of communications?

The Bureau recognizes that many consumers complain not only about the number and frequency of the calls they received from collectors, but also that they answer many calls in which the collector hangs up when they answer or in which there is no one on the line. It appears that such calls are the result of debt collectors’ use of predictive dialer technologies in placing calls. Predictive dialers are automated systems that determine who to call, when to call, and how often to call, based on information about the time of day, the time zone of the consumer, the number of collectors available, and other factors such as the length of prior collection calls. The 2009 FTC Modernization Report noted that approximately 50 percent of ACA members use some type of predictive dialer, and that dialers may be the “single most significant change in technology since the enactment of the FDCPA,” given their ability to increase the efficiency of collection operations.

The 2009 FTC Modernization Report concluded that predictive dialers can result in disconnections when a consumer is reached but no collector is available, resulting in “hang-ups” or “dead air.”<sup>208</sup> Although the FTC did not make policy recommendations relating to the use of predictive dialers in the collection context, the FTC has addressed hang-up and dead air calls in its Telemarketing Sales Rule. Call abandonment under the Telemarketing Sales Rule is treated as “abusive,” but the Rule creates a safe harbor for telemarketing systems that contain certain

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<sup>208</sup> 2009 FTC Modernization Report at 37.

safeguards.<sup>209</sup> For instance, to qualify for the safe harbor, three percent or less of the calls the system places can be abandoned. The system also must allow the consumer’s phone to ring for at least 15 seconds or four rings before disconnecting an unanswered call.

Q98: What are the costs and benefits to consumers and collectors of using predictive dialers? How commonly are they used by the collection industry and what are the different ways in which they are used? How often do consumers receive debt collection calls resulting in hangs-ups, dead air, or other similar treatment?

Q99: Should there be standards limiting call abandonment or dead air for debt collection calls, similar to the standards under the FTC’s Telemarketing Sales Rule? Are there reasons why debt collection standards should be more stringent or more lenient than standards for telemarketing?

#### *B. Deceptive Conduct (Section 807 of the FDCPA)*

##### *1. FDCPA Examples of Deception*

As discussed above, FDCPA section 807 prohibits “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” Without limiting the application of this general prohibition, section 807 also sets forth 16 examples of such prohibited behavior but does not explicitly define the terms “false, deceptive, or misleading.”<sup>210</sup>

The Dodd-Frank Act also prohibits deceptive practices but does not define “deceptive.” The Bureau has stated that the FTC’s interpretation and application of deception under the FTC Act informs the Bureau’s standard for deceptive practices under the Dodd-Frank Act.<sup>211</sup> Under

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<sup>209</sup> 16 CFR 310.4(b)(1)(iv) and 16 CFR 310(b)(4)(iii).

<sup>210</sup> 15 U.S.C. 1692e.

<sup>211</sup> See U.S. Bureau of Consumer Fin. Prot., *CFPB Supervision and Examination Manual* at UDAAP 6, available at [http://files.consumerfinance.gov/f/201210\\_cfpb\\_supervision-and-examination-manual-v2.pdf](http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf); see also U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2012-06, Marketing of Credit Card Add-On Products* (July 18, 2012), available at [http://files.consumerfinance.gov/f/201207\\_cfpb\\_bulletin\\_marketing\\_of\\_credit\\_card\\_addon\\_products.pdf](http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf) (adding

section 5 of the FTC Act, deceptive acts or practices can take the form of written or oral representations or omissions of material information. Whether a representation or omission is likely to mislead under the circumstances is considered from the viewpoint of a reasonable consumer.<sup>212</sup> To be deceptive, a representation or omission must be material, that is, likely to affect a consumer's purchasing or other decisions. Section 807 contains a set of prohibitions regarding (1) the identity of collectors; (2) character, amount, or status of debt; (3) documentation of debt; (4) consequence of non-payment of debt; (5) implications of debt transfers; and (6) reporting credit information.

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.

Q101: Do collectors falsely state or imply that the Servicemembers Civil Relief Act does not apply to debts? What would be the costs and benefits of requiring collectors to disclose information about rights related to debts subject to the Servicemembers Civil Relief Act to a consumer, consumer's spouse, or dependents? What debt collection information related to the Servicemembers Civil Relief Act should be communicated?

Q102: The Bureau has heard reports of debt collectors falsely stating that they will have a servicemember's security clearance revoked and threatening action under the Uniform Code of Military Justice if the servicemember fails to pay the debt. How prevalent are these threats?

Q103: Spouses and surviving spouses of alleged debtors may be asked by collectors to

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that the Bureau applies factors that track FTC guidance in evaluating the effectiveness of disclosures at preventing consumers from being misled).

<sup>212</sup> *Id.*

pay the spouse's individual debt in circumstances in which the non-debtor spouse is not legally liable for the debt. Do debt collectors state or imply that the non-debtor spouse or surviving spouse has an obligation to pay debts for which they are not liable? What would be the costs and benefits of requiring that collectors, where applicable, use disclosures or other approaches to convey that non-debtor spouses or surviving spouses have no legal obligation to pay the spouse's individual debt?

Q104: Authorized users on credit cards are sometimes contacted by debt collectors and asked to pay debts in circumstances where the cardholder is liable but the authorized user is not. How often are authorized users asked to pay debts for which they are not liable? What would be the costs and benefits of requiring that collectors disclose to authorized users, where applicable, that they have no legal obligation to pay the debt?

## *2. Other Deceptive Act and Practices*

As discussed above, Congress intended the specific conduct set out in FDCPA section 807 to be a non-exhaustive list of examples of false, deceptive, and misleading representations. Indeed, FDCPA section 807(10) is a broad provision which prohibits collectors from using any "false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." In addition, the Dodd-Frank Act also includes a general prohibition on any covered person or service provider engaging in unfair, deceptive, or abusive acts or practices, which would include deceptive acts and practices in the collection of debts arising out of consumer credit transactions. Consequently, the Bureau is interested in information about deceptive acts and practices beyond the specific examples in section 807 that would be appropriate to include in proposed rules.

### *a. Newer Communication Technologies*

Collectors are making use of newer communications technologies like social media and text messaging. In recent years, social media has become a major means of communications. A 2012 Nielson report found that over 20 percent of internet time is devoted to social media.<sup>213</sup> Social media can take many forms, including, but not limited to, micro-blogging sites (*e.g.*, Facebook, Google Plus, MySpace, and Twitter); forums, blogs, customer review web sites, and bulletin boards (*e.g.*, Yelp); photo and video sites (*e.g.*, Flickr and YouTube); sites that enable professional networking (*e.g.*, LinkedIn); virtual worlds (*e.g.*, Second Life); and social games (*e.g.*, FarmVille).<sup>214</sup>

Collectors' use of social media to communicate with consumers implicates certain provisions of the FDCPA. Section 807(10) forbids collectors from using "false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."<sup>215</sup> Section 807(11) requires that certain disclosures accompany initial and subsequent communications with consumers.<sup>216</sup> Similar concerns about deception in collecting via social media may arise under the Dodd-Frank Act's prohibition on deceptive acts and practices.

Text messaging is now a common mode of communication.<sup>217</sup> It may be more difficult to disclose information in a text message than in other methods collectors use to communicate with consumers. Text messages (sometimes called "short message service" or "SMS") are normally limited to 160 characters (although some services allow other forms of "messaging" with longer

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<sup>213</sup> Nielsen, *State of the Media: The Social Media Report 2012*, at 3 (Dec. 2012), available at <http://www.nielsen.com/us/en/reports/2012/state-of-the-media-the-social-media-report-2012.html>.

<sup>214</sup> For the purposes of this document, social media is a form of interactive online communication in which users can generate and share content through text, images, audio, and/or video; messages sent via email or text message, standing alone, do not constitute social media.

<sup>215</sup> 15 U.S.C. 1692e(10).

<sup>216</sup> 15 U.S.C. 1692e(11).

<sup>217</sup> A recent Pew Internet Research study found that 73 percent of cell phone users use text messages, sending an average of over 40 text messages each day. See Pew Research Ctr., *Americans and Text Messaging* (Sept. 2011), available at <http://pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx>.

formats). Debt collectors who communicate by text message, among other things, are subject to FDCPA section 807(11), but the limited character format of text messages presents a special challenge for inclusion of both the mini-Miranda disclosure and the communication itself.<sup>218</sup>

Q105: What technological limitations might prevent mini-Miranda warnings from being sent via text message? Should consumers be able to opt in to collector communications via text message that do not include a mini-Miranda warning? If so, what type of consent should be required and how and when should it be obtained? Could the mini-Miranda warning be more succinctly stated so that it fits within the character constraints of a text message?

Q106: What technological innovations (e.g., links, attachments) might facilitate the delivery of mini-Miranda warnings via text message? For instance, what would be the potential costs and benefits of allowing a collector to send the consumer a text message that does not contain the mini-Miranda but contains only a link to a website, PDF, or similar document that provides the mini-Miranda as well as other information about the consumer's debt? Should the acceptability of relying on a link or an attachment depend on the frequency with which persons who receive such links or attachments go to the linked material or open the attachment? Would relying on a link or an attachment raise privacy or security risks? If so, how significant are those risks?

Q107: Are there challenges in providing the mini-Miranda warning via other newer technologies, such as email or social networking sites? If so, what, if anything, should be included in proposed rules to address these challenges?

*b. Payment Methods and Fees*

With advances in technologies and in the marketplace, consumers now have a greater

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<sup>218</sup> See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment, *United States v. Nat'l Attorney Collection Services*, Case No. CV13-06212 (C.D. Cal. Aug. 23, 2013), available at <http://ftc.gov/os/caselist/1223032/130925nacstip.pdf>.

variety of payment options than they once did. For example, as the FTC noted in its 2009 Modernization Report, electronic payment methods have continued to proliferate in recent years.<sup>219</sup> According to the Federal Reserve, in 2009, electronic payments exceeded 75 percent of noncash retail payments, with checks constituting less than 25 percent of noncash retail payments.<sup>220</sup>

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?

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?

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?

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?

### *C. Unfair Conduct (Section 808 of the FDCPA)*

As discussed above, FDCPA section 808 prohibits any “unfair or unconscionable means

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<sup>219</sup> 2009 FTC Modernization Report at 20-21.

<sup>220</sup> Fed. Reserve Sys., *The 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States 2006-2009* at 4-5 (Dec. 10, 2007), available at [http://www.frbservices.org/files/communications/pdf/press/2010\\_payments\\_study.pdf](http://www.frbservices.org/files/communications/pdf/press/2010_payments_study.pdf).

to collect or attempt to collect any debt.”<sup>221</sup> Without limiting the application of this general prohibition, section 808 sets forth eight examples of such prohibited behavior. Unfairness is not defined in the FDCPA. The Dodd-Frank Act also prohibits unfairness, and it authorizes the Bureau to identify through rulemaking acts or practices as unfair so long as “the Bureau has a reasonable basis to conclude that—(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”<sup>222</sup> The Bureau may consider established public policies as evidence in its analysis of whether acts and practices are unfair.<sup>223</sup> This Dodd-Frank Act approach to “unfairness” is very similar to the approach to unfairness in section 5(n) of the FTC Act, and the Bureau has stated that its views on unfairness under the Dodd-Frank Act are informed by the FTC’s application of the unfairness standard in the FTC Act.<sup>224</sup>

### *1. General Unfair Conduct Questions*

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?

Q113: Should the Bureau include in proposed rules prohibitions on first-party debt

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<sup>221</sup> 15 U.S.C. 1692f.

<sup>222</sup> 12 U.S.C. 5531(c)(1).

<sup>223</sup> 12 U.S.C. 5531(c)(2).

<sup>224</sup> See U.S. Bureau of Consumer Fin. Prot., *CFPB Supervision and Examination Manual* at UDAAP 6.

collectors engaging in the same conduct that such rules would bar as unfair or unconscionable by third-party debt collectors? What information or data support or do not support the conclusion that this conduct is “unfair” under the Dodd-Frank Act? What information or data support or do not support the conclusion that this conduct is “abusive” or “deceptive” conduct under the Dodd-Frank Act?

## 2. *Specific Section 808 Prohibition Questions*

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?

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?

FDCPA section 808(5) prohibits debt collectors from “causing charges to be made to any person for communications by concealment of the true purpose of the communication.”<sup>225</sup> Since the FDCPA was enacted in 1977, communications methods other than collect calls and telegrams have been introduced that also may cause consumers to incur charges. Two prominent examples are calls to mobile phones and text messaging. While some consumers have wireless plans that do not charge for either mode of communication, other consumers are charged by the minute or by the text message. Some free-to-end-user services, however, may be available to allocate all charges to collectors and thereby obviate concerns about charges to consumers.

In the 2009 FTC Modernization Report, the FTC recommended that “the law should presume that consumers will incur charges for calls and text messages made to their mobile

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<sup>225</sup> 15 U.S.C. 1692f(5).

phones, and, therefore, generally prohibit debt collectors from contacting consumers via mobile phones.”<sup>226</sup> However, the FTC also recognized that “the law may need to be changed in the future if most consumers would not be charged based on the number of calls or text messages received or the time spent on calls to their mobile phones.”<sup>227</sup>

Q116: What communications technologies could cause consumers to incur charges from contacts by debt collectors? What are the costs to consumers and how many consumers use these technologies? For instance, how common is it for consumers to be charged for text messages and what is the average cost of receiving a text message? How common is it for consumers to be charged for mobile phone calls and what is the average cost of receiving an average-length call? Does incurring such charges vary by demographic group? If so, how?

Q117: Should proposed rules presume that consumers incur charges for calls and text messages made to their mobile phones? Should the failure to use free-to-end-user services when using technologies that would otherwise impose costs on the consumer be prohibited? What would be the costs and challenges for collectors of implementing such requirements?

Q118: Should proposed rules require collectors to obtain consent before contacting consumers using a medium that might result in charges to the consumer, such as text messaging or mobile calls? If so, what sort of consent should be required and how should collectors be required to obtain it?

Q119: Should proposed rules impose other limits beyond consent on communications via media that result in charges to the consumer and if so, what limits? For example, would it be feasible to require in proposed rules that consumers have the right to opt out of communications via certain media to avoid the possibility of being charged? If so, should initial communications

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<sup>226</sup> 2009 FTC Modernization Report at 41.

<sup>227</sup> *Id.* at 42.

via such media be required under proposed rules to include a disclosure of the consumer's right to opt out? Should proposed rules include limits on the frequency with which collectors use such media?

### *3. Payment Acts and Practices*

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."<sup>228</sup> 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?

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? Should proposed rules require that the payment be applied on or as of the date received or at some other time?

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

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<sup>228</sup> 15 U.S.C. 1692h.

consider?<sup>229</sup>

#### D. Substantiation

Firms may want to make claims to consumers for which they lack support, or lack adequate support, at the time they are made. To protect consumers from harm if such claims prove to be false, the FTC has a long history of treating certain types of unsubstantiated claims to consumers in advertising as unfair or deceptive in violation of section 5 of the FTC Act.

Even though the FTC's substantiation doctrine arose in the advertising context, the FTC has used it to protect consumers in other contexts. Most significantly, the FTC has brought cases alleging that debt collectors made unsubstantiated claims to consumers in seeking to recover on debts.<sup>230</sup> The FTC has clearly articulated its view that “[c]ollectors have a legal obligation to possess information to support the claims they make to consumers about debt, pursuant to both Section 5(a) of the FTC Act, and Section 807 of the FDCPA.”<sup>231</sup> The Bureau’s views regarding unfair and deceptive acts and practices under the Dodd-Frank Act are informed by the FTC’s application of those terms under the FTC Act.<sup>232</sup> The Bureau also gives due consideration to the FTC’s interpretation of the FDCPA prior to July 21, 2011.<sup>233</sup>

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<sup>229</sup> For example, New York City has issued rules providing that if a payment schedule or settlement agreement is reached, the collector must send a confirmation of the arrangement to the debtor within five business days with certain information. New York City Admin. Code § 2-192.

<sup>230</sup> See, e.g., *United States v. Luebke Baker & Assoc.*, No. 1:12-cv-01145 (C.D. Ill. May 23, 2012) (debt collector), available at <http://ftc.gov/os/caselist/0823206/120515luebkecmpt.pdf>; *United States v. Asset Acceptance, LLC*, No. 8:12-cv-00182 (M.D. Fla. Jan. 31, 2012) (debt collector), available at <http://www.ftc.gov/os/caselist/0523133/120130assetcmpt.pdf>; *United States v. Allied Interstate, Inc.*, No. 0-10-cv-04295 (D. Minn. Oct. 21, 2010) (debt collector), available at <http://www.ftc.gov/os/caselist/0823207/101021alliedinterstatecmpt.pdf>; *United States v. Credit Bureau Collection Services*, No. 2-10-cv-169 (D. Ohio Feb. 24, 2010) (debt collector), available at <http://www.ftc.gov/os/caselist/0623226/100303creditcollectioncmpt.pdf>. Note that the FTC also has brought actions against mortgage servicers for making unsubstantiated claims to consumers. *FTC v. EMC Mortg. Corp.*, No. 4:08-cv-00338 (E.D. Tex. Sept. 9, 2008) (mortgage servicer), available at <http://www.ftc.gov/os/caselist/0623031/080909emcmortgagecmpt.pdf>; *FTC v. Countrywide Home Loans, Inc.*, No. 2-10-cv-04193 (C.D. Cal. June 7, 2010) (mortgage servicer), available at <http://ftc.gov/os/caselist/0823205/100607countrywidecmpt.pdf>.

<sup>231</sup> 2009 FTC Modernization Report at 24 (footnotes omitted).

<sup>232</sup> U.S. Bureau of Consumer Fin. Prot., *CFPB Examination Manual* at UDAAP 1.

<sup>233</sup> The Bureau has explained:

Q123: Should the Bureau's proposed rules impose standards for the substantiation of common claims related to debt collection? If so, what types of claims should be covered and what level of support should be required for each such claim? What would be the costs and benefits to consumers, collectors, and others of requiring different levels of substantiation? Would a case-by-case approach to substantiating claims instead be preferable? Why or why not?

Q124: Should the information or documentation substantiating a claim depend upon the type of debt to which the claim relates (*e.g.*, mortgage, credit card, auto, medical)? Is it more costly or beneficial to substantiate claims regarding certain types of debts than others?

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?

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?

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

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The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency, in light of all relevant factors, including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.

*Identification of Enforceable Rules and Orders*, 76 FR 43569, 43570 (July 21, 2011).

creditworthiness have the potential to be deceptive under the FDCPA and the Dodd-Frank Act.<sup>234</sup>

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?

#### *E. Service Providers and Third-Party Liability for UDAAP Violations*

The previous section of this Part sought comment related to potential proposed rules that would prevent unfair, deceptive, or abusive acts and practices by first-party and third-party collectors. Section 1031(a) of the Dodd-Frank Act, however, not only prohibits such collectors from engaging in these acts and practices but also more broadly prohibits UDAAPs from being committed by “service providers.” Under the Dodd-Frank Act, “service provider” is defined to include “any person that provides a material service to a covered person in connection with the offering or provision . . . of a consumer financial product.”<sup>235</sup> The Dodd-Frank Act prohibits these service providers “from committing or engaging in an unfair, deceptive, or abusive act or practice . . . in connection with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” This prohibition includes those activities or practices that may arise out of a consumer credit transaction.

Q128: What services are provided to debt collectors in connection with the collection of

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<sup>234</sup> U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-08, Representations Regarding Effect of Debt Payments on Credit Reports and Scores* (July 10, 2013), available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_collections-consumer-credit.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf).

<sup>235</sup> Section 1002(26)(A) of the Dodd-Frank Act, 12 U.S.C. 5481(26)(A). The term, “service provider” does not include “a person solely by virtue of such person offering or providing to a covered person --- (i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.” Section 1002(26)(B) of the Dodd-Frank Act, 12 U.S.C. 5481(26)(B).

debts and who provides them? Are the types of services the same for first-party and third-party collectors? What information or data support or do not support the conclusion that such services provided are material to the collection of debts?

Q129: Are there specific acts or practices by service providers that should be specified in proposed rules as constituting unfair, deceptive, or abusive acts or practices in connection with the collection of debts? How prevalent are such acts or practices?

In addition to the prohibition on unfair, deceptive, and abusive acts and practices by service providers, section 1036(a)(3) of the Dodd-Frank Act prohibits “any person [from] knowingly or recklessly provid[ing] substantial assistance to a covered person or service provider in violation of the provisions of section 1031 or any rule or order issued thereunder.”

Q130: Who provides substantial assistance to debt collectors? Is the assistance provided to first-party collectors the same as the assistance provided to third-party collectors? What measure should be used to assess whether such services provided are material to the collection of debts?

Q131: In what types of circumstances, if any, are persons knowingly or recklessly providing substantial assistance to collectors who are a “covered person” or “service provider” as defined in the Dodd-Frank Act with respect to acts or practices by the covered person or service provider that violate section 1031? How prevalent is conduct by such persons?

## **VI. Time-Barred Debts**

Time-barred debts are debts that are older than the applicable statute of limitations. There are no requirements set forth in the FDCPA or the Dodd-Frank Act regarding time-barred debts. The Bureau is generally interested in comments about the need for and the costs and benefits of proposed rule provisions concerning the collection of time-barred debt. The Bureau

particularly is interested in comment about the need for and the costs and benefits of requiring debt collectors to provide consumers with information relating to time-barred debts.

#### A. No Legal Right to File Suit on Time-Barred Debt

The FTC and consumer groups have raised the concern that many consumers do not know or understand their legal rights with respect to the collection of time-barred debts. For example, a consumer may not realize that a debt collector is collecting on a time-barred debt and that it is unlawful<sup>236</sup> under the FDCPA for collectors to sue on such debts if the consumer does not pay. Some empirical research suggests that information about the time-barred status of debts may affect consumers' decisions to pay debts and in what order to pay their debts.<sup>237</sup>

The FTC and the Bureau have taken law enforcement actions arising from the collection of time-barred debts. In 2012, the FTC brought an action against a debt buyer that allegedly collected on time-barred debt without disclosing to consumers that they could no longer be sued successfully on the debt. The U.S. Department of Justice, on behalf of the FTC, filed a complaint against Asset Acceptance, LLC ("Asset") alleging that when Asset collects time-barred debts, "[m]any consumers do not know if the accounts that Asset is attempting to collect are beyond the statute of limitations. . . . When Asset contacts consumers to collect on a debt, many consumers believe they could experience serious negative consequences, including being

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<sup>236</sup> E.g., *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987); *Basile v. Blatt, Hasenmiller, Liebsker & Moore LLC*, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009).

<sup>237</sup> Timothy E. Goldsmith & Natalie Martin, *Testing Materiality Under the Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 Consumer Fin. L.Q. Rep. 372 (2010). This study examined whether consumers' responses to collection efforts are affected by the knowledge that a debt is time barred. The study concluded that "[t]hose participants who were told that the debt could not be enforced through court action chose different repayment options than participants who were not told about time-barred debt." Goldsmith & Martin at 377-80. In the study, 34 percent of subjects said they would decline to pay a hypothetical debt when they were told the debt "cannot be enforced against you through court action because the enforcement period has run out." Only 6 percent of subjects said they would decline to pay when they had not received the notice. This difference was statistically significant. *Id.* at 378-79.

sued, if they fail to pay the debt.”<sup>238</sup> The complaint alleged that it was deceptive for Asset to fail to disclose to consumers that they could not be sued if they did not pay.<sup>239</sup> Asset agreed to a settlement under which it was required to disclose such information when it collects on debts that it knows or should know are time barred.<sup>240</sup> Later in 2012, the Bureau also entered into a settlement agreement with a bank collecting on its own debts that requires the bank to provide disclosures concerning the expiration of the bank’s litigation rights when collecting debts that are barred by the applicable statute of limitations.<sup>241</sup>

The Bureau and the FTC also recently explained in a joint amicus brief that consumers may be deceived in connection with the collection of time-barred debts.<sup>242</sup> Consumers, in some circumstances, may infer from a collection attempt the mistaken impression that a debt is enforceable in court even in the absence of an express or implied threat of litigation. Accordingly, where a debt is not legally enforceable, a debt collector may be required to make the affirmative disclosure to that effect to avoid misleading consumers.

Q132: Is there any data or other information that demonstrate or indicate what consumers believe may occur when they do not pay debts in response to collection attempts? Does it show that consumers believe that being sued is a possibility?

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

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<sup>238</sup> Complaint at ¶ 34, *United States v. Asset Acceptance, LLC*, No. 8:12-CV-182-T-27EAJ (M.D. Fla. Jan. 30, 2012), available at <http://www.ftc.gov/opa/2012/01/asset.shtm>.

<sup>239</sup> *Id.* at ¶¶ 81-82.

<sup>240</sup> The Asset-required disclosure states that: (1) “The law limits how long [the consumer] can be sued on the debt,” and (2) “Because of the age of [the consumer]’s debt, we will not sue [the consumer] for it.” Consent Decree, *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 31, 2012), available at <http://www.ftc.gov/opa/2012/01/asset.shtm>.

<sup>241</sup> *In re Am. Express Centurion Bank, Salt Lake City, Utah*, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012), at 6-7 (Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty), available at <http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf>.

<sup>242</sup> Brief for FTC and CFPB as Amici Curiae Supporting Respondent, *Delgado v. Capital Mgmt. Services, LP*, No. 4:12-cv-04057 (7th Cir. Aug. 14, 2013), available at [http://files.consumerfinance.gov/f/201309\\_cfpb\\_agency-brief\\_12-cv-04057.pdf](http://files.consumerfinance.gov/f/201309_cfpb_agency-brief_12-cv-04057.pdf).

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?

**Q134:** The FTC in its *Asset Acceptance* consent order and several States by statute or regulation have mandated specific language disclosing that consumers cannot be lawfully sued if they do not pay time-barred debts. Please identify what language would be most effective in conveying to consumers that the collector cannot lawfully sue to collect the debt, and why.

*B. Revival of Statute of Limitations with Partial Payment of Debt*

The FTC and consumer groups also have raised concerns that consumers do not understand that partial payments in some jurisdictions may revive the entire balance of the debt for a new statute of limitations period. Specifically, consumers may believe that when they make a partial payment on a time-barred debt they have only obligated themselves in the amount of the partial payment but in many circumstances that is not true.<sup>243</sup> Under the laws of most States, a partial payment on a time-barred debt revives the entire balance of the debt for a new statute of limitations period.<sup>244</sup>

The FTC stated in its 2010 FTC Litigation and Arbitration Report that in many circumstances in States where laws provide that a partial payment on a time-barred debt revives it, a collector's attempt to collect time-barred debt may create a misleading impression as to the consequences of making such a payment, in violation of section 5 of the FTC Act and FDCPA section 807. The FTC stated that to avoid creating a misleading impression, collectors in many circumstances would need to disclose clearly and prominently to consumers prior to requesting

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<sup>243</sup> For example, if a debt collector offers to accept a \$50 payment on a \$500 time-barred debt, a consumer may believe that the \$50 payment itself is the only consequence to him or her of making the payment.

<sup>244</sup> 2013 FTC *Debt Buyer Report* at 47.

or accepting such payments that providing a partial payment would revive the collector's ability to sue to collect the balance.<sup>245</sup> Apart from avoiding a misleading impression, consumers also may benefit from receiving affirmative statements regarding the impact of partial payments in making decisions about whether to pay debts and in what order to pay them. Indeed, some State and local governments have started requiring collectors to disclose similar types of information when seeking partial payments on time-barred debts both to prevent deception and assist consumers in making better informed decisions.<sup>246</sup>

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?

Q136: Is there any data or other information bearing on what consumers believe are the consequences for them if collectors demand payment on debts and they make partial payments?

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?

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

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<sup>245</sup> 2010 FTC Litigation and Arbitration Report at 28.

<sup>246</sup> N.Y.C. Admin. Code § 20-493.2 (2012); N.M. Admin. Code 12.2.12; 940 Mass. Code Regs. 7.07(24).

time barred, should the collector be required to disclose information about the debt being time-barred, the right of the collector to sue, and the effect of making partial payment to these consumers, and, if so, when and how should it be provided?

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

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?

### *C. Consumer Testing of Time-Barred Debt Disclosures*

Some consumer financial services statutes and regulations mandate specific format and wording requirements for disclosures. In other cases, to ease compliance, the Bureau publishes model forms and model clauses that may be used to comply with certain disclosure requirements under its regulations. The Bureau seeks comments concerning developing model or standard language and formats for disclosures relating to time-barred debts.

Q141: Have industry organizations, consumer groups, academics, or governmental entities developed model time-barred debt notices? Have any of these entities or individuals developed a model summary of rights under the FDCPA or State debt collection laws related to time-barred debt? Which of these models, if any, should the Bureau consider for proposed rules?

The Bureau plans to conduct consumer testing and other research in developing content or format requirements for any disclosures for time-barred debts it may propose, and for any model forms or clauses for these disclosures it may propose. The Bureau believes that testing disclosures with consumers would help produce disclosures that consumers will be more likely to pay attention to, understand, and use. The Bureau recognizes that industry, academics, or others may have already conducted relevant consumer testing or other research.

Q142: Is there consumer testing or other research concerning consumer understanding or disclosures relating to time-barred debts that the Bureau should consider? If so, please provide any data collected or reports summarizing such data.

## **VII. Debt Collection Litigation Practices**

This Part of the ANPR seeks comment on several aspects of debt collection litigation practice and procedure. Part VII.A discusses section 811 of the FDCPA, which relates to the venue requirements for filing debt collection actions in State courts. Part VII.B seeks comment on a variety of issues related to litigation process and procedure.

### *A. Venue (Section 811 of the FDCPA)*

Section 811 of the FDCPA specifies where a debt collector may file suit and mandates that legal action be filed in one of three places. In an action to enforce an interest in real property securing the consumer's obligation, the suit must be filed where the property is located.<sup>247</sup> Otherwise, the suit must be filed in the judicial district in which the consumer signed the contract sued upon or in the district in which the consumer resides at the time of the commencement of the suit.<sup>248</sup>

These restrictions on venue are intended to protect consumers by preventing them from

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<sup>247</sup> 15 U.S.C. 1692i(a)(1).

<sup>248</sup> 15 U.S.C. 1692i(a)(2).

incurring undue costs that could arise if they were required to defend themselves in distant collection actions.<sup>249</sup> Even with these restrictions, however, consumer groups have stated that the venue alternatives may create problems for consumers in those States where judicial districts are sufficiently large that it can be unduly burdensome for indigent consumers to travel to distant courthouses.<sup>250</sup>

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?

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?

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

#### *B. State Debt Collection Litigation*

Most debt collection litigation actions that collectors file to recover on debts are filed in State and local courts. The administration of justice and regulation of these State and local courts "on all subjects not entrusted to the Federal Government, [is] the peculiar and exclusive province, and duty of the State Legislatures."<sup>251</sup> Despite the traditional State role in regulating State and local courts, the FDCPA has been applied to the actions of debt collectors in

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<sup>249</sup> S. Rept. 382, 95th Cong. at 2.

<sup>250</sup> See *2010 FTC Litigation and Arbitration Report* at 12 (noting that consumer groups have pointed out the challenges faced by some consumers in traveling to court).

<sup>251</sup> *Calder v. Bull*, 3 U.S. 386, 387 (1798).

connection with debt collection litigation.<sup>252</sup> The Bureau is interested in comments concerning how proposed rules could protect consumers in debt collection litigation without adversely affecting the traditional role of the States in overseeing the administration and operation of their court systems and without imposing undue or unnecessary burdens on the debt collection process.

Many of the consumer protection issues with regard to debt collection litigation involve issues of procedure and evidence. As mentioned above, the FTC addressed these issues in its 2010 Litigation and Arbitration Report<sup>253</sup> in which it recommended, among other things, that: (1) States should consider adopting measures to make it more likely that consumers would defend themselves in litigation, decreasing the prevalence of default judgments; and (2) States should consider requiring collectors to include more information about the alleged debt in their complaints.<sup>254</sup> At the recent FTC-CFPB Roundtable discussed above, panelists emphasized that a number of States have begun to address inadequate service of process and improve the information that collectors provide to consumers before and at the time a complaint is filed.<sup>255</sup> Some States also have adopted or have proposed regulations to modify procedures and standards

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<sup>252</sup> Courts have interpreted the FDCPA as prohibiting filing actions in court to collect on time-barred debt where the debt collector knows or reasonably should have known that it was time barred. *See, e.g., Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1488-89 (M.D. Ala. 1987). Courts have also interpreted the FDCPA as prohibiting collectors from making materially false or misleading representations in the pleadings, motions, and other documents filed in litigation. *See, e.g., Washington v. Roosen, Varchetti & Oliver, PLLC*, 894 F. Supp. 2d 1015, 1023 (W.D. Mich. 2012) (noting that false or misleading statements are prohibited where the statement is *materially* false or misleading to violation section 1692e); *see also Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596-97 (6th Cir. 2009).

<sup>253</sup> In its 2010 Litigation and Arbitration Report, the FTC also expressed concern about debt collectors' use of arbitration to resolve disputes with consumers. *2010 FTC Litigation and Arbitration Report* at 37-46. After that Report, there was an industry self-imposed moratorium on collectors' use of arbitration to resolve debt collection claims. Section 1028 of the Dodd-Frank Act directs the Bureau to conduct a study and submit a report to Congress concerning mandatory, pre-dispute arbitration with respect to consumer financial products or services, which would include debt collection.

<sup>254</sup> *2010 FTC Litigation and Arbitration Report* at iii-iv.

<sup>255</sup> Maryland Court of Appeals, *Rules Order* (adopting amendments to Rules 3-306, 3-308 and 3-509) (Sept. 8, 2011); North Carolina Senate Bill 974 (signed into law on Sept. 9, 2009).

for when collectors can obtain default judgments.<sup>256</sup>

The Bureau is interested in receiving information about the nature and extent of State debt collection litigation reforms relating to rules of procedure and evidence and standards for proof at the time of pleading and application for entry of a default judgment. Such information will be useful to the Bureau in understanding the impact of State rules of procedure and evidence on consumers who owe or are alleged to owe debt and to ensure that the proposed debt collection rules complement and avoid interfering with State rules of procedure and evidence. The Bureau is especially interested in comments from State courts and other State officials on these topics.

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?

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?

Under the FDCPA, the Bureau has the authority to issue rules prohibiting debt collectors

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<sup>256</sup> At the FTC-CFPB Roundtable, Christopher Koegel (Asst. Dir., Div. of Financial Practices, FTC) noted that Delaware, Maryland, and Texas had incorporated provisions of the FTC's earlier recommendations into their State's laws on debt collection. *Transcript of 2013 FTC-CFPB Roundtable* at 270. In addition, California, Colorado, North Carolina, and Minnesota also have enacted new laws regulating debt collection litigation.

from using “false, deceptive, or misleading representation or means in connection with the collection of any debt” or “unfair or unconscionable means to collect or attempt to collect any debt.” The Bureau also has the authority under the Dodd-Frank Act to prohibit unfair, deceptive, or abusive acts and practices in collecting on debts arising from consumer credit transactions. Concerns have been raised that some collectors may make unfair or deceptive claims about consumer indebtedness in the pleadings, motions, and related documents (usually affidavits) that they file in State debt collection litigation.<sup>257</sup>

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?

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?

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.<sup>258</sup> Should the Bureau address communications in formal legal actions in proposed rules? If so, how?

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

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<sup>257</sup> At the FTC-CFPB Roundtable, W. Thomas Lawrie (AAG, Office of the Maryland Attorney General) noted that he has seen multiple cases where the “affiant for the debt buyer [is] robo-signing affidavits” and “filing 400, 500, up to say 900 affidavits a day.” *Transcript of 2013 FTC-CFPB Roundtable* at 336.

<sup>258</sup> FTC Staff Commentary on FDCPA section 803(2), comment 2.

that complements and that is not inconsistent with State law?

## **VIII. State and Local Debt Collection Systems (Sections 817 and 818 of the FDCPA)**

### *A. Exemption for State Regulation (Section 817 of the FDCPA)*

Section 817 of the FDCPA provides that the Bureau “shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.”<sup>259</sup> Prior to July 21, 2011, the FDCPA permitted the FTC to grant such exemptions, and the FTC set forth procedures in 16 CFR Part 901 that States could use to apply for the exemption.

The Dodd-Frank Act transferred rulemaking authority related to the State exemptions under the FDCPA to the Bureau. On December 16, 2011, the Bureau published an interim final rule under Regulation F to establish procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the FDCPA.<sup>260</sup> Regulation F substantially duplicated the FTC’s rule related to State exemptions under the FDCPA, making only certain non-substantive, technical, formatting, and stylistic changes.<sup>261</sup> Accordingly, the FTC has rescinded its rule.<sup>262</sup>

The Bureau solicits comment as to whether it should revise the procedures and criteria that States must use to apply to the Bureau for exemption of a class of debt collection practices from the provisions of the FDCPA.<sup>263</sup>

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<sup>259</sup> 15 U.S.C. 1692o.

<sup>260</sup> See 12 CFR 1006.1 through 1006.8; 76 FR 78121 (Dec. 16, 2011).

<sup>261</sup> Subpart A of Regulation F contains the rule related to State exemptions under the FDCPA. Subpart B is reserved for any future rulemaking by the Bureau under the FDCPA.

<sup>262</sup> *Rescission of Rules*, 77 FR 22200 (Apr. 13, 2012).

<sup>263</sup> Maine is the only State that has ever sought or obtained this exemption. See *Exemption from Sections 803-812 of the Fair Debt Collection Practices Act granted to State of Maine*, 60 FR 66972 (Dec. 27, 1995).

Q152: Do the procedures and criteria set forth in sections 1006.1 through 1006.8 of Regulation F adequately enable States to apply for exemption? Are there any specific revisions to the procedures or criteria set forth in sections 1006.1 through 1006.8 of Regulation F that the Bureau should consider?

*B. Exception for Certain Bad Check Enforcement Programs Operated by Private Entities  
(Section 818 of the FDCPA)*

In 2006, Congress amended the FDCPA and added a new exception under section 818 for certain bad check enforcement programs operated by private parties acting pursuant to contracts with a State or a district attorney.<sup>264</sup> Under the exception, a private entity is excluded from the definition of “debt collector” under the FDCPA only if: (1) a State or district attorney has established a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such programs to avoid criminal prosecution;<sup>265</sup> (2) the private entity that operates the pretrial diversion program is “subject to an administrative services support contract with a State or district attorney” and “operates under the direction, supervision, and control of such State or district attorney”;<sup>266</sup> and (3) the private entity conducts its operations consistent with the specific requirements set forth in section 818(a)(2)(C) of the FDCPA.

Consumer groups have expressed concern that some of the entities may not be fulfilling the conditions necessary to be excluded from the definition of “debt collector,” and, therefore, that the entities should be subject to the FDCPA. For example, some consumer groups have suggested that entities may not be including a “clear and conspicuous statement” that the consumer may dispute the validity of the alleged bad check violation.<sup>267</sup>

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<sup>264</sup> Pub. L. 90-321, sec. 818, as added Pub. L. 109-351, sec. 801(a)(2), 120 Stat. 2004 (2006).

<sup>265</sup> 15 U.S.C. 1692p(a)(2)(A).

<sup>266</sup> 15 U.S.C. 1692p(a)(2)(B).

<sup>267</sup> 15 U.S.C. 1692p(a)(2)(C)(v)(I).

Q153: How prevalent are bad check pretrial diversion programs?

Q154: What provisions typically are included in the “administrative support services contracts” between private entities operating bad check pretrial diversion programs and State or district attorneys? Are these contracts available to the public? Should the Bureau define “administrative support services contracts” in proposed rules or specify in such rules what types of provisions must be included for contracts to meet the definition? Why or why not?

Q155: What do State or district attorneys usually do to ensure that the private entities that operate bad check pretrial diversion programs are subject to their “direction, supervision, and control”? Should the Bureau specify in proposed rules what State or district attorneys must do to direct, supervise, and control the private entities that operate bad check pretrial diversion programs in order for these programs to be excluded from the FDCPA? If so, what should be required?

Q156: One of the specific requirements in section 818(2)(C) of the FDCPA is that in their initial written communication with consumers the private entities operating bad check diversion programs must provide a “clear and conspicuous” statement of the consumers’ rights.<sup>268</sup> How do private entities currently disclose this information? Should the Bureau specify in proposed rules what constitutes a “clear and conspicuous statement” of these rights? If so, what standards should be included?

Q157: Private entities operating bad check pretrial diversion programs that meet the conditions set forth in section 818 are exempt from the FDCPA. Where these private entities are subject to title X of the Dodd-Frank Act, should the Bureau exempt these entities from title X of the Dodd-Frank Act and any implementing regulations?

Q158: Are there any other aspects of bad check pretrial diversion programs that the

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<sup>268</sup> 15 U.S.C. 1692p(a)(2)(C)(v).

Bureau should address in a proposed rule? To the extent commenters have concerns about acts or practices involving these programs, describe how prevalent the practice is and what harm it causes to consumers?

## **IX. Recordkeeping, Monitoring, and Compliance Requirements**

### *A. Federal Registration of Debt Collectors*

A number of States require the licensing or registration of debt collectors that operate in their State.<sup>269</sup> Although the procedures in each State differ, many States require that the collector file a certificate with the State that includes the name of the collection business, as well as the mailing and physical address of the business. States may also require a listing of individual branch offices, and all employees who operate in the State.<sup>270</sup>

In 2010, there were more than 4,000 third-party debt collection firms that employed more than 140,000 people.<sup>271</sup> Given the sheer number of debt collectors, the fact that not all States have licensing or registration programs, and that registration information may not be shared among States, debt collection firms or individuals engaged in debt collection may commit an unlawful act in one State, leave the jurisdiction, and then commence operations in another State.

Section 1022(c)(7) of the Dodd-Frank Act provides the Bureau with the authority to “prescribe rules regarding the registration requirements applicable to a covered person,” subject to limited exceptions.<sup>272</sup> Such a registration system could apply to many collection firms and individual collectors.

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<sup>269</sup> Examples of States with some type of licensing or registration requirement include Alaska, Delaware, Florida, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Tennessee, Utah, Washington, West Virginia, and Wyoming.

<sup>270</sup> See Alaska Application, available at <http://commerce.alaska.gov/dnn/portals/5/pub/coa4106.pdf>.

<sup>271</sup> Robert Hunt, Fed. Reserve Bank of Pa., *Understanding the Model: The Life Cycle of a Debt* at 10 (2013), available at <http://www.ftc.gov/bcp/workshops/lifeofadebt/UnderstandingTheModel.pdf> (presented at the FTC-CFPB Roundtable).

<sup>272</sup> The registration provision excludes “an insured depository institution, insured credit union, or related person.” Section 1022(c)(7) of the Dodd-Frank Act, 12 U.S.C. 5512(c)(7).

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?

Q160: The Nationwide Mortgage Licensing System and Registry (“NMLS”), which was originally used by State regulators for the registry of mortgage loan originators, is increasingly being used as a broader licensing platform, including for the registration of debt collectors.<sup>273</sup> Would it be desirable for NMLS to expand or for some other existing platform to be used to create a nationwide system for registering debt collectors rather than having the Bureau create such a system? What could the Bureau do to facilitate the sharing of information among regulators who are part of the NMLS or other nationwide system to safeguard confidentiality and protect privileged information?

#### *B. Recordkeeping Requirements*

At the FTC-CFPB Roundtable, several panelists stated that recordkeeping requirements should be added to the FDCPA.<sup>274</sup> The FDCPA does not currently contain specific record retention requirements, though debt owners, who also function as creditors or mortgage

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<sup>273</sup> For example, some State banking agencies (including those in Massachusetts, Oklahoma, Rhode Island, Vermont, and Washington) are using the system to manage licensing for a variety of non-depository financial services industries. See Press Release, Conf. of State Bank Supervisors, *State Regulators Expand Use of NMLS to Include Additional Non-Depository Industries* (Apr. 16, 2012), available at <http://www.csbs.org/news/press-releases/pr2012/Pages/pr-041612.aspx>.

<sup>274</sup> Transcript of 2013 FTC-CFPB Roundtable at 208-09.

originators, may be subject to record retention requirements under other statutes and regulations, such as TILA or the Equal Credit Opportunity Act and the Bureau’s implementing rules.<sup>275</sup>

Some Roundtable participants proposed that an FDCPA recordkeeping requirement should be coextensive with the length of time a debt can appear on a consumer report before it must be deleted as obsolete under the FCRA (generally seven years, with some exceptions).<sup>276</sup> Others have suggested that a recordkeeping requirement should be coextensive with the one-year statute of limitations for private actions under the FDCPA, which begins to run from the time of the FDCPA violation.<sup>277</sup> Another alternative would be to use the longer of these two periods.

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?

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,

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<sup>275</sup> See 12 CFR 1002.12 and 1026.25; *Transcript of 2013 FTC-CFPB Roundtable* at 208-10.

<sup>276</sup> See 15 U.S.C. 1681c; *Transcript of 2013 FTC-CFPB Roundtable* at 208.

<sup>277</sup> *Transcript of 2013 FTC-CFPB Roundtable* at 208; see section 813(d) of the FDCPA, 15 U.S.C. 692k(d) (“An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.”)

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?

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