February 28, 2014

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Advance Notice of Proposed Rulemaking for Debt Collection (Regulation F) –Docket No. CFPB-2013-0033, RIN 3170-AA41

Dear Ms. Jackson:

The North American Collection Agency Regulatory Association (NACARA) appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (the Bureau) request for comments on its Advanced Notice of Proposed Rulemaking regarding debt collection practices and the debt collection system. The Bureau has indicated that it is seeking information in order to help it determine what rules and other Bureau actions, if any, would be useful under the FDCPA and the Dodd-Frank Act.

NACARA is an association comprised of state and municipal governmental agencies that regulate the debt collection industry, and administer and enforce laws and regulations. Our member agencies regulate debt collectors through such methods as licensing or registration, compliance and consumer protection examinations, responses to consumer complaints, and administrative or civil enforcement actions.

NACARA supports the Bureau's objective to protect consumers through the review of the Fair Debt Collection Practices Act (FDCPA) and promulgation of rules relating to debt collection. NACARA also supports the Bureau's position that it will not impose undue or unnecessary burdens on the industry. State regulators recognize the value of state-federal collaboration and welcome the involvement of, and partnership with, the Bureau, especially to the extent that the Bureau recognizes the work of the states in these areas and seeks to complement our members' efforts utilizing the authority and resources allocated to the Bureau.

With respect to the specific questions presented in the Advanced Notice of Proposed Rulemaking, NACARA offers the following comments:

I. Debt Collection and Consumer Protection

No Questions

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

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

NACARA would like to offer the below observations followed by its response to the specific questions posed within the section.

Based on review multiple different enforcement actions, various different cases filed in state courts, and statements made by the industry itself, it is clear that debt buyers do not regularly acquire all, or even most, of the original account documents from any original creditor or other seller for any given consumer account, and that there are significant limitations on both the reliability and availability of those documents. The experiences of NACARA's members are often consistent with the FTC's summary of industry practices.

First, the single bulk sales agreements and forward flow agreements (collectively, "sales agreements") pursuant to which debt buyers acquire portfolios of consumer debts contain common features that span the industry. The accounts are sold "as is, where is," and "with all faults" with debt buyers being considered sophisticated purchasers. Any representations or warranties contained in the document are extremely limited, and the original creditor (or other seller) will expressly disclaim all other representations, warranties, and guarantees of any kind, express or implied. Notably, the sales agreements used throughout the industry lack representations or warranties about the authenticity or accuracy of the original account documents themselves, termed "media" by the industry. As such, the sellers of the debt have affirmatively disclaimed any representations or warranties as to the original account records themselves.

Additionally, any limited representations and warranties that are made by an original creditor are only valid as to the first purchaser of the consumer account. Therefore, in the millions of accounts that upstream debt buyers sell to downstream debt buyers each year, none of the limited representations or warranties made by the original creditor to the first debt buyer in the chain are even applicable to downstream buyers, and none cannot be relied on by the downstream buyer.

Second, major debt buyers do not regularly acquire all, or even most, of the original account documents from any original creditor or other seller for any given consumer account. The sales agreements do not provide for the automatic transfer of original account documents. Instead, the sales agreements limit the amount of original documentation that may be available to the buyer before assessing a fee for documents requested. Further, the sales agreements generally limit or eliminate the original creditor's obligation to provide supporting documentation if the debt buyer sells the account to a downstream debt purchaser. Thus, if the accounts are subsequently sold to other downstream debt buyers, there is no guarantee that these

downstream purchasers will be able to obtain any account documents from the original creditor.

Additionally, an account may be sold multiple times before it becomes subject to litigation. The specific documents and information transferred to each subsequent debt buyer in the ownership chain varies. The only items that are always transferred are the listing of accounts transferred pursuant to the "sale data file," along with any supplementary account information. If the debt buyer decides to sell the accounts, the debt buyer may or may not transfer any account documents obtained from previous owners of the debt to its downstream debt buyer, which, in turn, may not transfer those documents to yet other downstream debt buyers. As a result, since debt buyers do not obtain all (or even most) account documents for the accounts in a given portfolio, they also do not incorporate all account documents into their own business records. Accordingly, to the extent that the documents become "records" of the debt buyers, those records are incomplete at best.

Furthermore, while debt buyers may have the ability to obtain some additional account documents from the original creditor, many of those are generally not obtained until needed for purposes of litigation. Moreover, there is considerable variability among original creditors as to which, if any, original account documents they retain, for how long they retain them, and whether they are willing to provide them to any subsequent, downstream debt buyers who request them. The debt buying industry itself recognizes that original account documents may be unavailable to downstream debt buyers.

Third, there are problems associated with the accuracy and record-keeping procedures of the original creditors themselves; the reality is that the business records of national banks and other original creditors are not inherently reliable, as demonstrated by recent events in the mortgage industry and elsewhere. The largest national banks have had to acknowledge major recordkeeping deficiencies in the mortgage context, including with their original loan origination documents, their documentation pertaining to the sales of mortgages, and the records of subsequent servicing of such mortgages. Given these issues with the records of national banks in the context of large mortgage loans secured by residential real property, there is nothing to suggest that their record-keeping procedures would be any better in the context of credit cards with relatively small amounts of unsecured debt. In fact, a recent enforcement administrative enforcement action taken by the OCC against a large financial institution emphasizes this point. Therefore, these types of serious flaws in the recordkeeping of original creditors impair both the availability and the accuracy of documents associated with any accounts purchase by debt buyers.

Q1 – *NACARA's response:* We believe that insufficient information is transferred between debt sellers and debt buyers. We encourage the Bureau to strengthen the rules regarding such sales, to require that the selling entity provide a copy of the original legal obligation including any subsequent modifications, a complete account history including any unresolved disputes, original account number, current balance,

consumer's last known address and phone number. In our opinion any subsequent transfer, placement or return from placement should include the above information plus any subsequently-obtained information that modifies or supplements the account record. Account history information must clearly document last activity on the account in order to establish the time line for time-barred actions, both as to civil actions and to the limits relating to credit reporting.

On non-contract debt, we believe all evidence of responsibility, agreement or obligation to the indebtedness should be provided. In the case of an open-end account or invoiced transactions, the most recent evidence of account utilization and a history of payments on that account may be sufficient to demonstrate obligation, but the absence of a documented agreement to terms should, in our opinion, preclude collection of anything other than the transferred or placed balance.

Q2 – *NACARA's response:* Debt resellers should be required to scrub any accounts, and should be held liable for reselling debts without the minimum required account information as provided under the Bureau's rules.

Q3 – *NACARA's response:* In our opinion, creditors and debt owners should be held liable for costs or damages to the debtor resulting from inaccurate or incomplete information.

Q4 – *NACARA's response:* Creditors or debt owners should be prohibited from insisting on contractual limitations to recourse for damages resulting from inaccurate or incomplete information. The entity collecting the debt should be obligated to reply to requests for validation of the debt. In our view, if a collector simply ceases collection efforts and closes or returns the account, that act should be deemed an admission that the collector does not possess sufficient information to respond, and the offending party should be liable to the consumer.

Q5 – *NACARA's response:* Any dispute information should become part of the account record and new rules should require that the information be provided to a debt's owner and any subsequent holders.

Q6 – *NACARA's response:* Any and all collection notes and contact information should become part of the account history and therefore should be provided to the debt owner if an account is returned or transferred to another entity. Additionally, all collection calls should be recorded (including left messages) and records of those calls should be maintained for no less than two years.

Q7 – *NACARA's response:* Relevant information should include the history of a debt, how many times the account has previously been transferred/placed, and any fees added to the account at each level.

Q8 – *NACARA's response*: We believe that a debt collector should have access to sufficient documentation to support the legal obligation, any disputes, and a complete and accurate account history.

Q9 – *NACARA's response:* Any entity making collection contact with consumer debtors should be required to have the ability to produce the last periodic statement or billing statement provided by the original creditor or mortgage servicer for any consumer requesting validation or that specific information.

Q10 – *NACARA's response:* The list of documents referred to in the question (contract; payment history before and after charge-off; and charge-off statement) constitute a complete and logical list of evidence that should be provided as part of a verification request.

Q11 – *NACARA's response:* All information transferred or placed for collection purposes should be considered confidential and required to be maintained under the same level of security required of public and non- public information in depository institutions under the Gramm-Leach-Bliley Act.

Q12 - *NACARA's response:* We believe the establishment of such a repository would be inappropriate for various reasons, as described below:

i) Such a repository would produce concerns about consumer privacy rights that would be difficult to overcome;

ii) The timing of when a consumer account would be included in the database, and how, if ever, the account could be removed, would be difficult to establish.

iii) Accounting for the accuracy of documentation and correcting inaccurate information maintained in the repository would be logistically infeasible. Such a database would generate a massive volume of disputes;

iv) Such a database would create evidentiary problems related to certification of and testimony about business records, if one of the major purposes of such a repository is that downstream debt buyers can claim the records in the repository to be their own incorporated business records. Those claims would be contrary to state law in a number of instances;

v) The costs to institute and maintain the accuracy of such a system would prove monumental.

Credit reporting agencies now maintain electronic data pursuant to the FCRA, and in our opinion the debt owners and collectors should be individually responsible for maintaining records on debts they are attempting to collect.

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

Q13 – *NACARA's response:* In our opinion, notification requirements similar to those that apply to mortgage servicing should be implemented to ensure consumers are aware of who owns – and thereby who may be entitled to collect on – a debt.

Q14 – *NACARA's response:* Advance notice of an intended, impending transfer would give the current debt holder one last chance to collect on the debt, and would also provide the consumer with an updated account balance reminder.

Q15 – *NACARA's response:* Requirements of notification in advance of sale and upon receipt of purchase, similar to those utilized in mortgage servicing, should be implemented to ensure consumers are aware of who owns and thereby may be entitled to collect on a debt. In addition, the first contact notice from any third-party collector should be required to reflect the chain of ownership of a debt, rather than just the identity of the original creditor, where applicable.

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

A. Validation Notices

1. Information in Validation Notices Related to Recognizing the Debt

a. Current Owner of the Debt

Q16 - *NACARA's response:* It would be beneficial for the consumer to have access to additional information relating to the current owners of the debt (including a telephone number and mailing address). Having this information would enable the consumer to further verify the debt and allow the consumer to report any abusive behavior from a third-party collector. This information should be a required disclosure made as part of an initial validation notice.

b. Itemization of Total Amount of Debt

Q17 - *NACARA's response:* While differences exist among types of debts, it would be beneficial to apply a uniform itemization requirement to the industry. This would minimize the confusion created by multiple standards. We believe it would also be helpful to a consumer to have the debt's chain of custody disclosed, including the amount of fees charged by each owner and third-party collector involved in the debt from the date of charge-off or default.

c. Additional Information

Q18 - *NACARA's response:* Information that we believe would be useful to a consumer should include the name of the original creditor, the type of debt, and the date of the last payment by the consumer on the debt. Privacy issues relating to the disclosure of partial social security numbers and addresses of joint borrowers would best be addressed by not including this information within the validation notice.

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

Q19 - *NACARA's response:* The statements of consumer rights required by the FDCPA are understandable in their current form.

Q20 - *NACARA's response:* Providing information within the validation notice regarding the suspension of collection efforts pending written verification would be beneficial to the consumer. However, the Bureau should consider that if the validation notice becomes too voluminous, it is less likely the consumer will read it. The material included with the notice should be limited and relevant.

Q21 - *NACARA's response:* We generally agree that the example disclosures noted in the question may be helpful to many consumers. However, the Bureau should be cognizant that the inclusion of such information without also establishing standards to ensure the disclosures are made clearly and conspicuously may diminish the effectiveness of the validation notice.

Q22 - *NACARA's response:* It is our opinion that the validation notice should remain within one document. Splitting the notice into two documents would increase the likelihood that the consumer would fail to read the information disclosed.

3. Format and Delivery of Validation Notices

   a. Format

Q23 - *NACARA's response:* Debt collectors typically do not include any information in addition to the minimum requirements of the law. Further, it is our observation that state specific disclosure requirements are often contained within a debt collector's standard validation notice, or on the reverse of collection letters.

   b. Foreign Language Notices

Q24 - *NACARA's response:* It has been our observation that debt collectors frequently engage in verbal communications with consumers in the consumer's own language to the extent possible. However based on our experiences, debt collectors may not utilize written disclosures in the consumer's own language as frequently.

Q25 - *NACARA's response:* It is our opinion that information received by the debt collector, whether in the form of notice from a creditor that is attached to original documentation or by the language of the original documentation, or from notice given

by the consumer, should be adequate to trigger the requirement for foreign language disclosures.

c. Method and Delivery of Validation Notices

Q26 - *NACARA's response:* Many debt collectors currently provide validation notices to consumers electronically. The circumstances, frequency, and format, often are dictated by the technological sophistication of the debt collector and consumer. It is our experience that utilization of this form of notice spans most electronic mediums.
Q27 - *NACARA's response:* In our opinion, E-Sign protocols are generally adequate for use in relation to electronic disclosures.

Q28 - *NACARA's response:* In our experience, debt collectors regularly limit or restrict the use of e-mail and text messaging as a means to communicate with consumers specifically regarding debts in collection.

Q29 - *NACARA's response:* Since the FDCPA provides a very detailed explanation of what needs to be included within the validation notice, there is limited utility in having a model notice. Further, we would strongly suggest maintaining the ability for states to add state-specific requirements in addition to any federal requirements.

Q30 - *NACARA's response:* We are unaware of any testing or research concerning consumer understanding or disclosures relating to validation notices.

B. Disputes and Verifications

1. Definition, Types, and Timing of Disputes

Q31 - *NACARA's response:* It is our experience that debt collectors commonly treat written notice of a dispute given by the consumer as a *bona fide* dispute. However, current industry trends indicate that debt collectors are more regularly treating certain verbal communications as disputes for the purposes of the FDCPA.

Q32 - *NACARA's response:* Certain types of debts are disputed at higher rates than others, including credit card debt and medical debts. While there could be a difference in the rate of disputes between debt buyers and third-party collectors, the incidence of disputes will more likely result from specific factors related to the underlying debt (for example the age of the debt) rather than the party that is collecting the debt.

Q33 - *NACARA's response:* It is our observation that most disputed debts are not resolved but rather returned to the original creditor or repackaged and sold to a new owner.

Q34 - *NACARA's response:* In our opinion, it would be helpful to have a standard or definition relating to what constitutes a "dispute" for the purposes of the FDCPA.

This would help clarify whether certain actions taken by the consumer rise to the level of a dispute. Often verbal complaints are not seen as disputes and are therefore not treated as such.

Q35 - *NACARA's response:* It is our opinion that the consumer should not generally bear the responsibility of providing information or documentation in order to trigger an investigation under the FDCPA. Requiring the consumer to provide additional information may prevent or discourage her from disputing a debt. A debt buyer or third-party debt collector should possess the minimal amount of information necessary to provide a verification of the debt. It is our opinion that the standards set forth in the FCRA place too much of a burden on the consumer to disprove the validity of underlying obligations. This being said, there are instances where the consumer may be in a better position to provide information supporting the dispute, for example where a consumer claims to not be the debtor or where the debtor has made a previous payment.

Q36 - *NACARA's response:* It is our observation that a consumer will usually specify the basis of the dispute and provide some factual statement (e.g. claims they did not make a purchase or had already paid the obligation).

Q37 - *NACARA's response:* It is our experience in mediating consumer complaints that many debt collectors will follow the same verification procedures for disputes received after the 30 day period as they do for disputes received during the 30 day period, but we have also received numerous complaints where debt collectors have taken the position that they are not required to provide any verification after 30 days.

Q38 - *NACARA's response:* It is our experience in mediating consumer complaints that a collector will typically provide verification to the consumer within 45-60 days after receiving a notice of dispute from the consumer. While we think it would be beneficial to the consumer to have a specific time requirement for responding to disputes, the prohibition on collection until verification does create some incentive for the collector to provide the verification.

2. <u>Investigation of Disputed Debts</u>

Q39 - *NACARA's response:* It is our experience in mediating consumer complaints that most debt collectors will not do much of an investigation but will merely provide the consumer with a written statement that the amount being demanded is, in fact, what the creditor claims is owed. It appears that collectors typically do not request information from the debt owners or other parties. Based on this we believe the actions taken by many debt collectors are often not adequate.

Q40 - *NACARA's response:* We would be in favor of creating reasonableness standards for investigating a dispute. In order to be effective, these standard should include specific criterion or guidance in order to help the industry comply with the requirement. We think it is reasonable to require a debt collector to review account

specific documents upon receiving a dispute. While there may be a cost associated with requiring collectors to review the validity of the underlying obligations, this would allow debt collectors to better address complaints from consumers and more quickly identify issues relating to the debts in question.

Q41 - *NACARA's response:* The scope of the review will necessarily vary based on the type of dispute. However, most disputes can be verified by way of accessing information relating to the underlying obligation or subsequent payment history. For those matters that cannot be investigated through access to the previously mentioned information (e.g. disputes relating to the identity of the consumer or alleged payments made by the consumer), a collector may need to follow-up with the consumer to get information supporting the claim.

Q42 - *NACARA's response:* We have no specific information to provide in response to this question.

Q43 - *NACARA's response:* We have no specific information to provide in response to this question.

Q44 - *NACARA's response:* We would not be in favor of applying a frivolous and irrelevant exception for disputes similar to the one in the FCRA. This position is partially based on the differing level of supporting information required to be submitted by a consumer disputing a debt under the FDCPA versus the level required for a dispute under the FCRA. It is again our position that a consumer disputing a debt should not bear the responsibility of providing information or documentation to disprove the existence of the underlying obligation. Further, the incentives for collecting on debts are very different from the incentives of other furnishers and CRAs with respect to information included on consumer reports. There is clearly a self-serving purpose for a debt collector to deem that a consumer's dispute is frivolous and irrelevant. Based on this fact, we think such a standard would be ripe for abuse.

3. <u>Verification of Disputed Debts</u>

Q45 - *NACARA's response:* It is our experience in mediating consumer complaints that many debt collectors will not do much of an investigation but will merely provide the consumer with a written statement that the amount being demanded is what the creditor claims is owed. Further, it does not appear that many debt collectors provide the consumer with any additional supporting documentation.

Q46 - *NACARA's response:* Whenever a debt is disputed the debt collector should be required to provide some level of documentation to verify the debt. In most cases providing a copy of the last periodic or billing statement issued by the original creditor would be sufficient to verify the debt. However, it would be helpful to also include a detailed record showing the additional fees and charges occurring after the date of the last billing or periodic statement.

Q47 - *NACARA's response:* It is our opinion that this could result in substantial costs associated with the storage and protection of the information. However, the costs should not outweigh the benefit of providing to consumers some level of information to verify a debt.

Q48 - *NACARA's response:* It is our experience that most debt collectors obtain consumer consent prior to providing verification electronically.

Q49 - *NACARA's response:* It would be very beneficial for a consumer's communications relating to the disputed debt to follow through to all parties dealing with the specific debt, including the debt owner (if returned by the debt collector) and any subsequent collectors. Consumers get very frustrated having to repeatedly dispute a debt each time the debt changes hands.

Q50 - *NACARA's response:* When asked for verification of a disputed debt, debt collectors often either provide the consumer with a statement indicating that the amount being demanded is what the creditor claims that is owed or return the disputed debt to the debt owner. If a debt collector is unable to verify the debt, the verification responsibility should pass to the debt owner; and if the debt owner is unable to verify the debt, it should not be collected. A request to verify the debt should not be ignored upon transfer of the debt to another collector.

Q51 - *NACARA's response:* It is our experience that debt collectors do not commonly report errors or misrepresentations to consumers unless the consumer files a complaint with a regulator.

Q52 - *NACARA's response:* It is our experience in mediating consumer complaints that disputed, unverified, debts are often either sold to debt buyers or placed with new third-party collectors. We believe that unresolved disputes relating to the debt should follow the debt upon transfer. This would mean a disputed but unverified debt would have to be labeled as such when sold or re-placed, and the verification would have to be completed prior to any future attempt to collect the debt.

4. Reporting of Un-Validated Debts

Q53 - *NACARA's response:* We believe that while the consumer would benefit from the delay in reporting, the cost to the collector may be the loss of an effective tool for collecting on the debt.

IV. Debt Collection Communications (Section 804 and 805 of the FDCPA)

A. Advances in Communications Technologies

Q54 - *NACARA's response:* Debt collectors are increasingly using internet and mobile technologies to communicate with consumers. These communications are

increasingly involving computers (email and social networking sites) and cell phones (telephone calls and texting).

Based on the increasing use of cell phones and smartphones by consumers, we feel that it is necessary for the Bureau to address these mediums within their proposed rules to the FDCPA. In some cases, a cell phone or email is the only means of communication with a consumer. Clearly these new technologies create additional issues relating to unfair, deceptive, or abusive acts and practices. For example, a collector may have no way of knowing exactly where a consumer is physically located when they are calling a cell phone. Additionally, a consumer could incur charges for receiving texts from a collector.

These new technologies can also create potential privacy, security, or other risk of harm to consumers. Nowhere is this risk greater than in the area of social networking sites where a message can in some instances be viewed and shared with an unlimited amount of viewers.

While it may not be possible to address each and every possible issue relating to the newer technologies, it is extremely important that some parameters are established for the debt collection industry.

Q55 - *NACARA's response:* The Information Technology industry is currently evolving at such a rapid pace that there will likely be new mediums of communication created in the near future. However, many of the same principles will apply to those newer technologies, such as the fact that they will be globally accessible and are likely to impose costs on the average consumer. If the Bureau can create a flexible regulatory framework which applies to the general principles outlining these new advances in technology, it will likely remain relevant for newer forms of communication.

Q56 - *NACARA's response:* Of all the newer technologies, social media appears to create the biggest threat of abuse for consumers. While social media provides people with a means of easily sharing information with family members and friends, it also provides unscrupulous collectors with a powerful tool to harass and embarrass debtors. Unlike a text message, many communications shared on social media websites like Facebook can be viewed by many different people. Based on the foregoing, it is our position that communication regarding collection should either not be permitted via social media or if allowed, very strict limitations should be imposed (including ensuring that the communications cannot be viewed by persons other than the debtor).

Q57 - *NACARA's response:* It would be equally beneficial for consumers to receive mini-Miranda warnings when receiving communications by social media. While it would appear that the mini-Miranda could be provided in most types of social media, there may be some limitations existing for certain types of communications (including limitations on maximum characters allowed).

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

Q58 - *NACARA's response:* In our experience we frequently receive complaints from consumers who allege that collectors have contacted third-parties and have disclosed to those third-parties the existence of debts. A primary enforcement challenge is how to develop evidence, since a debtor who is already embarrassed about a neighbor or distant relative knowing about a debt, is unlikely to embrace the idea of further involving that third-party by requesting that the third-party cooperate with, and testify in, an enforcement action against the collector.

Since proof and evidence are primary barriers to developing a regulatory or civil case, a requirement that all outgoing collection calls be recorded and retained, would be extremely helpful. Further, if a collector claimed a particular recording was lost, the regulation could bestow a presumption of reliability on third-party's account of the content of the conversation.

Q59 - *NACARA's response*: We believe the standard in the *Expert Global Solutions* stipulated order as to when a third-party's earlier statements can be deemed erroneous or incomplete, is appropriate and provides a bright line of compliance for collectors and regulators. That standard would certainly stop the most egregious of the third-party contact cases that come to our attention, in which the same individuals are contacted repeatedly for "new" location information, even after the collector has made contact with the debtor.

Q60 - *NACARA's response*: We do not object to the use of aliases, so long as a single alias is consistently assigned to and used by an individual collector, and so long as permanent business records are maintained permitting regulators to positively identify and therefore hold accountable any collector using an alias.

Q61 - *NACARA's response:* We cannot suggest a way to easily improve the current standards. The frequent use of general (using words like "Accounts" and "Management") or abbreviated names of many collection agencies reduces the risk that disclosing the name of the collector's employer upon request of a third-party will reveal the existence of a debt. We feel it's important for a third-party, being contacted about a matter involving others, to be able to satisfy himself or herself of the legitimacy of the caller.

Q62 -*NACARA's response*: The same prohibitions against language or symbols on envelopes or elsewhere in written communications to third-parties that discloses the nature of a debt collector's business, should apply to technologies such as e-mails, text messages and faxes. The rationale for application of the existing standards to new technologies is the same as is applicable to traditional mailed letters – limiting the nature of the communication to acquisition of location information, while not informing the third-party of the reason for the communication.

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

1. Unusual or Inconvenient Times

a. Traditional Communications Technologies (Phones)

Q63 - *NACARA's response:* We are not sufficiently familiar with all the various forms of telephone number screening technologies to respond substantively to the question of whether such screenings would accurately discern mobile phone numbers from land-line numbers. We believe collectors should initially be able to rely on the consumers' characterizations of "home" phone versus "mobile" phone, without pre-screening area codes.

Q64 - *NACARA's response:* In determining the appropriate times during which a consumer can be contacted, and unless collectors have reason to believe the information is no longer accurate, we believe collectors should be able to rely on local time based on the address provided by the consumer at the time of application.

b. Newer Communications Technologies (Email and Text Message)

Q65, 66, & 67 - *NACARA's response:* We believe all communications, including e-mails and texts, should cease during the presumptively inconvenient hours. Contrary to the assumption made in this question, we believe the existing prohibition against collection calls at night was enacted for more reasons than simply preventing the noise of a ringing phone from disrupting a quiet household; rather, the ban was also intended to prevent news of an alleged debt from reaching a consumer at a time when that consumer is defenseless in terms of being unable to contact a bank, accountant, lawyer or family member for support and/or information with which to counter or rebut the claims of the collector.

2. Unusual or Inconvenient Places

Q68 - *NACARA's response*: Certainly the list of locations provided in the question (ranging from hospitals, churches and funeral homes to courts and military combat zones) qualify as *per se* "inconvenient places" to contact consumers by cell phone. Absent clear, articulable evidence of fabrication on the part of the consumer, the consumer's statement that he or she is in one of those locations should result in a stoppage of that call. Further, ideally if the consumer states, "I'm in church, where I go every Saturday from 4 p.m. to 6 p.m.," that should establish that time as an inconvenient time each week. Additionally, outside information (*e.g.*, the sounds of an active military presence in the background) should be sufficient to establish the inconvenience of a place, even in the absence of a statement from the consumer.

Q69 - *NACARA's response*: Other *per se* inconvenient locations include a consumer's presence in school during class time, and receiving a call while operating a motor vehicle.

Q70 - *NACARA's response:* We believe it is more frequent that a call to a place of employment is inconvenient, compared to those times it is convenient. In other words, unless an employer has a blanket policy against employees receiving calls from collectors (an unusual policy, in our experience), then a consumer is required to go to the employer, admit the substance of the issue and request information about the policy. In other words, the burden should be on the collector calling a consumer at work to inquire as to whether the location is convenient, and continue the conversation only if the consumer responds in the affirmative.

Q71 - *NACARA's response:* As stated above, in our experience it is unusual for an employer to have a policy relating specifically to calls from collectors. Rather, certain office workers may generally have more flexibility to accept calls, while workers on a production-floor, or in a mill or factory may be subject to general rules prohibiting the taking of all but family emergency calls while on the clock.

Q72 - *NACARA's response:* Certainly if a collector learns, for example, of a store-wide policy prohibiting calls to employees, the collector should not then require that each individual employee raise that issue upon contact. However, the flip side of that issue is also not true. That is, if a collector knows that an employer does not have an overall policy against calls that should not mean the collector can ignore a particular employee's statement that his or her supervisor does not permit such calls.

3. Consumers represented by Attorneys

Q73 - *NACARA's response:* We believe a "reasonable time" period for a collector to wait for a return call from a consumer's lawyer is 14 days. We have not personally dealt with many consumer complaints from consumers stating that they were contacted after demonstrating they were represented by attorneys.

Q74 - *NACARA's response:* In our experience it's relatively rare for an attorney to represent a consumer on a debt subject to routine debt collection practices. It's not cost-effective for the consumer or the attorney on small-dollar matters and a consumer unable to pay a valid debt is unlikely to have funds available to pay an attorney.

4. Servicemember Issues

Q75 - *NACARA's response:* We have limited experience seeing applications that request information about commanding officers or containing waivers of the prohibition against third-party contacts.

Q76 - *Regulators' response:* We do not have sufficient information to comment on this question.

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

1. Definition of "Consumer"

Q77 - *NACARA's response:* The death of a debtor changes the relationship, such that contacts should be with the representative of the estate, rather than with a surviving spouse. We do not believe the definition of "spouse" should be expanded to include the widow or widower of the debtor.

Q78 - *NACARA's response:* We believe either the consumer or the spouse should be able to request no further contact with the spouse, especially in a case involving estrangement or separation. In fact, the Bureau should consider whether the idea of being able to communicate with a spouse about a debt is still a valid and appropriate exemption to the third-party contact rule. If the spouse is not a co-signer, then perhaps the exemption should not apply. The rule may have been originally enacted during a time when all property and obligations in a marriage were considered jointly, and when credit reports contained trade lines from both spouses. At a minimum, either party should be able to request and require no further contact for any reason.

Q79 - *NACARA's response*: All collection efforts concerning a decedent's debts should be treated the same as any other third-party skip trace, only the debtor, for purposes of contact, now would be the executor, administrator, or personal representative as provided for under state law. A collector would be prohibited from pursuing contact with non-authorized individuals other than to locate said authorized persons.

Q80 *NACARA's response*: We believe any entity attempting to collect on a decedent's debt should inform the authorized party if the debt was in dispute, providing any applicable documentation as well.

Q81 *NACARA's response*: Although acceptance of payment from any non-obligated party should not be prohibited, notwithstanding debtor authorizations, third-party rules concerning communication should still apply.

2. Recorded Messages

Q82 & Q83 - *NACARA's response:* Foti v. NCO Financial Systems Inc. held that a voice message, regardless of the extent to which information is provided is always an FDCPA communication. The Court construed the FDCPA broadly finding that §1692a(2) applied to information conveyed directly or indirectly. The courts following the Foti's reasoning construe the FDCPA broadly to promote its policy to protect consumers against abuses historically common in the debt collection industry. Although a majority of courts have followed Foti there is beginning to be a disparity among federal district courts. Converse to Foti, the court in Koby v. ARS National Services, Inc. held that a message only providing the caller's name and request for a

return call did not constitute a direct or indirect conveyance of information regarding a debt and therefore it was not a communication as defined by the FDCPA. Further as the court noted in *Foti*, debt collectors are not left with a "Hobson's choice" regarding voicemail and answering machine messages. They can simply choose to not leave a message; they can try calling again or sending a letter. In other words, courts have rejected the argument that debt collectors are forced to choose between either not leaving voicemails in their business practice or having to litigate. In light of the general policy of the FDCPA courts have observed, collectors have an array of methods available to collect, however, they are not entitled to use inherently risky methods of communicating with consumers.

Because a majority of courts have found voice messages to be a communication, the rules promulgated by Bureau should clarify the term "communication." This definition should include all contacts with debtors. Much of the analysis of the courts has focused on the content of the communication, however, given new technology the definition should be worded such as to include any contact with a debtor by a collector that relates to the collection of the debt or induces a response or future action (this would then apply to all technologies e.g. voicemail, text messages, friend requests). To promulgate a rule that specifies the content of a communication would likely create loopholes allowing circumvention of the FDCPA's protections and further unintended ambiguity. (See *United States of America [For the Federal Trade Commission], Plaintiff, v. Expert Global Solutions, Inc., Formerly Known as NCO Group, Inc., et al.*, Case No. 3-13 CV 2611-M, FTC File No. 1023201 [ND Tex. July 16, 2013] in which the FTC instituted three rules regarding leaving messages). The focus should be on the process of collection and meeting the paramount purpose of the Act in protecting consumers.

3. Caller Identification ("Caller-ID")

Q84 - *NACARA's response:* Given the overriding public policies of the FDCPA and the purpose of protecting consumers there should not be an "opt out" provision of the mini-Miranda warnings. Again, as it is not really believed to be a "Hobson's choice" and if *communication* is defined, preserving disclosure and warnings as a consumer protection should not be sacrificed. Additionally, most consumers would likely not find or understand an "opt out" provision and any attempt to regulate such a provision would likely create further vague areas of interpretation and enforcement.

Q85 - *NACARA's response:* Adjustment to the various regulations that put a collector in a "Catch 22" position, between identification requirements and not violating third-party notification limitations needs to be addressed. An ID blocked caller ID should not be considered a violation since that is the only way a collector may be sure not to be in violation of third-party notification. Generic messages such as "This is Jim, calling for John Jones on a personal business matter. Please return my call at 800-999-9999" should be allowed.

Q86 - *NACARA's response:* Changing a telephone number to any number not registered under the agencies license would be considered deceptive under some state regulations. That limitation should be included in the rulemaking. The number that shows on the caller ID should be the same as that left in a generic message with the only exception being the addition of an extension number. There may be an issue with some IP/Phone companies providing a fee paid service of overriding caller ID blocking.

4. Newer Technologies

Q87- *NACARA's response:* It is our belief that these issues need to be addressed. One possibility is to prohibit initial communication through any media that the collector has knowledge, or should be aware, that it might be viewed or accessed by a prohibited third-party. Subsequent communication could be allowable upon authorization/verification of that media not being one in which third-party notification is a likely possible outcome.

Q88 *NACARA's response:* The onus of proof is on the collector making communication over any media. Although it requires another step in the process, collectors will have to obtain documentable authorizations to reach what might be a safe harbor level of protection.

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

Q89 - *NACARA's response:* Various state laws address the frequency of communications, which range from specific numbers and types of contacts to the generic "not excessive or unreasonable." Type of contact may need to be defined, such as left message, unanswered calls, third-party contact and actual debtor contact etc. with specific maximums per type. Limiting times other than the 8am-9pm current limits should only come into play concerning requirements of a debtor's employment. As long as a debtor has provided at least one "valid" method for contact they should be allowed to limit or authorize access to other media. Valid should be defined to include an active media format through which the debtor responds to the collector.

Q90 - *NACARA's response:* Sometimes it is more beneficial for consumers to receive communication than to not receive them. For example, a Notice of Right to Cure gives the consumer a limited amount of time to cure a debt. This is important for the consumer to know their deadline, whether there is a cease communication or not on file.

Q91 - *NACARA's response:* Given the least sophisticated consumer standard of the FDCPA, a requirement for a consumer to be able to reach a natural person may mitigate some of the confusion experienced by consumers and it is generally beneficial for the collector to have actual contact with the debtor.

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

A. Abusive Conduct (Section 806 of the FDCPA)

1. General Abusive Conduct Questions

Q92 - *NACARA's response:* The language of FDCPA section 806 is broad enough to cover most types of harassment and coercive or abusive conduct by a debt collector. No rule is necessary to implement these provisions. Issues arising from any violation of this section and are factual. It is best to leave the broader application of this section to the regulator making a determination of whether or not the conduct of debt collector violated this section. However, if a rule is promulgated and lists examples it should be clear that the examples are illustrative, and not exclusive or exhaustive.

Q93 - *NACARA's response:* It is our experience that complaints relating to the conduct of first-party collectors are on the rise, and the original rationale for excluding these types of collectors from the FDCPA no longer holds true.

2. Specific Section 806 Prohibition Questions

Q94 - *NACARA's response:* We do not see a current need to extend the prohibition in section 806(3).

Q95 - *NACARA's response:* This particular section provides enough detail as to what constitutes harassment or annoyance that any rule may only compromise the statutory language. Again, it is mostly a factual issue rather than a problem with the statutory language.

Q96 - *NACARA's response:* Adopting standards (e.g. more than three calls in any seven day period) that create a presumption of annoyance, harassment, or abuse may be helpful. However, any rule should clarify that conduct may still constitute harassment even if not rising to the standard set forth and likewise, the collector should be able to rebut the presumption of a violation.

Q97 - *NACARA's response:* Regarding predictive dialers, this has the potential of harassing a consumer depending on the number of calls are to a consumer. This too is already within the statutory language of what constitutes harassment, annoyance or abusive practices. Regardless of the media, any separate communication should count as such (e.g. one phone call, one text, and one-email all in one day would counts as three communications in a day).

Q98 - *NACARA's response:* It is our experience that predictive dialing technologies are common within the industry. Complaints regarding the technology often result when a predictive dialer making two or three times call attempts in one day, rather than from dropped calls or dead air.

Q99 - *NACARA's response:* Standards similar to the FTC's Telemarketing Sales Rule may be beneficial in application to debt collector practices.

B. Deceptive Conduct (Section 807 of the FDCPA)

1. FDCPA Examples of Deception

Q100 - *NACARA's response:* It is our opinion that any rule implementing the existing language of Section 807 should remain as broad as possible. Providing clarifications that are too narrow may only limit its application.

Q101 - *NACARA's response:* Given the protections of the Service Members Civil Relief Act, a consumer's status as a service member should be communicated to any buyer or collector to ensure compliance with the Act. It would further the intent of the Act if a notice was sent to service members advising them of the transfer or sale of their debt.

Q102 - *NACARA's response*: Given the intent of the Service Members Civil Relief Act and the unique situation of the military, the Bureau should consider prohibitions and protections against such threats or potentially harmful communications.

Q103 - *NACARA's response:* The Bureau may wish to consider standards of practice and disclosure for instances where debt collectors make contact with a non-debtor spouse who is also not liable to pay an obligation.

Q104 - *NACARA's response:* Authorized users of a credit card should not be subject to debt collection. Any attempt at communicating a debt to an authorized user of credit card may constitute third-party disclosure unless the authorized user is acting as an agent for the party that authorized the use of the credit card.

2. Other Deceptive Acts and Practices

a. Newer Communication Technologies

Q105 - *NACARA's response:* As text messaging is often limited to certain number of characters it is primarily intended for short, quick or cryptic informal messages between persons who are acquainted and not commonly for messages from a debt collector. A text message from a debt collector to a consumer is doomed for deletion since it will mostly likely be identified by the consumer as junk message or of unknown origin.

Because text messaging is very informal, it cannot be a substitute for a formal written communication where the sender is required to provide necessary information to the recipient for legal compliance; otherwise, it may compromise the substance of a collection letter. Additionally, to receive a text message may cost a consumer money

unlike receiving a letter in the mail. Furthermore, text messaging may also create another concern as it could potentially cause inconvenience to the consumer when such text messages are sent and received by the consumer while working. Finally, we do not see a benefit in providing consumers an option to waive the mini-Miranda warning that is intended for their protection. Nor do we believe the mini-Miranda warning could be shortened without diminishing its ability to convey the intended message to the consumer.

Q106 - *NACARA's response:* It may be possible to combine technologies, such as delivering disclosure documentation attached to text messages to facilitate communications and required disclosures to consumers.

Q107 - *NACARA's response:* It is our opinion that any rulemaking should consider that electronic communications are at risk of being compromised and that such rules should include security measures for the protection of individual information.

b. Payment Methods and Fees

Q108 - *NACARA's response:* It is our experience that consumers pay by paper check through the mail, pay by phone authorization from their bank accounts or credit cards, MoneyGram, or on-line payments though the agency's website or via link to a provider. Although we are unaware of which payment method is preferred by consumers, it appears that consumers are trending toward electronic payment.

Q109 - *NACARA's response:* In some jurisdictions, payment convenience fees are prohibited unless authorized by law or the agreement creating the debt. The FDCPA also prohibits such fees unless permitted by law or the agreement which created the debt. The Bureau may wish to consider rulemaking which prohibits a debt collector from insisting on only limited types of payment that it will accept. For example, a collection agency should not be able to insist that a consumer may pay only by credit card or authorize a direct debit from his or her bank account. Consumers should have a range of legitimate choices as to the method of payment, whether by paper check, legal tender, or an electronic method.

Q110 - *NACARA's response:* Our members have received inquiries as to whether or not a collection agency can insist on a particular payment method. Considering that there are several payment methods by which a debt can be discharged, the choice of payment method should be given to the consumer.

Q111- *NACARA's response*: We are unaware of information that would demonstrate whether consumers understand the underlying cost of using a specific payment method to pay a debt. However, consumers that have used electronic payment methods in other transactions outside of debt collection may already have the knowledge or idea of the speed that electronic payments are being processed. In instances where additional costs associated with collection are permitted, debt

collectors should be required to disclose to a consumer the cost for processing electronic payments and consumers should be advised of the other payment options available.

C. Unfair Conduct (Section 808 of the FDCPA)

1. General Unfair Conduct Questions

Q112 - *NACARA's response*: Collecting time-barred debt should be a prohibited practice. A prevalent debt collector practice is to re-age a time-barred debt by obtaining default judgments or to get the consumer to make a partial payment. If a list of examples are incorporated in order not to be exclusionary, it would need to include language that the list is illustrative not exhaustive.

Q113 - *NACARA's response*: Pursuant to response to Q93, currently first-party collectors are not regulated, however, complaints about abusive or deceptive conduct of such collectors is on the rise, and the original rationale for excluding first-party collectors from the FDCPA no longer holds true. Therefore, any rule containing prohibitions should apply to first part debt collectors.

2. Specific Section 808 Prohibition Questions

Q114 - *NACARA's response:* Owners of debt should be required to clearly document the terms of any legal obligation attempted to be collected. In the absence of documentation showing a clear legal obligation collection would be prohibited.

Q115 - *NACARA's response:* Owners of debt should be required to clearly document the terms of any legal obligation attempted to be collected. In the absence of documentation of the amount of the debt, any provisions for interest, default fees or other charges, those items would be prohibited from the pursuit of collection.

Q116 - *NACARA's response:* The only exception to the prohibitions under the 2009 FTC Modernization Report should be if the debtor informs a particular debt collector that it is authorized to utilize a particular method of communication. Such authorization may be revocable by the debtor upon notice to the collecting entity (verbal notice should be sufficient) and authorization should not be transferable unless reauthorized by the debtor.

Q117 - *NACARA's response:* Except as individually authorized by a debtor, any cost to the debtor associated with a communication method should be prohibited.

Q118 - *NACARA's response:* Debtor authorization should be in a verifiable format, written communication, (e-mail or text message form a source verifiable as belonging to the debtor) or recorded verbal authorization (with the consumer's full consent)

clearly identifying the method of communication and acknowledgment of acceptance of any potential cost to the debtor.

Q119 - *NACARA's response:* Any authorization should be revocable by the debtor upon notice to the collecting entity (verbal notice shall be sufficient) and authorization should not be transferable unless reauthorized by the debtor. Additionally, all subsequent communications should note a right to opt-out. Frequency of use limits would be the same as any other method of communication (excessive contact/attempted contact, are addressed by various state laws). The Bureau may wish to set specific limits, addressing number and time frame.

3. Payment Acts and Practices

Q120 - *NACARA's response:* The Bureau could supplement FDCPA section 810 to direct that application of payments in the absence of any direction from the consumer with language similar to the following:

> "In the absence of any direction from the consumer as to how a payment should be applied, the collection agency must apply payments first to debts that carry the highest rate of interest, otherwise, such payment should be prorated on all the debts being collected."

Q121 - *NACARA's response:* The proposed rules should provide for written disclosure as to how a collection agency intends to apply a consumer payment in the absence of any specific instructions from consumers. Should the collection agency change the manner of applying a payment, it should provide a 30-day written notice prior making such change. The rule should also provide that, where the consumer intends to change the payment application proposed by the collection agency, that the consumer should provide a written notification to the collection agency 30 days prior to changing the application of payments.

Q122 - *NACARA's response:* The proposed rules should require collection agencies to send written confirmation regarding any payment agreement/arrangement with the consumer, along with information regarding the full amount of the debt, an itemization of principal and interest, if any, before accepting the initial payment from the consumer. If the collection agency and the consumer have agreed to settle the debt for a lesser amount, the collection agency should send a written proposal to the consumer containing the agreed amount before accepting payment. Once the consumer has fully paid the debt, the collection agency should send a written notice that the debt has been paid in full within 15 days after the last payment was received. If the debt was reported to a consumer reporting agency, the collection agency should notify a credit reporting agency within 30 days that the debt has been paid in full.

D. Substantiation

Q123 - *NACARA's response:* The Bureau should have rules in place regarding a standard for substantiating a debt.

i) This should cover every type of consumer debt falling within the definition of a "debt" under the FDCPA and/or under any state law with a more comprehensive definition of a debt that is being collected by any person or entity, other than the creditor, that comes within the definition of a debt collector or collection agency, including any party who acquires ownership of such debt, by purchase or by any type of transfer.

ii) There should be one standard for all types of debts being collected in the same manner so that the "least sophisticated consumer" standard is applied to every consumer regardless of the type of debt owed. Having a separate standard for every type or kind of debt would create confusion from all sides (consumers, debt collector/purchasers, and regulators) and is bound to become a compliance and enforcement problem.

The standard for substantiating a debt could be: "What does it take to convince a reasonable person that a debt is owed?" A reasonable person is an individual who is able to approach a particular issue or question with neutrality and resolve it without any bias or a predisposed judgment. One may say that neither a consumer nor a debt collector can be a reasonable person under this definition. This is true, just like in any litigation neither side is free of bias or predisposed mind. This is where the neutral party, the court or judge, comes into play. This is the area where both federal and state regulators will come to implement that standard since we are the parties that can approach the issue or contention, between the consumer and the debt collector, with neutrality and without a predisposed judgment.

iii) Having one standard, as opposed to having differing standards for each type of debt, will give regulators flexibility in resolving each conflict, or determining the reasonableness of the actions by either the debt collector or the consumer regarding the collection of a debt.

Since the adoption of the FDCPA, neither the FTC nor the courts have clearly provided any standard or consistent guideline as to the sufficiency of substantiating a debt. By establishing a standard, it will limit the courts from creating their own standards and work around the standard established by the Bureau's rules.

iv) The issue of establishing a standard for substantiating a debt should not be approached from a cost benefit analysis but rather from a consumer protection perspective. Having a standard for substantiating a debt will be more beneficial to consumers than the debt collection/debt buying industry since this will limit the number of debts that can be collected. The initial effect on the industry may be problematic in the sense that they have to discard debts which cannot be substantiated under the standard that will be adopted. However, in the long run

this will benefit the debt collection industry in the sense that they are better assured of collecting a debt and success in litigating it sans judgment by default.

v) By adopting a standard, it will eliminate the problem of self-serving affidavits or statements being used by debt collectors/debt purchasers in substantiating debts both in and outside of the courts. Our members have observed that a common manner of substantiation is for the collector to state, "You owe the debt because I say so or because the creditor said so."

Q124 - *NACARA's response:* Depending on the kind of debt being collected, the documentation necessary to substantiate the debt may vary including the cost of verifying the debt. A mortgage debt may require more proof than a debt resulting from an x-ray performed by a medical provider. However, the cost of proving or substantiating the validity of a debt should meet the standard of proof to verify its existence.

Q125 - *NACARA's response:* It would be ideal if the collection agency/debt purchaser was required to have the documentation substantiating the debt at the time it makes the initial attempt to collect the debt from a consumer. This would eliminate any speculation regarding the validity of the debt being collected and any unnecessary attempts and expense of collecting a debt that cannot be proven as being owed. However, because of the provision that allows a debt collector to assume the debt to be valid if the consumer fails to dispute the debt within 30 days of the receipt of the initial validation letter, it appears that the law allows that during the initial stage of debt collection only the information about the debt supplied by the creditor or the agency's client is be sufficient until the consumer disputes the debt or a debt collector/purchaser files a civil complaint.

Q126 - *NACARA's response:* We believe that the following elements should be used at different stages in the debt collection cycle:

i) Prior to sending validation letter – Information provided by the creditor about the consumer's name, address, social security number, name of the creditor, the date the debt was incurred, the type of debt, the amount of the principal debt, interest rate, amount of the accumulated interest should be sufficient.

ii) After a consumer disputes the debt – Documentation such as an invoice, billing statement, contract, which shows when an how the debt was created, the type of debt, the amount of the debt, the name and address of the original creditor, the agreed rate of interest, if any, and the total added interest. If the debt has been sold and purchased, a copy of the debt purchase agreement, in addition to the above documentation.

iii) Prior to commencing a lawsuit - Copies of all the written communications sent by the collection agency to the consumer, if any, copies of all communications from the consumer to the collection agency, documentation that will substantiate or prove

the existence or validity of the debt, the date the debt was incurred, amount of the principal, computation of the accumulated interest, the date of default which should not be past the statute of limitations at the time the case is filed in court.

iv) Self-serving affidavit or statement made by the creditor or debt purchaser or any person should not be sufficient verification or proof of a debt that is disputed and should not be admissible evidence to prove the existence of a debt in litigation.

Q127 - *NACARA's response:* It is our opinion that representations about the results of paying a debt often pose potential violations of the FDCPA and FCRA. These representations, whether true or not when applying the least sophisticated consumer standard, can potentially violate the FDCPA as they may have the tendency to overshadow the consumer rights advisories.

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

Q128 - *NACARA's response:* We do not have sufficient information to comment on this question.

Q129 - *NACARA's response:* We do not have sufficient information to comment on this question.

Q130 - *NACARA's response:* We do not have sufficient information to comment on this question.

Q131 - *NACARA's response:* We do not have sufficient information to comment on this question.

VI. Time-Barred Debts

A. No Legal Right to File Suit on time-Bared Debt

Q132 - *NACARA's response:* From our perspective, it appears consumers often do not understand the meaning of a time-barred debt. Further, in most cases consumers do not even know that their debt can be classified as time-barred, and assume that they can be sued on the debt. In states where the statute of limitations must be asserted as an affirmative defense, ignorance of the law can effectively eliminate any protections afforded to the consumer. Therefore, in most cases disclosure becomes a very important protection for the consumer.

Q133 - *NACARA's response:* The Bureau should include within the proposed rules a requirement that debt collectors disclose when a debt is time-barred and that the collector has no legal authority to sue on that debt. This disclosure is extremely relevant to the collection of the debt and should be made on the validation notice. It

may also be necessary to require a subsequent notice upon further communication with the consumer.

Some may question whether consumers are already afforded protections for the collection of time-barred debt based on currently existing laws prohibiting false or misleading representations, including misstating the legal status of a debt, or threatening to take an action that may not legally be taken or that the collector does not intend to take. Providing this additional disclosure would remove any doubt as to whether a consumer was informed on the issue of time-barred debt. Some complications may exist regarding the disclosure of time-barred debts including the fact that the statute of limitations may vary based on the type of debt and state in which it originated. Further, the statute of limitations may be interrupted or even reset if the consumer makes interim payments. These factors should be accounted for within any rule requiring disclosure of time-barred debt.

Q134 - *NACARA's response:* We do not have sufficient information to comment on this question.

B. Revival of Statute of Limitations With Partial Payment of Debt

Q135 - *NACARA's response:* We do not have sufficient information to comment on this question.

Q136 - *NACARA's response:* From our perspective, it appears in most cases the consumer does not understand the consequences for them if collectors demand payments on time-barred debts and they make partial payments.

Q137 - *NACARA's response:* The Bureau should require debt collectors seeking or accepting partial payments to disclose within the validation notice the impacts of those partial payments, including the impacts on the statute of limitations in the applicable state. This disclosure should be highlighted within the notice. The benefit to the consumer would be full disclosure of the impacts of partial payments, and the implied consents made by such an action.

Q138 - *NACARA's response:* For debts that become time-barred after the date of the validation notice, the debt collector should provide the consumer with an updated disclosure prior to any additional attempts to collect on the debt. This information is no less important for a consumer who falls into this fact scenario.

Q139 - *NACARA's response:* As stated in the response to question number 133, it may be useful to require this disclosure on all correspondence occurring after the applicable statute of limitations.

Q140 - *NACARA's response:* If there is any other action under state law that would reset the statute of limitations on the debt, it should be disclosed to the consumer.

C. Consumer Testing of Time-Barred Debt Disclosures

Q141 - *NACARA's response*: To our knowledge, some states have required disclosures concerning time-barred debt. However, any model disclosure must provide consumers with a prominent notice of the fact that, if a consumer makes any partial payment on a time-barred debt, original creditors and other debt buyers often consider the debt to have been revived (i.e., that the statute of limitations has been reset), and that the creditor might then sue them upon that debt.

Q142 - *NACARA's response*: We do not have sufficient information to comment on this question.

VII. Debt Collection Litigation Practices

A. Venue (Section 811 of the FDCPA)

Q143 - *NACARA's response:* In our experience, with respect to suits filed to collect debt that was conveyed pursuant to DDA Agreements, debt collectors generally file suit in the district where the consumer resides.

Q144 - *NACARA's response:* Many states have large counties or other civil jurisdictional districts. However, we are not aware of steps taken to reduce burden on consumer litigants.

Q145 - *NACARA's response:* We are aware of instances where debt buyers have chosen venues, or even specific courts and judges, specifically because those venues or courts provide more latitude for the debt buyers to engage in what we consider to be unfair, deceptive, or abusive practices. Although the ability to choose such venues varies from state to state, we recommend that the Bureau implement rules that would prohibit such practices.

B. State Debt Collection Litigation

Q146 - *NACARA's response:* We are aware that, nation-wide, debt buyers have collectively filed hundreds of thousands or millions of lawsuits annually in state courts for at least the last decade. However, we are not aware of any appreciable changes in general trends.

Q147 - *NACARA's response:* We believe that rules that are adopted by the Bureau should specify that they are a floor, and that states can impose greater requirements. Moreover, the following would be an aid to states in their enforcement actions against predatory debt collection practices:

i) The Bureau should expressly state that all complaints, affidavits, and documents submitted in conjunction with collection related lawsuits are "communications" subject to the FDCPA.

ii) The Bureau could require that all affidavits be made on personal knowledge, and that affiants must specify which particular account documents they reviewed in each specific lawsuit, and that they must attach those documents in states where it is required (e.g., Indiana, Arizona).

iii) Further, the Bureau should expressly state in their new rules that it is a "false, deceptive, or misleading representation," and an unfair or unconscionable means to collect or attempt to collect a debt, if the debt buyer submits insufficient documentation under applicable state law (statutes, regulations, rules of procedure, etc.) in an attempt to obtain judgment on affidavit or default judgment.

iv) Finally, the Bureau should expressly state in their new rules that it is a "false, deceptive, or misleading representation," and an unfair or unconscionable means to collect or attempt to collect a debt, if at the time the debt buyer submits a collection-related lawsuit, it does not have in its possession all necessary documentation that might subsequently be required under state law to prove its claim in the event that the consumer-defendant actually defended the lawsuit.

Q148 - *NACARA's response:* Debt collectors commonly file affidavits, signed by employees of the debt collectors, in which the employees incorrectly state that they have personal knowledge regarding the business and record keeping practices of the original creditor. The reality is that the employees for the debt collectors almost certainly have no personal knowledge of the business and record keeping practices of the original creditor and, in fact, are often prohibited from directly contacting the original creditor. Likewise, in order to swear to an affidavit based on "personal knowledge," debt buyers often claim in their affidavits that they have reviewed the account records for a given consumer's account, when in fact they may have little or no original account documents at the time the affidavit is signed. We know that they never obtain all account documents, yet they never specify which specific documents they actually reviewed in their affidavits. This is completely misleading to the consumers and to courts.

Additionally, in Maryland, Delaware, and other states where debt buyers are required to provide a complete chain of assignment documents from the original creditor to the plaintiff, with each assignment attaching the "sale data file" showing the particular consumer account being sued upon, debt buyers are often unable to satisfy this requirement. Some actually manufacture documents after the fact to make them appear to be assignment documents, when in fact they are just a historical summary prepared exclusively for litigation. Also in the same vain, debt buyers frequently do not have the "sale data file," so instead will submit a printout from their own database purportedly showing that the debt was transferred to them along with the portfolio sale, even though this does not satisfy the specific state requirements.

Debt buyers often submit an "exemplar" agreement or "exemplar" terms and conditions, which might approximate those that applied to the consumer's account and might be from around the same time period, but which are not the specific agreement or terms and conditions that actually apply to that particular account. However, debt buyers never identify them as "exemplars," and they are often able to get past a judge without being questioned.

Debt buyers frequently misrepresent the principal, interest, and other fees associated with the accounts. They often claim that the charge-off amount is really their principal, and they seek to obtain prejudgment interest on the entire charge-off amount. In reality, this charge-off amount actually consists of principal, interest, fees, and other charges (collectively, interest under the National Bank Act), and so debt buyers seek to obtain illegal compound interest on the part of the charge-off amount that is not principal (they are seeking to charge interest on interest, which is prohibited under many states' laws).

Robo-signing remains an enormous problem – not just employees signing hundreds of affidavits per day, but also debt buyers submitting affidavits containing falsified signatures by affiants and notaries.

Sewer service and other forms of falsified service remains an enormous problem, but the extent of it is difficult to quantify. That said, studies of New York City debt buyer actions have demonstrated just how large of a systemic problem was in that jurisdiction, and likely in other jurisdictions throughout the U.S. as well.

Q149 - *NACARA's response:* Debt collectors typically file affidavits, signed by their own employees that purport to establish that the debt is owed, although such affidavits are deficient in multiple ways as discussed above. However, debt buyers typically file lawsuits even though they lack other necessary documentation.

Various states have implemented statutes, court rules, or other laws that specify the documents that debt collector plaintiffs are required to have or file in collection-related lawsuits. As a good example, Rule 3-306 of the Maryland Rules of Procedure imposes document requirements in the context of assigned consumer debt, thereby requiring debt buyers to submit, in addition to affidavits made on personal knowledge, certified or otherwise properly authenticated documents satisfying all of the following: (1) Proof of the Existence of the Debt or Account. (2) Proof of Terms and Conditions; (3) Proof of Plaintiff's Ownership (accompanied by a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor, as well as by a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner, including the plaintiff, with each assignment containing specific reference to the debt sued upon); (4) Identification and Nature of Debt or Account (including information about the name of the original creditor, the name of the defendant as it appeared on the original account, the type of account, and various other specific types of information); (5)

Future Services Contract Information; (6) Account Charge-off Information; (7) Information for Debts and Accounts not Charged Off; and (8) Licensing Information for the plaintiff (since debt buyers are required to be licensed as collection agencies under Maryland law).

Q150 - *NACARA's response:* Federal courts have held that the FDCPA does apply to communications made in legal proceedings. *E.g. Henry v. Shapiro*, 2010 U.S. Dist. LEXIS 25475 (E.D. Pa. Mar. 15, 2010). The Bureau should adopt a similar interpretation. There is no meaningful basis for distinguishing between communications made outside of court and those made in litigation, particularly since such communications are relied on by unsophisticated consumers who are typically unable to afford to hire their own defense counsel.

Q151 - *NACARA's response:* Litigating or filing suits on time barred debt is a prevalent practice, as the laws in most states do not expressly prohibit it. Rather, in the majority of states the claim that a debt is time-barred is an "affirmative defense" that the consumer/debtor must raise in response pleadings, and if the consumer/debtor does not raise the defense or is not served or does not appear, then the defense is deemed to be waived. State regulators encourage the Bureau to adopt regulations restricting the ability of debt collectors to pursue litigation on time-barred debts.

VIII. State and Local Debt Collection Systems (Section 817 and 818 of the FDCPA)

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

Q152 - *NACARA's response:* We believe the criteria are clear and sufficient, and no need exists to modify those standards for states to apply for exemptions from the federal laws for certain classes of debt collection practices.

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

Q153 - *NACARA's response:* Although we are aware that a number of states have adopted pretrial diversion programs, we do not have sufficient information to comment on this issue.

Q154 - *NACARA's response:* We are not familiar with the specific terms and conditions contained in contracts between prosecutors' offices, and the providers of pretrial diversion programs. We believe such contracts should be public information.

Q155 - *NACARA's response:* We do not have sufficient information to comment on this issue.

Q156 - *NACARA's response:* We believe it would be appropriate for the Bureau to develop model language, similar to the mini-Miranda notice and the 30-day dispute

notice, clearly and conspicuously informing recipients of the pre-trial diversion letters of their rights.

Q157 - *NACARA's response:* We believe these pretrial diversion programs warrant close attention by the Bureau, since by the very nature of their activities they straddle the line between civil and criminal collection. Therefore, we believe exemption from title X of Dodd-Frank is not appropriate.

Q158 - *NACARA's response:* In our experience the volume of business has been reduced for these pretrial diversion programs, corresponding to the reduction in the use of paper checks.

IX. Recordkeeping, Monitoring, and Compliance Requirements

A. Federal Registration of Debt Collectors

Q159 - *NACARA's response*: This question asks whether the Bureau should institute a registration system and, if so, for recommendations on the parameters of that system. While state regulators understand that value and importance of registration or licensing as the first level of accountability, we are also concerned about actual or practical preemption of the systems that are working well to protect consumers in our individual states. If a registration system were instituted, the obvious questions would include: (1) Who will be required to register? (2) What will be the penalties for failing to register? Additionally, many violations are committed by unlicensed collectors whose whereabouts are often not known, but who could be calling from neighboring countries or even offshore locations. So the balancing act here is to focus attention on those who require it, while simultaneously honoring those state systems that provide rigorous oversight..

Among our member states, several (including Colorado, Idaho, and Alaska) require registration of individual collectors, while others (including Maine) obtain accountability by holding the employer liable for the actions of all employees or contractors. We do not have a recommendation on which is the better system, since the countervailing forces are 1) ideal accountability over specific violative individuals, who may be terminated from one company but who are then re-hired or who go to work for other collectors; balanced against 2) the large expansion of a system required to accommodate the estimated 4,000 companies, to a system designed to also receive (and amend, on a daily basis) information about an additional 140,000 individuals.

Regardless of the approach utilized, one challenge will remain how to locate and prosecute companies that operate without having registered or otherwise complied with the system imposed. The Bureau should give equal consideration to a two-part enforcement system: first, a rule stating that debt collectors must comply with state licensing and consumer protection laws; and second, using the Bureau's resources to assist states to prosecute violations.

Q160 - *NACARA's response*: If the CFPB chooses to register debt collectors, NACARA recommends that the Bureau utilize the Nationwide Multi-State Licensing System & Registry (NMLS). The NMLS is an excellent example of coordinated regulation among state agencies, and also between state and federal regulators in the mortgage market. The NMLS is an already established system which is effective in licensing and registering non-bank financial services providers, including debt collectors. The NMLS is already being used by 5 states to license and register debt collectors, and currently nearly 1,000 debt collection companies are on the NMLS. The NMLS provides increased regulatory effectiveness by providing regulators with the ability to follow licensees across state lines and across industries. The NMLS also performs the function of providing information about collector violations among state users, since the NMLS performs that function for other licensees and also makes this information public through Consumer Access. Additionally, the use of the already existing system will eliminate the costs and duplicative efforts that would be necessary in order for the Bureau to create a separate system. The Bureau may wish to consider rules requiring registration using this existing system to apply to debt collectors that are not already subject to state licensing or registration requirements.

B. Recordkeeping Requirements

Q161 - *NACARA's response:* State laws differ on what information must be maintained by creditors and collectors. Some states require retention (and production to state examiners) of contracts in existence between creditors and collectors. Debt collectors must maintain copies of listing sheets showing what information they received from client creditors. In instances of a dispute, collectors must retain records of their efforts to verify a debt. Some states now require retention of records of phone calls, at least outgoing phone calls.

Additionally, any new rules should address the following problematic issue: debt buyers often file lawsuits without sufficient documentation, while the original creditors of those debts are not required to have maintained all original account records for that length of time (and thus the documents are unavailable to the debt buyer plaintiff). Either the original creditors should be required to maintain the documents for as long as a lawsuit might be filed, plus the statutory time that a consumer has to bring a private right of action under the FDCPA, or the debt buyers should be precluded from filing lawsuits without the guarantee of being able to obtain all original account documents from the original creditors.

Q162 - *NACARA's response:* For original creditors who choose to sell consumer accounts to debt buyer, or for original creditors who bring their own collection-related actions, such creditors should be required to maintain records for as long as a collection-related lawsuit might be filed against the consumer (whether by themselves or by any potential downstream debt buyer), plus the statutory time that the consumer

has to bring a private right of action under the FDCPA. Debt buyers should be required to maintain account records for as long as they hold an open account, and for as long as a collection-related lawsuit might be filed against the consumer (whether by themselves or by any potential downstream debt buyer), plus the statutory time that the consumer has to bring a private right of action under the FDCPA. Further, all creditors should be required to maintain the records of disputed accounts for as long as the debt may reported in a credit report. Original creditors who do not sell accounts to debt buyers, and who do not engage in collection-related litigation, should be given a shorter record-retention time requirement for consumer accounts (except for those accounts that are disputed by consumers, for which the credit report time period should apply).

Thank you again for the opportunity to provide comments relating to the proposed rulemaking. NACARA's members understand, having maintained oversight of debt collectors for many years, the difficult objective of protecting consumers while not also imposing undue or unnecessary burdens on the industry. Our members strive to provide protection and assistance for consumers and other persons subject to collection activity, as well as to provide clear guidance to regulated debt collectors and debt buyers. We look forward to working collaboratively with the Bureau, and are always available to share with you our knowledge and experiences regulating the debt collection industry.

Sincerely,

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