COMMENTS
to the
Consumer Financial Protection Bureau
on its

Proposed Debt Collection Rule
Docket No. CFPB-2019-0022
RIN 3170-AA41

By the
National Consumer Law Center
On behalf of its low-income clients
and

Americans for Financial Reform Education Fund
Consumer Federation of America
National Association of Consumer Advocates
U.S. PIRG
Woodstock Institute

September 18, 2019

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I. Summary of Comments

The National Consumer Law Center (on behalf of its low income clients), Americans for Financial Reform Education Fund, Consumer Federation of America, National Association of Consumer Advocates, U.S. PIRG, and Woodstock Institute submit these comments on the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed debt collection rule.

We are terribly disappointed with the proposed regulations, which do far more to protect abusive collectors than consumers. The primary goal appears to be to make it easier for collectors to collect debts, to give them more vehicles to pressure and harass people who simply cannot afford to pay, and to protect collectors from responsibility for violating the law and abusing consumers. While there are instances in which the regulations clarify and improve protections, the overall impact of these regulations, should they be promulgated, will be to hurt consumers, not help them. In particular, among other concerns, the proposed rule will:

- permit excessive calls to consumers and potentially third parties and businesses;
- prevent people from receiving information they are entitled to under the law;
- provide new vehicles to harass consumers by email, text, and other means;
- permit violations of consumers' privacy;
- encourage collection of old debts, leading to abuse, deception, and mistakes;
- protect attorneys who make false, deceptive, or misleading representations in court documents; and
- expose consumers and businesses to malware and computer viruses.

Many of the proposals conflict with the protections that Congress has mandated, create exemptions that the CFPB has no authority to make, and are otherwise arbitrary and capricious. There are numerous instances in which the regulations would permit collection activities that contradict key judicial interpretations of the FDCPA and would conflict with statutes' key goals and protections.

The CFPB is well aware of the chronic, unrelenting problems affecting consumers subject to debt collection activities. Abusive practices by debt collectors were a serious problem in 1977 when Congress passed the Fair Debt Collection Practices Act (FDCPA), and they remain a problem 42 years later, regularly topping the list of consumer complaints to the Federal Trade Commission (FTC) and now the CFPB. These problems have only gotten worse with the expansion of predatory lending, the stagnation of wage growth and inequality, and the growth of the debt buyer industry, with old debts sold and resold with increasingly inaccurate information.

We and others have provided extensive comments[1] on the problems posed by abusive debt collection and the need for reform through the 2013 Advance Notice of Proposed Rulemaking.[2] Since then, in dozens if not hundreds of meetings, presentations, writings, and comments provided by consumers and advocates, the Bureau has heard about the numerous ways in which consumers are being harmed on a daily basis by the overreaching and abusive actions of collectors. The CFPB's own research[3] and that of many other organizations, courts, and reporters document these problems. And there are thousands of individual stories in the CFPB's complaint database and the FTC's Consumer Sentinel, putting human faces on these common problems.

The CFPB has the power to do tremendous good with regulations on debt collection. But this proposal will not meet that goal. We urge the CFPB to go back to the drawing board, and reissue proposals that will enhance the protections for consumers from abusive, harassing, and unfair debt collections.

Summary of Comments and Key Recommendations

Our detailed comments in Part IV, *infra*, are provided in sequential order for each section of the proposed regulations. In this section, we provide an overview of our key recommendations by topic area. This summary does not and cannot address all of our important recommendations, some of which are too technical to summarize here but nonetheless will have a critical impact on whether consumers are treated fairly.

Authority

The CFPB has no authority to weaken the FDCPA (*See* Part III). The CFPB's rulemaking authority under the FDCPA is to implement the statute, including the statute's purpose of eliminating abusive debt collection practices. Notably, the FDCPA does not give the CFPB the same exemption and adjustment authority found in other statutes, such as the Truth in Lending Act. Thus, the CFPB lacks authority to grant debt collectors exemptions from the FDCPA or to

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[1] National Consumer Law Center et al., Comments to the Consumer Fin. Prot. Bureau re: Advance Notice of Proposed Rulemaking Regarding Debt Collection, Docket No. CFPB-2013-0033 (Feb. 28, 2014), *available at* https://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf.

[2] Consumer Fin. Prot. Bureau, Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848 (Nov. 12, 2013).

[3] *See, e.g.,* Consumer Fin. Prot. Bureau, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 18, 2019), *available at https://www.consumerfinance.gov/data-research/research-reports/market-snapshot-third-party-debt-collections-tradeline-reporting/;* Consumer Fin. Prot. Bureau, Complaint snapshot: Debt collection (May 31, 2018), *available at* https://www.consumerfinance.gov/data-research/research-reports/complaint-snapshot-debt-collection/; Chris D'Angelo, Consumer Fin. Prot. Bureau, *How we keep you safe in the consumer financial marketplace* (June 2, 2017), *available at https://www.consumerfinance.gov/about-us/blog/how-we-keep-you-safe-consumer-financial-marketplace/;* Consumer Fin. Prot. Bureau, Consumer Experiences With Debt Collection: Findings From the CFPB's Survey on Consumer Views on Debt (Jan. 12, 2017), *available at* https://www.consumerfinance.gov/data-research/research-reports/consumer-experiences-debt-collection-findings-cfpbs-survey-consumer-views-debt/.

weaken its protections against abusive debt collection practices. Yet in many cases, the proposed rules do just that, and thus are outside of the CFPB's authority and are arbitrary and capricious. This is especially true in the proposals that authorize new communications by debt collectors to third parties that violate consumers' privacy; that substitute electronic communications for written disclosures without complying with the E-SIGN Act; that relieve collection attorneys of liability for false, deceptive, or misleading representations; and that may allow debt collectors in some circumstances to file or threaten lawsuits on time-barred debt. *See* §§ 3.6.2, 3.6, 6.3.2, 7.4.2, 9.2.1, 13.3.2.

Number of phone calls (§§ 1006.10(c), 1006.14(b))

The proposal allows **too many telephone calls.** We support specific limits on the number of both attempted calls and conversations. However, the number of attempted calls proposed – seven per week – is too high, above what courts have ruled is abusive. Moreover, allowing that number for each debt a consumer owes would multiply it even more. Collectors should be limited to **three attempted calls, resulting in no more than one conversation <u>to each consumer</u> each week**, and only one attempted call per week to third parties for location information. To avoid evasions, calls responding to a consumer's request for information or to call back should be included in the call limits, with just one additional call allowed if necessary to respond to a request for information. The CFPB should also open a new rulemaking to address excessive calls by payday lenders and other first-party creditors. *See* §§ 5.4, 6.3.

Emails, texts, social media messages and other electronic communications (§§ 1006.6(d), (e), 1006.22(f), 1006.34(c), 1006.42)

The proposed rule would allow collectors to **email or text validation notices and other important disclosures to consumers** without complying with the E-SIGN Act, even when the FDCPA requires them to be provided in writing**. The CFPB lacks legal authority** to exempt collectors from compliance with the E-SIGN Act**.** Just because the consumer at some point along the way gave E-SIGN consent (perhaps without a choice) to a creditor or prior debt collector does not mean that the consumer has current access to that email or phone number, or that the consumer will see messages from an unfamiliar party (which may go into the consumer's spam folder) *See* § 13.3.

Authorizing the use of hyperlinks to send validation notices, without consumer consent, is especially arbitrary and capricious, and could increase the threat of viruses and identity theft. Consumers are unlikely to receive or click on these hyperlinks, and requiring the consumer to notice and exercise a previously provided right to opt out of receiving electronic communications is no substitute for consent. These messages are especially likely to be caught in spam folders or deleted or ignored by consumers. The proposal will undermine warnings never to click on a link from an unfamiliar party, and scammers will impersonate debt collectors. *See* §§ 13.3.4.3, 13.4.

The CFPB cannot exempt debt collectors from the ban on disclosing debts to third parties when they send electronic messages to consumers who have not affirmatively consented to that particular form of electronic communication. Debt collectors should not send email, text, or private direct social media messages to consumers without their consent. These messages could go to the wrong party, be sent to shared addresses, or be seen by third parties who see a text message or other message pop up on a phone or computer. The conditions outlined in the rule are not reasonably adapted to avoid third-party disclosures. The CFPB cannot put the burden on consumers to opt out of protection of their privacy or presume, because the consumer did not affirmatively object, that electronic communications by a debt collector will not violate the consumer's privacy. If collectors use electronic media without consumer consent, they should bear responsibility under the FDCPA for violating the third-party disclosure ban if such a disclosure occurs. *See* § 4.4.3.

We support the proposal to require a **right to opt out of electronic communications,** disclosed in those communications, but it should be *in addition to* and not instead of a requirement for opt-in consumer consent to receive messages via an electronic communication channel. In addition, the CFPB should require debt collectors to accept consumer opt-outs through any reasonable method, including orally. *See* § 4.5.

We support the ban on public social media messages, but the CFPB should extend it to **all publicly viewable electronic media** (such as comments to a blog post, group text, or chat room discussions), not just social media. *See* § 8.2.3.

We support the ban on emails to addresses that the collector **knows or should know are work emails,** but the CFPB should require opt-in consent to electronic communications to prevent emails from inadvertently being sent to consumers at work. *See* § 8.2.2.

The CFPB should **monitor** and require reporting on collectors' use of emails, texts and direct messages; should add specific categories to the complaint portal for these complaints; and should consider specific limits if, as we expect, problems arise. *See* § 8.4.

Limited-content messages (§ 1006.2(j))

The CFPB has **no authority to exempt limited-content messages** from the statute's definition of "communication" or associated protections. Both of the sample messages, and especially the one that allows reference to an "account," will indirectly convey that the consumer has a debt in collection. The messages will also enable collectors to communicate with consumers without providing the disclosures required by the statute. *See §* 3.6.

If the CFPB persists in permitting limited-content messages, it should not allow any messages to be left with third parties and should allow only limited-content messages to be left on the consumer's voicemail. *See* §§ 3.6.3.

Requests to stop phone calls or cease communication through other media (§§ 1006.14(h))

We support the proposal to **allow consumers to stop phone calls** or other specific forms of communication without fully cutting off all communication, such as letters. Allowing consumers to stop phone calls or other forms of communication that they find harassing will help address abusive conduct by collectors without depriving consumers of information. Collectors should give consumers **notice of their right to stop calls in each collection call.** *See* § 6.4.

The CFPB should clarify that consumers may exercise this right **in any reasonable manner, including in an oral conversation.** Asking the collector who is on the phone to stop calling, or to stop emailing or texting, is the most natural way that consumers will do so even if they are not specifically aware of their FDCPA rights. *See* § 6.4.

Anyone, not only consumers, should be allowed to stop debt collector communications. If a third party receives a misdirected communication, a limited-content message, or a request for the consumer's location, that person should also be able to stop those communications. This right is important for everyone, including businesses, and will also curtail continuing privacy violations. *See* § 5.4.

A request to cease communication through a particular communications channel should apply to all accounts that a collector holds for a given consumer and should bind future collectors. *See* § 6.4.1.

False, deceptive, or misleading representations by collection attorneys (§ 1006.18(g))

The proposal gives attorneys a safe harbor that deems them to be in compliance with the ban on false, deceptive, or misleading representations in court documents merely because the attorney takes minimal steps that are wholly inadequate to ensure meaningful attorney involvement in ensuring that the representations are accurate. The proposed rule will encourage lawsuits against **the wrong person, lawsuits for amounts that the collector is not entitled to collect**, and other abuses by collection attorneys. *See* § 7.4.1.

In light of the ample evidence of collection attorney misconduct, the **conditions for the safe harbor are inadequate and not rationally connected** to implementing the FDCPA's ban on false, deceptive, or misleading representations. The attorney need only "review" (how carefully or long is not stated) the document and unspecified "information" supporting the document (potentially an unverified spreadsheet or other inadequate information) and somehow "determine[], to the best of the attorney's knowledge, information, and belief" that the contentions are warranted, that the factual contentions have evidentiary support (not necessarily admissible evidence), and that any denials of factual contentions are warranted. An attorney who files a lawsuit after reviewing only cursory, inadmissible, and inaccurate information such as a spreadsheet or an affidavit, information that is contradicted by original account documents, could conceivably meet this standard. The CFPB provides no data or evidence that this vague and cursory standard will prevent the prohibited conduct. The proposed standard is far less than the Bureau has required in settlements of lawsuits against collection attorneys. *See* §§ 7.4.3, 7.4.4.

This standard, copied from Rule 11, improperly deviates from the statute's consciously limited bona fide error defense and undermines Congress's express decision to address attorney misconduct. Congress explicitly amended the FDCPA to delete a statutory exemption for attorneys, yet the proposed rule effectively gives attorneys engaging in litigation a safe harbor from liability under a core provision of the Act. Congress also deliberately limited defenses to those that meet the definition of a bona fide error. The proposal gives attorneys a far broader defense not authorized by the statute. *See* § 7.4.2.

The CFPB should require collection attorneys to **review original, account-level documentation, have admissible evidence, and make independent determinations** that they are filing a lawsuit against the right person, for the right amount, based on accurate information about the age of the debt, and that their client has the legal authority to file the lawsuit. The CFPB has identified the serious problem of inaccurate debts and previously outlined an extensive regime governing the information that debt collectors, including attorneys, must have before collecting debts. While the CFPB is not required to address information requirements for debt collection in this rulemaking, it is outside the Bureau's authority and arbitrary and capricious to do the opposite -- insulate collection attorneys who sue consumers based on false or inaccurate information without ensuring that they have the correct information they need. *See* §§ 7.4.2, 7.4.3.

The CFPB should also reinstate a rulemaking covering both creditors and debt collectors to address information-sharing requirements. *See* § 7.4.6.

Time-barred debt (§ 1006.26)

The CFPB should **bar collection of all time-barred debts, in or out of court**, as they are too old to collect without mistakes or deception. § 9.1.

Instead, the proposed rule would bar collectors from filing or threatening lawsuits on time-barred debt only if the collector "knows or should know" that the debt is beyond the statute of limitations. This will **protect false, deceptive, or misleading representations or means to collect such debt in violation of the FDCPA.** The CFPB should hold the collector responsible for knowing that a debt is too old for a lawsuit, as courts have done. Collectors simply should not threaten a lawsuit or file one unless they know that the debt is not time-barred. Courts have repeatedly held that the FDCPA is a strict liability statute and have found, without considering the collector's state of mind, that suing or threatening suit on a time-barred debt violates the Act. § 9.2.

The proposal will **lead to deception and abuse of consumers who may unknowingly make a payment reviving a time-barred debt** or pay an aggressive collector over other debts, not knowing that they cannot be sued and that the debt cannot harm their credit report. While the CFPB is testing disclosures on time-barred debt, it is unlikely that this complicated topic can be adequately disclosed by a collector that is simultaneously trying to pressure the consumer to pay. §§ 9.1, 9.4.

If the Bureau promulgates disclosures on time-barred debt, it should test them for understanding by the least sophisticated consumer, including testing with consumers who are not online. The disclosures should be used in every communication regarding time-barred debt. *See* § 9.4.

If the CFPB does not prohibit the collection of all time-barred debts, it should clarify that its limited restriction on suing on time-barred debt includes submitting proofs of claim in bankruptcy; limit collection efforts on time-barred debt to written communications; prohibit deceptive offers to "settle" a time-barred debt; bind subsequent collectors and debt buyers to a determination that the debt is time-barred; require collectors to disclose when a debt is too old to appear on a credit report; and prohibit suits or threats of suits on revived debts. *See* §§ 9.3, 9.5.

Model validation notice (§§ 1006.34, 1006.38, Appx. B)

The validation notice is an important tool under the FDCPA, and a clear, understandable consumer-tested notice will help consumers understand the debt and their rights. However, the proposed model notice must be improved to meet that goal. The model form should undergo more testing to ensure comprehension by the least sophisticated consumer before any safe harbor is provided. §§ 11.2.4, 11.3.3, 11.3.4.4, 11.4.2, 11.4.3.

Collectors should not be allowed to provide the expanded list of validation information just through oral delivery. Consumers need to be able to retain the validation notice for future reference and they are unlikely to be able to remember all of the information provided in a stressful call from a collector. Providing only oral notice will result in unfair and deceptive practices and will harm the least sophisticated consumers – especially given the significant expansion in the amount of information that the proposed rules will require. If a notice is provided orally, a subsequent written one must be required as well. *See* § 11.1.4.

The Bureau correctly recognizes that oral disputes are sufficient to counter the presumption of validity, but it needs to revise the model validation notice to clarify that written disputes are necessary to preserve other important rights. *See* § 11.3.4.4.

To avoid confusion by a consumer who might believe that a payment is necessary to dispute a debt, the box for making a payment should be separated from other responses (which should also be expanded with more possible responses). *See* § 11.3.5.2.

The notice should list all ways of contacting the collector. *See* §§ 11.3.3.

The validation notice should **include a statement of rights,** as earlier envisioned in the CFPB's SBREFA Outline, or, at a minimum, the URL for the statement of rights page on the CFPB website. *See* § 11.3.4.5.

Instead of creating a complicated rule to allow collectors to ignore duplicative disputes, the CFPB should require debt collectors to provide real responses to consumers' disputes about debts. When a collector merely parrots what a debt buyer told it, it is no wonder that frustrated consumers re-submit their disputes. The CFPB should require debt collectors to review and provide copies of original, account-level documentation in response to consumer disputes. *See* § 12.5.2

English language notices should include a brief statement in Spanish that the notice is an attempt to collect and that information provided by the consumer will be used for that purpose. They should also include a one-line reference to several other languages for which translated notices are available. The Bureau should translate the validation notice into several common languages and should require collectors to provide that notice (or their own complete and accurate translation) to consumers who prefer that language. Collectors should collect and retain language preference and transfer it to the next collector. *See* § 11.5.3.

There should be a **single date** from which the amount of the debt must be **itemized**, not four different possible dates, which will lead to confusion. The Bureau should conduct robust consumer testing to determine which itemization date will be most helpful to consumers, and to make sure it does not cause confusion. The CFPB should require all future debt collectors to use the same itemization date to avoid confusion caused by each collector reporting a different itemization based on a different date. *See* § 11.2.4.

An email or text should count as an initial communication, triggering the deadline to send a validation notice, even if the consumer does not respond. *See* § 11.2.3.

Validation notices should be in at least 12-point font. *See* § 11.2.2.

Deceased consumers (§§ 1006.2(e), 1006.6(a), 1006.10(a), 1006.34(a), 1006.38)

The proposal expands the definition of "consumer" to include deceased consumers, but this is overly broad since the term appears more than 200 times in the proposed regulation. Comments to the proposed rule would also interpret the term "consumer" to include surviving spouses and surviving parents of debtors in some portions of the proposed regulations. Doing so creates confusion, ignores existing provisions for executors and administrators, is unjustified by the legal principles the Bureau cites, and will open the door to abuses in the collection of decedent debt. *See* §§ 3.3, 4.1.

Not all surviving spouses are executors and they generally do not step into the consumer's shoes to become responsible for the decedent's debts. Considering all widows, widowers, and surviving parents to be the "consumer" would allow collectors to communicate with them and pressure them to pay debts they do not owe. Surviving spouses and parents should be contacted only for location information and only if the collector is not able to determine the executor or other responsible party from public records. *See* §§ 4.1.2, 4.1.3, 5.2.

The CFPB also proposes to expand who is an executive or administrator of an estate by expanding the term to include personal representatives. The vague definition of "personal representatives" would allow impermissible contacts with and pressure on a person to pay debts for which that person is not legally obligated. *See* § 4.1.4.

The CFPB should also adopt a rule or comment stating that it is a violation of the ban on false or misleading representations to suggest that a surviving spouse is responsible for the deceased consumer's debts, unless the collector discloses why it believes the spouse is responsible. *See* § 7.1.

Collectors should provide a validation notice to a deceased consumer's estate administrator, executor, or other appropriate person even if one was provided to the deceased consumer. The CFPB should create a separate model validation notice for this purpose that informs the recipient why they are receiving the notice and that they are not personally responsible for the debt. The Bureau should also require collectors to respond to disputes or requests for original-creditor information submitted by the executive or administrator. *See* §§ 11.1.2, 11.4.1, 12.1.2.

Use of aliases (§ 1006.18(f))

The CFPB should remove the proposed rules allowing debt collectors to use aliases. If it does permit aliases, it should require collectors to register their aliases with the CFPB and limit each collector to a single alias that does not change. *See* § 7.3.

Parking debts on credit reports (§ 1006.30(a))

We support the proposal to prohibit "parking" debts on credit reports without first informing the consumer about the debt. However, the Bureau should require the collector to communicate with the consumer directly and should prohibit an electronic notice unless the consumer has opted in to receive such communications. *See* § 10.1.

Sale of debt (§ 1006.30(b))

We support prohibiting collectors from selling, transferring, or placing for collection accounts that were paid, that were discharged in bankruptcy, or where an identity theft report was filed. Collectors should also be barred from attempting to collect those debts. Moreover, the list of types of accounts covered by this section should be expanded to include debts extinguished under state law, debts with unresolved consumer disputes, debts lacking original, account-level documentation, and time-barred debts. *See* § 10.2.1.

II. Understanding Consumer Experiences with Debt Collection

1. Brief History of the FDCPA

There is a long history of abusive and harassing practices by debt collectors collecting consumer debts.[4] Concerned about the effect of overreaching debt collection practices on consumers, the National Consumer Law Center released the National Consumer Act in 1970 to serve as a model for state reform efforts.[5] By the mid-1970s, 13 states had no laws to protect consumers, while another 11 provided little to no effective protection.[6] Only about half of the states had enacted meaningful debt collection laws to protect consumers[7] despite the "abundant evidence of abusive, deceptive, and unfair debt collection practices by many debt collectors."[8] Congress specifically found that, by 1977, there were more than 5,000 collection agencies in the country, and that in 1976 alone about $5 billion in debts had been turned over to them.[9] Collection abuses were a widespread, serious national problem that included the use of obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentations of legal rights, and the disclosure of personal information to neighbors, friend, and employers.[10]

In 1975, Congressman Frank Annunzio of Chicago introduced a bill to protect consumers from abusive debt collection. After several redrafts and years of debate and negotiation, the FDCPA was passed in 1977 and became law on March 20, 1978. Congress found that the existing laws were inadequate to redress the harm to consumers caused by unfair debt collection practices, including the filing of personal bankruptcies, marital instability, the loss of jobs, and invasions of

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[4] *See* National Consumer Law Center, Fair Debt Collection § 1.2 (9th ed. 2018), *available at* https://library.nclc.org/fdc/0102-0.

[5] National Consumer Law Center, National Consumer Act: First Final Draft, Prefatory Note (Jan. 1970), *available at* www.nclc.org.

[6] S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

[7] S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

[8] 15 U.S.C. § 1692(a)

[9] S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

[10] *Id.*

individual privacy.[11] Congress enacted the FDCPA to eliminate such abusive debt collection conduct as well as to ensure that debt collectors who did not engage in unfair collection conduct were not unfairly disadvantaged.[12]

2. Predatory Lending and the Recession Lead to Increased Debt for Consumers.

A significant factor contributing to an increase in defaulted debt was the expansion of the unregulated "nontraditional" or "alternative" loan product market, especially between 2004 and 2007.[13] Such predatory lending products included interest-only loans, payment option adjustable rate mortgages, and hybrid adjustable rate mortgages, such as "2-28s" and "3-27s."[14] Interest-only loans became predominant in the secondary mortgage market; 23.5% of all securitized subprime loan originations in 2005 were interest-only loans.[15] Almost three-quarters of securitized subprime mortgages originated in 2004 and 2005 were so-called "exploding ARMs" where the initial low interest rate would surge after a short time and payments of both principal and interest would be due.[16] Many of these loans were made without consideration of the consumer's ability to pay and without adequate underwriting to determine whether the borrower could afford the loan beyond the initial teaser rate.[17] While more than three-quarters of the increase in debt from 2001 to 2007 was mortgage debt, fringe lenders flooded the market and made other credit more available than ever.[18] With this increase came a sharp rise in predatory loans, not just with home mortgages but also with check cashers, payday lenders, car title lenders, and auto lenders imposing excessive or unnecessary fees to steer borrowers into

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[11] 15 U.S.C. § 1692(a),(b).

[12] 15 U.S.C. § 1692(c).

[13] *Id.*

[14] *See* National Consumer Law Center, Mortgage Lending § 1.2.4 (2d ed. 2014), *available at* https://library.nclc.org/ml/010204-0 (citing Hearing Before the S. Comm. on Banking, Hous. & Urb. Affairs, Subcomm. on Hous. & Transp. & Subcomm. on Econ. Pol'y, Calculated Risk: Assessing Non-Traditional Mortgage Products (Sept. 20, 2006) (testimony of Michael Calhoun, Pres., Ctr. for Responsible Lending), *available at* www.responsiblelending.org).

[15] National Consumer Law Center, Mortgage Lending § 1.2.4 (2d ed. 2014), *available at* https://library.nclc.org/ml/010204-0 (citing Inside B & C Lending, *What Else Is New? ARMS Dominate Subprime MBS Mix* (Jan. 20, 2006)).

[16] National Consumer Law Center, Mortgage Lending §1.2.4 (2d ed. 2014), *available at* https://library.nclc.org/ml/010204-0 (citing Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., Possible Responses to Rising Mortgage Foreclosures 1 (Apr. 17, 2007)).

[17] *See* National Consumer Law Center, Mortgage Lending § 1.2.4 (2d ed. 2014), *available at* https://library.nclc.org/ml/010204-0.

[18] *See* Nikitra S. Bailey, *Predatory Lending: The New Face of Economic Injustice* (July 1, 2005), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator/; Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 83 (2011), *available at* https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

unaffordable loans.[19] For example, auto lenders provided kickbacks to dealers that steered consumers into higher finance rates when they could qualify for a lower rate.[20] Payday lenders offered small, short-term loans with exorbitant interest rates of 300% to 700% in some states that made it impossible for most consumers to repay within the one- or two-week time frame, resulting in the accumulation of more fees and interest.[21] By mid-2006, household debt had risen from 80% of disposable personal income in 1993 to almost 130%.[22]

The widespread and inappropriate origination of nontraditional mortgage and other financial products ultimately led to huge increases in defaults and foreclosures, devastating individual consumers, their families, and their communities.[23] As homeowners defaulted on poorly underwritten or fraudulent subprime mortgage loans, mortgage delinquencies caused a foreclosure crisis that began in mid-2007 and led to the recession that followed.[24] As of the beginning of 2011, over twenty-six million Americans had no job, could not find full-time work, or had given up looking for work, and, at the same time, almost $11 trillion in household wealth had vanished, including retirement accounts and life savings.[25] Faced with unemployment and

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[19] *See* Nikitra S. Bailey, *Predatory Lending: The New Face of Economic Injustice* (July 1, 2005), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator/.

[20] *See id. See also* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 7.2.3.2 (9th ed. 2016), *available at* https://library.nclc.org/udap/07020302-0.

[21] *See* Nikitra S. Bailey, *Predatory Lending: The New Face of Economic Injustice* (July 1, 2005), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator/; National Consumer Law Center, Consumer Credit Regulation § 1.2.6 (2d ed. 2015), *updated at* www.nclc.org/library.

[22] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 83 (2011), *available at* https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. *See also* Andrew Haughwout et al., Federal Reserve Bank of New York, Staff Reports, Trends in Household Debt and Credit (Mar. 2019), *available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr882.pdf.

[23] *See* National Consumer Law Center, Mortgage Lending § 1.2.4 (2d ed. 2014), *available at* https://library.nclc.org/ml/010205-0 (citing Debbie Gruenstein Bocian, Wei Li, & Carolina Reid, Ctr. for Responsible Lending, Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures 17 (Nov. 2011) (as of February 2011, of the hybrid or option ARM mortgage loans originated between 2004 and 2008, 12.8% had been foreclosed upon and 11.7% were seriously delinquent; noting that these loans represented 25.4% of all mortgage loans originated and 56.7% of all mortgage loan foreclosed)).

[24] *See* National Consumer Law Center, Mortgage Lending § 1.2.5 (2d ed. 2014), *available at* https://library.nclc.org/ml/010205-0.

[25] National Consumer Law Center, Mortgage Lending § 1.2.5 (2d ed. 2014), *available at* https://library.nclc.org/ml/010205-0 (citing Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xv (2011), *available at* https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf). *See also* Michael S. Barr & Daniel Schaffa, Wash. Ctr. for Equitable Growth, *Nothing Left to Lose? Changes Experienced by Detroit Low-and-Moderate-Income Households During the Great Recession* (Sept. 2016), *available at* https://equitablegrowth.org/working-papers/nothing-left-to-lose/ (summarizing studies documenting the decline in household wealth nationally; regarding Detroit, finding that employment fell by 10%, median unemployment duration increased by 4.3 months, median household income fell by $5000, mean home values fell by over $44,000, the number of underwater homes increased by 62%, mean mortgage payments increased by $164, gas or electric shutoffs increased by 6%, and disconnected phone lines increased by 20%, based on data collected between July 2005 and January 2006, and between October 2009 and March 2010).

tough economic times, Americans were forced to use their credit cards to pay for necessities like food, housing, and medical care — the costs of which continued to increase.[26] As their debt rose, more and more Americans found it impossible to keep up with their payments.[27] Not surprisingly, the total outstanding credit card debt carried by Americans rose during this time, and by 2008 it was at a record high of over $957 billion.[28] Almost a third of that debt was held by borrowers with low credit ratings.[29] By 2009, 6.77% of all credit card debt was in default: another record high.[30]

3. Current Consumer Debt Levels are at an All-Time High and Continue to Grow.

Today, seventy-one million American adults have one or more debts in collection on their credit report.[31] The effects of the fallout from the flood of foreclosures and the resulting financial meltdown are still being felt today. The typical American household now carries an average debt of $137,063, whereas in 2000 the median debt was only $50,971.[32] Consumer debt reached $13.86 trillion in the second quarter of 2019, which was the 20th consecutive quarter for an increase.[33] This is $1.2 trillion higher, in nominal terms, than the previous peak of $12.68 trillion in the third quarter of 2008.[34] Non-housing balances increased by $37 billion in the second quarter of 2019, with a $17 billion increase in auto loan balances and a $20 billion increase in credit card balances offsetting an $8 billion decline in student loan balances.[35]

As of June 30, 2019, 4.4% of outstanding debt was delinquent.[36] Of the $604 billion of debt that is delinquent, $405 billion is seriously delinquent, *i.e.,* over 90 days past due.[37] The share of

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[26] *See* Arianna Huffington, *The Credit Card Debt Crisis: The Next Economic Domino*, Mar. 27, 2009, Huffington Post, ***available at*** https://www.huffpost.com/entry/the-credit-card-debt-cris_b_169657.

[27] *See id.*

[28] *See id. See also* Federal Reserve statistical release, Consumer Credit October 2010 (Dec. 7, 2010), ***available at*** https://www.federalreserve.gov/releases/g19/20101207/g19.pdf.

[29] *See* Arianna Huffington, *The Credit Card Debt Crisis: The Next Economic Domino*, Huffington Post, Mar. 27, 2009, ***available at*** https://www.huffpost.com/entry/the-credit-card-debt-cris_b_169657.

[30] Board of Governors of the Fed. Reserve System, Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks, Delinquency Rates 1985-2019, ***available at*** https://www.federalreserve.gov/releases/chargeoff/delallsa.htm.

[31] Hannah Hassani, Signe-Mary McKernan, Urban Institute,*71 Million US Adults have debt in collections* (July 19, 2018), ***available at*** https://www.urban.org/urban-wire/71-million-us-adults-have-debt-collections.

[32] Bill Fay, Demographics of Debt (Dec. 19, 2018), ***available at*** https://www.debt.org/faqs/americans-in-debt/demographics/.

[33] Fed. Reserve Bank of N.Y., Household Debt and Credit Report: Q2 2019, ***available at*** https://www.newyorkfed.org/microeconomics/hhdc.html.

[34] *Id.*

[35] *Id.*

[36] Quarterly Report on Household Debt and Credit, Center for Microeconomic Data (Aug. 2019), ***available at*** https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf.

[37] *Id.*

credit card balances transitioning into being over 90 days past due has been rising since 2017.[38]

Frequently, the reason that consumers do not pay what they owe is that they have fallen on hard times due to loss of a job, illness, injury, or loss of a breadwinner to illness, divorce, or death.[39] A recent study found that 66.5% of all bankruptcies (about 530,000 families per year) were tied to the cost of medical care or time lost from work due to an illness or injury.[40]

4. Low-Income and Non-White Consumers are Disproportionately Impacted by Debt Collection.

Low- and moderate-income consumers are disproportionately impacted by debt collection activity.[41] In an effort to cover all of their financial needs, low-income consumers may engage in a variety of strategies to try to cover bills that they cannot pay in full such as borrowing from others, paying with an earned income tax credit (EITC) refund, skipping or rotating payments, paying less than the minimum, paying off a bill with a credit card or loan, or ignoring certain debts that can put them further in the red.[42] About 40% of Americans would struggle to pay a

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[38] *Id.*

[39] *See* National Consumer Law Center, Fair Debt Collection § 1.3.1.1 (9th ed. 2018), *available at* https://library.nclc.org/fdc/01030101 (citing Office of Pol'y Dev. & Res., U.S. Dept. of Housing & Urban Dev. Report to Congress on the Root Causes of the Foreclosure Crisis 15 (2010) ("It is generally understood that most borrowers become delinquent due to a change in their financial circumstances that make[s] them no longer able to meet their monthly mortgage obligations. These so called 'trigger events' commonly include job loss or other income curtailment, health problems, or divorce.")). *See also* J. Michael Collins, *Exploring the Design of Financial Counseling for Mortgage Borrowers in Default*, 28 J. Fam. Econ. Issues 207, 213 tbl. 2 (2007) (showing job loss as the most common self-reported cause of mortgage nonpayment, followed by medical problems (affecting 28% of borrowers in default), unfair loan terms (20%), income reduction (20%), injury/accident (19%), home repair/improvement (19%), death in family (18%), and credit card management (15%)); Elizabeth Warren and Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Parents Are (Still) Going Broke 81 (Basic Books 2016 ed.) (citing 2001 Consumer Bankruptcy Project noting that 87% of families with children cite job loss, medical problems, or divorce or separation as the reason for their divorce while the remaining 13% cite bad investment, crime victim, credit card overspending, natural disaster, other explanation, or no explanation); Barry Adler, Ben Polak, & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. Legal Stud. 585, 589 (2000) ("Many scholars and reformers believe that the insolvency is exogenous: the consumer borrower becomes insolvent through no fault of his own, in consequence of job loss, illness, or the like."); Theresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press 2000) (citing 1991 Consumer Bankruptcy Project as stating that respondents' reasons for filing for bankruptcy were: job (67.5%), family (22.1%), medical (19.3%), creditor problems (13.6%), other (13.6%), and housing (6.2%) (multiple responses permitted)).

[40] Deborah Thorne, PNHP, *New medical bankruptcy study: Two-thirds of filers cite illness and medical bills as contributors to financial ruin* (Feb.7, 2019), *available at* http://pnhp.org/news/new-medical-bankruptcy-study-two-thirds-of-filers-cite-illness-and-medical-bills-as-contributors-to-financial-ruin/ (referring *to* David U. Himmelstein et al., *Medical Bankruptcy: Still Common Despite the Affordable Care Act, American Journal of Public Health* (Mar. 2019).

[41] *See* National Consumer Law Center, Fair Debt Collection § 1.3.1.4 (9th ed. 2018), *available at* https://library.nclc.org/fdc/01030104.

[42] *See id.* (citing Laura M. Tach & Sara Sternberg Greene, *"Robbing Peter to Pay Paul": Economic and Cultural Explanations for How Lower-Income Families Manage Debt*, 61 Social Problems 1 (Feb. 2014)).

$400 unexpected expense.[43] The result is that any unexpected event such as a medical emergency, job loss, or even a furnace or car that needs repair can set these families into a financial tailspin. This can result in excessive, constant debt collection communications, lawsuits, and wage and bank account garnishment, which put families further in debt and unable to recover. Consumers in the lowest income group were three times more likely to have been contacted about a debt in collection than consumers in the highest income group[44] and more likely to have been sued.[45]

People of color are also disproportionately subject to debt collection. Residents of predominantly non-white communities are more likely to have debt in collections. The Urban Institute found that 45% of the population in predominantly non-white areas had debts in collection, compared to just 27% of borrowers in predominantly white areas.[46] A study by ProPublica examining five years of court judgments from three metropolitan areas — St. Louis, Chicago and Newark — showed that, even accounting for income, the rate of debt collection judgments was twice as high in mostly black neighborhoods as it was in mostly white

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[43] Board of Governors of the Fed. Reserve Sys., Report on the Economic Well-Being of U.S. Households in 2017 at 2 (May 2018), *available at* https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

[44] *See* National Consumer Law Center, Fair Debt Collection § 1.3.1.4, *available at* https://library.nclc.org/fdc/01030104 (citing Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 15, 28 (Jan. 2017) (52% of consumers with annual household incomes of less than $20,000, compared to 16% of respondents with household incomes over $70,000)). *See also* FINRA Investor Educ. Foundation, Financial Capability in the United States 2016 at 27 (July 2016) (25% of respondents to the 2015 National Financial Capability Study with incomes of less than $25,000 reported being contacted by a debt collection agency in the past year, compared to 18% of all survey respondents).

[45] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 15, 20, 22, 28 (Jan. 2017*), available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (20% of consumers with annual household incomes of less than $20,000 and 16% of consumers with household incomes between $20,000 to $39,999 that had been contacted about a debt in collection were sued, compared to 12% of respondents with household incomes over $70,000). *See also* Kate Owen, Legal Aid of Nebraska, Presentation at the University of Nebraska at Omaha on *The High Cost of Being Poor* (Oct. 21, 2016) (reporting that 56.3% of all judgments in Douglas County, Nebraska were against individuals residing in high poverty zip codes); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers* (Mar. 2014) ("In Maryland, debt buyers disproportionately sued in jurisdictions with larger concentrations of poor people and racial minorities. For example, Prince George's County has only 15% of the [sic] Maryland's population, yet 23% of all debt buyer complaints were filed against Prince George's County residents."); Claudia Wilner & Nasoan Sheftel-Gomes, *Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers* 10 (May 2010) ("91% of people sued by debt buyers and 95% of people with default judgments entered against them live in low- or moderate-income communities."); Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1, 42 (2008) (civil filings in Virginia were positively correlated with poverty).

[46] Urban Inst., Debt In America: An Interactive Map (last updated Dec. 6, 2017), *available at* https://apps.urban.org/features/debt-interactive-map/?type=medical&variable=perc_debt_collect.

neighborhoods.[47] In some neighborhoods in Newark and St. Louis, ProPublica found more than one judgment for every four residents over a five-year period.[48]

5. Debt Collection Conduct is a Top Complaint of Consumers.

While the FDCPA has improved debt collection industry practices, forty years after its enactment hundreds of thousands of consumers complain about debt collection practices each year to federal regulators.[49] Many of the debt collection complaints compiled by the FTC include reported violations of core protections of the FDCPA.[50] A debt in collection can wreak havoc on consumers, subjecting them to harassing debt collection calls and potential lawsuits. It is estimated that the collection industry contacts Americans more than a billion times a year.[51] It is no surprise, then, that in 2017 the FTC compiled 620,800 complaints about debt collection, the most common type of complaint received.[52] From January 1, 2018 through December 31, 2018, the FTC compiled 483,200 debt collection complaints,[53] including 84,500 debt collection complaints received by the Bureau.[54] These complaints provide evidence of the pervasiveness of the problems consumers experience with debt collectors.

6. The Emergence of Debt Buyers Has Contributed to Debt Collection Abuses.

[47] Paul Kiel and Annie Waldman, ProPublica, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods* (Oct. 8, 2015 ("[G]enerations of discrimination have left black families with grossly fewer resources to draw on when they come under financial pressure.")

[48] Paul Kiel, ProPublica, *Why Small Debts Matter So Much to Black Lives* (Dec. 31, 2015), *available at* https://www.propublica.org/article/why-small-debts-matter-so-much-to-black-lives.

[49] *See* 84 Fed. Reg. 23,277 (May 21, 2019). *See also* Consumer Fin. Prot. Bureau, BCFP Fair Debt Collection Practices Act Annual Report (Mar. 2019) ("From January 1, 2018 through December 31, 2018, the Bureau received approximately 81,500 debt collection complaints.").

[50] *See* April Kuehnhoff & Ana Girón Vives, National Consumer Law Center, Consumer Complaints About Debt Collection: Analysis of Unpublished Data from the FTC 14 (Feb. 2019), *available at* https://www.nclc.org/issues/analysis-of-unpublished-data-ftc.html.

[51] Robert M. Hunt, *Understanding the Model: The Life Cycle of a Debt* 10, presented at FTC-CFPB Roundtable "Life of a Debt: Data Integrity in Debt Collection" (June 6, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf.

[52] *See* April Kuehnhoff & Ana Girón Vives, National Consumer Law Center, Consumer Complaints About Debt Collection: Analysis of Unpublished Data from the FTC (Feb. 2019), *available at* https://www.nclc.org/issues/analysis-of-unpublished-data-ftc.html (analyzing hundreds of thousands of debt collection complaints received by FTC in 2017).

[53] Federal Trade Comm'n, FTC Consumer Sentinel Network Data Book 2018, *available at* https://public.tableau.com/profile/federal.trade.commission#!/vizhome/TheBigViewAllSentinelReports/TopReports.

[54] *See, e.g.*, Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 1 (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf.

Since the 1990s, debt buyers have played a significant role in consumer debt collection, purchasing defaulted credit card accounts for an average of pennies on the dollar and rapidly increasing the number of lawsuits filed to collect the debt.[55] Debt buyers try to collect the debts themselves, place debts with collection agencies or attorneys for collection, or sell the debts to other debt buyers. Debt purchased by debt buyers has skyrocketed with some debt buyers purchasing vast amounts of debt. For example, in 2017, Encore Capital Group, Inc. purchased portfolios of debt with a face value of $10.1 billion and PRA purchased portfolios of debt with a face value of $7.5 billion.[56] By 2018, PRA's purchases rose to $9.2 billion.[57] Despite paying just a small fraction of the amount owed to purchase consumer debts that were written off by the original lender, debt collectors aggressively seek to collect the full amount of the debt – often adding interest, penalties, and sizeable attorney's fees.[58]

Debt buyers purchase debt accounts from original creditors, intermediaries, or other debt buyers in bulk, frequently obtaining only minimal information about the debts and no guarantee from the seller regarding the accuracy of the information provided.[59] Each time a debt changes hands, there is an increased chance of errors, complicating the debt collection process for consumers. Debt buyers then attempt to collect on the debts with incomplete information. In an FTC study of 3400 debt portfolio sales from 2006 to 2009, the FTC found that only 30% of the accounts contained information about the interest rate, only 11% listed the principal amount, only 37% contained information about finance charges and fees, and only 35% reported the date of first default.[60] The FTC also found that debt buyers almost never received documentation at the time of sale, finding that account statements and terms and conditions were transmitted with only 6% of accounts.[61] Moreover, debt buyers rarely received any dispute history or information about whether a prior dispute had been resolved.[62] The lack of reliable information contributes to collection problems like collecting from or suing the wrong person or for the wrong amount or attempting to collect accounts that have already been paid or settled.

7. Debt Collectors Continue to Engage in Abusive and Harassing Communications Practices.

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[55] Paul Kiel, ProPublica, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine* (May 5, 2016). *See also* National Consumer Law Center, Consumer Debt Collection Facts 2 (Feb. 2018), *available at* https://www.nclc.org/images/pdf/debt_collection/Debt-Collection-Facts-2016.pdf.

[56] Encore Capital Group, Inc., Form 10-K (Dec. 31, 2018), *available at* https://www.sec.gov/Archives/edgar/data/1084961/000108496119000020/ecpg-20181231x10k.htm; PRA Group, Inc., Form 10-K (Dec. 31, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1185348/000118534818000008/praa-20171231x10k.htm.

[57] PRA Group, 2018 Annual Report, *available at* https://ir.pragroup.com/download/PRA+Group+2018+Annual+Report_2018.pdf.

[58] *See* National Consumer Law Center, Fair Debt Collection 1.3.4.3 (9th ed. 2018).

[59] *See* National Consumer Law Center, Fair Debt Collection §§ 1.4.7.2, 1.4.7.3 (9th ed. 2018).

[60] *See* National Consumer Law Center, Fair Debt Collection § 1.4.7.3 (9th ed. 2018) (citing Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry T-9, T-10 (Jan. 2013)).

[61] *Id.*

[62] *Id.*

The FDCPA prohibits collectors from contacting consumers who state in writing that they want communications to cease,[63] and prohibits collectors from making repeated calls with the intent to annoy, abuse, or harass the called party.[64] Many credit card issuers, however, have a policy of allowing collectors to call consumers two to nine times *per account per day*.[65] Yet courts have found that as few as three to six calls *per week* can be harassing.[66]

As reflected in the vast number of consumer complaints about such conduct, the frequency of debt collection calls is overwhelming for consumers. Of the debt collection complaints received by the FTC in 2017, more than one-third of consumers complained that the debt collector called repeatedly (210,238 complaints) and continued to call even after being told to stop (227,917 complaints).[67] In the Bureau's 2017 survey of consumer experiences with debt collection, 63% of survey respondents who had been contacted about a debt "said they were contacted too often" and 36% complained that they were called after 9 p.m. or before 8 a.m.[68] In its 2018 FDCPA Annual Report, the Bureau found that complaints about communication tactics used when collecting debts, mainly by phone, were the third most common issue complained about in 2017.[69] The majority of consumers complaining about communication tactics reported frequent or repeated calls (52%), some involving several calls a day, while other calls were received consistently over several months.[70] Another 25% of communication complaints were for continued contact attempts despite requests to stop, and 4% were for calling outside of the FDCPA's assumed convenient calling hours of 8:00 a.m. to 9:00 p.m.[71] The number of communication tactic complaints involving frequent or repeated calls increased slightly in 2018,

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[63] 15 U.S.C. § 1692c(c).

[64] 15 U.S.C. § 1692d(5).

[65] Consumer Fin. Prot. Bureau, The Consumer Credit Card Market 141 (Aug. 2019), *available at* https://files.consumerfinance.gov/f/documents/201908_cfpb_card-act-report.pdf.

[66] *See, e.g.*, Ambroise v. American Credit Adjusters, L.L.C., 2016 WL 6080454 (S.D. Fla. Mar. 22, 2016) (fifteen calls over a three week period - around five calls per week); Lawrence v. American Med. Collection Agency, 2015 WL 12762024 (M.D. Fla. Nov. 16, 2015) (eighty-five calls over four months - around five calls per week); Schumacher v. Credit Prot. Ass'n, 2015 WL 5786139 (S.D. Ind. Sept. 30, 2015) (fifty-four calls over three months - around four calls per week); McGowan v. Credit Mgmt. L.P., 2015 WL 5682736 (D. Nev. Sept. 24, 2015) (seventy one calls over four months - around four calls per week); Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217 (D. Mass. 2014) (sixty calls over three months - around five calls per week); Turner v. Professional Recovery Servs., Inc., 956 F. Supp. 2d 573 (D.N.J. 2013) (one hundred-thirty-three calls in five months - around six calls per week); Sussman v. I.C. Sys., Inc., 928 F. Supp. 2d 784 (S.D.N.Y. 2013) (fifty calls over three months - around four calls per week); Garcia v. Resurgent Capital Servs., L.P., 2012 WL 1144239 (N.D. Cal. Apr. 4, 2012) (forty to fifty calls within three months - around three calls per week); Valentine v. Brock & Scott, P.L.L.C., 2010 WL 1727681 (D.S.C. Apr. 26, 2010) (eleven calls over nineteen days - around three calls per week).

[67]National Consumer Law Center, April Kuehnhoff & Ana Girón Vives, Consumer Complaints About Debt Collection: Analysis of Unpublished Data from the FTC 14-15 (Feb. 2019), *available at* https://www.nclc.org/issues/analysis-of-unpublished-data-ftc.html.

[68] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017).

[69] Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 16 (Mar. 2018)

[70] *Id.*

[71] *Id.*

to 55%.[72] This data highlights the ongoing harassment consumers experience with excessive phone calls and collectors' refusal to stop calling.

In addition to the harassment of excessive, repeated calls from debt collectors, consumers face abusive calls. These include debt collectors threatening to sue on time-barred debt,[73] collectors who prey on moral obligations of surviving family members to pay a deceased consumer's debt [74] and other false representations discussed in the next section.

8. Many Consumers Complain about False Representations Made by Debt Collectors.

Section 1692e of the FDCPA prohibits a debt collector from using false, deceptive, or misleading representations to collect any debt. Despite this, in the 2017 debt collection complaints compiled by the FTC, nearly one-third of consumers reported that the collector made false representations about the debt (192,704 complaints).[75] In the Bureau's survey of consumer experiences with debt collection published in 2017, 53% of respondents "indicated that the debt was not theirs, was owed by a family member, or was for the wrong amount."[76]

In the Bureau's 2018 Annual FDCPA Report, examiners found the most common debt collection complaint at 39% was for attempts to collect a debt not owed where: 1) the debt was not the consumer's debt (57% of complaints); 2) the debt had been paid (27%); 3) the debt was a result of identity theft (11%); or 4) the debt was discharged in bankruptcy (5%).[77] The Bureau found that 10% of complaints were for false statements or representations, of which 73% involved

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[72]Consumer Fin. Prot. Bureau, Annual Report 2019: Fair Debt Collection Practices Act 17 (Mar. 2019)

73 *See* Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011) (per curiam) (whether there is FDCPA violation turns on whether collection letter threatens litigation); Castro v. Collecto, Inc., 634 F.3d 779 (5th Cir. 2011) (while threatening to sue on time-barred debt can violate FDCPA, debt in this case was within state statute of limitations and shorter FCC statute did not apply); Freyermuth v. Credit Bureau Servs., Inc. 248 F.3d 767, 771 (8th Cir. 2001) (holding that "in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid"); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1489 (M.D. Ala. 1987) (debt buyer threatened to sue if bill was not paid).

[74] *See* Ryan Chittum, *A Super Journal Story on "Death-Debt" Collectors* (Dec. 5, 2011), *available at* https://archives.cjr.org/the_audit/a_super_journal_story_on_death.php; Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at:* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710; Alexander Eichler, *Woman Sues Capital One, Says Debt Collectors Went After Her Late Husband's Discharged Debt*, Huffington Post, June 27, 2012, *available at:* https://bit.ly/2lDYGr5.

[75] *See* April Kuehnhoff and Ana Girón Vives, National Consumer Law Center, Consumer Complaints About Debt Collection: Analysis of Unpublished Data from the FTC 15 (Feb. 2019), *available at* https://www.nclc.org/issues/analysis-of-unpublished-data-ftc.html.

[76] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[77] Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 15 (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf.

attempts to collect the wrong amount from the consumer.[78] Examiners from the Bureau also found other false representations by debt collectors that would violate the FDCPA, such as misleading consumers about the effect on their credit score of paying a debt in full rather than settling the debt for less than the full amount, and deceptively implying that authorized users of credit cards are responsible for a debt.[79] In the 2019 Annual Report, the Bureau again found that the most common complaints, at 40%, involved attempts to collect debts not owed, including that the debt was not their debt (53% of these complaints), was paid (23%), resulted from identity theft (20%) or was discharged in bankruptcy and no longer owed (4%).[80]

Senior populations are especially vulnerable to such misleading debt collection techniques.[81] From 2003 to 2015, debt for consumers aged 50 to 80 increased by 59%. In a December 2014 and March 2015 survey conducted by the Bureau, one in five senior participants aged 62 or older reported being contacted by debt collectors.[82] About 15% of U.S. residents are 65 or older, and almost 23% of that population is widowed.[83] There are debt collectors who specialize in attempting to collect the debts of deceased consumers. This so-called "death-debt" collection industry is rapidly growing.[84] Decedent-debt collectors prey on the vulnerability of surviving family members and impose a moral obligation, claiming that the deceased would want the bills paid, yet failing to disclose that the family member may not be personally liable for the debt.[85]

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[78] Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 16 (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf.

[79] Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 21 (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf.

[80] Consumer Fin. Prot. Bureau, Annual Report 2019: Fair Debt Collection Practices Act 16 (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf.

[81] *See* Consumer Fin. Prot. Bureau, Office of Fin. Prot. for Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf.

[82] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 17 tbl. 5 (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[83] U.S. Census Bureau, Older Americans Month: May 2019, *available at* https://www.census.gov/newsroom/stories/2019/older-americans.html. *See also* U.S. Census Bureau, 2018 and earlier Current Population Survey, Annual Social and Economic Supplements tbl. A1, Marital Status, *available at* https://www2.census.gov/programs-surveys/demo/tables/families/2017/cps-2017/taba1-all.xls?#; Table 2: Projected age and sex composition of the population at https://www2.census.gov/programs-surveys/popproj/tables/2017/2017-summary-tables/np2017-t2.xlsx.

[84] *See* Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at:* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710. *See also* Michelle L. Maynard, Senior Helpline Attorney, Legal Services for the Elderly (Augusta, Me.), *Debt Collectors Target Survivors of Deceased Debtors* (Sept. 5, 2014), *available at* https://legalhotlines.org/debt-collectors-target-survivors-of-deceased-debtors/.

[85] *See* Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at:* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710. *See also* Arielle

Oftentimes, the calls and letters are so persistent that relatives will pay the debt just to get the collector to stop contacting them.[86]

9. The Surge of Debt Collection Lawsuits Based on Insufficient Review and Supporting Documentation Has Caused Significant Harm to Consumers.

In many courts, debt buyers and their attorneys file more suits than any other plaintiff.[87] For example, in 2011 alone, Pressler and Pressler, a collections law firm in New Jersey, had one attorney who filed about 69,000 lawsuits, mainly for the debt buyers Encore Capital and New Century Financial Services.[88] The Pressler attorney spent about four seconds reviewing each lawsuit, reviewing between 300 and 1,000 complaints a day.[89] As the Bureau's enforcement actions have shown, this conduct is not uncommon; many collection attorneys provide only a cursory review of pleadings filed with the court, let alone any supporting documentation.[90] Others also fail to obtain any supporting, admissible evidence to prove that a consumer owes a particular debt.

Filing without review of original, account-level documentation has led to inaccurate, false, and misleading lawsuits being brought against mostly unrepresented consumers, who are then left with the burden of discovering and challenging the misrepresentations.[91] In about 99% of the suits brought by Pressler in 2011, defendants did not have attorneys, which is typical of

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Pardes, *Debt Collectors Make a Killing on the Debts of the Dead*, Vice, Feb. 10, 2016, *available a*t https://www.vice.com/en_us/article/8gk35k/debt-collectors-make-a-killing-on-the-debts-of-the-dead; Alexander Eichler, *Woman Sues Capital One, Says Debt Collectors Went After Her Late Husband's Discharged Debt*, Huffington Post, June 27, 2012, *available at* https://bit.ly/2lDYGr5.

[86] *See* Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at:* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710.

[87] *See* Paul Kiel, ProPublica, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine* (May 5, 2016), *available at* https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine.

[88] *See In re* Pressler & Pressler, L.L.P., File No. 2016-CFPB-0009, Consent Order at 12- 15 (Apr. 25, 2016). *See also* Bureau of Consumer Fin. Prot. v. Forster & Garbus, L.L.P., Civ. Action No. 2:19-cv-02928, Complaint at paras. 12, 15, 21, 26, 27, 28 (E.D.N.Y. May 17, 2019) (attorneys reviewed each complaint for only a minute or two before filing); Consumer Fin. Prot. Bureau v. Hanna & Assocs., Civ. Action No. 1:14-cv-02211, Consent Order (N.D. Ga. Dec. 28, 2015) (attorneys reviewed pleadings for no more than one minute before reviewing and signing, and one attorney signed an average of 1,300 collection suits each week).

[89]*. In re* Pressler & Pressler, L.L.P., File No. 2016-CFPB-0009, Consent Order (Apr. 25, 2016).

[90] *See* Bureau of Consumer Fin. Prot. v. Forster & Garbus, L.L.P., Civ. Action No. 2:19-cv-02928, Complaint at paras.15, 12, 21, 26, 27, 28 (E.D.N.Y. May 17, 2019) (attorneys reviewed each complaint for only a minute or two before filing); Consumer Fin. Prot. Bureau v. Hanna & Assocs., Civ. Action No. 1:14-cv-02211, Consent Order (Dec. 29, 2015) (attorneys reviewed pleadings for no more than one minute before reviewing and signing and one attorney signed an average of 1,300 collection suits each week).

[91] *See* Paul Kiel, ProPublica, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine* (May 5, 2016), *available at* https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine.

collection suits.[92] In a study performed in Maryland, for example, only 2% of consumers in Baltimore County had attorneys, whereas 98% of the plaintiffs had attorneys in debt collection actions.[93] Debt collection attorneys know that their careless filings will probably not be challenged, as many low-income, unrepresented consumers fail to appear in collection lawsuits, resulting in default judgments.[94] Debt collectors rely on court rules that allow them to obtain default judgments in an overwhelming majority of these lawsuits, often without presenting any evidence.[95]

10. The Consequences of Default Judgments on Consumers is Devastating.

The consequences of these default judgments are devastating. Once a debt collector has a judgment in hand, it has access to powerful remedies to collect the judgment. Although the specific remedies available vary from state to state, they can include wage and bank account garnishment, the placement of liens on the consumer's home, and levying on personal property. The judgment in many states is valid for a decade or more[96] and a collector can seek garnishment at any time during that period (if available under state law). A 2016 study by ADP, the nation's largest payroll services provider, found that one in 10 employees in the prime working ages of 35 to 44 had their wages garnished for debts, including consumer debts such as credit cards, medical bills and student loans.[97] In Maryland, for example, 76,611 consumers faced garnishment in 2016, with 48,868 as wage garnishments and 27,744 as bank account seizures.[98] Many times, collectors will take all of the cash in a bank account to cover the debt, which can leave a consumer unable to pay rent, buy groceries, or buy life-saving medicine.

These tactics hit lower-income consumers the hardest. Many lower-income consumers in such a predicament originally defaulted on the debt due to unemployment, illness, divorce, or other unanticipated hardships, so they have little to no financial cushion when their bank accounts are

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[92] *See id. See also* National Consumer Law Center, Fair Debt Collection § 1.4.9.4 (9th ed. 2018).

[93] Robyn Dorsey & Marceline White, Maryland Consumer Rights Coalition, *No Exit: How Maryland's Debt Collection Practices Deepen Poverty & Widen The Racial Wealth Gap* 12 tbl. 2 (June 2018), *available at* http://www.marylandconsumers.org/penn_station/folders/about/annual_report/No_Exit_Report.pdf.

[94] *Id.* at 12. *See also* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018), *available at* https://library.nclc.org/ca/03060402.

[95] Robyn Dorsey & Marceline White, Maryland Consumer Rights Coalition, *No Exit: How Maryland's Debt Collection Practices Deepen Poverty & Widen The Racial Wealth Gap* 12 (June 2018), *available at* http://www.marylandconsumers.org/penn_station/folders/about/annual_report/No_Exit_Report.pdf..

[96] National Consumer Law Center, Collection Actions § 3.6.4.3 (4th ed. 2017), *available at* https://library.nclc.org/ca/03060402.

[97] ADP Research Inst.,*The U.S. Wage Garnishment Landscape: Through the Lens of the Employer* (2017), *available at* https://www.adp.com/resources/articles-and-insights/articles/t/the-us-wage-garnishment-landscape-through-the-lens-of-the-employer.aspx. *See also* ProPublica, Getting Sued Over Debt: Readers Tell Their Stories (Sept. 15, 2014), *available at* https://www.propublica.org/article/getting-sued-over-debt-readers-tell-their-stories.

[98] Robyn Dorsey & Marceline White, Maryland Consumer Rights Coalition, *No Exit: How Maryland's Debt Collection Practices Deepen Poverty & Widen The Racial Wealth Gap* 16 tbl. 5 (June 2018), *available at* http://www.marylandconsumers.org/penn_station/folders/about/annual_report/No_Exit_Report.pdf (the State of Maryland can also seize an individual's tax return to repay a state-owed debt).

cleaned out.[99] "The average number of garnishments and garnishment rate for all types of garnishment is highest for those earning between $20,000 and $60,000, with more than 60% of employees with a garnishment in this income range."[100] Garnishments can also lead to overdraft fees that can leave a consumer in a several-hundred-dollar hole and a downward financial spiral.[101]

11. Debt Collectors Continue to Attempt to Collect, Threaten to Sue on, and Sue on Time-Barred Debt.

With the emergence of debt buyers has also come an increase in attempts to collect on debts that have aged beyond the statute of limitations for collections.[102] Accounts generally reach the statute of limitations after three to fifteen years of delinquency, depending on the state and type of debt.[103] Most states' statutes of limitations are between three and six years, and no state's statute of limitations is longer than fifteen years.[104] A study by the FTC found that, of the debts that were purchased from other debt buyers, 32.1% were between three and six years old, 27.5% were between six and fifteen years old, and 2.6% were over fifteen years old.[105] The same study also found that debt buyers are more likely to have third-party debt collectors collect on older debt that is six to fifteen years old, compared to less than three years old.[106] A Bureau report about online debt sales found that the median age of the debt in a portfolio was five years, with several portfolios having an average age of nine or more years.[107]

Unlike original creditors, debt buyers have little motivation to cultivate future transactions with consumers and are motivated mainly by their financial stake in the purchased debts.[108] Because of this, debt buyers tend to be more aggressive than creditors in attempting to collect

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[99] *See* National Consumer Law Center, Consumer Debt Collection Facts (Feb. 2018), *available at* https://www.nclc.org/images/pdf/debt_collection/Debt-Collection-Facts-2016.pdf. *See also* National Consumer Law Center, Fair Debt Collection § 1.3.1.1 (9th ed. 2018).

[100] ADP Research Inst., *The U.S. Wage Garnishment Landscape: Through the Lens of the Employer* 9 (2017), available at https://www.adp.com/resources/articles-and-insights/articles/t/the-us-wage-garnishment-landscape-through-the-lens-of-the-employer.aspx.

[101] Paul Kiel, ProPublica, *Old Debt, Fresh Pain: Weak Laws Offer Debtors Little Protection* (Sept, 16, 2014), *available at* https://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection.

[102] Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. Rev.. 327, 330-31 (2014).

[103] *Id.*

[104] National Consumer Law Center, Collection Actions § 3.6.4.3 (4th ed. 2017). *See also* Paul Kiel, ProPublica, *Old Debt, Fresh Pain: Weak Laws Offer Debtors Little Protection* (Sept, 16, 2014), *available at* https://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection.

[105] Federal Trade Comm'n, The Structure and Practices of the Debt Buying Industry 43 (Jan. 2013), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[106] *Id.*

[107] Consumer Fin. Prot. Bureau, Market Snapshot: Online Debt Sales (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Online-Debt-Sales-Report.pdf.

[108] Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. Rev. 327, 331 (2014).

on debts, including debts that are time-barred.[109] Likewise, many third-party debt collectors work on a contingency basis where their fees increase with the age of the debt, creating incentives for more aggressive collection tactics for older debts.[110]

Courts have found that the FDCPA prohibits debt collectors, including debt buyers, from suing or threatening to sue on debt that is time-barred. [111] Yet some debt collectors continue to sue or threaten to sue on time-barred debt. The Bureau found, in its 2018 FDCPA Annual Report, that 11% of complaints received were for collectors taking or threatening to take legal or other negative action, with 26% of those complaints involving a threat to sue on an old debt.[112] The majority of circuit courts, and many lower courts, have imposed or implied a strict liability standard so that knowledge or intent is not required to find a debt collector violated the FDCPA for suing, threatening to sue, or misrepresenting the legal status of a time-barred debt.[113]

Collecting on these "zombie debts" exposes consumers to harmful errors, as older debts often lack documentation to prove that the amount of the debt is correct and that the consumer actually owes it. Consumers themselves also typically lack documentation for these older debts. Such collections also cause substantial injury to consumers, particularly the least sophisticated consumers, who do not understand that the statute of limitations has run, that paying on the debt can restart the clock on the debt (in many states), or that they have a defense to a legal action. Depending on the state, collectors can revive and enforce time-barred debts by persuading consumers to pay a portion of these debts, acknowledge these debts, or enter into new payment agreements.[114] In an effort to get paid on a debt that is legally unenforceable, debt collectors will offer to "settle" the time-barred debts for a series of small payments that will amount to a fraction of the amount owed, usually failing to disclose to the consumer that a payment may revive the statute of limitations on the debt and permit judicial recovery of the entire balance for many years to follow, or that the debt is no longer enforceable in court. [115] Consumers faced with a lawsuit are likely to believe that the allegations in the complaint are accurate and that there is a valid claim against them for the debt.[116] As such, they often end up paying on debts they otherwise would not pay, with money that would have gone toward food, rent, and other necessities. Or, believing that they have no defenses, they may fail to appear in the action, resulting in a default judgment against them.[117] As discussed above, this leads to a series of devastating consequences for the consumer.

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[109] *Id.*

[110] Marc C. McAllister, *Ending Litigation and Financial Windfalls on Time-Barred Debts*, 75 Wash. & Lee L. Rev. 449, 453 (2018).

[111] *See* Discussion of Proposed § 1006.26 in § 9, *infra*.

[112] Consumer Fin. Prot. Bureau, Annual Report 2018: Fair Debt Collection Practices Act 15-16,, tbl. 1 (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf.

[113] *Id.*

[114] Neil L. Sobol, Protecting Consumers from Zombie-Debt Collectors, 44 N.M. L. Rev. 327 (2014)

[115] Marc C. McAllister, *Ending Litigation and Financial Windfalls on Time-Barred Debts*, 75 Wash. & Lee L. Rev. 449, 455 (2018).

[116] See Consumer Fin. Prot. Bureau v. Hanna & Assocs., 114 F. Supp. 3d 1342, 1366 (N.D. Ga. July 14, 2015)

[117] *See* Consumer Fin. Prot. Bureau v. Hanna & Assocs., 114 F. Supp. 3d 1342, 1366-67 (N.D. Ga. July 14, 2015)

12. Consumers Complain about a Lack of Written Notification about the Debt.

Pursuant to § 1692g of the FDCPA, debt collectors are required, within five days after the initial communication with a consumer, to provide the consumer with a written notice informing them, among other things, of their right to dispute the debt, unless this information was contained in the initial communication or the consumer has paid the debt. In the Bureau's 2019 Report, 20% of consumer debt collection complaints involved written notifications about the debt, the second most common issue complained about by consumers.[118] Of the complaints related to written notification, consumers reported that they did not receive enough information to verify the debt (72%), they did not receive a notice of their right to dispute it (25%), or the notification did not disclose that it was an attempt to collect a debt (3%).[119] The numbers were generally the same in the Bureau's 2018 Report, with 22% of complaints involving written notification about the debt, 72% of which involved not receiving enough information to verify the debt.

13. Mental Health Issues Plague Consumers Facing Debt Collection.

Indebtedness has a direct negative impact on psychological well-being and can lead to depression, anger, and anxiety.[120] High amounts of debt are associated with higher rates of stress and depression.[121] The relationship between indebtedness and poor mental health remains significant even after controlling for socioeconomic status and other factors.[122] Several

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[118] Consumer Fin. Prot. Bureau, Annual Report 2019: Fair Debt Collection Practices Act 16 (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf

[119] *Id*. at 17.

[120] *See* Sabri Ben-Achour, Marketplace, *How debt may take a toll on mental health* (une 5, 2019), *available at* https://www.marketplace.org/2019/06/05/the-other-dark-side-of-debt-psychological-wellbeing/ (discussing research of Patricia Drentea, professor at the University of Alabama at Birmingham).

[121] *See* Kristen Kuchar, The Simple Dollar, *The Emotional Effects of Debt* (July 23, 2019), *available at* https://www.thesimpledollar.com/the-emotional-effects-of-debt/ (citing Social Science & Medicine's August 2013 study entitled *The high price of debt: household financial debt and its impact on mental and physical health* by Elizabeth Sweet, Arijit Nandi, Emma K. Adam, & Thomas McDade).

[122] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Aging & Health 673, 685 (2012) ("Indebtedness increases symptoms of depression, anxiety, and anger, above and beyond the influences of income, wealth, education, occupational status, employment, various controls, and earlier mental health."), K. A. McLaughlin et al., *Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis*, 42 Psychol. Med. 1441, 1444 (2012) ("The association between foreclosure and symptoms of depression and anxiety was observed even after rigorous adjustment for sociodemographics, prior history of psychiatric disorder, and exposure to other financial stressors, including job loss."), and R. Jenkins et al., *Debt, Income, and Mental Disorder in the General Population*, 38 Psychol. Med. 1485, 1485 (2008) ("The more debts people had, the more likely they were to have some form of mental disorder, even after adjustment for income and other sociodemographic variables.")).

studies have shown that debt is a risk factor for depression,[123] anxiety,[124] substance abuse,[125] and mental disorders.[126] Twenty nine percent of people with high debt stress also report severe anxiety.[127] The psychological burdens of carrying debt—including the fear of never being able to pay off debt and the stress of being contacted by collectors—lead to feelings of hopelessness, shame, and despair.[128] In addition, debt strains relationships and makes social support harder

[123] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Ageing & Health 673 (2012) (surveying 1463 adults in Florida and concluding that indebtedness is associated with symptoms of depression), K. A. McLaughlin et al., *Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis*, 42 Psychol. Med. 1441 (2012) (surveying 1547 adults in Detroit and observing an association between home foreclosure and clinical symptoms of major depression), and Craig Evan Pollack & Julia Lynch, *Health Status of People Undergoing Foreclosure in the Philadelphia Region*, 99 Am. J. Public Health 1833 (2009) (studying 250 Philadelphia-area residents undergoing mortgage foreclosure and finding that 36.7% met the screening criteria for major depression)).

[124] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Patricia Drentea, *Age, Debt and Anxiety*, 41 J. Health & Soc. Behav. 243 (2000) (surveying 1037 Ohio adults and finding that anxiety is associated with being in default and that anxiety increases as the ratio of credit card debt to income grows), Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Ageing & Health 673 (2012), and K. A. McLaughlin et al., *Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis*, 42 Psychol. Med. 1441 (2012)).

[125] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing R. Jenkins et al., *Debt, Income, and Mental Disorder in the General Population*, 38 Psychol. Med. 1485, 1490 (2008) ("The more debts people had, the more likely they were to have . . . alcohol dependency and drug dependency.")).

[126] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Elizabeth Sweet, Arijit Nandi, Emma K. Adam, & Thomas W. McDade, *The High Price of Debt: Household Financial Debt and its Impact on Mental and Physical Health*, 91 Soc. Sci. & Med. 94, 95 (2013) ("several empirical studies have found that financial strains such as personal debt and home foreclosures are strong predictors of depression, general psychological distress, mental disorders, suicidal ideation and behavior"), Thomas Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013) ("Odds ratios demonstrate more than a three-fold risk of a mental disorder in those with debt, or alternatively a three-fold risk of debt in those with a mental disorder."), and R. Jenkins et al., *Debt, Income, and Mental Disorder in the General Population*, 38 Psychol. Med. 1485, 1490 (2008) ("People with six or more separate debts had a six-fold increase in mental disorder after adjustment for income."); Simon Hatcher, *Debt and Deliberate Self-Poisoning*, 164 British J. of Psychiatry 111 (1994) ("Psychiatrists were more likely to diagnose mental illness in those in debt.")).

[127] *See* Kristen Kuchar, The Simple Dollar, *The Emotional Effects of Debt* (July 23, 2019), *available at* https://www.thesimpledollar.com/the-emotional-effects-of-debt/ (citing January 2012 study by Dr. John Gathergood of the University of Nottingham entitled *Debt and Depression: Causal Links and Social Norm Effects on the correlation between carrying debt and any depression and anxiety associated with it*).

[128] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Aging & Health 673, 676 (2012) ("Indebtedness has negative mental health consequences for various reasons, possibly including the perception of not being able to get out of debt or the potential shame and anxiety resulting from defaulting on loans or declaring personal bankruptcy") and H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 Psychol. Med. 771 (2011) ("Feelings of hopelessness partially mediated the relationship between debt and suicidal ideation.")).

to come by.[129] Even the children of indebted adults show impaired socioemotional development.[130]

Indebtedness has also been shown to be a risk factor for suicidal ideation[131] and suicide completion.[132] A meta-analysis of several studies conducted in the United States, Hong Kong, Finland, and the United Kingdom found that people who commit suicide are nearly eight times more likely to have financial debt.[133] A study of adults in the UK found that people in debt were twice as likely to contemplate suicide.[134] Suicidal ideation is common enough that debt collectors frequently report encountering suicidal customers. A 2017 survey of debt collection organizations found that one in four frontline staff members reported having spoken to at least one customer in the past year who seemed serious about committing suicide.[135] A 2016 study by the Federal Reserve Board of Atlanta found that "that individuals with better credit risk and smaller amounts of delinquent debt have a lower probability of mortality."[136]

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[129] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Aging & Health 673, 674 (2012) (arguing that worry about debt leads to "externalizing behaviors, such as irritability and conflict with others, and a general state of anger")).

[130] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Lawrence M. Berger & Jason N. Houle, *Parental Debt and Children's Socioemotional Well-Being*, 137 Pediatrics 1 (2016) ("unsecured debt is negatively associated with socioemotional development, which may reflect limited financial resources to invest in children and/or parental financial stress")).

[131] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 Psychol. Med. 771, 776 (2011) (finding a "strong association of debt and suicidal ideation" after controlling for various sociodemographic and lifestyle factors) and J. Hintikka et al., *Debt and Suicidal Behaviour in the Finnish General Population*, 98 Acta Psychiatr. Scand. 493, 493 (1998) ("difficulties in repaying debts were found to be a factor independently associated with suicidal ideation")).

[132] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013) (finding that, across the four autopsy studies, 31% of suicide completers had debt, whereas only 5% of control group individuals had debt), and Simon Hatcher, *Debt and Deliberate Self-Poisoning*, 164 British J. of Psychiatry 111 (1994) (examining British hospital records, finding that 37% of self-harmers had problem debt, and concluding that individuals with debt were "more likely to harm themselves with greater suicidal intent and, after the episode, to report more symptoms of depression and hopelessness")).

[133] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing Thomas D. Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013) (pooling together several studies and concluding that suicide completers have "nearly an eight-fold risk of debt")).

[134] *See* National Consumer Law Center, Fair Debt Collection § 3.6.4.2 (9th ed. 2018) (citing H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 Psychol. Med. 771 (2011) ("Those in debt were twice as likely to think about suicide, after controlling for sociodemographic, economic, social and lifestyle factors.")).

[135] Chris Fitch et al., Univ. of Bristol Personal Fin. Research Ctr., *Vulnerability: A Guide for Debt Collection* 54 (2017).

[136] Laura M. Argys, Andrew I. Friedson, & M. Melinda Pitts, Fed. Reserve Bank of Atlanta, *Killer Debt: The Impact of Debt on Mortality*, Working Paper 2016–14 (Nov. 2016).

There is also a stigma around debt that can make people feel ashamed or guilty.[137] "Those who feel the strongest sense of shame and personal failure in turn suffer the worst health consequences."[138] That sense of shame is not generally deserved, however, as most debt is due to basic living expenses such as food, housing, utilities, and education, and, for many people, using a credit card is their only option to pay for necessities.[139] Feelings of shame and anxiety over the debt can also perpetuate further health problems and cause a downward spiral for consumers that is difficult to escape. Many are so overwhelmed that they go into a state of denial or inertia about the debt and fail to open bills or bank statements, answer the phone, or respond to legal documents.[140] Feelings of anxiety and shame can also lead to problems with a marriage, partnership, or family.[141] One partner may resent or blame the other for spending habits that led to the debt or for not making enough money to pay the debt. [142] Arguments about money are the top predictor of divorce and can lead to severe effects on a household's psychological well-being.[143] Abusive and harassing attempts to collect on the debt can exacerbate this stress, anxiety, and shame that cause harm to consumers and their families.

III. The CFPB Lacks General Authority to Exempt Debt Collectors from or to Weaken the FDCPA's Statutory Protections.

The FDCPA's purpose 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."[144]

The CFPB's source of rule writing authority in the FDCPA is 15 U.S.C. § 1692*l*(d), which states:

> Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010,[145] the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

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137 See Sabri Ben-Achour, Marketplace, *How debt may take a toll on mental health* (June 5, 2019), *available at* https://www.marketplace.org/2019/06/05/the-other-dark-side-of-debt-psychological-wellbeing/.

138 *Id.* (quoting Elizabeth Sweet, professor of anthropology at the University of Massachusetts Boston).

139 *Id.*

140 *See* Kristen Kuchar, The Simple Dollar, *The Emotional Effects of Debt* (July 23, 2019), *available at* https://www.thesimpledollar.com/the-emotional-effects-of-debt/.

141 *See id*.

142 *Id.*

143 *Id.*(citing Sonya Britt, assistant professor of family studies at Kansas State University and The Royal College of Psychiatrists, whose study, published in 2013, revealed that early financial arguments are a predictor of divorce; study is available at https://phys.org/news/2013-07-reveals-early-financial-arguments-predictor.html).

144 15 U.S.C. § 1692(e).

145 Section 1029(a) of the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act), 12 U.S.C. § 5519(a), limits the CFPB's authority over

The CFPB's authority is to implement the FDCPA's protections for consumers, including its purpose of protecting consumers and competitors from debt collectors who use abusive practices.

Notably, the language "may prescribe rules with respect to the collection of debts by debt collectors" does not grant the CFPB the authority to grant debt collectors exemptions, adjustments, or differentiations from particular statutory provisions. In the Truth in Lending Act and other statutes, by contrast, Congress explicitly gave the CFPB authority to implement regulations that "contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[146]

The only exemption authority in the FDCPA is in 15 U.S.C. § 1692*o*, which specifically instructs the Bureau to issue regulations that:

> 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.

In addition, the E-SIGN Act has narrowly circumscribed statutory exemptions that we discuss in more detail in § 13.1.3 of our comments.

As discussed throughout these comments, in many places the proposed rule exempts collectors from, or modifies and weakens, the FDCPA's protections. The CFPB does not have that authority, and to the extent it purports to relieve debt collectors of their obligation to comply with the statute, the rule is not in accordance with law.

IV. Comments on Specific Proposals

1. Introduction

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certain motor vehicle dealers. It does not limit the CFPB's authority over third-party debt collectors collecting auto loan debt.

[146] 15 U.S.C. § 1604(a). *See also* 15 U.S.C. § 1691b(a) ("The Bureau shall prescribe regulations to carry out the purposes of [the Equal Credit Opportunity Act]. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith."); 15 U.S.C. § 1693b(c) ("Regulations prescribed [under the Electronic Fund Transfer Act] may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of electronic fund transfers or remittance transfers, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.").

The previous sections of these comments addressed general matters: a summary of our comments as a whole, background on the FDCPA and the persistent problems with unfair, deceptive, and abusive debt collection, and the limits of the CFPB's statutory authority. The sections that follow address the fifteen proposed rules one by one, along with the proposed comments that relate to each rule. The final section addresses the Bureau's proposed Introduction to the Official Interpretations.

2. § 1006.1 Authority, purpose, and coverage

2.1 § 1006.1(a): Authority

Section 1006.1(a) of the proposed rule lists the statutes on which the CFPB is relying for authority to promulgate the rule: the Fair Debt Collection Practices Act (FDCPA), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), and the Electronic Signatures in Global and National Commerce Act (E-SIGN). As discussed in Section III, *supra*, and throughout these comments, many aspects of the proposed rule go beyond the authority provided by these statutes.

2.2 § 1006.1(b): Purpose

The FDCPA was enacted in response to "abundant evidence of the use of abusive, deceptive, and unfair practices by many debt collectors"[147] where Congress found existing laws inadequate to protect consumers.[148] The FDCPA contains a statement outlining the purposes of the FDCPA,[149] and the CFPB has adopted a slightly modified version of that as the first sentence of this section discussing the purpose of the proposed rule. Congress also clearly identified "invasions of individual privacy" as a harm that the FDCPA was intended to address in § 1692(a) and, indeed, did address in numerous sections of the statute.[150]

[147] 15 U.S.C. § 1692(a). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695 ("committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem").

[148] 15 U.S.C. § 1692(b). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695 ("[FDCPA's] purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors").

[149] 15 U.S.C. § 1692(e) ("It is the purpose of this subchapter 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.").

[150] *See, e.g.,* 15 U.S.C. §§ 1692b, 1692c(b), 1692d(3), 1692d(4), 1692f(7), 1692f(8). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695 ("In addition, this legislation adopts an extremely important protection recommended by the National Commission on Consumer Finance…: 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..."); 122 Cong. Rec. H7, 308 (daily ed. July 19, 1976) (remarks of Rep. Annunzio on H.R. 13720) ("The bill's controls on communication are quite reasonable and strike a fair balance between the debt collector's need to contact and the consumer's right to privacy and right to be free from harassment.").

Consistent with the CFPB's Dodd-Frank authority under 12 U.S.C. § 5532, the purpose section then discusses ensuring that "certain features of debt collection are disclosed fully, accurately, and effectively to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with debt collection." Consistent with the CFPB's Dodd-Frank authority under 12 U.S.C. §§ 5512 and 5514, the purpose section also discusses the purpose of its record retention requirements as enabling the Bureau "to administer and carry out the purposes of the FDCPA and the Dodd-Frank Act."

2.3 § 1006.1(c): Coverage

Proposed § 1006.1(c) identifies four sections,[151] whose contents are discussed in more detail below, which are issued under the CFPB's Dodd-Frank authority. The Bureau is proposing that a parallel prohibition be adopted under the Bureau's FDCPA authority in only two of these four sections.[152] As a result, the requirements in the remaining two sections[153] will apply only to covered debt collectors that are collecting consumer financial product or service debt. This means that these requirements will not apply to some consumer debts (*e.g.*, medical debts), and that even where the requirements do apply, violations will not be actionable under the FDCPA's private right of action. The Bureau does not explain why only two of the sections issued under Dodd-Frank authority have parallel sections issued under FDCPA authority.

The Bureau should issue the remaining two provisions under both statutes to avoid confusion and to better protect consumers. Issuing these provisions under both Dodd-Frank and FDCPA

[151] These sections are:

- **§ 1006.14(b)(1)(ii):** "Identification and prevention of Dodd-Frank Act unfair act or practice. With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in § 1006.2(f), it is an unfair act or practice under section 1031 of the Dodd-Frank Act to place telephone calls or engage any person in telephone conversation repeatedly or continuously in connection with the collection of such debt, such that the natural consequence is to harass, oppress, or abuse any person at the called number. To prevent this unfair act or practice, such a debt collector must not exceed the frequency limits in paragraph (b)(2) of this section."
- **§ 1006.30(b)(1)(ii):** "Identification of Dodd-Frank Act unfair act or practice. With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in § 1006.2(f), it is an unfair act or practice under section 1031 of the Dodd-Frank Act to sell, transfer, or place for collection a debt described in paragraph (b)(1)(i) of this section."
- **§ 1006.34(c)(2)(iv):** "If the debt collector is collecting consumer financial product or service debt as defined in § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date."
- **§ 1006.34(c)(3)(iv):** "If the debt collector is collecting consumer financial product or service debt as defined in § 1006.2(f), a statement that informs the consumer that additional information regarding consumer protections in debt collection is available on the Bureau's website at https://www.consumerfinance.gov."

[152] These two sections are: § 1006.14(b)(1)(ii), which is proposed pursuant to the Bureau's Dodd-Frank authority and is paralleled by § 1006.14(b)(1)(i), which is proposed pursuant to its FDCPA authority; and § 1006.30(b)(1)(ii), which is proposed pursuant to the Bureau's Dodd-Frank authority and is paralleled by § 1006.30(b)(1)(i), which is proposed pursuant to its FDCPA authority.

[153] These two sections are §§ 1006.34(c)(2)(iv) and 1006.34(c)(3)(iv).

authority would eliminate concerns about their inapplicability to certain types of debts and about the lack of a private right of action.

***Recommendation*: The Bureau should issue §§ 1006.34(c)(2)(iv) and (3)(iv) under both its Dodd-Frank authority and the FDCPA to avoid confusion and to better protection consumers.**

3. § 1006.2 Definitions

Proposed § 1006.2 sets forth various definitions. This section discusses six of the proposed definitions.

3.1 § 1006.2(b): Attempt to communicate

The CFPB has proposed the creation of a new definition for "attempt to communicate," a phrase that that is not found in the FDCPA.

The proposed definition explicitly includes limited-content messages as defined by § 1006.2(j). As discussed in our comments in § 3.6, *infra*, regarding limited-content messages, we object to the Bureau's creation of this category of messages and its proposal to exempt them from critical FDCPA protections. Nonetheless, we agree that a message that meets the proposed definition of a limited-content message is, at a minimum, an attempt to communicate. Categorizing these messages as "attempts to communicate" and prohibiting certain conduct when a debt collector communicates or attempts to communicate (*e.g.,* § 1006.6(b)) results in preserving some of the FDCPA protections that should apply to these messages. In our comments in § 3.6.1, *infra*, we note additional sections in the proposed rule that should apply to attempts to communicate as well as communications (*e.g.,* § 1006.22(f)(1)).

3.2 § 1006.2(d): Communicate or communication

Proposed § 1006.2(d) is a definition of "communicate or communication." The first sentence of the definition reads, "[c]ommunicate or communication means the conveying of information regarding a debt directly or indirectly to any person through any medium." This language tracks the statutory definition of "communicate" in 15 U.S.C. § 1692a(2) of the FDCPA. However, the Bureau is proposing to add a second sentence to the definition:

> A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector provides only a limited-content message, as defined in paragraph (j) of this section.

The proposed exemption created by this new sentence fundamentally contradicts the broad definition of communication in 15 U.S.C. § 1692a(2), which includes "the conveying of information regarding a debt *directly or indirectly*."[154] Additionally, because certain requirements

[154] 15 U.S.C. § 1692a(2) (emphasis added). *See also* National Consumer Law Center, Fair Debt Collection § 4.6.4 (9th ed. 2018) (discussing court interpretation of the term "communication").

of the proposed regulation only apply to "communications" and not "attempted communications" (*e.g.,* §1 006.6(d), prohibiting third-party disclosures, and § 1006.22(f)(1), prohibiting communication by postcard), exempting certain types of debt collector contacts from coverage under the definition of communications also limits the scope of consumer protections. As discussed more fully in § 3.6.2.1, *infra*, creating these exemptions is beyond the Bureau's authority. The Bureau should eliminate this new sentence from the definition.

Proposed Comment 2(d)-1 provides a broad interpretation of the phrase "any medium" in the definition of communication, which recognizes that collection communications (or attempted communications) may come from a variety of communication channels.

Recommendation: **The Bureau should delete the second sentence from the proposed definition of "communication."**

3.3 § 1006.2(e): Consumer

3.3.1 Introduction

Proposed § 1006.2(e) would add the clause "whether living or deceased" to the definition of "consumer" in 15 U.S.C. § 1692a(3), so that "consumer" would "mean[] any natural person, whether living or deceased, obligated…to pay any debt." This portion of the comments focuses on this change. Our comments regarding § 1006.6(a) in § 4.1, *infra*, discuss the proposed changes to the separate definition of consumer for purposes of proposed §§ 1006.6 and 1006.14(h). That discussion also addresses the particularly harmful effect on decedent debt of the proposed addition of "whether living or deceased" to the general definition of "consumer."

3.3.2 Expanding the definition of "consumer" to be applicable for the entire regulation is confusing and overly broad.

The word "consumer" appears over 200 times in the proposed regulation. While the addition of the clause "whether living or deceased" to the definition of "consumer" may provide helpful clarification in limited areas of the proposed regulation, applying it to the term "consumer" throughout is overly broad and will result in substantial confusion.

There are many areas where it would not make sense to define "consumer" to include a deceased person. These include provisions governing debt collectors' communications with consumers under § 1006.6. For example, a debt collector cannot communicate with a deceased person at all, let alone by engaging in such communications at times "inconvenient" for the deceased under § 1006.6(b)(1). Nor does a deceased person have legal representation or a place of employment under § 1006.6(b)(2) and (3). Defining a deceased person as a consumer for the entirety of the proposed rule would also be harmful to consumers facing collection of decedent debt, as discussed in our comments regarding Proposed § 1006.6(a) in § 4.1, *infra*.

3.3.3 Expanding the definition for the entire statute is unnecessary and is not supported by the authority the Bureau cites.

The Bureau posits that expanding the definition of "consumer" to include deceased consumers is necessary to clarify who should receive various notices regarding decedent debt. But there is already sufficient clarification as to whom debt collectors may contact to collect a deceased debt. The plain language of both § 1692c(d) of the FDCPA and Proposed § 1006.6(a)(4) make it clear that communications can be directed to the executor or administrator of the estate of a deceased consumer. Proposed Comment 6(a)(4)-1 would clarify (and expand) these terms.[155] Under Proposed § 1006.6(a)(5), a consumer would also include a "confirmed successor in interest." And, as discussed in §§ 11.1.2 and 12.1.2, *infra*, the Bureau also proposes clarification in Comments 1006.34(a)(1)-1 and 1006.38-1 that a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of Proposed §§ 1006.34(a)(1) and 1006.38 regarding validation notices and disputes. These existing and proposed provisions (some of which are themselves overbroad, as discussed in our comments regarding § 1006.6(a) in § 4.1, *infra*), render superfluous the proposed change to the definition of "consumer" in § 1006.2(e).

The Bureau states that the additional "whether living or deceased" language is "consistent with a modern trend in the law that favors recognizing, as a default, the continued existence of a natural person after death."[156] But as authority for this proposition the Bureau cites only to statutes and court rules that deal with whether a cause of action for or against a person survives the person's death.[157] This is an entirely separate question from the question of whether "consumer" is defined to include a deceased individual, and depends on factors such as whether the statute under which the claim is brought is remedial or penal. Moreover, when a cause of action survives a litigant's death, statutes and court rules typically require some other party, such as the executor or administrator of the decedent's estate, to be substituted for the deceased litigant.[158] Treating a deceased person as still being a "consumer" would run counter to the standard treatment of causes of action that survive a litigant's death, as it would imply that no substitution is necessary and that the deceased party is to continue to direct the litigation.

If the Bureau's goal is to clarify whether claims by the consumer against the debt collector pursuant to the proposed rules survive the death of the consumer, adding "whether living or deceased" to the definition of consumer does not accomplish that purpose. The civil liability provision of the FDCPA does not even use the term "consumer" but, rather, allows any "person" to bring a claim of liability against a debt collector.[159]

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[155] As discussed in our comments at § 4.1, *infra,* the Bureau's proposal would expand them too much.

[156] 84 Fed. Reg. at 23,288.

[157] *Id.* at 23,288 n.153.

[158] *See, e.g.*, Fed. R. Civ. P. 25(a)(1) (if a party dies and the claim is not extinguished, any party may move for substitution; if such a motion is not made within 90 days after service of a statement noting the death, the action must be dismissed); Fla. R. Civ. P. 1.260 (same); Tex. R. Civ. P. 151 ("If the plaintiff dies, the heirs, or the administrator or executor of such decedent may appear and upon suggestion of such death being entered of record in open court, may be made plaintiff, and the suit shall proceed in his or their name. If no such appearance and suggestion be made within a reasonable time after the death of the plaintiff, the clerk upon the application of defendant, his agent or attorney, shall issue a scire facias for the heirs or the administrator or executor of such decedent, requiring him to appear and prosecute such suit. After service of such scire facias, should such heir or administrator or executor fail to enter appearance within the time provided, the defendant may have the suit dismissed.").

[159] 15 U.S.C. § 1692k(a).

3.3.4 Expanding the definition is useful in limited sections.

There are limited areas of the regulation that would benefit from having the definition of "consumer" clarified to include a person "whether living or deceased" to prevent abuse or misrepresentations. For example, the prohibition on publishing a list of "consumers who allegedly refuse to pay debts"[160] should also prohibit the publication of a list of names of deceased consumers who allegedly owe debts. As another example, the false representation that "the consumer committed any crime or other conduct in order to disgrace the consumer" [161] should prohibit a debt collector from falsely representing, in an effort to coerce payment on a debt, that a deceased consumer had committed a crime. Instead of adopting a global definition of "consumer" to include deceased individuals, the CFPB should simply draft comments that clarify that the prohibitions found in §§ 1006.14(e) and 1006.18(b)(iv) apply to deceased consumers. The CFPB has already successfully taken this approach in Proposed Comments 34(a)(1)-1 and 38-1, which address validation notices and disputes.

***<u>Recommendation</u>*:**

- **The Bureau should not amend the definition of "consumer" in § 1006.2(e) to include "whether living or deceased."**
- **Rather than amending the definition globally, the CFPB should comment on narrow portions of the proposed regulation to clarify that they apply to deceased consumers.**

3.4 § 1006.2(h): Debt

The CFPB proposes to amend the definition of "debt" in 15 U.S.C. § 1692a(5) to read:

> Debt, except for the purpose of paragraph (f) of this section, means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment. For the purpose of paragraph (f) of this section, debt means debt as that term is used in the Dodd-Frank Act.

This proposed definition includes confusing language. The CFPB should delete the clause "except for the purpose of paragraph (f) of this section" and replace the current last sentence with:

> For purposes of §§ 1006.14(b)(1)(ii), 1006.34(c)(2)(iv), and (3)(iv) and 1006.30(b)(1)(ii) only, "debt" means "consumer financial product or service debt" as defined in paragraph (f).

[160] 15 U.S.C. § 1692d(3).

[161] 15 U.S.C. § 1692e(7).

This alternate last sentence will be an improvement on the current last sentence, which refers to the definition of debt "as that term is used in the Dodd-Frank Act." The Dodd-Frank Act does not contain a definition of "debt" at 12 U.S.C. § 5481, and we are unaware of anywhere else in the Act that defines the term.

<u>Recommendation:</u>

- **The Bureau should delete the clause "except for the purpose of paragraph (f) of this section" in Proposed § 1006.2(h) and replace the current last sentence with:**

  For purposes of §§ 1006.14(b)(1)(ii), 1006.34(c)(2)(iv), and (3)(iv) and 1006.30(b)(1)(ii) only, "debt" means "consumer financial product or service debt" as defined in paragraph (f).

3.5 § 1006.2(i): Debt collector

Proposed § 1006.2(i) is a definition of the term "debt collector" that generally restates the statutory definition from 15 U.S.C. § 1692a(6).

In its discussion of this section, the CFPB noted that the Supreme Court's decision in *Henson v. Santander Consumer USA Inc.*[162] only addressed "whether, by using its own name to collect debts that it had purchased, a debt buyer met the 'regularly collects' prong of the introductory language in FDCPA section 803(6)." [163] The CFPB rightly noted that the Supreme Court expressly declined to address the other two ways that a debt buyer would qualify as a debt collector under FDCPA section 803(6): (1) by meeting the "regularly collects" prong by regularly collecting or attempting to collect debts owned by others, in addition to collecting debts that it purchased and owned; or (2) by meeting the "principal purpose" prong of the definition.[164]

The CFPB then noted that it would be entirely consistent with the Court's holding in *Henson* to include, as part of the definition of "debt collector," a debt buyer collecting debts that it purchased and owned "if the debt buyer either met the "principal purpose" prong of the definition or regularly collected or attempted to collect debts owned by others, in addition to collecting debts that it purchased and owned.[165]

This clarification of the ways that debt buyers are considered debt collectors under the FDCPA is helpful to both consumers and the collection industry because it provides clarity on a complex issue. We recommend that the CFPB explicitly adopt that analysis and issue a comment stating that:

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[162] Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 198 L. Ed. 2d. 177 (2017).

[163] 84 Fed. Reg. at 23,289.

[164] Henson, 137 S. Ct. at 1721. The CFPB noted that the Court had not identified these questions as being presented when it granted certiorari. *Id.*

[165] 84 Fed. Reg. at 23,289 (May 21, 2019) (citing *Barbato* v. *Greystone Alliance, L.L.C.*, 916 F.3d 260 (3d Cir. 2019) as holding that a debt buyer whose principal purpose was debt collection was an FDCPA-covered debt collector even though the debt buyer outsourced its collection activities to third parties).

The definition of "debt collector" in § 1006.2(i) includes a debt buyer who regularly collects or attempts to collect debts owned by others in addition to collecting debts that it purchased and owns, or has a "principal purpose" of debt collection, even if the debt buyer retains others to collect on its behalf.

3.6 § 1006.2(j): Limited-content message

3.6.1 Overview

The CFPB proposes to create a definition for "limited-content messages." As discussed in § 3.1, *supra*, such a message would be defined as an "attempted communication" under Proposed § 1006.2(b) but not a "communication" under § 1006.2(d) of the proposed regulations. As a result, these messages would be exempt from the many consumer protection provisions in the proposed regulations that apply only to "communications" and not to attempted communications:

- the prohibition on communications with third parties - § 1006.6(d)(1);
- the limits placed on debt collector communications with third parties in order to obtain the consumer's location information - § 1006.10(b);
- the requirement that a debt collector disclose in the initial communication with a consumer that it is a debt collector attempting to collect a debt and that any information obtained will be used for that purpose and to disclose in subsequent communications that the communication is from a debt collector - § 1006.18(e)(1) & (2);
- the ban on communicating with consumers by postcard regarding a debt - § 1006.22(f)(1); and
- the requirement to send a validation notice within five days of the initial communication with the consumer - § 1006.22(a)(1)(i).

We oppose the creation of a category of limited-content messages to which these important FDCPA protections would not apply. These messages are "communications" within the meaning of the FDCPA, and the CFPB does not have the authority to exempt them from the statute's protections governing communications. The messages will violate consumers' privacy, deceive consumers, and deprive consumers of information that Congress mandated, and could lead to harassment of third parties as well. We discuss our numerous concerns below.

While we strongly oppose exempting these messages from the FDCPA's protections, we also offer some suggestions to mitigate the harm of the proposed exemption should the CFPB decline to withdraw it.

3.6.2 The proposed limited-content message rule should be withdrawn because it is arbitrary and capricious, beyond the CFPB's authority, and would allow abusive practices.

3.6.2.1 *Exempting limited-content messages from the definition of "communication" would conflict with the FDCPA's definition and its use of that term, and is beyond the CFPB's authority.*

In § 1006.2(d), the CFPB proposes to define "communication" to exempt limited-content messages. As defined in § 1006.2(j), a limited-content message is one that states the consumer's name, a request to reply to the message, the name or names of one or more natural persons to reply to, the telephone number for replies, and, if the communication is electronic, an opt-out notice. It may also include a salutation, the date and time of the message, a "generic statement that the message relates to an account," and suggested dates and times for the consumer to respond, but nothing else.

In Comment 2j-2, the CFPB provides two examples of permissible limited-content messages. The first includes only the required content:

> "This is Robin Smith calling for Sam Jones. Sam, please contact me at 1-800-555-1212."

The second example includes all of the optional content, most notably the permitted "generic statement that the message relates to an account"[166]:

> "Hi, this message is for Sam Jones. Sam, this is Robin Smith. I'm calling to discuss an account. It is 4:15 p.m. on Wednesday, September 1. You can reach me or, Jordan Johnson, at 1-800-555-1212 today until 6:00 p.m. eastern, or weekdays from 8:00 a.m. to 6:00 p.m. eastern."

Under the FDCPA, the definition of "communication" in 15 U.S.C. § 1692a(2) is "the conveying of information regarding a debt directly or indirectly to any person through any medium." The CFPB premises its proposed exemption of these messages from the definition of "communication" on the theory that they will not convey information about a debt, and that they can thus be excluded from the definition of "communication" and the associated requirements for communications. This premise is incorrect. Courts have found that messages similar to those that would be allowed here either violated the FDCPA or that the plaintiff who brought the case stated a claim for a violation. For example:

- *Edwards v. Niagara Credit Solutions, Inc*., 584 F.3d 1350, 1351, 1353-54 (11th Cir. 2009) (affirming judgment against collector that left message on consumer's answering machine stating "This is an important message for Edwards Brenda. Please return this message at 1–800–381–0416, between the hours of 8 a.m. and 9 p.m. eastern standard time. It is important that you reach our office"; concluding, at 1353 n.3, that this was a "subsequent communication" within the meaning of §1692e(11)).

- *Thorne v. Accounts Receivable Mgmt., Inc*., 2012 WL 3108662, at *2, 9 (S.D. Fla. July 24, 2012) (message stating "This message is being left during business hours for Thorne Tiffany N. Please return ou[r] call at 888–548–8829 between the hours of 8 a.m. and 9 p.m. Monday [through] Thursday, Friday 8 a.m. until 5 p.m., Saturday 8 a.m. until 12 noon. Thank you." is an "actionable 'communication' under the FDCPA" because "the message conveyed information 'regarding a debt' directly or indirectly to Thorne").

[166] Proposed § 1006.2(j)(2)(iii).

- *Pisarz v. GC Servs. L.P.*, 2017 WL 1102636, at *1, 10 (D.N.J. Mar. 24, 2017) (denying motion to dismiss claim against collector that left message stating "[t]his message is for Danielle Pisarz, my name is Al Lease. Please return my call at your earliest convenience at 877–551–9781. Use your reference number 104338. Our hours are 11:00 am to 10:00 pm."; rejecting collector's argument that this was not a "communication" under § 1692e(11)).

- *Winehouse v. GC Servs. L.P.,* 2017 WL 2455075, at *1, 3 (E.D.N.Y. June 6, 2017) (denying motion to dismiss § 1692e(11) claim against collector that left message on consumer's answering machine stating "Shifra Winehouse, my name is Joy Gallop. I would appreciate you returning my call. You can reach me at 877-710-8001. Thank you."; finding that "While the message did not reference the debt, it remained, at its core, a communication prompted by Winehouse's debt and concerned with that debt's satisfaction.").

These decisions directly address the question whether messages that meet the Bureau's proposed definition of limited-content messages are "communications." [167] Yet the Bureau has failed to analyze them. In its discussion,[168] it cites only two of them, and its analysis consists of merely characterizing the decisions on the issue as "conflicting."

Several Circuits have found voicemail and similar messages not to fall within the definition of "communication," but the messages in those cases all contained less information than the proposed limited-content message rule would allow. *Marx v. General Revenue Corp.*[169], holds that a fax that was sent to a consumer's employer, containing the sender's name, address, phone number, and logo, stating an "ID" number, and asking the recipient to verify the consumer's employment, was not a communication. The court stressed that the form did not use the word "account." Since the proposed rule would allow an explicit statement that the message relates to an account, *Marx* does not support its compliance with the statute, but in fact suggests the contrary. *Brown v. Van Ru Credit Corp.*[170], finds that a message asking an employer to call back was not a communication as defined by the FDCPA, but, again, the

[167] *See also* Hultman v. Professional Choice Recovery, 2017 WL 2963869 (D. Neb. June 9, 2017) (granting summary judgment for consumer on § 1692e(11) claim; message stating "Hey, this is Sarah, just trying to get a current number for Chad Hultman. If you could give me a call back at (402) 476-8021 and let me know if this is or isn't a good number for Chad I'd appreciate it." is communication); Mark v. J.C. Christensen & Assocs., Inc., 2009 WL 2407700 (D. Minn. Aug. 4, 2009) (denying defendant's motion for judgment on the pleadings on § 1692e(11) claim; message stating ""Hi Cindy, this is Eva, can you call me quick when you get this message. My office number is 866–565–1399." is communication as defined by FDCPA); Inman v. NCO Fin. Sys., Inc., 2009 WL 3415281 (E.D. Pa. Oct. 21, 2009) (granting summary judgment for debtor; message stating "This message is for Thomas Inman. Please call us back today at toll-free, 1–800–350–2457. When calling back, the Reference ID is EL9170. Once again, this number is toll-free 1–800–350–2457. Thank you. Goodbye." is communication); Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp. 2d 1104 (C.D. Cal. 2005) (denying motion to dismiss § 1692e(11) claim; messages were communications where they stated "This message is for Ashraf. Ashraf, my name is Clarence Davis. I have some very important information to discuss with you. I have to make a decision about a situation that concerns you. I am going to make this decision with our [sic] without your input. Contact my office right away at 877–647–5945, Extension 3619. Failure to return my call will result in a decision-making process that you will not be a part of.").

[168] 84 Fed. Reg. at 23,290.

[169] 688 F.3d 1174 (10th Cir. 2011).

[170] 804 F.3d 740 (6th Cir. 2015).

message did not use the word “account” or indicate that it was about an account. Similarly, the message found not to be a communication by the recent decision in *Lavallee v. Med-1 Solutions, L.L.C.*[171], also did not use the word “account,” so also does not support the Bureau’s proposed exclusion of these messages from the definition.

The Bureau’s discussion of the rule refers to several decisions interpreting the definition of communication as applied to voicemail and similar messages,[172] but merely characterizes them as “conflicting.” The Bureau has completely failed to analyze these decisions, which would give it important guidance as to whether its proposed rule is inconsistent with the FDCPA. Nor does the Bureau cite any consumer testing it has done or plans to do regarding whether the proposed limited-content messages would convey information about the debt to third parties.

Congress’s treatment of calls seeking location information makes clear that a conversation can be a “communication” even if its content is limited. Section 1692b states that “[a]ny debt collector <u>communicating</u> with any person” for the purpose of seeking location information must “identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer.”[173] That these calls are communications is confirmed by § 1692c(b), which governs “Communication with third parties,” and which also specifically exempts these location information calls from a general prohibition on third-party disclosures. The fact that the FDCPA characterizes a contact that conveys such limited information as a communication makes it clear that a “limited-content” contact also meets the definition. Indeed, a “limited-content” contact as defined by Proposed § 1006.2(j) can state that it relates to an account, so conveys *more* information regarding the debt than contacts that are treated as communications by § 1692b. Thus, Congress clearly understood that a contact was a “communication” even if, like the proposed limited-content messages, the information is limited.

It is also plain from the statutory definition itself that these limited-content messages are communications. The statute defines a communication as one that “directly *or indirectly*” conveys information regarding a debt.[174] The proposed exemption impermissibly ignores the word “indirectly.” Limited-content messages will, at a minimum, indirectly disclose information about a debt.

Limited-content messages from debt collectors will be clearly recognizable to third parties as collection communications because, unlike other businesses, debt collectors will not identify the name of the business or their purpose in calling in their message. Relatives, neighbors, and employers will have no trouble recognizing that cryptic messages that fall into the limited-content pattern are about debts. This is so even if the message does not include the optional reference to “an account.”

In addition, the CFPB has entirely failed to address the likelihood that third parties who receive limited-content calls will ask questions of the caller—for example, what the call is about or on whose behalf it has been placed. The CFPB has not proposed any method for debt collectors to deal with such questions without indirectly conveying that the call is about a debt or adding

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[171] 932 F.3d 1049 (7th Cir. 2019).

[172] *See* 84 Fed. Reg. at 23,290.

[173] 15 U.S.C. § 1692b (emphasis added).

[174] 15 U.S.C. § 1692a(2) (emphasis added).

content beyond the required and optional content specified in the regulation. The collector's refusal to answer questions, and evasive answers that use content not in the scripted message, can all convey that this is not a personal message from a friend or acquaintance, or a normal business matter such as a call from a medical office but, instead, a debt collector. The same is true if the collector strictly repeats the original message in a stilted manner or hangs up when getting questions.

Congress recognized the awkwardness of not responding when a third party, contacted for location information, asks who the person's employer is by authorizing a response but only in that situation.[175] Though we would oppose allowing debt collectors to answer that question when leaving a limited-content message, refusal to do so also conveys information.

Beyond the mere fact of a cryptic message, the rule's proposal to allow collectors the option of including a "generic statement that the message relates to an account," without saying more, will especially tip off the called party that the call is from a debt collector. Again, where the collector, if asked, refuses to identify what kind of account is involved, it will confirm the impression that the message is about a debt. Allowing this reference to an account will serve to make limited-content messages even more easily recognizable as debt collection messages. Collectors are likely to take advantage of the option to refer to an account for that very reason—to embarrass the consumer into paying the debt.

Even today, people are likely to know that messages like these are from debt collectors. Once these limited-content messages become widespread, especially if collectors repeatedly use the exact authorized language, contacted parties will know perfectly well that they relate to debt collection, contrary to the Bureau's unsupported assertion.[176] Co-workers who hear these messages on voicemail, friends who see the text pop up on a buddy's phone, and family members who receive messages for the consumer, will recognize these as debt collection messages. These third-party disclosures will lead to violations of consumer privacy and will serve as an ideal tool for collectors to embarrass and harass the debtor.

The judgment that these messages do not indirectly convey information about a debt, or that they are not "communications" as defined and understood by Congress, is arbitrary and capricious. The CFPB has not engaged in any kind of consumer testing to determine what types of messages convey information about a debt "indirectly" and what types do not. As a result, it has no rational basis for determining that a message referencing an "account" is permissible and will not convey debt information while another word is not. Nor does it have a rational basis for assuming that people will not understand that debt collectors are calling when they want to leave messages but refuse to disclose their company or purpose in calling.

As discussed in § III of our discussion, *supra*, the CFPB lacks authority to create exemptions from the FDCPA or to undermine its protections. Yet this is exactly what the CFPB seeks to do in the proposed rule regarding limited-content messages. Defining "communication" to exclude limited-content messages would create an exemption from the definition that the CFPB does not have authority to create.

[175] 15 U.S.C. § 1692b(1).

[176] 84 Fed. Reg. at 23,292.

3.6.2.2 *The CFPB's proposed treatment of limited-content messages would authorize violations of several provisions of the FDCPA, exceeding the CFPB's authority.*

3.6.2.2.1 Overview

As discussed in the preceding section, defining "communication" to exclude limited-content messages is beyond the CFPB's authority because these messages meet the statutory definition of "communication," and the CFPB lacks exemption authority. In addition, the consequences of excluding these messages from the definition of "communication" would conflict with the statute in a number of ways. The treatment of these limited-content messages under the proposed rule would violate the FDCPA's restrictions on communications with third parties, calls without meaningful disclosure of the caller's identity, the use of postcards to communicate about a debt, and the requirement that a validation notice be sent within five days after the initial communication. The CFPB lacks authority to create exemptions from or override any of these prohibitions.

3.6.2.2.2 Limited-content messages left with third parties or sent by postcard would violate consumers' privacy in violation of the FDCPA.

Under the FDCPA, 15 U.S.C. § 1692c(b) prohibits collectors from contacting third parties except to obtain location information as specified in 15 U.S.C. § 1692b. This prohibition is central to the FDCPA. When Congress enacted the FDCPA, it repeatedly emphasized its concern with the abusive nature of third-party collection contacts, terming its prohibition of them "extremely important."[177] Section 1692b provides a very narrowly crafted exception that can be used only to obtain location information when the debt collector cannot locate the consumer. In short, Congress specified only one strictly limited form of communication with third parties. Yet the proposed rule would allow limited-content messages instructing the consumer to call the collector to be left with third parties.[178] The proposal is not in accordance with current law or the delicate balance struck by Congress to ensure consumer privacy. The CFPB does not have the authority to create this exemption from this key protection.

Another way that the FDCPA prohibits disclosures to third parties is through § 1692f(7), which prohibits communicating with a consumer regarding a debt by postcard. Using a postcard is an obvious way to pressure a debtor by revealing the debt to the mail carrier and to household members who retrieve the mail. The proposed rule would allow limited-content messages to be sent to consumers in violation of this prohibition. The CFPB lacks authority to make an exception to this prohibition.

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[177] S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("[T]his legislation adopts an extremely important protection . . . it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs."). *See also id.* at 2 ("collection abuse takes many forms, including … disclosing a consumer's personal affairs to friends, neighbors, or an employer"), 4 ("this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the debtor's personal affairs to third persons… .").

[178] *See* Proposed Comment 2(d)-3 (stating that it is permissible for debt collectors to leave a limited-content message orally "with a third party who answers the consumer's home or mobile telephone").

3.6.2.2.3 The proposed limited-content message rule would allow communications to be sent to consumers without the disclosures required by the FDCPA.

By defining a limited-content message as not being a communication, the CFPB would also exempt collectors from the disclosures that are required by 15 U.S.C. § 1692e(11). This section of the statute requires a debt collector to disclose in the initial communication with a consumer that it is a debt collector attempting to collect a debt and that any information obtained will be used for that purpose, and to disclose in subsequent communications that the communication is from a debt collector.

The requirement of disclosure of the debt collection purpose of a contact protects consumers against the possibility that they will unwittingly reveal information to the collector. When it enacted the FDCPA, Congress stressed the importance of preventing collectors from obtaining information by false pretenses.[179] Although § 1692e(11) requires a collector to make disclosures to the consumer when the debt collector does speak to the consumer,[180] the reality is that the consumer will be revealing personal information to the debt collector by simply placing the call – namely a phone number that the debt collector might not currently have on file. The disclosure requirements also protect a consumer who disputes a debt or does not have the money to pay it from being tricked into returning a call that will cause further stress, anguish, abuse, and harassment.

Exempting limited-purpose messages from the definition of "communication" would allow collectors to violate this important protection. It is beyond the Bureau's authority to create an exemption from this disclosure requirement.

3.6.2.2.4 The limited-content message rule would go beyond the Bureau's authority by allowing calls that do not meaningfully disclose the caller's identity.

The FDCPA's prohibitions of harassment and abuse include the requirement in 15 U.S.C. § 1692d(6) that "[i]n connection with the collection of any debt a debt collector must not place telephone calls without meaningfully disclosing the caller's identity."

The CFPB proposes to codify 15 U.S.C. § 1692d(6) as § 1006.14(g), but in Comment 2(j)-4 purports to interpret that section of the regulation to be inapplicable to debt collectors conveying limited-content messages. Comment 2(j)-4 states that:

> A debt collector who places a telephone call and leaves only a limited-content message for a consumer does not violate § 1006.14(g) with respect to that telephone call.

[179] S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (FDCPA prohibits "a host of harassing, deceptive, and unfair debt collection practices. These include: … obtaining information under false pretenses… ."); *id.* at 2 ("Collection abuse takes many forms, including … obtaining information about a consumer through false pretense… .").

[180] *See also* Comment 18(e)(1)-1 (clarifying that an incoming call from a consumer also triggers the required disclosures).

In its discussion, the CFPB explains that, by providing "[t]he name or names of one more natural persons whom the consumer can contact to reply to the debt collector" as required by proposed § 1006.2(j)(iii), the debt collector would comply with the requirement in § 1006.14(g) to "meaningfully disclos[e] the caller's identity." [181]

However, just providing the "[t]he name or names of one more natural persons whom the consumer can contact to reply to the debt collector" is not sufficient to comply with § 1692d(6). First, the proposed rule does not require disclosure of the name of the caller, but just the name of someone to whom the consumer can reply. The statute requires disclosure of the *caller's* identity. Second, Proposed § 1006.18(f) would allow debt collection employees to use aliases. And third, the bare disclosure of a name—or an alias—is not a meaningful disclosure of the caller's identity without a disclosure of the collection agency that is involved.[182]

For these reasons, the CFPB's treatment of the content in § 1006.2(j)(iii) as satisfying the "meaningful disclosure of the caller's identity" requirement is arbitrary and irrational, and amounts to an exemption that is beyond its authority.

That the CFPB lacks authority to exempt limited-content messages from the requirement of meaningful disclosure of the caller's identity is particularly clear since the statute uses the word "call" rather than "communicate" or "communication." Thus, even if the Bureau had the authority to narrow the statutory definition of "communication," all calls would still have to include a meaningful disclosure of the caller's identity.

3.6.2.3 Even if the limited-content message rule were within the Bureau's authority, it should withdraw it because of the abusive practices it would allow.

As discussed in the preceding section, the proposed limited-content message rule goes beyond the CFPB's statutory authority. But even if it were within the Bureau's authority to adopt it, the Bureau should not do so because of the abusive practices the rule would allow. As discussed in the preceding sections, it would countenance direct or indirect disclosure to third parties of information about the consumer's indebtedness. It would enable collectors to induce consumers to unwittingly reveal information to them. It would allow collectors to pressure consumers into paying debts by leaving embarrassing limited-content messages with others.

***Recommendation*: The CFPB should withdraw the limited-content message proposal.**

[181] 84 Fed. Reg. at 23,291.

[182] *See* Hilgenberg v. Elggren & Peterson, 2015 WL 4077765 (D. Utah July 6, 2015), at *5 (§ 1692d(6) "requires a debt collector to disclose the caller's name, the debt collection company's name, and the nature of the debt collector's business. … Merely stating the debt collector's personal name is not meaningful to the debtor.") (internal quotation marks omitted); Torres v. ProCollect, Inc., 865 F. Supp. 2d 1103, 1105 (D. Colo. 2012) (holding that § 1692d(6) "requires a debt collector to disclose its company name in a voicemail left for a consumer").

3.6.3 If the CFPB proceeds with its limited-content message proposal, it must limit and clarify it.

3.6.3.1 Overview

As discussed in the preceding sections, the Bureau's limited-content message proposal is arbitrary and capricious and would harm consumers. The Bureau should abandon it. If, however, the Bureau proceeds with this proposal, it should make a series of changes to it in order to reduce the harm that it will cause consumers. Several provisions of the proposed limited-content message rule would allow particularly abusive practices and should be withdrawn for that reason.

3.6.3.2 The CFPB must put meaningful limits on how limited-content messages can be sent.

Proposed Comment 2(j)-3 states that a collector may transmit a limited-content message by leaving voicemail at the consumer's telephone number, sending a text message to the consumer's cell phone, or leaving a message orally with a third party who answers the consumer's phone.[183] However, this appears not to be intended as a complete list, because, as currently proposed, the rule does not place any restrictions on the manner in which limited-content messages can be sent, so long as the debt collector complies with § 1006.2(j).

For example, debt collectors may argue that they can also send limited-content messages via social media direct messages, messages via messaging apps like WhatsApp and Slack, calendar invites, and even old-fashioned postcards. Moreover, communication technology will continue to evolve, and it is likely that the broad scope of the exemption that the CFPB has created will become apparent as limited-content messages migrate to a variety of new communication media without any control from the CFPB. The privacy implications of these new technologies are unknown.

In its discussion, the CFPB states:

> The proposal would not enable a debt collector to transmit a limited-content message by email because, as discussed below, email messages typically require additional information (e.g., a sender's email address) that may in some circumstances convey information about a debt, and consumers may be unlikely to read or respond to an email containing solely the information included in a limited-content message (e.g., consumers may disregard such an email as spam or a security risk)… . [A] rule that would enable debt collectors to send limited-content messages by email might not sufficiently protect consumers' privacy interests.[184]

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[183] *See also* proposed Comment 2(b)-1(ii) ("Attempts to communicate include, but are not limited to …

> ii. Transmitting a limited-content message, as defined in § 1006.2(j), to a consumer by voicemail or text message sent directly to the consumer or by an oral message left with a third party who answers the consumer's home or mobile telephone number").

[184] 84 Fed. Reg. at 23,291.

However, the CFPB has not incorporated this statement into the regulation or an official comment.

We support this analysis and encourage the CFPB to amend the proposed regulation to specifically prohibit sending limited-content messages via email or, at a minimum, to clarify this prohibition in a comment.

***Recommendation*: If the CFPB permits limited-content messages, it should restrict the communication channels that debt collectors can use to send them and limit such messages to the consumer's voicemail only.**

3.6.3.2 The CFPB must clearly prohibit debt collectors from contacting third parties to leave limited-content messages.

The proposed § 1006.2(j) defines a limited-content message as a message "for a consumer." In proposed Comment 6(d)(1)-1, the Bureau states that, since a limited-content message is not a communication, a collector does not violate the prohibition against communicating with third parties by leaving a limited-content message with a third party who answers the consumer's phone number. However, neither the proposed comment nor the proposed rule expressly restricts leaving limited-content messages to this circumstance. Indeed, debt collectors may argue that, by exempting limited-purpose messages entirely from the prohibition on contacting third parties, the proposed rule allows collectors to deliberately contact third parties—neighbors, relatives, employers—for the exclusive reason of delivering a limited-content message for the consumer. The CFPB has requested comment on this very question.[185]

As discussed in §§ 3.7.2.1 and 3.7.2.2, *supra*, allowing such contact with third parties clearly violates the privacy protections of 15 U.S.C. §§ 1692b and 1692c(b) of the FDCPA. Congress strictly delineated when collectors may contact third parties, and the statute does not authorize calls for the purpose of conveying a message to a consumer. The proposed rule would foster invasions not only of the consumer's privacy, but also the privacy of the consumer's neighbors, friends, and relatives. While the proposed rule places some limits on attempts to communicate with the consumer (for example, by prohibiting contacts at inconvenient times and giving the consumer the right to demand that contacts cease), *it gives no such rights to the neighbors, friends, and relatives* who are likely to be bombarded with limited-content messages if the CFPB allows debt collectors to contact third parties for the purpose of leaving limited-content messages. The ability to harass neighbors, friends, relatives, and employers with limited-content messages would allow collectors to embarrass consumers into paying debts.

As discussed above, messages left with third parties are likely to generate questions from the third party to the consumer about who just contacted them and why. Moreover, there are many more third parties that the debt collector could potentially contact to leave a limited-content message than there are people who might potentially answer the consumer's phone number,

[185] 84 Fed. Reg. at 23,292 ("In addition, the Bureau requests comment on whether a debt collector should be permitted to leave limited-content messages with third parties only in certain circumstances (e.g., if a third party answers the consumer's telephone number) and whether a debt collector should be able to include additional content in a limited-content message if leaving it with a third party (e.g., a request that the third party take a message).").

and the privacy violation will be more acute for many of these. Thus, the potential privacy violation would be multiplied exponentially if collectors could direct calls to parents, friends, former significant others, employers, clergy, relatives, or commanding officers in order to leave limited-content messages for the consumer.

The FDCPA's general prohibition on communications with third parties, with the narrowly crafted exception of calls to obtain location information, serves not only to protect the consumer but also to protect friends, family members and other third parties. Congress specified that debt collectors may contact third parties only to obtain location information and, even then, may not contact a person more than once except under limited circumstances.[186] It is important to ensure that limited-content messages are not used to evade the congressional limits on contacts with third parties. Deliberate contacts with third parties must be limited to those allowed by statute, and, as discussed in our comments on § 1006.10, *infra*, debt collectors should not be allowed to convey a limited-content message in a call seeking location information.

Recommendations: **If the CFPB does not withdraw its proposed limited-content message rule, it should prohibit leaving such messages with third parties, or at least should allow limited-content messages to be left only with third parties who answer the consumer's phone number, and it should explicitly prohibit other contacts with third parties for the purpose of conveying messages to the consumer.**

4. § 1006.6 Communications in connection with debt collection.

4.1 § 1006.6(a): Definition of "consumer" in §§ 1006.6 and 1006.14(h)

4.1.1 Overview

The Bureau is proposing to make two changes to the statutory definition of "consumer" that will affect communications in connection with debt collection. First, its proposed general definition of "consumer" would include deceased individuals. This change, which is found in proposed § 1000.2(e), is discussed generally in §3.3, *supra*, but its significant effect on communications in connection with debt collection is discussed here. Specifically, the Bureau has indicated in proposed Comment 6(a)-1 that it interprets this change to mean that a debt collector can contact a consumer's surviving spouse or the surviving parent of a deceased minor consumer to the same extent that the collector could contact the consumer.

Second, the Bureau is proposing to expand the FDCPA's special definition of "consumer" that applies to the restrictions on communications that are found in § 1692c. The statutory definition provides that, for purposes of § 1692c, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. The Bureau is proposing to add "confirmed successor in interest" to this list. It is proposing to make this

[186] 15 U.S.C. § 1692b(3).

addition for purposes of both §§ 1006.6 and 1006.14(h).[187] (Section 1006.14(h) deals with the consumer's right to ask that the debt collector not use a particular medium of communication.)

We have serious concerns about these proposed changes. Allowing certain collection communications with a surviving relative, whether a spouse, parent, someone acting as an administrator, executor, or personal representative of the estate, or a "confirmed successor in interest," requires unique consideration and care. As the Bureau itself recognizes, there is significant risk of potential "harm from debt collection communications during the vulnerable time after a loss... [and the] possibility that a surviving spouse who is not responsible for the deceased consumer's estate nor otherwise obligated to pay the debt could, if contacted by a collector shortly after the consumer's death, be vulnerable to paying collection requests without full consideration."[188]

Studies have shown that the core symptoms of grief relating to losing a spouse, including anxiety, depression, shock, and intrusive thoughts, take from at least six months up to three years to subside and allow for normal functioning to resume.[189] Losing a spouse leaves individuals vulnerable to loneliness, depression, and chronic stress, making it difficult for them to make informed choices.[190] Losing a child is even more devastating, and periods of intense shock, despair, isolation, and grief last at least 18 months.[191] The Bureau's complaint record shows that communications attempting to collect on decedent debt that the relative does not owe can be very disturbing and confusing.[192] In such a vulnerable mental state, a surviving relative is at extreme risk of making uninformed decisions to pay a decedent's debt, whether to honor the memory of a loved one or to just stop the communications.[193]

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[187] *See* Proposed §§ 1006.2(e), 1006.6(a)(5).

[188] Consumer Fin. Prot. Bureau, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* 35 (July 28, 2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [hereinafter SBREFA Outline].

[189] *See* Ruth Davis Konigsberg, AARP, *5 Surprising Truths About Grief* (Mar. 14, 2011), *available at*: https://www.aarp.org/caregiving/basics/info-2017/truth-about-grief.html.

[190] *See* Romeo Vitelli, *Grief, Loneliness, and Losing a Spouse,* Psychology Today, Mar. 16, 2015, *available at*: https://www.psychologytoday.com/us/blog/media-spotlight/201503/grief-loneliness-and-losing-spouse.

[191] *See* Cancer.Net, *Grieving the Loss of a Child* (Mar. 2018), *available at* https://www.cancer.net/coping-with-cancer/managing-emotions/grief-and-loss/grieving-loss-child.

[192] *See* Consumer Fin. Prot. Bureau Consumer Complaint Database, Complaints numbered 3023869 (Sept. 18, 2018) (collector sent deceased husband's bills to widow and called about settlement of debt; "these people want me to pay for his debt. This is totally unfair on several accounts, I never signed my name on any of his bills, never used any of his credit, didn't know what credit he even had. My credit has always been important to me…"); 2985227 (Aug. 7, 2018) ("The credit card company started calling asking me, relentlessly, asking when I would be able to pay. I explained that this was my husband 's card only, he's deceased and I do not have any money to pay for a debt that wasn't from me. They refuse to resolve the issue."); 2898695 (5/7/2018) (father being contacted by collector about deceased son's debt when father had no obligation on debt not understanding why). *See also* complaints numbered 3168608 (Mar. 4, 2019); 3141686 (Feb. 4, 2019); 3106454 (Dec. 20, 2018); 3084667 (Nov. 27, 2018); 3073053 (Nov. 13, 2018); 3028062 (Sept. 24,2018).

[193] *See* Consumer Fin. Prot. Bureau Consumer Complaint Database. *See also* Complaint no. 2978498 (July 31, 2018) (widow made payment on debt with unknowingly-exempt insurance proceeds on debt she did now owe after call with debt collector asking her to review late husband's assets to pay debt).

Certain debt collectors specializing in the recovery of decedent debt compound this risk of harm. This so-called “death-debt” collection industry “appears to be growing, according to court records, regulatory filings and interviews with dozens of lawyers and industry experts.”[194] Companies that engage in post-death collections “monitor deaths and quickly identify and locate people who have, or might have, authority to pay the decedent's bills. They then pull out various tools in an effort to obtain payment.”[195] Imposing a moral obligation on a surviving relative is one of those tools. Decedent debt collection is “an industry that makes money by pressuring newly widowed spouses or other surviving family members to pay debts they don’t legally owe.”[196] Some decedent-debt collectors attempt to pin a moral obligation on the deceased’s relatives to pay debt they do not owe, claiming the deceased would want the bills paid.[197] This can result in a payment to avoid a deceased relative's name from being “dragged through the mud like some kind of deadbeat.”[198] Often times, the calls and letters are so persistent that relatives will pay the debt just to get the collector to stop contacting them.[199] “‘Each call brought up fresh memories of my husband's death.’ Patricia Smith, 56, says about the calls she started getting [ ] about $1,787.04 in credit-card debt owed by her late husband, Arthur. The debt-collection calls and letters kept coming and wore her down, says Mrs. Smith, who lives in Jackson, Miss. She agreed to scrounge together $50 a month ‘just to make the calls stop.’”[200]

It is through these manipulative techniques that decedent-debt collectors inappropriately attempt to collect on deceased debt from surviving relatives.[201] To insure that the collection of decedent debt is handled with the utmost care to avoid this risk of harm, the Bureau should make the changes to Proposed § 1006.6(a)(1)-(5) and the related Official Comments that are described below.

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[194] Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011 *available at* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710

[195] Jim Flynn, *Closer Look at Death and Debt Collectors*, The Gazette, Oct. 22, 2017, *available at* https://gazette.com/jim-flynn-closer-look-at-death-and-debt-collectors/article_195058dc-b141-58dc-b7e0-ca9232a298a9.html.

[196] Ryan Chittum, *A Super Journal Story on “Death-Debt” Collectors* (Dec. 5, 2011), *available at* https://archives.cjr.org/the_audit/a_super_journal_story_on_death.php; Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at:* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710.

[197] *See* Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at:* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710. See also Alexander Eichler, *Woman Sues Capital One, Says Debt Collectors Went After Her Late Husband’s Discharged Debt*, Huffington Post, June 27, 2012, *available at* https://bit.ly/2lDYGr5.

[198] *See* Jessica Silver-Greenberg, *For the Families of Some Debtors, Death Offers No Respite*, Wall Street Journal, Dec. 3, 2011, *available at* https://www.wsj.com/articles/SB10001424052970204224604577030043890121710

[199] *Id.*

[200] *Id.*

[201] *See* Consumer Fin. Prot. Bureau, Consumer Complaint Database, Complaints against Data and Contact Management Solutions, L.L.C. (DCM), a decedent-debt collector, including numbers 3073053 (Nov. 13, 2018); 2978498 (July 31, 2018); 2589126 (July 29, 2017); 2855530 (Mar. 26, 2018); 2329001 (Feb. 6, 2017); 2041676 (Aug. 2, 2016); 1885056 (Apr. 19, 2016).

4.1.2 The Bureau should not issue comments interpreting surviving spouses as spouses/consumers.

4.1.2.1 Including "surviving spouse" as a "consumer" contradicts the plain language of the FDCPA.

In the official interpretation of the proposed rule at Comment 6(a)(1)-1, the Bureau says that a consumer's spouse includes the surviving spouse of a deceased consumer. This interpretation violates the plain language as well as the purpose of the FDCPA. This comment should be eliminated.

The FDCPA explicitly allows collectors to communicate with the spouse of the consumer under 15 U.S.C. §1692c.[202] But the permission to communicate with the spouse by including the spouse in the definition of "consumer" is explicitly limited to *that section only.* At the same time, the general prohibition of that section states that "… a debt collector must not communicate, in connection with the collection of any debt, with any person other than the consumer...."[203]

However, in Comment 6(a)(1)-1 to the proposed rule, the Bureau incorrectly interprets the term "spouse" to include the bereaved, unobligated widow or widower of a consumer.[204] This is an inappropriate extension of an exception articulated in the FDCPA, and it must be deleted. A widow or widower is no longer a "spouse" after the death of their spouse. Marriage terminates at the death of a spouse.[205]

Congress's decision not to employ the term "surviving spouse" or similar language in 15 U.S.C. § 1692c(d) of the FDCPA is controlling. Throughout the U.S. Code, there are examples where Congress included the term "surviving spouse" when, unlike here, it intended to identify widows and widowers.[206] Congress's failure to do so here confirms the plain meaning of the actual language used in the FDCPA.

The use of the present tense in the statutory definition of "consumer" in § 1692c(d) is additional evidence that Congress did not intend to include widows and widowers in the term "spouse." That section defines the term "consumer" to include "the consumer's spouse, parent (if the consumer *is* a minor), guardian, executor, or administrator."[207] The statute's use of the present tense in the phrase "is a minor" is, as discussed in § 4.1.3, *infra*, a clear indication that the child must be living in order for the parent to be considered a consumer. But that use of the present

[202] 15 U.S.C. § 1692c(d).

[203] 15 U.S.C. § 1692c(a).

[204] Comment 6(a)(1)-1.

[205] *See, e.g.*, 52 Am. Jur. 2d Marriage § 10 ("Thus, all valid marriages continue in force during the joint lives of the parties or until divorce or annulment; a marriage cannot be revoked at the will of the parties, and is terminable only by death or presumption of death, or by a judicial decree of divorce, dissolution, or annulment.") (footnotes omitted).

[206] *See, e.g.,* 10 U.S.C. § 1447(q) (military pensions); 26 U.S.C. § 2(a)(1) (Internal Revenue Code); 38 U.S.C. § 101(3)(veterans' benefits); 42 U.S.C. § 402(g)(1) (Social Security benefits).

[207] 15 U.S.C. § 1692(d) (emphasis added).

tense is also an indication that the entire sentence is intended to be in the present tense, and should be interpreted to encompass only the spouse of a living consumer (and only the parent of a living child, and a person who is *currently* a guardian, executor, or administrator for the consumer).

In addition, the plain language of the statute already specifically addresses collection communications regarding decedent debt. Under 15 U.S.C. § 1692c(d), a consumer includes the "administrator" or "executor" of the consumer's estate. This clearly shows Congress's intention to allow communications after the death of the consumer, but only with persons who have authority under law to administer the consumer's estate.
If the Bureau is concerned that "administrator" and "executor" are being interpreted too narrowly, without taking account of state variations in probate law, the proper approach would be to clarify those terms. Indeed, it has done so in Proposed Comment 6(a)(4)-1. While we have a number of concerns about that comment, discussed in §4.1.4, *infra*, we submit that this is the right approach to resolve that issue. It is both unnecessary and contrary to the statute to interpret the definition of "spouse" to include the term "surviving spouse."

4.1.2.2 Including "surviving spouse" as a consumer is inconsistent with the purpose of the FDCPA.

Interpreting "spouse" to include "surviving spouse" would mean that debt collectors will be permitted to approach unobligated widows and widowers to persuade them to assume the deceased's debt.[208] This is inconsistent with a main purpose of the FDCPA to "eliminate abusive debt collection practices by debt collectors."[209]

One of many examples in the CFPB database illustrates the abuse that this proposed change would foster. A recently widowed individual was contacted by a decedent-debt collector about a debt incurred by her deceased husband.[210] In a subsequent call, the decedent-debt collector suggested that she use the proceeds of any insurance her late husband had to pay the debt. The collector did not tell her that insurance funds were exempt from collection, even after the widow mentioned that there were life insurance proceeds. As a result, she used part of the life insurance money to pay off the debt that she personally did not owe. The widow stated,

> I learned [after] … that as the widow I did not need to use insurance money to pay that debt. I was misled…I want other spouses to know this…Spouses experiencing such a tragedy don't always think to ask the right questions. We need support… Unfortunately, I was trying to deal with the necessary things after the sudden death of my XXXX year old husband while I was not of clear mind. It is a traumatic event and I was trusting the people I was dealing with to be forthright.[211]

[208] *See* § 4.1.1 of these comments, *supra*, for examples of such conduct.

[209] 15 U.S.C. § 1692(e).

[210] *See* Consumer Fin. Prot. Bureau, Consumer Complaint Database, Complaint number 2978498 (July 31, 2018).

[211] *Id.*

Senior populations are especially vulnerable to such misleading debt collection techniques.[212] About 15% of U.S. residents are 65 or older, and almost 23% of that population is widowed.[213] A February 2019 CFPB report has identified "the need for strong and diverse interventions by financial institutions, law enforcement, and social services, as well as the involvement of policymakers" to address widespread and damaging elder financial exploitation.[214]

Where a widow or widower is not obligated to pay the decedent debt and is not an executor or administrator of the consumer's estate, it is an abusive debt collection practice to contact that individual for any purpose other than the very limited purpose of acquiring location information regarding the person or entity that is authorized to act on behalf of the deceased consumer's estate. There is no reason to include the term "surviving spouse" in the definition of "consumer" under proposed § 1006.6(a)(1).

Instead, the Bureau should include a comment stating that, for decedent debt, debt collectors are prohibited from contacting anyone, other than for location information per § 1006.10, without first determining that the individual is obligated on the debt or that the individual also acts as the executor or administrator of the estate or, in relation to the mortgage loan only, is a confirmed successor in interest per §§ 1006.6(a)(4) and (5). That individual may end up being the deceased's "surviving spouse" in some cases, but not in all cases, which is why such clarification is necessary.

4.1.3 The CFPB should not issue comments interpreting parents of minor children to include surviving parents for deceased minor children.

In Comment 6(a)(2)-1, the Bureau proposes to interpret the "consumer's parent, if the consumer is a minor" in § 1006.6(a)(2) to include the "parent of a deceased minor consumer." This additional language would enable debt collectors to engage in certain communications in connection with the collection of a debt from the parent of a deceased minor child. This is also an inappropriate extension of an exception articulated in the FDCPA,[215] and it must be deleted.

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[212] *See* Consumer Fin. Prot. Bureau, Office of Fin. Prot. For Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf.

[213] U.S. Census Bureau, Older Americans Month: May 2019, *available at* https://www.census.gov/newsroom/stories/2019/older-americans.html. *See also* https://www.census.gov/newsroom/stories/2019/older-americans.html. *See also U.S.* Census Bureau, 2018 and earlier Current Population Survey, Annual Social and Economic Supplements tbl. *A1, Marital Status*, *available at https://www2.census.gov/programs-surveys/demo/tables/families/2017/cps-2017/taba1-all.xls?#; Table 2: Projected age and sex composition of the population at https://www2.census.gov/programs-surveys/popproj/tables/2017/2017-summary-tables/np2017-t2.xlsx*

[214] Consumer Fin. Prot. Bureau, Office of Fin. Prot. For Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends 25 (Feb. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf.

[215] 15 U.S.C. § 1692c(d) ("For the purpose of this section, the term "consumer" includes the consumer's . . . parent (if the consumer is a minor)."

First, this proposed interpretation is inconsistent with the FDCPA. For purposes of the restrictions on communications in § 1692c, the FDCPA defines the term "consumer" to include "the consumer's … parent (if the consumer *is* a minor)."[216] The statute's use of the present tense in the phrase "is a minor" is a clear indication that the child must be living in order for the parent to be considered a consumer. If Congress had wanted to include the parent of a deceased child, it would have either specified that the term "consumer" includes a parent if the consumer "is a minor or died before reaching majority," or it would have added surviving parents along with executors and administrators.

A parent is not always automatically liable for a deceased minor child's debt. The age at which a person can contract to obtain a credit card, student loan, or other debt varies per creditor and state. For example, the Credit Card Act of 2009 allows anyone under age 21 to obtain a credit card if the consumer submits a written application to the card issuer that includes financial information showing the consumer has independent means of repaying an obligation.[217] As such, someone under the age of majority (18 or 19 depending on the state) could take out a credit card on their own and be solely liable to repay any charges. Additionally, a minor student can borrow from the federal student loan programs because the Higher Education Act preempts the defense of infancy for federal student loans.[218] Thus, a person who has not reached a legal age of majority could still be solely responsible on a credit card, student loan or other debt for which the parent has no legal obligation.

The proposed interpretation would make it legal for debt collectors to contact the parent of a deceased child, whether or not that parent was obligated on the alleged debt, and attempt to collect from someone in an extremely vulnerable position who may believe they have a legal or moral obligation to pay the debt. Such communications can lead to confusion and distress. As one father explained, "Why would they hold me responsible for a debt I never initiated or authorized. Everyone gives me a standard answer without using common sense or without investigation."[219]

To protect such parties from abusive debt collection practices, the Bureau should clarify that, for decedent debt, debt collectors are prohibited from contacting any individual other than for location information without first determining that the individual is obligated on the debt or that the individual also acts as the executor or administrator of the estate. The parent of a minor deceased child may be that individual, but also may not be, and should not be contacted about payment of the debt.

***Recommendation*: The Bureau should:**

- **Withdraw Comment 6(a)(1)-1. Surviving spouses should not be included in the definition of "consumer" under § 1006.6.**

[216] 15 U.S.C. § 1692(d) (emphasis added).

[217] 15 U.S.C. § 1637(c)

[218] 20 U.S.C. § 1091a(b)(2), (3)

[219] Consumer Fin. Prot. Bureau, Consumer Complaint Database, Complaint number 2898695 (May 7, 2018).

- **Withdraw Comment 6(a)(2)-1. Parents of deceased minor children should not be included in the definition of "consumer" under § 1006.6.**
- **Include in a Comment to proposed Rule 1006.6 that, for decedent debt, debt collectors are prohibited from contacting anyone, other than for location information per §§ 1692b and 1006.10, without first having determined that the individual is obligated on the debt or that the individual acts as the executor or administrator of the estate or, in reference to a mortgage debt, is a successor in interest.**

4.1.4 Limit the definition of personal representative.

4.1.4.1 Overview

In Proposed Comment 6(a)(4)-1, the Bureau proposes to significantly broaden the definition of executor and administrator by providing an overly expansive interpretation that such terms include "the personal representative of the consumer's estate." The proposed comment defines this term as:

> [A]ny person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's assets extrajudicially.

The Bureau recognizes that most states allow for procedures to settle an estate that are "faster and less expensive that the formal probate process" and that the purpose of adding "personal representative" is to "recognize the evolution in estate resolution processes over time, including the use of a personal representative to be the executor or administrator of the decedent's estate."[220] While it would be helpful to include a category of individuals as consumers who perform the same functions as an administrator or executor of an estate but are not judicially appointed as such, the definition must be narrowly tailored to include only those who are specifically authorized under state laws to act on behalf of the deceased consumer's estate.

The Bureau's proposed interpretation is far beyond the plain language of the statute, which simply includes "executor or administrator."[221] The proposed comment also goes beyond the proposed rule, which includes "[t]he executor or administrator of the consumer's estate, if the consumer is deceased."[222] The proposed definition of "personal representative" is vague and unclear, and includes several confusing prongs.

[220] *See* 84 Fed. Reg. at 23,294 (May 21, 2019).

[221] 15 U.S.C. § 1692c(d).

[222] Proposed § 1006.6(a)(4).

We discuss each of the categories proposed by the Bureau in the following sections. All of them should be revised to refer specifically to state probate and estate laws. In addition, the Bureau should place the burden upon the collector to determine, before contacting someone believed to be a personal representative, who has authority, either through a court order or under a less formal procedure allowed by state probate or estate laws, to manage the assets and debts of the decedent's estate. If the collector cannot determine from court records who has authority to act on behalf of the deceased consumer's estate, it could contact third parties for the purpose of obtaining information about the location of the person with this authority, subject to the limitations of Proposed § 1006.10.

4.1.4.2 Any person who is authorized to act on behalf of the consumer's estate

The proposed comment starts with a general definition of a personal representative as "any person who is authorized to act on behalf of the consumer's estate." This clause is unclear as to what "authorized" means. The Bureau should amend this statement to say "any person who is authorized to act on behalf of the consumer's estate <u>under state probate or estate laws</u>."

In its discussion of this comment,[223] the Bureau states that it considered limiting the definition of personal representative to "individuals recognized under State probate or estate laws." It decided against this limitation because it wanted to expand the definition beyond "formally appointed executors or administrators."[224] The term "authorized" accomplishes that goal, but without a reference to "state probate or estate laws," the term "authorized" is too vague. The Bureau should revise the proposed comment to say "any person who is authorized to act on behalf of the consumer's estate <u>under state probate or estate laws</u>."

4.1.4.3 Personal representatives under the informal probate and summary administrations procedures of many states

The Bureau offers several examples in addition to the general definition of personal representative. The first example is "personal representatives under the informal probate and summary administration procedures of many States." This language makes it fairly clear that the Bureau is referring to procedures authorized by state probate and estate laws. However, to avoid ambiguity, it would be far better for the comment to so specify. Otherwise, the vagueness of the definition could lead collectors to believe that they are allowed to contact a wide variety of family members who may be playing some informal role in resolving the decedent's estate. We recommend that the example be revised to refer to "personal representatives under the informal probate and summary administration procedures authorized by state probate and estate laws."

4.1.4.4 Persons appointed as universal successors

As a second example of a personal representative, the Bureau lists "persons appointed as universal successors." This is a term that does not appear to be widely used in state probate

[223] 84 Fed. Reg. at 23,294 (May 21, 2019).

[224] *Id.*

and estate laws. A search of the statutes in all 50 states found references to the term only in Lousiana's statutes.[225]

The Bureau should explain what it means by "universal successor." If it is intending to refer to this very specific (and apparently unusual) Louisiana concept, it should make that clear. Otherwise, the comment gives the impression that this is a term that has some general meaning that collectors can interpret.

To the extent that the term "universal successor" is equivalent to the heir, it also is unclear whether this language would include the heirs of any deceased heirs and where the chain of individuals would end. Just because someone is an heir to the estate does not mean they have any authority, obligation, or knowledge in the management or disposal of the assets and payment of outstanding debts. While the Bureau is attempting to capture individuals who are handling a deceased's estate without a formal probate court appointment, such individuals must be narrowly identified to prevent collectors from contacting individuals who have little to no involvement with the management of the debts of the deceased. To do otherwise would contradict the main purposes of the FDCPA to eliminate abusive debt collection practices by debt collectors and protect individuals from invasion of privacy.[226]

4.1.4.5 Persons who sign declarations or affidavits to effectuate the transfer of estate assets.

The Bureau's third example of what it means by personal representative is "persons who sign declarations or affidavits to effectuate the transfer of assets." This example is another attempt to include in collections of deceased consumers' estates people that, under state law, are not required to go through probate court, but again the Bureau fails to clarify what exactly is covered.

Some state laws provide an affidavit procedure as an alternative to formal appointment in the case of a small estate. For example, the state might allow an heir such as a surviving spouse to file an affidavit listing the decedent's assets and the claims against the estate, among other things. The court then reviews the materials, makes orders about how the estate's assets are to be distributed, and authorizes the heir to proceed.[227] It is these more streamlined probate procedures that the Bureau probably had in mind when it drafted this comment. However, as drafted, the comment is excessively vague and open to interpretation, potentially encompassing any person who signs any affidavit or declaration in connection with the transfer of any asset

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[225] La. Civ. Code Art. 3506(28) (stating that examples of "universal successor" are "the heir, the universal legatee, and the general legatee"; "The universal successor represents the person of the deceased, and succeeds to all his rights and charges."). A handful of other states refer to the term "universal successor" in comments to their probate code, taken from comments written by the drafters of the Uniform Probate Code. These comments seem to treat the term as one used by other countries. *See, e.g.*, Commentary to Ala. Code § 43-8-270 ("A person authorized by a court to accept delivery of a will from a custodian may, in addition to a registrar or clerk, be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.").

[226] 15 U.S.C. § 1692(a), (e).

[227] *See, e.g.*, Conn. Gen. Stat. Ann. § 45a-273; Nev. Rev. Stat. § 146.080. *See also* 755 Ill. Comp. Stat. § 5/25-1 (authorizing an affidavit procedure to effectuate access to safe deposit box and obtain transfers of certain other assets, without specifying any requirement for court review).

belonging to the decedent. The Bureau should revise the comment to read “persons who utilize an affidavit procedure authorized by state probate or estate law to settle a decedent’s estate.”

4.1.4.6 Persons who dispose of the deceased consumer’s assets extrajudicially

The Bureau’s final example of a personal representative is “persons who dispose of the deceased consumer’s assets extrajudicially.” Here again, the Bureau has attempted to identify persons who are authorized to settle an estate outside of court, but has used vague, overly broad language that creates a very slippery slope of who exactly a debt collector may contact.

It is unclear what the Bureau means by “dispose of the deceased assets.” This could be anyone who sells, gives away, or otherwise gets rid of a deceased’s assets whether they have the authority to do so or not. This could include a landlord or neighbor who cleans out a deceased consumer’s home and throws away worthless items; a friend who takes a keepsake of no monetary value from the home; a mother of a deceased veteran who donates the funeral military flag to the VFW; or a sister who brings her deceased brother’s clothes to Goodwill. The Bureau should revise the comment to read “persons who dispose of the deceased consumer’s assets extrajudicially pursuant to state probate or estate law.”

Recommendation**:** **The Bureau should:**

- **Amend the interpretation of “personal representatives” in Comment 6(a)(4)-1 to clarify that debt collectors must first determine who has authority, either through a court order or under a less formal procedure allowed by state probate or estate laws, to manage the assets and debts of the estate before contacting an individual as if the person were a consumer and attempting to collect on the debt.**

- **Revise the comment to limit the examples of “personal representative” to persons acting pursuant to state probate or estate law.**

4.1.5 Retain successor in interest and clarify its scope

The Bureau proposes to add “a confirmed successor in interest” to the definition of “consumer” under § 1006.6(a)(5). We support this addition to ensure consistent communications with surviving relatives regarding a mortgage on a home under Regulations X and Z. However, the Bureau must clarify that an individual who qualifies as a confirmed successor in interest for one debt (*e.g.*, a home mortgage) is not a confirmed successor in interest for other types of debts (*e.g.* a credit card debt) and that communications with such individuals must be limited to the mortgage loan that qualified them to become a successor in interest. This would ensure that certain loan servicers can communicate with the new owner of the home regarding their rights and options under Regulations X and Z, but not expand such communications unnecessarily to include the collection of other unrelated debt that the individual may not have authority to manage.

Recommendation: The Bureau should add a comment to § 1006.6(a)(5) stating that a debt collector may contact a "confirmed successor in interest" only regarding the debt that qualified that individual as a successor in interest under Regulation X, 12 C.F.R. § 1024.31 and Regulation Z, 12 C.F.R. § 1026.2(a)(27)(ii), *i.e.*, the mortgage loan securing the real estate property.

4.2 § 1006.6(b): Prohibitions on Certain Attempts to Communicate

Section 1006.6(b) essentially mirrors the language in the statute prohibiting certain debt collection communication practices. Our comments focus on the proposed comments interpreting the language of the proposed regulation.

4.2.1 Comment 6(b)(1)-1: Unusual or inconvenient times or places

Proposed Comment 6(b)(1)-1 clarifies when a communication is inconvenient and provides four examples. In its discussion, the Bureau asks if it should "require a debt collector to ask a consumer at the outset of all debt collection communications whether the time or place is convenient to the consumer."[228] Affirmatively confirming that this is a convenient time is a best practice for phone calls or in-person communications, and we urge the CFPB to adopt such a requirement.

Recommendation: The Bureau should supplement Proposed § 1006.6(b)(1) or Proposed Comment 6(b)(1)-1 by adding a requirement that the debt collector ask the consumer at the outset of all debt collection communications whether the time or place is convenient to the consumer.

4.2.2 Comment 6(b)(1)(i)-1: Time of electronic communication

Proposed Comment 6(b)(1)(i)-1 states that "[f]or purposes of determining the time of an electronic communication under § 1006.6(b)(1)(i) [stating that a communication is presumed to be inconvenient before 8:00 a.m. and after 9:00 pm], an electronic communication occurs when the debt collector sends it." We support this interpretation. However, the Bureau should further clarify that "sending" does not include scheduling a message for later delivery.

Recommendation: The Bureau should adopt Proposed Comment 6(b)(1)(i)-1, but should clarify that "sending" does not include scheduling a message for later delivery.

4.2.3 Comment 6(b)(1)(i)-2: Consumer's location

[228] 84 Fed. Reg. at 23,296 (May 21, 2019).

Proposed Comment 6(b)(1)(i)-2 clarifies that "[i]f a debt collector is unable to determine a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector complies with § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located." This common-sense interpretation will protect consumers and give helpful guidance to collectors, and the Bureau should adopt it.

***<u>Recommendation</u>*: The Bureau should adopt Proposed Comment 6(b)(1)(i)-2.**

4.2.4 Comment 6(b)(3)-1: Prohibitions regarding consumer's place of employment

Proposed Comment 6(b)(3)-1 reiterates the FDCPA's prohibition in 15 U.S.C. § 1692c(a)(3) against communications with a consumer in connection with the collection of a debt at the consumer's place of employment if the collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communications. We have no objection to this statement, since it merely reiterates a statutory prohibition.

However, we recommend that the CFPB add that a debt collector that knows or has reason to know that a consumer's employer prohibits the consumer from receiving communications in connection with the collection of a debt is also prohibited from directing communications (including by voice or text) to any non-work mobile device during any known working hours. The statutory prohibition relates to receiving communications at the consumer's place of employment, not just to receiving communications on the employer's equipment.

The CFPB should also clarify that the debt collector knows or has reason to know that the employer prohibits the consumer from receiving communications in connection with the collection of a debt if the consumer asks the collector not to contact her at work.

See our further discussion of emails at work in § 8.2.2, *infra*, regarding Proposed § 1006.22(f)(3).

***<u>Recommendation</u>*: The Bureau should:**

- **Clarify that the restrictions on communicating with a consumer at the consumer's place of employment apply to non-work mobile devices during any known working hours.**
- **Clarify that a debt collector knows or has reason to know that the employer prohibits the consumer from receiving communications in connection with the collection of a debt if the consumer asks the collector not to contact her at work.**

4.2.5 § 1006.6(b)(4): Exceptions

The text of Proposed § 1006.6(b)(4) generally restates the exceptions to the restrictions on communications that are found in 15 U.S.C. § 1692c(b), with the important additional protection in § 1006.6(b)(4)(i) that any consent of the consumer given directly to the debt collector must be given during a communication that does not itself violate the communication limitations imposed by § 1006.6(b)(1)-(3). The proposed addition will provide important protections for consumers.

Comment 6(b)(4)(i)-1 clarifies that a debt collector who learns during a communication with a consumer that the communication is occurring at an inconvenient time or place may not ask the consumer to consent to continuing the conversation at the inconvenient time or place, but may ask what would be a convenient time or place. Comment 6(b)(4)(i)-2 clarifies that prior consent of the consumer to communicate in ways that would otherwise be prohibited by § 1006.6(b)(1)-(3) must be given directly to the debt collector and does not transfer from the original creditor or a prior debt collector.

The CFPB should clarify that the prior consent of anyone who qualifies as a consumer under the broader definition of § 1006.6(a) does not transfer to any other person who qualifies as a consumer for this section. In other words, if a consumer's spouse consents to be contacted at 10:00 p.m., that consent does extend to the consumer who allegedly owes the debt or anyone else who qualifies as a consumer under § 1006.6(a).

***Recommendation*: The Bureau should clarify that the prior consent of anyone who qualifies as a consumer under the broader definition of § 1006.6(a) does not transfer to any other person who qualifies as a consumer for purpose of § 1006.6(b)(4)(i).**

4.3 § 1006.6(c): Cease communication requests and refusals to pay

Section 1692c(c) of the FDCPA requires the collector to cease communication upon a written request from a consumer or a written statement that the consumer refuses to pay the debt. Proposed § 1006.6(c) largely restates the statutory language at 15 U.S.C. § 1692c(c), with the addition of a prohibition on *attempting to communicate*. This addition is important because, as discussed in our comments on § 1006.2(j) in § 3.6, *supra*, if the CFPB does not withdraw its proposal to allow limited-content messages, the prohibition on "attempting to communicate" is necessary to prevent debt collectors from sending limited-content messages after a cease communication request or refusal to pay.

Comments 6(c)(1)-1 and 2 clarify that a consumer complies with the notice requirement of § 1692c(c) by notifying a debt collector "in writing or in electronic form using a medium of electronic communication through which a debt collector accepts electronic communications from consumers." This position is entirely consistent with the E-SIGN Act. While E-SIGN does not require any person to agree to use or accept electronic communications, it allows them to do so and ensures the validity and legal effect of electronic contracts, signatures, and other documents if the parties have so agreed.[229]

The proposed comment will make it easier for consumers to access the protections of § 1006.6(c). It would be helpful for the Bureau to also clarify, however, that a collector should be deemed to accept electronic communications from consumers through any non-public-facing[230] medium listed on its website or listed in any of its outgoing communications to consumers.

In addition to approving this step to make it easier for consumers to cease all communications, we still believe that it is important for consumers to have the ability to turn off particular channels of communications (*e.g.* all phone calls) as discussed in our comments in § 6.3, *infra*, regarding § 1006.14(h).

Recommendation: **The Bureau should adopt Proposed Comments 6(c)(1)-1 and -2, but should clarify that a collector should be deemed to accept electronic communications from consumers through any non-public-facing medium listed on its website or listed in any of its outgoing communications to consumers.**

4.4 § 1006.6(d): Communications with third parties

4.4.1 § 1006.6(d)(1): Prohibitions on third-party communications

Proposed § 1006.6(d)(1) largely restates the FDCPA's prohibitions on third-party communications. However, Proposed Comment 6(d)(1)-1 states that because a limited-content message is not a communication, a debt collector would not violate this section "if the debt collector leaves a limited-content message for a consumer with a third party who answers the consumer's home or mobile telephone." We have serious concerns about the Bureau's proposal regarding limited-content messages. Those concerns are discussed in our comments regarding § 1006.2(j) in § 3.6, *supra*.

4.4.2 § 1006.6(d)(2): Exceptions to prohibitions on third-party communications

Proposed § 1006.6(d)(2) largely restates §1692c(b) of the FDCPA. Proposed Comment 6(d)(1)-1 refers to Comment 6(b)(4)(i)-1 for "guidance concerning a consumer giving prior consent directly to a debt collector." We refer the Bureau to our remarks on Proposed Comment 6(b)(4)(i)-1 in § 4.2.5, *supra*, and do not repeat them here.

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[229] 15 U.S.C. § 7001(a), (b). Note that E-SIGN's consumer consent procedures are required only when a law requires information to be provided *to a consumer* in writing, not when a law requires a consumer to give written notice. 15 U.S.C. § 7001(c)(1).

[230] In other words, even if the collector lists a Facebook page on its website, consumers would not be able to send a cease communication request by posting on the debt collector's Facebook page.

4.4.3 § 1006.6(d)(3): "Reasonable procedures" for email and text message communications

4.4.3.1 *The Bureau should withdraw the proposed safe harbor rule.*

Proposed § 1006.6(d)(3) would create a blanket safe harbor for debt collectors whose efforts to communicate electronically with consumers result in third-party disclosures. It does this by defining "procedures that are reasonably adapted, for purposes of [15 U.S.C. § 1692k(c)], to avoid a bona fide error."[231] These procedures, discussed in §§ 4.4.3.2 to 4.4.3.3, *infra*, allow extremely loose methods for a collector to obtain and use what it thinks might be the consumer's mobile phone number or email address—methods that are certain to result in messages reaching third parties. Yet under this proposed safe harbor, a debt collector that complies with § 1006.6(d)(3) would be able to assert that it has fulfilled the second prong of the bona fide error defense – requiring the "maintenance of procedures reasonably adapted to avoid any such error"[232]—if a consumer sued the collector for a third-party disclosure in violation of § 1692c(b).

The Bureau should withdraw the proposal. The proposal is contrary to the consumer protection purposes of the statute and is arbitrary and irrational. It is based on assumptions for which the Bureau has marshaled no support.

Email and text message communications carry a significant risk of third-party disclosure. For example, text messages frequently pop up on screens in a way that makes them visible to others. Text messages to mobile phones used for work may be visible to employers in the same way that emails typically are. Many low-income consumers rely on public locations like libraries to access emails that may be viewable by others.

The risk of third-party disclosure is particularly high in the case of text messages. Because of the frequency of reassignment of cell phone numbers, text messages will inevitably reach persons who have nothing to do with the debt. Especially among low-income consumers who are struggling to pay ongoing bills, changing phone numbers is a very common occurrence as consumers lose cell phone service due to non-payment or running out of prepaid cell phone minutes. According to the Federal Communications Commission (FCC), nearly 35 million cell phone numbers are reassigned each year.[233] As such, the likelihood of texting the wrong person is high and debt collectors have good reason to anticipate third-party disclosures.

The Bureau will do a disservice not only to consumers but also to debt collectors if it adopts this ill-advised safe harbor. Regardless of what the CFPB's FDCPA rules provide, text messages violate the Telephone Consumer Protection Act (TCPA)[234] if they are sent via an autodialer to persons who did not give the sender prior express consent. Collectors have often been held

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[231] 84 Fed. Reg. at 23,300.

[232] 15 U.S.C. § 1692k(c).

[233] *See* Advanced Methods to Target and Eliminate Unlawful Robocalls, Proposed Rules, 83 Fed. Reg. 17,631, 17,632 (Apr. 23, 2018) ("Approximately 35 million numbers are disconnected and made available for reassignment to new consumers each year.").

[234] 47 U.S.C. § 227(b)(1)(A).

liable under the TCPA for making autodialed calls to a debtor who has not provided prior express consent[235] or for bombarding a non-debtor with calls intended for a debtor.[236] The TCPA's requirements apply equally to text messages.[237] A debt collector will be liable for statutory damages of $500, which can be trebled if the violation was knowing or willful, for each text message sent to a person—either the consumer or a third party—without that person's prior express consent.[238] This liability has often been imposed in class actions.[239]

The Bureau's proposed opt-out procedures are far too lax to amount to an assurance that the collector has the consumer's prior express consent. Nor will the CFPB's so-called safe harbor protect debt collectors from TCPA liability when their text messages reach parties other than the actual debtor, which they inevitably will. While consent given by a debtor to a creditor may transfer to the collector under the TCPA, consent given by a debtor to call a certain number does not allow the creditor or collector to call that number after it has been reassigned to someone else.[240]

The Bureau has requested comment about how its proposed rule would interact with other federal statutes such as the TCPA.[241] Its safe harbor rule would interact poorly with the TCPA. Instead of acting as a safe harbor, it would lead debt collectors into the eye of the storm. Moreover, the evidence shows that the majority of consumers do not want to receive email or text messages from debt collectors. Only 17% of all consumers (and12% of consumers who have been previously contacted about a debt in collection) told the Bureau that email or text messages were their "most preferred" method of being contacted about a debt in collection.[242] Yet the CFPB's approach will open the floodgates to electronic communications for everyone.

A far more consumer-oriented approach would require collectors to honor the preferences of consumers by first asking how they prefer to be contacted and obtaining explicit consent to use that method. One of the reasons that consumers may not want to receive text messages from debt collectors is that some cell phone plans require the consumer to pay per text message sent

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[235] *See, e.g.,* Gager v. Dell Fin. Servs., L.L.C., 727 F.3d 265 (3d Cir. 2013).

[236] *See, e.g.*, Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637 (7th Cir. 2012)

[237] *See* Report and Order, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, at ¶ 165 (F.C.C. July 3, 2003); *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 27, 107–108, 111–115 (F.C.C. July 10, 2015), *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed). *See also* Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019) (finding Facebook subject to the TCPA for sending repeated text messages to non-subscriber). *See generally* National Consumer Law Center, Federal Deception Law § 6.7.2 (3d ed. 2017), *updated at* www.nclc.org/library.

[238] 47 U.S.C. § 227(b)(3).

[239] *See* National Consumer Law Center, Federal Deception Law § 6.12.5 (3d ed. 2017), *updated at* www.nclc.org/library.

[240] *See, e.g.*, Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. 2014); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 640 (7th Cir. 2012). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.3 (3d ed. 2017), *updated at* www.nclc.org/library.

[241] 84 Fed. Reg. at 23,396-23,397.

[242] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 37 (Jan. 2017), *available at* http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

or received. Requiring affirmative consumer consent would allow the consumer to decide whether any perceived advantages of communicating by text are worth the costs per message. It would also avoid leading the collector into TCPA liability.

The Bureau should also clarify that the safe harbor does not apply to direct messages, whether via social media platforms or free-standing messaging platforms.[243] The CFPB should *not* expand the definition of email to include direct messages because, unlike distinct and individual email addresses, some direct message platforms message people based on their name, making it likely that messages will go to the wrong person, especially where the name is common (*e.g.* sending a direct message to John Smith on Facebook).

Our discussion in this section refers to the E-SIGN Act, where relevant. However, our main discussion of the E-SIGN Act, including electronic delivery of validation notices, is in § 13, *infra*, regarding Proposed § 1006.42.

Recommendations: **The Bureau should withdraw the proposed safe harbor rule. It should require affirmative opt-in by the consumer as a condition of the debt collector's use of any form of electronic communication.**

4.4.3.2 § 1006.6(d)(3)(i): First prong of the reasonable procedures for email and text message communication

The proposed safe harbor rule has two prongs. The first prong requires debt collectors, in order to qualify for the safe harbor from third-party disclosures, to take one of three steps before using an email address or, in the case of a text message, a phone number to communicate with a consumer. These three methods of qualifying for the first prong of the safe harbor are discussed in the following subsections. They are extraordinarily lax, and illustrate why the proposed safe harbor rule must be withdrawn. The second prong is set forth in Proposed § 1006.6(d)(3)(ii), and is discussed in § 4.4.3.3, *infra*.

4.4.3.2.1 § 1006.6(d)(3)(i)(A): Email address or telephone number used by the consumer to contact the debt collector

The first permissible method that the CFPB describes for qualifying for the first prong of the safe harbor is for the collector to use an email address or telephone number for text messages "that the consumer has recently used to contact the collector for purposes other than opting out of electronic communications." The proposed rule provides that complying with this method, unlike the second and third methods, will allow a debt collector to use a work email address or a work telephone number, not just a non-work email address or telephone number.

[243] In its discussion, the CFPB requested comments, "on whether to clarify the meaning of the term email in proposed § 1006.6(d)(3), such as by specifying that it includes direct messaging technology in mobile applications or on social media platforms." 84 Fed. Reg. at 23,301. We strongly object to such an expansion of the definition of email.

The CFPB assumes that consumers will assess the risk of third-party disclosures before using a particular email address or phone number to contact a debt collector.[244] This assumption is unjustified and arbitrary, and the Bureau cites to no evidence to support it. To the contrary, we think it highly unlikely that consumers will have done a third-party disclosure risk analysis before using a particular email or phone number to communicate with a collector.

Instead of relying on the unwarranted assumption that a collector can safely send messages to a cell phone number or email address that a consumer has recently used, the CFPB should require prior consumer consent provided directly to the debt collector to authorize using a particular method of electronic communication. This requirement is far more protective of consumers. At a minimum, the CFPB should clarify in a comment on this section that a phone call from a cell phone does not invite a text to that number. Consumers may be able to initiate a call in private but text responses may pop up in a way that is visible to third parties.

The likelihood that emails will be seen by third parties is particularly high with respect to work email addresses. As discussed in more detail in § 8.2.2, *infra*, it is common for an employer to have the ability to access all emails received by its employees at employer-provided email addresses. Employees may not be aware of this risk when they send personal emails from a work email address. Even a consumer who is aware of this issue likely will be unaware that sending a carefully-worded email to a collector will authorize the collector to send whatever emails it chooses, revealing whatever information it wants, to the work email address. Moreover, the CFPB's proposal to limit this category to emails or telephone numbers that the consumer has used "recently" to contact the debt collector is so vague that it is meaningless. The proposed rule does not define "recently" at all, leaving it up to the imagination of the debt collector. However, in its discussion, the CFPB asks if "in the past year should qualify as recent."[245] Such a long period is entirely inconsistent with the commonly-understood meaning of "recently," and would cause many problems for consumers. Struggling consumers may change cell phone numbers frequently. Low-income consumers in financial crisis may change phone numbers multiple times over the course of a single year. Many of these phone numbers will be reassigned, and text messages sent to them will reach third parties. Email addresses can also be terminated (*e.g.* an email address associated with a cable provider that ends when service is terminated or an email address associated with a school or job) and sometimes are reassigned (*e.g.* a university that discontinues an email address for a departed student and reassigns it to an incoming student), although we believe that this happens far less frequently than the reassignment of phone numbers. If this ill-advised safe harbor is retained, we suggest that "recently" should be defined as within the past 30 days to reflect the month-to-month nature of many pay-as-you-go cell phone plans and the frequency of reassignment of telephone numbers.

Another significant problem with this proposed method of satisfying the first prong of the safe harbor is that, under the TCPA, capturing a cell phone number that the consumer has used to call the collector does not amount to prior express consent for the collector to send autodialed text messages to the consumer at that number.[246] By suggesting that sending a text message

[244] 84 Fed. Reg. at 23,301 ("a consumer's decision to communicate electronically using a specific email address or telephone number may suggest that the consumer has assessed the risk of third-party disclosure to be low").

[245] 84 Fed. Reg. at 23,302.

[246] *See, e.g.*, Phillips v. Mozes, Inc., 2015 WL 12806594 (N.D. Ala. Jan. 26, 2015) (lack of consent sufficiently alleged when defendant captured plaintiff's cell phone number from text message plaintiff sent and text message itself did not state number); Castro v. Green Tree Servicing, 959 F. Supp. 2d 698 (S.D.N.Y. 2013) (placing call from cell phone to creditor is not consent); *In re* Rules & Regulations

to a cell phone number that the consumer has used to call the collector falls within a safe harbor, the CFPB would lead collectors into violating the TCPA.

<u>Recommendation</u>: **The CFPB should require affirmative consumer opt-in before the debt collector transmits electronic communications. Failing that, it should at least revise the safe harbor rule to state that a call from a phone number does not authorize a return text message. It should also revise its proposed Comment to state that "recently" means within the past 30 days.**

4.4.3.2.2 § 1006.6(d)(3)(i)(B): Disclosure of intent to communicate electronically and failure to opt out

The second method that the CFPB describes for obtaining an email address or telephone number for text messages that would satisfy the first prong of the safe harbor is having the debt collector or creditor notify the consumer, no more than 30 days in advance, that a particular non-work email address or non-work telephone number for text messages might be used to contact the consumer, and giving the consumer a chance to opt out before using it.

The Bureau asserts that this method is permissible because a consumer who fails to opt out has assessed the risk of third-party disclosures and determined that it is low.[247] However, the Bureau cites no evidence to support this assertion. But it is far more likely that the consumer was overwhelmed, did not notice any opt-out notice, or did not take the time to opt out, than that the consumer actually conducted a risk assessment related to third-party disclosures.

This method is limited to contact at a non-work email address or, for text messages, a non-work telephone number. Proposed comment 6(d)(3)(i)-1 refers to § 1006.22(f)(3) and its commentary for clarification regarding when a debt collector knows or should know that an email address is provided by a consumer's employer. Please see our comments on § 1006.22(f)(3) in §8.2.2, *infra*, for discussion of the issues raised by these sections. The CFPB provides no guidance to determine when a collector knows or should know that a telephone number is provided to the consumer by the consumer's employer.

We are concerned that this notice may get lost among other notices, despite the requirement in § 1006.6(d)(3)(i)(B)(1) that it be provided clearly and conspicuously.[248] For example, it may be added to a validation notice that is already full of other information, or added to a long list of

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Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, 23 F.C.C. Rcd. 559 n.34 (Jan. 4, 2008) ("The Commission also noted, however, that if a caller's number is 'captured' by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.").

[247] 84 Fed. Reg. at 23,302.

[248] Comment 6(d)(3)(i)(B)(1)-1 refers to the definition of "clearly and conspicuously" in § 1006.34(b)(1). Please see our comments on that section in § 11.2.2, *infra*.

information provided in a phone conversation.[249] We are also concerned that electronic notices about the right to opt out might not be seen at all. Consumers would be unlikely to listen to an opt-out message provided by robocall. [250] Unquestionably, the best way to protect consumers from third-party disclosures is an opt-in method for electronic communication.

Comment 6(d)(3)(i)(B)(1)-2 says that the opt-out notice can be provided orally and the creditor or debt collector may require the consumer to make the opt-out decision during that same communication—in other words, the period during which the opt-out right can be exercised can be limited to the length of the call. As noted above, phone calls to consumers already involve multiple disclosures, and an opt-out notice about electronic communications may be overlooked by consumers overwhelmed with other information.

Indeed, Comment 6(d)(3)(i)(B)(1)-3 states that both this opt-out notice and the opt-out notice for hyperlinked delivery of validation and other required notices could be sent to the consumer in the same communication. This will encourage collectors and creditors to mix in this opt-out notice with other material where it will not be noticed. In addition, it will add to consumer confusion to present two opt-out rights in the same notice. Consumers who attempt to opt out may not realize that there are actually two different things that they can opt out of, and they may opt out of only one instead of both. We discuss our serious concerns about the hyperlinked opt-out notice in § 13.3.4.3, *infra*, in our discussion of § 1006.42.

Another concern about this proposed opt-out procedure is that the proposed rule makes the safe harbor available to a collector if the *creditor* sends the opt-out notice and the consumer fails to opt out. Creditors that are not also debt collectors under the FDCPA, however, will not be subject to the proposed rule or required to document their compliance and provide that documentation to debt collectors under any other statute or regulation. As a result, consumers would not have a private right of action against a creditor that falsely claims to have provided the opt-out notice.

Even if there were no other concerns about this proposed method of satisfying the first prong of the safe harbor, its failure to conform to the prior express consent requirement of the TCPA makes it a very unwise policy to adopt. A consumer's failure to opt out after receiving a notice about electronic communications is unlikely to be considered prior express consent under the TCPA. A collector that sends autodialed text messages to a consumer who has failed to respond to an opt-out notice is likely to face TCPA liability. The CFPB should not adopt a rule that would encourage collectors to violate the TCPA.

Comment 6(d)(3)(i)(B)(1)-2 does not define a reasonable period for the consumer to exercise the opt-out right when the disclosure of the right is given in written or electronic communications. However, according to Proposed § 1006.6(d)(3)(B)(1), the opt-out notice must be sent "no more than 30 days before" the debt collector's first message to the email address or phone number that it acquires through the opt-out procedure. This means that the window for opting out must be shorter than 30 days. By contrast, the statute requires the consumer to be

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[249] The proposed rule would expand the amount of validation information that has to be provided to consumers, *see generally* § 1006.34, but would authorize debt collectors to provide that information orally at § 1006.34(a)(1)(ii).

[250] The Telephone Consumer Protection Act's prohibition of prerecorded calls to landlines without the consumer's prior express consent applies only to telemarketing calls, not to debt collection calls. 47 C.F.R. § 64.1200(a)(3).

given a full 30 days to exercise the rights provided by a validation notice. 15 U.S.C. § 1692g(a), (b). It is very confusing to permit a written notice to consumers about an opt-out right that could be included in the validation notice, but would have a shorter period for action than the time frame to dispute a debt or request original-creditor information in response to a validation notice. Again, the solution to this problem is to present information about options to communicate electronically that invites the consumer to opt in rather than presenting an opt-out right with a deadline that differs from the deadline on the validation notice.

Comment 6(d)(3)(i)(B)(2)-1 appropriately clarifies that, even after the opt-out period in the § 1006.6(d)(3)(B)(1) notice, the debt collector would have to stop using that email address, or that phone number for text messages, if the consumer opts out of contacts at that email address or phone number (or opts out of all emails or text messages) pursuant to § 1006.14(h). While these statements are true, this list is incomplete, since the debt collector would also have to stop using the email address or phone number for text messages if the consumer opted out pursuant to § 1006.6(e), or opted out of all communications pursuant to § 1006.6(c)(1)(ii). The CFPB should amend the comment to clarify this.

<u>Recommendation</u>**: Obtaining permission from the consumer through an opt-out procedure to send electronic communications to a particular email address or phone number is not a reliable way to ensure that the messages are not disclosed to third parties and should not serve as the basis for a safe harbor. The CFPB should withdraw Proposed § 1006.6(d)(3)(B).**

4.4.3.2.3 § 1006.6(d)(3)(i)(C): Disclosure from creditor or prior collector and failure to opt out

The third method that the CFPB describes for obtaining an email address, or a telephone number for text messages, that will satisfy the first prong of the safe harbor requires these three steps:

1. the debt collector must communicate with the consumer using a non-work email address or, in the case of a text message, a non-work telephone number that the creditor or a prior debt collector obtained from the consumer to communicate about the debt;

2. before the debt was placed with the debt collector, the creditor or the prior debt collector must have recently sent communications about the debt to the non-work email address or non-work telephone number; and

3. the consumer must not have asked the creditor or the prior debt collector to stop using the non-work email address or non-work telephone number to communicate about the debt.[251]

The first problem with this method is the inherent assumption that if either the creditor or the debt collector sent information to the consumer at a specific email address or a non-work telephone number, that is sufficient proof that the consumer actually received it. As described in §§ 4.4.3.1 and 4.4.3.2.1, *supra*, email addresses and cell phone numbers change often.

[251] 84 Fed. Reg. at 23,304.

Moreover, unlike postal mail, which allows for mail forwarding by the postal service (or, indeed, informal mail forwarding by subsequent dwellers at previous addresses), there is no ubiquitous method of forwarding email or text messages. *Sending* the information to the consumer does not mean the consumer *received it.* And even if the message was received, that does not mean that the consumer viewed it, as it could easily have been viewed by a subsequent assignee of that phone number or sent to a spam filter.

As with the second method, this method requires use of a "non-work email address or, in the case of a text message, a non-work telephone number." This is an important prerequisite to protect consumers. Please see our comments in § 8.2.2, *infra*, regarding § 1006.22(f)(3) for more about workplace emails.

In addition, the Bureau's assumption that a consumer's provision to a creditor of any email address or a cell phone number shows consent to receive messages at that address or number from a debt collector is unfounded. When consumers provide an email address or phone number for text messages to a creditor, they typically do not think about the possibility that they will fail to make the payments, the account will become delinquent, and that this same method of communication will be used by a subsequent debt collector. Indeed, phone numbers and email addresses are frequently required for account formation. Consumers are certainly not performing risk assessments about the likelihood of future third-party disclosures if the email or phone number that they provide for text messages is used potentially years in the future by a debt collector.

We also have specific concerns about the three steps required under this provision. These concerns are discussed in the remainder of this section.

Step One of this third method says that the email address or phone number for text messages must have been "obtained from the consumer to communicate about the debt." The CFPB does not specify what this means, and the whole issue raises a number of questions:

1. How will the debt collector know that the email address or phone number for text messages was "obtained from the consumer"? Will data be separately marked when it was obtained from the consumer versus the result of research by a prior debt collector?

2. Can a credit card company use an email address that was provided at account formation years prior to an account becoming delinquent? In that instance, the creditor obtained the email address in order to be able to send the consumer ongoing communications such as monthly account statements. The address was not provided to communicate about a delinquent debt.

3. Can a creditor use a phone number that was provided for text messages for fraud alerts? In that instance, the phone number was provided for the limited purpose of receiving fraud alerts on the account and was not provided to communicate about the debt.

These concerns are compounded by the fact that, when a consumer gives a creditor or a debt collector a phone number for text messages, or an email address for the purpose of communicating about a debt, the consumer may not anticipate that the information will be transferred from the creditor to a collector or from one collector to another.

Moreover, most creditors are not subject to the FDCPA's regulations because they are not debt collectors. Thus, the CFPB will not be able to regulate through this rulemaking how these creditors actually obtain email addresses or phone numbers for text messages from consumers. There are thus serious concerns about whether Step One is even workable, much less consistent with the consumer protection purposes of the FDCPA.

Step Two requires that "before the debt was placed with the debt collector, the creditor or the prior debt collector recently sent communications about the debt to the non-work email address or non-work telephone number."[252] However, it does not require that the consumer actually received or was able to view the message, or that the creditor or debt collector took any steps to confirm receipt and access. And, of course, any requirements placed on the creditors are not enforceable under this proposed rule if they are not debt collectors under the FDCPA.

The addition of the undefined term "recently" does not add any reliable protection to consumers, because it can be interpreted in so many different ways. This issue is heightened by the Bureau's suggestion in its discussion of another section of the safe harbor rule that "recently" might encompass contacts that occurred a year earlier. [253] See § 4.4.3.2.1, *supra*, regarding § 1006.6(d)(3)(i)(A) for more discussion of this issue.

Step Three requires that "the consumer did not request the creditor or the prior debt collector to stop using the non-work email address or non-work telephone number to communicate about the debt."[254] To treat non-response as confirmation that the phone number or email address can be safely used to communicate with the intended consumer is completely unjustified. Non-response is just as likely to mean that an email message ended up in the recipient's spam folder, that it was blocked by a robocall blocking service, or that it reached the wrong person, who deleted it as spam or phishing.

Moreover, in the case of communications from the creditor, the creditor would be under no obligation to inform the consumer of the right to opt out of such communications.[255] It is especially wrong to treat a failure to exercise an opt-out right of which the consumer was never informed as implicitly authorizing a different party to send messages to that email address or phone number.

***Recommendation*: The CFPB should withdraw this proposed method based on notice from the creditor or a prior debt collector.**

4.4.3.3 § 1006.6(d)(3)(ii): Second prong of the reasonable procedures for email and text message communication

In addition to taking one of the three steps discussed above to comply with § 1006.6(d)(3)(i), the proposed regulation requires that, in order to qualify for the safe harbor, debt collectors must

[252] 84 Fed. Reg. at 23,304.

[253] 84 Fed. Reg. at 23,302.

[254] 84 Fed. Reg. at 23,304.

[255] In contrast, under § 1006.6(e), a debt collector would have to provide an opt-out notice in electronic communications.

take “additional steps to prevent communications using an email address or telephone number that the debt collector knows has led to a [third-party disclosure].” We definitely agree that the three steps discussed above are insufficient to provide any reasonable assurance that emails or text messages will not be seen by third parties. However, the vague requirement of “additional steps” is wholly inadequate. If the collector knows that its use of an email address or telephone number has led to a third-party disclosure, the Bureau should mandate that the collector discontinue use of that email address or telephone number immediately, and that it not use that email address or telephone number again until it has had an actual interaction with the consumer in which the consumer provides explicit consent.

Recommendation: If it retains any part of its proposed safe harbor, the CFPB should require collectors to stop using an email address or phone number for text messages if it knows that using that email address or phone number for text messages has caused a third-party disclosure, unless the collector has received explicit authorization from the consumer to continue using the email address or phone number for text messages in spite of the disclosure.

4.5 § 1006.6(e): Opt-outs for electronic communications

In Proposed § 1006.6(e), the CFPB proposes to require debt collectors to add opt-out notices to communications or attempts to communicate electronically. This section states:

> A debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. The debt collector may not require, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector or provide any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt out.

We strongly support an opt-out requirement. Without a specified limit on the number of electronic communications, it is particularly critical that consumers have an ability to turn off these channels of communication if they become harassing. The opt-out procedure must work well, and debt collectors must be held responsible for responding in a timely manner to opt-out requests.

Aside from limiting harassment, there are a number of other situations where consumers may wish to opt out. For example, if debt collectors are contacting the consumer by text message on a work phone or via a work email, consumers need the ability to easily shut down such communications immediately. Consumers who do not have reliable access to a particular channel of electronic communication may prefer to opt out of communications via that channel entirely. Consumers who are being contacted erroneously may prefer to opt out rather than call the debt collector to deal with a wrong-number text or an email message that was the result of a typo. Indeed, opt-out messages have become such a ubiquitous part of the consumer landscape that it is surprising and confusing not to see one.

While we strongly support this opt-out requirement, it should be in addition to and not instead of a requirement for opt-in consumer consent to receive messages via a particular electronic communication channel. Moreover, we have several specific recommendations about how the CFPB can strengthen its opt-out requirement, which we discuss below.

First, the CFPB should require debt collectors to accept consumer opt-outs through any reasonable method. "Reasonable method" should be defined to include any communication channel used by the debt collector to communicate with the consumer or that the debt collector lists on its website, or any communications that it provides to consumers as a means of contacting the debt collector. This means, for example, that a consumer who wants to opt out of debt collection emails should be able to call a debt collector to opt out of future email communications if the debt collector uses the phone to contact consumers, lists its phone number on its website, or lists its phone number on written communications with consumers. In contrast, for example, if a debt collector does not want to be contacted with consumer opt-outs by fax, it can refrain from contacting consumers by fax, remove any fax numbers from its website, and remove fax numbers from its written communications.

Currently, the CFPB's proposed rule generally leaves it to the debt collector's discretion to choose the ways that a consumer can opt out. This discretion is problematic, because debt collectors could adopt onerous requirements to limit the consumer's ability to opt out or extend the amount of time that they will be able to communicate with the consumer before any opt-out takes effect. For example, a debt collector could say that, in order to opt out of email or text messages, the consumer must send a certified letter to a certain Post Office Box in Nebraska. Even if the debt collector is not trying to make it difficult to opt out, an unnecessarily limited method for opting out may be problematic for some consumers. For example, if the debt collector inadvertently emails a consumer at work, an opt-out procedure that requires a return email from that email address could be problematic for a consumer whose work emails are monitored and who would therefore prefer to contact the debt collector by phone or through another communication channel. For these reasons, allowing the consumer to opt out through any reasonable method will provide far more protection.

Since this rule, if adopted, will apply to text messages, it is particularly important to make it clear that the consumer can opt out of receiving text messages by any reasonable method. The Telephone Consumer Protection Act applies to text messages that are sent by an autodialer,[256] as texts from businesses typically are. The Federal Communications Commission has ruled that a called party has the right to revoke consent to receive autodialed calls or text messages by any reasonable means.[257] In order to protect consumers and to avoid leading debt collectors to

[256] Report and Order, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, at ¶ 165 (F.C.C. July 3, 2003). *See generally* National Consumer Law Center, Federal Deception Law § 6.7.2 (3d ed. 2017), *updated at* www.nclc.org/library.

[257] *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 63, 64 (F.C.C. July 10, 2015), *ruling upheld*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.4.1 (3d ed. 2017), *updated at* www.nclc.org/library.

violate the TCPA, which can carry significant liability, the CFPB should take pains to conform its rule to these requirements.

The proposed rule does provide that "[t]he debt collector may not require, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector or provide any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt out." These protections are important, but we note that by limiting this to a prohibition on paying a fee to the debt collector, the debt collector can still require the consumer to incur a cost in order to opt out. For example, as discussed above, the proposed rule appears to allow debt collectors to require a certified letter in order to opt out. For consumers who have to pay for each text message, requiring a text to opt out would also cause the consumer to incur an additional charge.[258] Once again, this speaks to the need to allow consumers to choose how best to opt out, which would allow them to avoid potential costs.

We are also concerned that some collectors may argue that the opt-out procedure is not required for all types of electronic communications. The proposed rule says that debt collectors will have to provide opt-out methods when communicating or attempting to communicate "electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address." Some collectors may argue that direct messages through certain social media platforms, for example, may not qualify under this list to the extent that they do not have an electronic-medium address. For example, in Facebook Messenger or LinkedIn Messaging a user searches for a person by name, potentially choosing from multiple people with the same name as the person that the user wants to message, rather than specifying an email address, phone number, or other account identifier. The CFPB should revise this language to make it clear that opt-out notices are required for all electronic communications.

In Proposed Comment 6(e)-1, the CFPB clarifies that the opt-out notice must be clear and conspicuous, which is defined at § 1006.34(b)(1) as meaning "readily understandable . . . the location and type size also must be readily noticeable to consumers." This requirement is positive.

In its proposed comments, the CFPB gives two examples of opt-out procedures that would comply with the rule. Both have merit, but the CFPB should require collectors to make these procedures available instead of simply giving them as examples and leaving it to the collector's discretion whether to offer them. First, Proposed Comment 6(e)-1(i) states that a debt collector would comply with these requirements by including in a text message, "Reply STOP to stop texts to this telephone number." The CFPB should require collectors that send text messages to allow opt-out by replying "STOP," and to disclose this method in the text message. However, In keeping with the idea that consumers should be able to use any reasonable method to opt out, we recommend that this statement be revised to read, "Contact us or reply STOP to stop texts to this telephone number."

Second, Proposed Comment 6(e)-1(ii) says that an email message will comply "by including instructions in a textual format in the email, in a type size no smaller than the other text in the

[258] The CFPB cites one source stating that 10% of U.S. mobile phone numbers did not have unlimited texting in 2015. 84 Fed. Reg. at 23,305 n.255 (May 21, 2019) (citing Josh Zagorsky, Almost 90% of Americans Have Unlimited Texting, Instant Census Blog (Dec. 8, 2015), *available at* https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting)).

email, explaining that the consumer may opt out of receiving further email communications from the debt collector to that email address by replying with the word ‘stop’ in the subject line.” Again, we agree that this is a reasonable opt-out method, but the CFPB should require collectors to make this method available in all emails instead of just listing it as an example. However, the message about how to stop collection emails should be expanded to address all the methods that can be used to contact the collector. For example, “Contact us via phone, email, text, or reply to this message with the word ‘stop’ in the subject line to opt out of future emails to this email address.”

As for the details of this method, we agree that the description of the opt-out right should be textual instead of being included in a graphic, to ensure that the information is available to readers with disabilities who may use text reading tools. Requiring it to be textual will also ensure that the information displays, since email programs may not download graphics to limit the amount of data needed or due to slow internet connections. The text should be the same size as the text in the email to ensure that the message does not get lost in the fine print.

As a final comment, it is notable that Proposed § 1006.6(e) gives consumers the right to opt out of receiving electronic communications from a debt collector, but does not explicitly require the collector to honor the consumer’s opt-out. Instead, the requirement to honor an opt-out is found in § 1006.14(h). We recommend that the Bureau revise Proposed § 1006.6(e) to require the collector to honor a consumer’s opt-out request as provided by § 1006.14(h). Stressing this requirement is particularly important, since the Telephone Consumer Protection Act will impose liability on a collector that continues to send autodialed text messages to a consumer after the consumer has withdrawn consent to receive them.

***Recommendation*:** **The Bureau should:**

- **Include an opt-out requirement in addition to a requirement for opt-in consumer consent to receive messages via a particular electronic communication channel.**
- **Require debt collectors to accept consumer opt-out requests through any reasonable method, including any communication channel used by the debt collector to communicate with the consumer or that the debt collector lists on its website or any communications that it provides to consumers as a means of contacting the debt collector.**
- **Mandate that collectors allow consumers to opt out of text messages by texting “STOP” and to opt out of email messages through a similar procedure, and that they disclose this method in any text message or email.**
- **Add a Comment to § 1006.6(e) noting that the collector must honor a consumer’s opt-out request as provided by § 1006.14(h).**

5. § 1006.10: Acquisition of location information

5.1 Overview

In Proposed § 1006.10, the CFPB addresses the limits on collectors' activities to obtain location information about a consumer. Much of the proposed rule closely tracks the parallel statutory prohibition in § 1692b of the FDCPA. However, we have serious concerns about the unjustifiably high number of calls that the proposed rule would allow collectors to make to third parties and its failure to address electronic communications.

5.2 § 1006.10(a): Definition of location information

Proposed § 1006.10(a) restates the definition of "location information" with minor modifications from the original text in 15 U.S.C. § 1692a(7) of the FDCPA.

Comment 10(a)-1 explains that, for a deceased consumer, "location information" includes the information provided in § 1006.10(a) for a person who is "authorized to act on behalf of the deceased consumer's estate." As discussed in our comments regarding § 1006.6(a) in § 4.1.4, *supra*, the term "authorized to act on behalf of the deceased consumer's estate" is vague and unclear and needs further clarification by the CFPB to limit these contacts to the person who is legally authorized to act on behalf of the estate.

The CFPB should further state in this comment that where the debt collector has the relevant person's contact information, the collector is prohibited from contacting third parties for location information, as the FTC's Commentary stated.[259] The CFPB should also clarify that the debt collector must consult available public records to identify whether an estate is in probate. If it is, the CFPB should clarify that the collector may contact only the executor or administrator of the estate identified in the public filing and is prohibited from contacting third parties.

<u>Recommendation</u>: **The CFPB should:**

- **Prohibit third-party contact where the debt collector already has the relevant person's contact information; and**
- **Require debt collectors to review public records to identify whether an estate is in probate with an executor or administrator and, if so, prohibit contact with other third parties.**

5.3 § 1006.10(b): Form and content of location communications

Proposed § 1006.10(b) restates § 1692b of the FDCPA, providing instructions for how debt collectors can contact third parties to obtain location information for the consumer.

Proposed Comment 10(b)(2)-1 addresses the question of how a debt collector should comply with Proposed § 1006.10(b)(2), which instructs that a debt collector must "[n]ot state that the

[259] FTC Official Staff Commentary § 805(b)-2 ("a debt collector may not call third parties under the pretense of gaining information already in his possession").

consumer owes any debt" when attempting to acquire location information, when the consumer is deceased. The comment states that a debt collector does not violate this rule if the debt collector states that it is "seeking to identify and locate the person who is authorized to act on behalf of the deceased consumer's estate." We do not have any concerns about this proposal.

5.4 § 1006.10(c): Frequency of attempted calls to obtain location information

Proposed § 1006.10(c) states, in part, that a debt collector must comply with § 1006.14(b), regarding limits on the frequency of telephone calls to a third party when the collector is seeking location information. This would allow a debt collector to attempt to call a third party who has no relation to or obligation on the debt up to seven times a week, including seven attempted calls in one day, or one attempted call every day for an indefinite period of time if the third party does not answer.

Even worse, if a consumer allegedly owes multiple debts, the debt collector could attempt to call the third party seven times per week for every debt in collection, meaning that the collector would be allowed to attempt to call this un-obligated person multiple times per day. As discussed in our comments on § 1006.14(b), this is abusive and harassing for a consumer, let alone a third party who has no obligation on the debt.

Moreover, under the proposed rule, a debt collector would also be able to call an unlimited number of third parties in an effort to seek location information for the consumer. This means that a collector could potentially call the consumer's parents, siblings, other relatives, classmates, friends, former neighbors, clergy, commanding officers, and former co-workers. For a consumer who allegedly owes seven debts, a debt collector would be able to make 49 attempted calls per week to each of these persons. This is absurd.

At a time when Americans are increasingly reluctant to answer calls from unknown phone numbers, third parties are likely to treat attempted location calls as spam calls and simply ignore them. This is particularly true given that the debt collector may be initiating calls from multiple numbers and is not prohibited by the proposed rule from spoofing its number.[260] Thus, the fact that collectors "must not communicate more than once with such person"[261] (absent certain exceptions) will not provide the same protection from a high volume of harassing attempted calls as it once did when people typically answered all calls to their landline phones.

Given these serious problems with the proposal to allow all these calls to un-obligated third parties, the Bureau must take additional steps to further limit the number of attempted calls a debt collector can make to an unobligated third party to seek location information. The Bureau should prohibit more than one attempted call per third party per week until the debt collector communicates with that person. Once the collector communicates with the third party, all additional attempted communications must cease unless there is an applicable exception under § 1006.10(c). In addition, the Bureau should clarify that a communication in which the called party declines to give information to the collector or asks the collector to stop calling is a

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[260] Contrast SBREFA Outline at 116 Appx. H ("the Bureau is considering a proposal that would require debt collectors to display working, in-bound, toll-free telephone numbers to appear on caller ID screens of consumers").

[261] Proposed § 1006.10(c).

communication for purposes of the prohibition of future calls, and that a belief that such a person has location information is not grounds for the collector to place additional calls to that person. The Bureau should also clarify that a collector is prohibited from contacting <u>any</u> third parties under the pretense of gaining location information if it already has location information for a consumer, as the FTC did in its commentary.[262]

***<u>Recommendation</u>*: The Bureau should:**

- **Limit collectors to one attempted communication per third party per week until the collector communicates with the third party.**
- **Prohibit a collector from making additional attempted communications after communicating with the third party, unless the exceptions in § 1006.10(c) apply;**
- **Prohibit a collector from making further calls to a third party who has declined to provide information or has asked the collector to stop calling.**
- **Prohibit a collector from contacting third parties to obtain location information if it already has location information for that consumer.**

5.5 Electronic communications, voicemails, and location information

The CFPB does not address whether or how debt collectors will be allowed to use electronic communications or voicemail messages to contact third parties in order to obtain consumer location information. It should clarify that any electronic communication or voicemail message to a third party to obtain location information is required to comply fully with § 1006.10. It should also make clear that such messages are prohibited to the extent that they convey the name of the collector's employer without the third party first requesting such information. For example, an email message might identify the employer in the body of the message, in the email address, or in the email header.

Moreover, the CFPB should make clear throughout the proposed rule that limitations on electronic communications or voicemails directed toward consumers apply equally to attempts to obtain location information, including the opt-out requirement in § 1006.6(e) and the prohibition on outward-facing social media communications in § 1006.22(f)(4).

As discussed in the prior section, protections for unobligated third parties must also go beyond protections for consumers, limiting any attempted communication - whether by phone or electronically - to no more than one attempt per week.

***<u>Recommendations</u>:* The Bureau should:**

[262] FTC Official Staff Commentary § 805(b)-2 ("a debt collector may not call third parties under the pretense of gaining information already in his possession").

- **Clarify that any electronic communication or voicemail message to a third party to obtain location information must fully comply with § 1006.10 and that messages are prohibited to the extent that they convey the name of the employer without the third party first requesting such information.**

- **Clarify throughout the proposed rule that limitations on electronic communications or voicemails directed toward consumers apply equally to attempts to obtain location information.**

5.6 Limited-content messages and location information

As discussed in our comments regarding Proposed § 1006.2(j) in § 3.6, *supra*, the Bureau is proposing to allow debt collectors to leave limited-content messages with third parties. One of our many concerns about this proposal is that it could be interpreted to allow collectors to leave limited-content messages with third parties who are contacted for the purpose of obtaining location information. As discussed more fully in § 3.6.3.2, *supra*, we urge the Bureau, if it goes forward with the proposed limited-content message rule, to make it clear that collectors cannot leave limited-content messages with third parties except when the third party has answered a call to the consumer's telephone number.

6. § 1006.14: Harassing, oppressive, or abusive conduct

6.1 Overview

In Proposed § 1006.14, the Bureau addresses limits on the frequency and manner of making collection calls. The Bureau's proposed limit on the frequency of calls to the consumer is excessively high. It arbitrarily and irrationally ignores compelling evidence of the harm that excessive calls cause to consumers and the high volume of consumer complaints about this practice. If adopted, it will likely result in an increase rather than a decrease in high-volume harassing calls.

A positive feature of the proposed rule is that it would allow consumers to opt out of receiving communications by a particular medium of communication. However, this portion of the proposed rule should be significantly strengthened in order to achieve its purposes.

6.2 § 1006.14(a): General prohibition of harassing, oppressive, or abusive behavior

Proposed § 1006.14(a) would provide specific limits on telephone calls made to collect debts, but not on any other type of contact, including electronic communications. In its discussion, the CFPB states that the general prohibition of any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt, found in § 1692d and in proposed § 1006.14(a), "would apply to harassment through media other than telephone calls."[263] The CFPB should codify this interpretation in a comment to § 1006.14(a), articulating that emailing, texting, or otherwise engaging in electronic communication or attempted communication too frequently is a violation of § 1006.14(a). Further, the comment should state that this rule applies even if the consumer had not exercised the § 1006.6(e) opt-out right or the § 1006.14(h) right to request that the debt collector stop using a particular communication channel. The comment should also explain that, in assessing whether the "natural consequence" of a particular number of communications was to harass, oppress, or abuse, all communications, including phone calls, must be included to evaluate whether the debt collector violated § 1006.14(a). In other words, the cumulative amount of total communications could violate § 1006.14(a) even if the total number of communications through a single channel did not.

The Bureau explained in its discussion that it "currently is unaware of sufficient evidence of consumer injury that would suggest a need for restricting the frequency of email and text message communications."[264] This lack of evidence is likely due to the fact that, as the Bureau recognized, "debt collectors generally have not yet begun communicating with consumers using these or other newer communication media."[265] However, there are other sources of information that the Bureau should assess before reaching any conclusion about the effect of frequent text messages or emails on consumers. For example, the FTC receives tens of thousands of complaints every year about text messages, including unsolicited text messages.[266] To ensure that consumers are protected from a flood of emails, texts, or other electronic communications that are harassing, oppressive or abusive, the CFPB should not proceed with this rulemaking until it has requested and analyzed the FTC's data. It should also ask the FCC to share its complaint data about unsolicited text messages. In addition, whether or not the CFPB proceeds with a rule that does not place limits on the frequency of email and text messages in debt collection, it should gather evidence about communication frequency annually to assess whether a specific limit is needed for electronic communications in the future. In order to facilitate better tracking of consumer complaints about electronic communications, the CFPB should also modify the complaint database to enable consumers to indicate whether they are complaining about an electronic communication.

Recommendation: **The Bureau should:**

- **Issue a comment clarifying that emailing, texting, or otherwise engaging in electronic communication or attempted communication too frequently would be a violation of § 1006.14(a).**

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[263] 84 Fed. Reg. at 23,309.

[264] *Id.*

[265] 84 Fed. Reg. at 23,308.

[266] *See* Holly Shively, *Robotexts a growing concern for fraudulent activity*, Dayton Daily News, Aug. 24, 2019, *available at* https://www.daytondailynews.com/business/robotexts-growing-concern-for-fraudulent-activity/xV6vu8kfpSICZ9MD0T0GDM/# ("Last year, the Federal Trade Commission received 93,331 complaints about unsolicited, potentially fraudulent, misleading or deceptive texts, a spokesman told the Dayton Daily News. That's a 30 percent increase from the 71,777 in 2017. … During the first six months of 2019, there have been 44,422 complaints to the FTC, which has the largest consumer complaint database in the country.").

- **Obtain and analyze the FTC's and FCC's complaint data about unsolicited text messages before proceeding with a rule that does not place frequency limits on them.**

- **Gather evidence about communication frequency annually to reassess the need for explicit limits on electronic communications.**

6.3 § 1006.14(b): Repeated or continuous telephone calls or telephone conversations

6.3.1 § 1006.14(b)(1): Prohibition of repeated or continuous telephone calls or conversations

Proposed § 1006.14(b)(1) largely restates § 1692d(5) of the FDCPA, which provides that a debt collector violates the general prohibition against harassing, oppressive, or abusive conduct in § 1692d by repeatedly "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."[267] The CFPB proposes to modify the language from "causing a telephone to ring" in § 1692d(5) to "placing" the telephone calls in § 1006.14(b)(1)(i), (ii). This is a helpful modification, because placing multiple calls can be harassing even if the consumer's phone does not ring each time it is dialed (either because the phone provides a different type of alert, such as vibrating, or because the call goes directly to voicemail).

Proposed Comment 14(b)(1)-1 clarifies that "placing a telephone call" under § 1006.14(b)(1)(i) and (ii) includes ringless voicemail. Treating ringless voicemail as placing a call will protect consumers from harassment. Ringless voicemails can be used to harass consumers if multiple voicemail messages fill up the consumer's voicemail box[268] and make it difficult to receive critical personal or business messages. As the 4,461 consumer comments made by consumers in the proceeding initiated at the Federal Communications Commission[269] regarding ringless

[267] 15 U.S.C. § 1692d(5).

[268] *See, e.g.*, AT&T, Explore Voicemail Options, *available at* https://www.att.com/esupport/article.html#!/wireless/KM1009209?gsi=rmne6w (capacity ranges from 20 to 40 voicemails, where an additional fee is required for more than the basic 20 voicemail plan); Sprint, Know how many messages can be stored in your voicemail box (Jun. 2, 2017), *available at* https://www.sprint.com/en/support/solutions/services/know-how-many-messages-can-be-stored-in-your-voicemail-box.html ("Your voicemail box can hold a total of 30 messages."); Verizon, Voicemail Comparison, *available at* https://www.verizonwireless.com/support/voice-mail-comparison/ (capacity ranges from 20 to 40 messages; in some cases only 20 messages are available without an additional fee).

[269] The proceeding at the FCC was initiated by the request for an express exemption from the TCPA. *See In re* Petition for Declaratory Ruling filed by All About the Message, L.L.C., CG Docket No. 02-278 (filed Mar. 31, 2017), *available at* https://ecfsapi.fcc.gov/file/104010829816078/Petition%20for%20Declaratory%20Ruling%20of%20All%20About%20the%20Message%20LLC.pdf.

voicemails made clear, consumers are quite concerned about voicemails filling up their message boxes.[270]

Comment 14(b)(1)-1 also clarifies that "placing a telephone call" under § 1006.14(b)(1)(i) and (ii) does not include sending electronic messages to a mobile phone, including text or email. Please see our comments on frequency of electronic communications in our discussion of § 1006.14(a) in § 6.2, *supra*.

In addition to adopting this prohibition pursuant to its FDCPA authority as Proposed § 1006.14(b)(1)(i), the CFPB proposes to adopt a parallel prohibition under the Dodd-Frank Act as § 1006.14(b)(1)(ii). Because of the scope of the Dodd-Frank Act, this latter subsection would be limited to debt collectors collecting consumer financial product or service debt. As addressed in our comments regarding § 1006.1(c) in § 2.3, *supra*, we do not have concerns about the more limited coverage under the Dodd-Frank Act where, as here, the CFPB issues a parallel regulation under its FDCPA authority.

We do, however, have concerns about the fact that the CFPB has chosen to limit its authority under the Dodd-Frank Act to debt collectors instead of debt collectors and creditors who call in excess of the proposed frequency limits.[271] Creditors engaged in debt collection are among the most frequent users of robocalling technology.[272] The CFPB should engage in a second rulemaking to limit abusive practices by creditors collecting their own debts.

Recommendations:

- **Ringless voicemail should be considered placing a call under § 1006.14(b)(1)(i).**
- **The Bureau should engage in a second rulemaking to limit abusive practices, like high call volumes, by creditors collecting their own debts.**

6.3.2 § 1006.14(b)(2): Frequency limits on phone calls

6.3.2.1 Introduction

In 2018, call frequency was the number one category of law violations among the nearly 480,000 debt collection complaints collected by the FTC's Consumer Sentinel Network, with more than 136,000 complaints reported under the heading "calls any person repeatedly or continuously."[273] Proposed § 1006.14(b)(2) would clarify when debt collectors violate §

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[270] Comments on the AATM Petition, *available at* https://www.fcc.gov/ecfs/search/filings?q=ringless%20AND%20(proceedings.name:((02%5C-278*))%20OR%20proceedings.description:((02%5C-278*)))&sort=date_disseminated,DESC.

[271] 84 Fed. Reg. at 23,313 n.314.

[272] National Consumer Law Center, Robocalls & Telemarketing, Top 50 Robocallers in the US: June 2019, *available at* http://www.nclc.org/issues/robocalls-and-telemarketing.html.

[273] National Consumer Law Center analysis of data produced on June 24, 2019 by the Federal Trade Commission in response to a Freedom of Information Act request. *See also* April Kuehnhoff and Ana

1006.14(b)(1)'s prohibition on "plac[ing] telephone calls or engag[ing] any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number" by providing a bright line standard. A bright line standard is a good idea if it would serve to protect consumers. The problem, however, is that the number proposed by the Bureau for this standard is so high as to actually cause more problems than it solves.

Specifically, under the proposed rule a debt collector would violate § 1006.14(b)(1) only by (1) making more than seven calls in a seven-day period, or (2) calling within seven days after having a telephone conversation with the consumer. As explained in § 1006.14(b)(5), these limits would apply per account rather than per collector.

For the reasons that we explain below, these limits do not provide sufficient protection to consumers from harassing calls. The proposed rule would greatly increase the total permissible call volume in many cases. It would create a safe harbor for harassing and oppressive cumulative calls.

Our comments in this section focus on the basic frequency limits, while our comments regarding § 1006.14(b)(5) in § 6.3.5, *infra*, address the devastating impact of multiplying these limits by the number of accounts in collection.

6.3.2.2 The Bureau's proposal allows an excessive number of calls, contrary to compelling evidence of consumer harm.

While the proposed frequency limits are too high, we agree that frequency limits are important and necessary. As enacted, § 1692d(5) left unanswered how to define "repeatedly or continuously." Legislative history shows that many of the versions of the FDCPA considered by Congress restricted collector contacts to a specific maximum number of telephone calls, such as two phone calls per week, or one to three calls per month at work.[274] However, no specific limits were enacted, and courts have varied widely in what they consider to be a violation of § 1692d(5).[275]

Numerous courts have allowed consumers to proceed with FDCPA litigation related to call frequency for far fewer calls than the CFPB's rule would permit and protect from challenge.[276]

Girón Vives, National Consumer Law Center, Consumer Complaints about Debt Collection: Analysis of Unpublished Data from the FTC 2 (Feb. 2019), ***available at*** https://www.nclc.org/images/pdf/pr-reports/report-analysis-debt-coll-ftc-data.pdf (reporting that, in 2017, call frequency was the second most common complaint, with more than 210,000 violations reported).

[274] *See* H.R. 5294, 95th Cong., 1st Sess. §§ 804(a)(3), 804(b) (1977) (two calls per week and three per month at work permitted, unless creditor has consumer's daytime home phone number or consumer requests not to be called at work); H.R. 13720, 94th Cong., 2d Sess. §§ 804(a)(3), 804(b)(2) (1976) (two calls per week or one call at work per month); S. 918, 95th Cong., 2d Sess. §§ 805(a)(3), 805(b) (1977) (maximum two contacts in seven days and one contact at work if convenient).

[275] *See* National Consumer Law Center, Fair Debt Collection E.2.3.2 (9th ed. 2018) (collecting cases about repeated or continuous phone calls). *See also* Donald E. Petersen, *How Often Can Debt Collectors Call?* (Mar. 27, 2018), ***available at*** https://tcpa.mobi/how-often-can-debt-collectors-call/.

[276] *See, e.g.,* Ambroise v. American Credit Adjusters, L.L.C., 2016 WL 6080454 (S.D. Fla. Mar. 22, 2016) (fifteen calls over a three-week period - around five calls per week); Lawrence v. American Med. Collection Agency, 2015 WL 12762024 (M.D. Fla. Nov. 16, 2015) (eighty-five calls over four months - around five calls per week); Schumacher v. Credit Prot. Ass'n, 2015 WL 5786139 (S.D. Ind. Sept. 30,

These decisions are a good indication that the number of calls permitted by the proposed rule is far too high, even if it were applied to all accounts held by a collector.

Two states and one city already provide much lower reasonable limits on the number of permissible communications that can be made to consumers while collecting a debt. Massachusetts regulations limit phone calls, text messages, and voicemails to two per week;[277] the applicable statute in Washington applies more broadly to a "communication" and limits contacts to three times per week;[278] and New York City generally limits debt collectors to two communications per week.[279] These limits have existed since 1971 in Washington,[280] 1986 in Massachusetts,[281] and 1991 in New York City.[282] Thus, debt collectors have long needed to adapt to contact restrictions, and there is no evidence that credit is more expensive or harder to

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2015) (fifty-four over calls a three-month period - around four calls per week); McGowan v. Credit Mgmt. L.P., 2015 WL 5682736 (D. Nev. Sept. 24, 2015) (seventy-one calls over four months - around four calls per week); Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217 (D. Mass. 2014) (sixty calls over three months - around five calls per week); Turner v. Professional Recovery Servs., Inc., 956 F. Supp. 2d 573 (D.N.J. 2013) (one hundred and thirty-three calls in five months - around six calls per week); Sussman v. I.C. Sys., Inc., 928 F. Supp. 2d 784 (S.D.N.Y. 2013) (fifty calls over three months - around four calls per week); Garcia v. Resurgent Capital Servs., L.P., 2012 WL 1144239 (N.D. Cal. Apr. 4, 2012) (forty to fifty calls within a three month period - around three calls per week); Valentine v. Brock & Scott, P.L.L.C., 2010 WL 1727681 (D.S.C. Apr. 26, 2010) (eleven calls over nineteen days - around three calls per week)..

[277] 940 Code Mass. Regs. § 7.04(1)(f) (unfair or deceptive act or practice for creditors to "[i]nitiat[e] a communication with any debtor via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven-day period to either the debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number and two such communications in each 30-day period other than at a debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, for each debt"); 209 Code Mass. Regs. § 18.14(1)(d) (without prior consent of the consumer, the debt collector may not "engage[] any consumer in communication via telephone or via text messaging, initiated by the debt collector, in excess of two such communications in each seven-day period to a consumer's residence or cellular telephone and two such communications in each 30-day period other than at a consumer's residence, or cellular telephone for each debt").

[278] Wash. Rev. Code § 19.16.250(13)(a), (b) ("A communication shall be presumed to have been made for the purposes of harassment" if the debtor is contacted more than once per week at work or the debtor or spouse are contacted more than three times per week in "any form, manner, or place").

[279] New York City, N.Y., Rules, tit. 6, § 5-77(b)(1)(iv) (Westlaw).

[280] As originally enacted in 1971, Wash. Rev. Code § 19.16.250(12)(a), (b) stated that, "[a] communication shall be presumed to have been made for the purposes of harassment if: (a) It is made with a debtor or spouse in any form, manner, or place, more than three times in a single week; (b) It is made with a debtor at his or her place of employment more than one time in a single week." *See* 1971 ex.s. c 253 § 16.

[281] The version of 940 Code Mass. Regs § 7.04(1)(f) enacted December 31, 1986, stated that it was an unfair or deceptive act or practice for creditors to engage "any debtor in communication via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence and two calls in each thirty-day period other than at a debtor's residence, for each debt." (historical version on file with author). In the version of 209 Code Mass. Regs. § 18.00 that became effective as of December 31, 1993, § 18.15(1)(f) prohibited "[e]ngaging any debtor in connection via telephone, initiated by the collection agency, in excess of two calls in each seven-day period at the debtor's residence and two calls in each 30-day period other than at a debtor's residence, for each debt."

[282] New York City, N.Y., Rules, tit. 6, § 5-77 (Westlaw).

access in these jurisdictions as the result of these much more protective limits on communication frequency.

According to the CFPB's Debt Collection Consumer Survey, 37% of consumers contacted about a debt in collection were contacted four or more times a week, and about 90% of these consumers indicated that they were contacted too often.[283] Indeed, the record demonstrates that repeat calls cause consumers to feel stressed, upset, intimidated, hounded, and weary, interfering with their health and sleep.[284] Repeat calls lead consumers to pay debts they do not owe, and to pay debts with funds needed for higher-priority family needs such as food, clothing, shelter, and medical treatment.[285] Unwanted calls also use up phone minutes for individuals with prepaid or other limited phone plans.[286]

The Bureau's proposal is arbitrary and capricious in disregarding the harm caused to consumers by repeat calls. Instead of the proposed rule, the Bureau should use Massachusetts, Washington State, and New York City as models and prohibit more than three attempted phone calls per week, resulting in no more than one live conversation initiated by the debt collector.

The proposed rule is also arbitrary and capricious because it fails to take into account the harm that could result from a high volume of voicemail messages if debt collectors leave voicemails after each call. As discussed in § 6.3.1, *supra*, voicemail boxes typically have limits, and it is possible for a consumer's voicemail box to be overwhelmed, making it hard for the consumer to find, or even receive, other messages. If the CFPB does not significantly lower the number of permissible collection calls, it will need to place limits on the number of voicemails debt collectors can leave.

6.3.2.3 The Bureau should clarify the seven-day waiting period between conversations.

Proposed Comment 14(b)(2)-2 explains that if a debt collector makes calls to a number and later learns that the number does not belong to the consumer, calls made to that number do not count toward the seven-call limit. However, it is only fair that the CFPB should require that, in order to take advantage of this provision, the debt collector must check the number against the reassigned number database that the FCC is creating (or one of the commercial databases that is already available), to see if it has been reassigned since the collector last verified that it belonged to the consumer.[287] The debt collector should not be entitled to the relief provided by Comment 14(b)(2)-2 if the number appears in the database as having been reassigned or the debt collector did not check the database. An important collateral benefit of this requirement

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[283] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 31 (Jan. 2017), *available at* http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[284] 84 Fed. Reg. at 23,310, 23,315. *See also* Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 649 (4th Cir. 2019) ("Telemarketing calls are also intrusive. A great many people object to these calls, which interfere with their lives, tie up their phone lines, and cause confusion and disruption on phone records.").

[285] 84 Fed. Reg. at 23,315.

[286] For example, nearly 11 million households used Lifeline phones in 2017. Universal Service Administrative Co., Lifeline Participation, *available at* https://www.usac.org/li/about/process-overview/stats/participation.aspx.

[287] Advanced Methods to Target and Eliminate Unlawful Robocalls, 84 Fed. Reg. 11,226, 11226 (Mar. 26, 2019).

would be to reduce the number of collection calls made to wrong numbers, which can be extremely difficult for the recipients of these calls to stop. These calls can also subject the caller to liability under the TCPA if they are autodialed or prerecorded and made to a cell phone.[288] The CFPB should also clarify that if the debt collector learns that the consumer is not at that number because a third party with location information answers the phone (*e.g*. the collector reaches a family member who still resides at that number), this is the debt collector's one opportunity to obtain location information from that third party unless one of the exceptions in § 1006.10(c) applies.

Proposed Comments 14(b)(2)(ii)-1(i) and (ii) provide examples of the application of the seven-day waiting period that would be required between conversations between the debt collector and the consumer. As illustrated in the examples, the seven-day waiting period should apply regardless of whether the debt collector or the consumer initiated the conversation. The CFPB should also provide clarification that a "telephone conversation" occurs any time the consumer answers the debt collector's call, even if the debt itself is not discussed because, for example, the consumer hangs up after learning that the call is from a debt collector or after realizing that it is an autodialed or prerecorded call.

We also urge the CFPB to make it clear that the limits imposed on contacts with the debtor are in addition to any applicable restrictions imposed by the TCPA.[289] The TCPA prohibits autodialed or prerecorded calls to cell phones unless the called party has provided prior express consent.

<u>Recommendations</u>**: The Bureau should:**

- **Prohibit more than three attempted phone calls per week per consumer, resulting in no more than one live conversation initiated by the debt collector.**
- **Require debt collectors to check the numbers that they are calling against the FCC's reassigned number database or a commercial database if they do not want calls to wrong numbers to count against the weekly call limit.**
- **Specify that the seven-day waiting period applies regardless of whether the debt collector or consumer initiated the conversation.**
- **Clarify that a "telephone conversation" occurs any time the consumer answers the debt collector's call, even if the debt itself is not discussed.**
- **Clarify that the limits imposed on contacts with consumers are in addition to applicable restrictions imposed by the Telephone Consumer Protection Act.**

[288] 47 U.S.C. § 227(b)(1)(A).

[289] 47 U.S.C. § 227.

6.3.3 § 1006.14(b)(3): Calls excluded from frequency limit

Proposed § 1006.14(b)(3) describes four types of calls that would not count towards the frequency limits, in addition to calls to a number that does not belong to a consumer as described in Comment 14(b)(2)-2 and discussed in § 6.3.2.3, *supra*. We discuss each of these four exceptions below.

6.3.3.1 Calls responding to requests for information

The first type of calls that the proposed rule would not count against the frequency limits is calls that are made to respond to a request for information.

As currently drafted, this exception would allow debt collectors to call the consumer regardless of the communication channel that the consumer used to request information. This is not a good policy. Instead, the Bureau should clarify that, wherever possible and unless otherwise indicated by the consumer, the debt collector should respond to requests for information in the same communication channel that the consumer used to request the information. So, for example, if the consumer sends a letter with a request for more information, the debt collector should respond by letter unless the consumer asked for some other type of contact (e.g. please call me to explain the account balance). Thus, the exception described here should only apply if the consumer asks for more information by phone or indicates that a return call is acceptable.

Comment 14(b)(3)-1 further explains the frequency exception for requests for additional information. It states that "telephone calls placed to a person to respond to the person's request for information do not count toward, and are permitted in excess of, the frequency limits in §1006.14(b)(2)."[290] However, this comment does not place any limit on the number of calls that may be made, giving the debt collector an unlimited number of attempted calls until the debt collector "provides a response to a person's request for information." To avoid this problem, the comment should specify collectors can make *one additional call* to respond to a request for information even if that would put them over the 7 call limit that week.

***Recommendations*: The Bureau should:**

- **Clarify that the debt collector should respond to requests for information in the same communication channel used by the consumer to request the information.**
- **Revise the comment to clarify that a debt collector that is responding to a request for information from a consumer can make one additional call even if that call would exceed the frequency limits instead of allowing for unlimited additional calls.**

6.3.3.2 Calls with prior consent

[290] *See also* Comment 14(b)(3)-2 (providing an example of a call to provide additional information).

The second type of calls that the proposed rule would not count against the frequency limits are calls made with the consumer's prior consent given directly to the debt collector. Comment 6(b)(4)(i)-2 clarifies that prior consent of the consumer to communicate in ways that would otherwise be prohibited by § 1006.6(b)(1)-(3) must be given directly to the debt collector and does not transfer from the original creditor or a prior debt collector.[291] These are both important consumer protections. In particular, the prohibition against transferring consent from the original creditor is necessary to prevent boilerplate contract clauses from being added to contracts with original creditors such that consumers would unknowingly grant prior consent to exceed call frequency limits.

However, the Comment should clarify that the prior consent must be explicitly for the additional call. If the consumer says "please text me later" or "contact me later," the debt collector would not then have permission to make calls in excess of the frequency limits.

Another concern about this proposed Comment is that it could be interpreted to allow debt collectors to obtain consent to make an unlimited number of collection calls so that the frequency limits would never apply to that debt collector when calling that consumer. The CFPB should clarify that prior consent only authorizes the collector to exceed the frequency limit for a specific seven-day period.

Recommendation: **The Bureau should:**

- **Clarify that a consumer's prior consent must be explicitly for the additional call only and that the debt collector would not have permission to make calls in excess of the frequency limits beyond that call.**
- **Clarify that, where a consumer has asked for a call back at a later time, only a single attempt may be made. If that call is unsuccessful, the debt collector can respond by postal mail, electronically with consumer consent, or wait until they can lawfully make additional phone calls.**

6.3.3.3 Unconnected calls

The third type of calls that do not count against the frequency limits are calls that are not connected to the dialed number. Comment 14(b)(3)(iii)-1 explains that unconnected telephone calls include busy signals and out-of-service messages. We do not have any concerns about these examples.

Comment 14(b)(3)(iii)-1 also explains that if "the call causes a telephone to ring at the dialed number but no one answers the call, or the call does not cause a telephone to ring but is connected to a voicemail or other recorded message," the call would be "connected" and would not fall under this exception. The CFPB should add forwarded calls to this list, because if the call rings it should still be considered to be a connected call even if rings at a different number.

[291] *See also* Proposed Comment 14(b)(3)(ii)-2 (providing an example of an additional contact with prior consent).

Recommendation: The Bureau should include forwarded calls within the examples of connected calls.

6.3.3.4 Calls to specific persons

The fourth type of calls that do not count against the frequency limits are calls with persons described in § 1006.6(d)(1)(ii) through (vi). Specifically, this means that there are no frequency limits on calls to the consumer's attorney; a consumer reporting agency, if otherwise permitted by law; the creditor; the creditor's attorney; or the debt collector's attorney. This exception will not lead to increased harassment for consumers, and we do not have concerns about it.

6.3.4 § 1006.14(b)(4): Effect of complying with frequency limits

Proposed § 1006.14(b)(4) provides that a debt collector that complies with the frequency limits in § 1006.14(b)(2) is automatically deemed to comply with § 1006.14(b)(1), which prohibits debt collectors from placing telephone calls repeatedly or continuously, and with 15 U.S.C. § 1692d(5), the equivalent provision in the FDCPA. The section also specifies that a debt collector that complies with the frequency limits also complies with § 1006.14(a), which generally prohibits "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," and with 15 U.S.C. § 1692d, the equivalent provision in the FDCPA. Finally, this section provides that a debt collector that complies with the frequency limits complies with 12 U.S.C. §§ 5531 and 5536(a)(1)(B), which prohibit unfair, deceptive, or abusive acts or practices.

There are serious flaws in this proposal and we strongly oppose it. The FDCPA's general prohibition of "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt" is meant as a fallback safety net protecting consumers from this illegal conduct. One of the possible ways of violating this provision is for a collector to place telephone calls repeatedly or continuously. The two prohibitions overlap, but they are not the same. The safe harbor created by this proposed rule flies in the face of Congress's deliberate intent to give consumers both the specific protection against overly frequent calls and the general protection against behavior that is harassing, oppressive, or abusive.[292] The proposed rule creates an exemption from a critically important FDCPA protection and exceeds the Board's authority, as discussed in § III, *supra*.
Under the parameters set out in these proposed rules, a collector could argue that it is exempt from liability for such harassing activity as calling a consumer repeatedly, one time after another, seven times in a row, in a matter of minutes or six times in rapid succession after the consumer hung up the phone on the debt collector. And a collector that was collecting multiple debts from this consumer could call seven times, repeatedly, for each debt. For example, if the

[292] Congress recognized its inability to foresee every conceivable harassing, oppressive, and abusive debt collection method. According to the Senate report: "this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted at* 1977 U.S.C.C.A.N. 1695, 1696; Currier v. First Resolution Inv. Corp., 762 F.3d 529, 533 (6th Cir. 2014) ("The Act prohibits a wide array of specific conduct, but it also prohibits, in general terms, any harassing, unfair, or deceptive debt collection practice, which enables the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.").

collector was collecting five accounts, the collector could call 35 times in one day or even in one hour. The debt collector could also choose to concentrate those calls on days that will be more likely to harass the consumer, such as Sundays or holidays.

As discussed in our comments regarding § 1006.14(b)(2) and (5) in §§ 6.3.2, *supra*, and 6.3.5, *infra*, the number of calls that the proposed rule would authorize is simply too high, especially when authorized on a per account basis. Using a per account basis will mean that debt collectors can lawfully make dozens, or even scores, of calls each week to some consumers. While we think that a bright line limit is generally in the best interest of consumers, a bright line limit that is set on a per account basis will authorize an unknown multiple of calls - insulating the debt collector from liability even though a debt collector collecting on seven accounts could make the maximum allowable 49 calls per week, every week, with the intent to annoy, abuse, or harass.

The CFPB should eliminate the per account rule, as discussed in our comments regarding § 1006.14(b)(5) in § 6.3.5, *infra*. It should also, as discussed in § 6.3.2, *supra*, adopt a much lower weekly baseline than seven calls. But whether or not the Bureau takes either of these steps, it should, at the very least, provide that complying with the frequency limit in § 1006.14(b)(2) will create only a rebuttable presumption of compliance with §§ 1006.14(b)(1), 15 U.S.C. § 1692d(5), and 12 U.S.C. §§ 5531 and 5536(a)(1)(B). Moreover complying with the frequency limit in § 1006.14(b)(2) should not create a safe harbor under the general prohibition in § 1006.14(a) or § 1692d, because it would be possible to violate these general prohibitions even while complying with the frequency limits.

Recommendation: **The Bureau should revise the proposed rule to state that complying with the frequency limit in § 1006.14(b)(2) will create:**

- **Only a rebuttable presumption of compliance with § 1006.14(b)(1), 15 U.S.C. § 1692d (5), and 12 U.S.C. §§ 5531 and 5536(a)(1)(B), and**
- **No safe harbor of any kind for the general prohibition in § 1006.14(a) and 15 U.S.C. § 1692d.**

6.3.5 § 1006.14(b)(5): Definition of "particular debt" and the proposed per-account rule

Proposed § 1006.14(b)(5) states that the frequency limits in § 1006.14(b)(2) are per account in collection and not per consumer, with the exception of student loan debts, which will be treated as one debt if they were "serviced under a single account number at the time the debts were obtained by the debt collector." That means that, for non-student loan debts, debt collectors are allowed to attempt to call consumers seven times the number of accounts in collection and have as many conversations per week as there are debts in collection. For example, if a consumer has eight debts in collection, the debt collector could attempt to call the consumer up to 56 times per week and have up to eight conversations with the consumer so long as each conversation was about a different account. As discussed in our comments regarding § 1006.14(b)(2) in § 6.3.2, *supra*, seven calls per week would be excessive even if this limit were per consumer. Creating a per account rather than per consumer call frequency limit means that the rule would allow the majority of consumers to suffer extreme harassment as a result of call frequency. The only difference is that this time the harassment will be officially sanctioned by the CFPB.

Consumers frequently have multiple debts in collection simultaneously, and certain types of debts such as student loan debts,[293] medical debts,[294] and store credit cards frequently have multiple accounts in collection simultaneously, which may be placed with a single collector. The CFPB's survey of consumer experiences with debt collection found that 73% of consumers who had been contacted about repaying a debt in the prior year had been contacted about more than one debt, with 57% contacted about two to four debts and, 16% contacted about five or more debts.[295] The CFPB estimates that 49 million consumers are contacted by debt collectors each year.[296] If 57% of these consumers are contacted about two to four debts, that would be approximately 28 million Americans that debt collectors could attempt to call 14 to 28 times each week. If 16% of these consumers are contacted about five or more debts, this means that debt collectors could attempt to call approximately eight million Americans 35 times or more each week.

Allowing such a high volume of calls is not only likely to result in consumer harassment, but is also likely to be a disservice to collectors. First, if they understand their debt collection rights, consumers who receive a high volume of calls may decide to opt out of all collection calls under § 1006.14(h) or to opt out of all collection communication under § 1006.6(c). To stop the oppressive calls, many consumers may be attracted to debt settlement companies, which frequently leave consumers worse off financially than when they started, with less money available to pay the debt. Others may turn to bankruptcy to make the calls stop, leaving creditors worse off.

Adopting a per account rather than per consumer approach will create a huge loophole in the call frequency limits. If, for example, the debt collector is collecting on three accounts for a particular consumer, when the consumer answers after seven or fewer attempted calls, the debt collector can talk to the consumer about all three debts. However, if the consumer does not

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[293] U.S. Dep't of the Treasury, Bureau of the Fiscal Service, Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt 3 (July 2016), *available at* https://www.treasury.gov/connect/blog/Documents/student-loan-pilot-report-july-2016.pdf (reporting that borrowers with defaulted federal student loans in their pilot project had an average of three loans in default, and that "[t]hese loans are generally representative of the composition of the defaulted loan portfolio"). *See also* Experian, The State of Student Loan Debt 2017 (2017), *available at* https://www.experian.com/innovation/thought-leadership/state-of-student-lending-in-2017.jsp (reporting average of 3.7 student loans per consumer, and more for members of Generation Y).

[294] Consumer Fin. Prot. Bureau, Consumer Credit Reports: A Study of Medical and Non-Medical Collections 20 (2014), *available at* http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medicalcollections.pdf ("Among the 19.5 percent of consumers who have medical collections tradelines, the median consumer has two such tradelines.").

[295] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 13 (Jan. 2017), *available at* http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf. *See also* Bureau of Consumer Fin. Prot., Consumer Credit Reports: A Study of Medical and Non-Medical Collections, at 20 (2014), available at http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medicalcollections.pdf ("Most consumers whose credit reports contain collections tradelines have multiple collections tradelines on their reports. The median consumer with collections tradelines has three such tradelines (with an average of 4.5 collections tradelines) on his or her report.").

[296] 84 Fed. Reg. at 23,385.

answer after seven attempted calls, the debt collector can keep calling up to fourteen more times (or more, if there are more than three accounts in collection) and simply talk to the consumer about just one of the three debts if the consumer answers on the twenty-first call. The debt collector could then share all the information about the consumer that it learns on that call (*e.g.*employment status, ability to pay, location information, etc.) with the other two accounts for future attempts to collect those accounts.

The Bureau cites to the fact that some collectors' computer systems are not set up to track the total number of calls to an individual as a reason to impose a per account rather than a per consumer call cap.[297] But there is no reason that a debt collector's computer systems could not be set up to do so in the future. Moreover, we are skeptical of claims that this is not currently possible. Washington State appears to have per consumer limits on the frequency of debt collection communications.[298] We urge the CFPB to research debt collection practices in Washington State designed to comply with this limit as part of an ongoing evaluation of the feasibility of per consumer call caps.

The CFPB's proposed treatment of student loans is an attempt to mitigate the impact of the per account call caps for one type of debt where consumers frequently have multiple accounts in collection. Unfortunately, this approach falls short, because whether or not the student loans were serviced under a single account number depends entirely upon the servicer. Student loan borrowers typically have multiple student loans, often two per semester. Student loan servicer practices vary with respect to whether multiple student loan debts are serviced under a single account number or separate account numbers. Practices even vary internally within a single servicer, which may treat different types of student loan debt differently (*e.g.*, private vs. federal loans, and, within federal loans, Direct vs. FFEL vs. Perkins, subsidized vs. unsubsidized, Consolidation loans, PLUS loans, and more).

Moreover, servicers can change these practices at any time. Indeed, in response to requests from debt collectors who prefer to have a higher limit on the number of calls that they can make, servicers could simply stop assigning a single account number to multiple student loan debts or change the way that accounts are organized before they are transferred to debt collectors.

The manner in which student loan debts are transferred to servicers is also unlikely to be transparent to consumers who do not know how the servicer transferred the debts to the collector and will not know what call frequency limit to anticipate. As a result, it will be more difficult for consumers with student loans to identify and bring private enforcement actions for violations of § 1006.14(b)(2).

Recommendation: **The Bureau should prohibit more than three attempted phone calls per week per consumer instead of per account.**

6.4 § 1006.14(h): Prohibited communication media

[297] 84 Fed. Reg. at 23,320.

[298] Wash. Rev. Code § 19.16.250(13)(a), (b) ("A communication shall be presumed to have been made for the purposes of harassment" if the debtor is contacted more than once per week at work or the debtor or spouse are contacted more than three times per week in "any form, manner, or place.").

6.4.1 § 1006.14(h)(1): In general

Proposed § 1006.14(h)(1) says that "a debt collector must not communicate or attempt to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer." Comment 14(h)-1 refers the reader to comment 2(d)-1 for examples of communication media, and that comment explains that:

> "[a]ny medium" includes any oral, written, electronic, or other medium. For example, a communication may occur in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media.

Thus, § 1006.14(h) means, for example, that a debt collector is prohibited from communicating with a consumer by phone if the consumer has requested that the debt collector not contact her by phone (or by email if the consumer requested no contact by email, etc.). Comment 14(h)-2 clarifies that a medium of communication can be as detailed as a specific address or telephone number.

The right that is described in §1 006.14(h) is a critical consumer protection. It is consistent with interpretations of §§ 1692d and 1692d(5) of the FDCPA finding that consumers stated a claim for violations of the FDCPA when debt collectors continued to call them after being asked to stop.[299] It also builds upon that case law by clarifying that the natural consequence of continuing to communicate with consumers via <u>any</u> type of communication media after they have asked the debt collector to stop are to "harass, oppress, or abuse" in violation of § 1692d. We therefore support the concept behind Proposed § 1006.14(h).

However, the CFPB should clarify and expand upon this critical consumer protection in several ways. First, the CFPB proposes that, for the purpose of § 1006.14(h), the definition of "consumer" would be the broader definition used in § 1006.6(a), which includes the consumer, the consumer's spouse, the consumer's parents if the consumer is a minor, the consumer's legal guardian, the executor or administrator of the consumer's estate if the consumer is deceased, and a confirmed successor in interest. This is an important protection, because § 1006.6(d) allows debt collectors to contact all of those people. All of the people that debt collectors can contact should have the ability to stop communication through particular channels. However, as discussed in our comments about § 1006.6(a) in §4.1, *supra*, the CFPB should scale back its overbroad interpretation of who qualifies as a consumer under § 1006.6(a).

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[299] *See, e.g.,* Fields v. Credit Mgmt. Sys., 2015 WL 11367930 (C.D. Cal. Nov. 23, 2015) (consumer stated a claim under § 1692d(5) where the collection agency repeatedly and continuously called her two to four times a day, including calling her back after she had disconnected a call and after she had requested that agents stop calling her); Lopez v. Professional Collection Consultants, 2012 WL 777497 (C.D. Cal. Mar. 9, 2012) (allegations that the defendant continued to telephone the plaintiff multiple times per day for weeks after the plaintiff informed the defendant that it had the wrong person and that he was not the debtor whom it was seeking and after he told the defendant "to stop contacting him because the constant phone calls were annoying, abusing and harassing" stated a claim under §§ 1692d and 1692d(5)); Barnes v. Seterus, Inc., 2013 WL 6834720 (S.D. Fla. Dec. 26, 2013) (consumer stated a claim for violation of § 1692d(5) considering the frequency of the debt collector's calls and the fact that it had been told to stop).

Second, an issue that is not addressed in the proposed rule is whether a request to stop communications through a particular channel applies to one account or all accounts for a particular consumer that are owned by or placed with a particular debt collector. The CFPB should clarify through a comment that a request to stop contacts through a particular communication channel applies to all accounts held by the debt collector unless the consumer specifies otherwise.

Third, the CFPB should require all requests to stop contacts through a particular channel of communication to be noted in the collector's file on the consumer and transferred to the creditor or subsequent debt collector so that future collectors will be on notice that communication through a particular channel will be a violation of § 1006.14(h). The failure to require such information to be transferred would give collectors an incentive to simply transfer debts to other collectors whenever requests like these are received. As a result, consumers would have to reassert repeatedly their request not to receive communications through such channels.

Fourth, the proposed rule does not address how consumers can invoke the rights it provides. The CFPB should clarify in a comment that the consumer can use any reasonable method to contact the debt collector and that no specific words are required. (Please see our comments to § 1006.6(e) in § 4.5, *supra*, for a discussion of opting out by "any reasonable method.") Critically, a discussion about how to invoke this right must make it clear that a request that the debt collector stop calling, emailing, etc. can be made orally.

Fifth, in addition to clarifying how to turn off a particular channel of communication, the CFPB should provide examples of what debt collectors should treat as opting out of a specific phone number or address, versus all communications in a particular channel, or even all debt collection communications. For example, if a consumer says "stop calling me," the CFPB should make it clear through a comment that this should be treated as a request to stop all phone communications (and not a request to cease all communications), while a consumer's statement "I can't talk at this number" should be treated as a request to stop calls to a particular phone number.

Finally, the CFPB should address how consumers will learn of their right to ask debt collectors not to use certain communication channels. Unfortunately, the CFPB eliminated the statement of rights that was proposed in its SBREFA Outline.[300] As a companion notice that would have accompanied validation notices, this would have been an appropriate vehicle to inform consumers of this right. As we discuss in our comments regarding § 1006.34 in § 11.3.4.4, *infra*, we encourage the CFPB to reinstate it. In addition, as discussed in our comments regarding § 1006.14(b)(2) in § 6.3.2, *supra*, in light of the many consumer complaints about frequent and harassing phone calls, the CFPB should require oral notice to the consumer in each collection call about the right to opt out of collection calls. This is particularly critical given the high volume of collection calls that the CFPB is proposing to authorize, as discussed in our comments in §§ 6.3.2 and 6.3.5, *supra*, regarding §§ 1006.14(b)(2) and (5).

<u>Recommendation</u>**: The Bureau should:**

- **Clarify that a request to stop contacts through a particular communication channel applies to all accounts held by the debt**

[300] SBREFA Outline at 114-115 Appx. G.

collector.

- **Require consumer requests to stop contacts through a particular channel to be transferred to the creditor or subsequent debt collector.**

- **Clarify that the consumer can use any reasonable method to contact the debt collector and that no specific words are required.**

- **Clarify that a request that the debt collector stop calling, emailing, etc. can be made orally;**

- **Provide examples of what debt collectors should treat as opting out of all calls versus a specific phone number.**

- **Require oral notice to the consumer in each collection call about the right to opt out of collection calls.**

6.4.2 § 1006.14(h)(2): Exceptions

In Proposed § 1006.14(h)(2), the CFPB proposes two exceptions to the prohibition of future contact in a communication channel that the consumer has asked the debt collector not to use.

The first exception says that if the consumer opts out in writing from receiving electronic communications, the debt collector may reply once to confirm the consumer's request to opt out if the reply contains no information other than a confirmation of the opt-out. To protect consumers who have opted out of a workplace communication channel, the CFPB should clarify that this exception does not apply if the debt collector knows or should know that the written opt-out request came from a workplace-provided communication channel (such as a workplace email address).

The second exception allows the debt collector to contact a consumer using an address or a telephone number that the collector previously asked the debt collector not to use if a consumer initiates contact with the debt collector using that address or telephone number. As with the prior exception, we urge the CFPB to exclude addresses and phone numbers that the debt collector knows or should know belong to the consumer's workplace unless the debt collector confirms with the consumer that it is okay to use them again. At times, the consumer may inadvertently use a workplace email, for example, instead of a personal one - especially if using a mobile device set up to send messages from both accounts. Similarly, a consumer who calls from work may have found a private place to do so during a lunch break, but may otherwise be unable to take personal calls at work.

***Recommendation*: The Bureau should clarify that the exceptions do not apply if the debt collector knows or should know that the opt-out request came from a workplace provided communication channel.**

7. § 1006.18: False, deceptive, or misleading representations or means

7.1 § 1006.18(a): Additional clarifications needed about the collection of decedent debt

Proposed § 1006.18(a) restates FDCPA § 1692e's general prohibition of any false, deceptive, or misleading representation or means in connection with the collection of a debt. This section of our comments addresses clarifications that the Bureau should make through new comments on § 1006.18(a) to prevent false, deceptive, or misleading practices in the collection of decedent debt. Our comments regarding Proposed §§ 1006.2(e) and 1006.6(a) in §§ 3.3 and 4.1, *supra*, raise other serious concerns about the Bureau's approach to the collection of decedent debt.

As detailed in our discussion of § 1006.6(a) in § 4.1, *supra*, the vulnerable state of surviving family members, along with the coercive techniques of certain debt collectors, puts surviving family members at high risk of paying debts they do not owe. This is a well-recognized problem that is incumbent on the Bureau to affirmatively address in these proposed regulations.

The SBREFA outline that the Bureau released earlier in this rulemaking proposed to adopt an Official Comment "clarify[ing] that prohibited false, misleading, or unsubstantiated claims include claims: (1) that a person (*e.g.*, a surviving spouse of a decedent in many circumstances) is responsible for a consumer's debts…"[301] To ensure that collectors collect debts of deceased persons only from persons who actually owe those debts, the Bureau should adopt this proposed comment.

New York State recently enacted N.Y. Gen. Bus. Law § 601-A (effective Mar. 28, 2019), to specifically prohibit debt collection agencies from misrepresenting that a person owes or is required to pay the debt of a deceased family member.[302] This bill was enacted in response to a New York Times article[303] detailing the conduct of debt collection agencies that trained employees to use "empathic active listening" to comfort grieving family members while convincing them to pay on the decedent debt.[304] Like New York State, the Bureau should clarify that misrepresenting to surviving consumers that they are obligated for a decedent's debt is a violation of § 1006.18(a) by adding a comment to that section.

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[301] SBREFA Outline at 117 Appx. H(3).

[302] A copy of the bill is available at https://legislation.nysenate.gov/pdf/bills/2017/S3491A ("AN ACT to amend the general business law, in relation to disclosure by principal creditors and debt collection agencies of the legal obligations of a deceased debtor's family and household members.").

[303] *See* David Streitfeld, *For US Debt Collectors, the Dead are a Healthy Bet*, New York Times, Mar. 4, 2009, *available at http://www.nytimes.com/2009/03/04/business/worldbusiness/04iht-04dead.20578219.html*.

[304] *See* Eric Rosenkoetter, Consumer Financial Services Blog, *New York Passes Law Addressing Collection of Decedent's Debts* (Jan. 7, 2019), *available at* https://consumerfsblog.com/2019/01/new-york-passes-law-addressing-collection-of-decedents-debts/.

The Bureau should further clarify that collecting decedent debt is deceptive unless the debt collector (1) specifically discloses to consumers that they are not legally obligated to make a payment on the debt, or (2) explains the reason that the debt collector believes that this person is legally obligated for the decedent's debt, and explains the contractual or legal basis for this belief (*e.g.*, the consumer co-signed the contract, the state doctrine of necessaries applies, etc.) before accepting any payment on the debt.

Recommendations: **The Bureau should add comments to § 1006.18(a) to clarify that:**

- **Claiming that an unobligated person is responsible for a decedent's debt is a violation of § 1006.18(a).**
- **With a decedent debt, a debt collector must, before accepting any payment on the debt, (1) disclose to the payor that he or she is not legally obligated to make a payment on the debt, or (2) explain the reason that the debt collector believes that the payor is legally obligated for the decedent's debt.**

7.2 § 1006.18(e): Disclosures Required

Proposed § 1006.18(e) mirrors FDCPA §1692e(11), which requires debt collectors to make certain disclosures in the first communication and subsequent communications with a consumer.

Comment 18(e)-1 states that a debt collector that leaves a limited-content message as described in § 1006.2(j) need not leave the disclosures required by § 1006.18(e) because the limited-content message is not a communication. As we discussed in our comments on § 1006.2(j) in § 3.6, *supra*, we strongly oppose the theory that a category of limited-content messages can or should be exempted from the definition of communication. Please see our comments on § 1006.2(j).

Comment 18(e)-1 also states that debt collectors that include content in addition to the required or permitted content described in § 1006.2(j) in a voicemail will have to provide the § 1006.18(e) disclosures if the additional content "directly or indirectly conveys information about a debt." As we have discussed in our comments on § 1006.2(j), limited-content messages already convey information about a debt. However, if the Bureau does not withdraw its proposed limited-content message rule entirely, it should, at a minimum, require § 1006.18(e) disclosures for any voicemails that deviate <u>at all</u> from the mandatory and optional content described in § 1006.2(j), rather than leaving it up to collectors to assess if the message "directly or indirectly conveys information about a debt." Requiring strict adherence to the proposed content for limited-content messages will create more clarity for consumers, debt collectors, enforcement agencies, and courts.

Comment 18(e)(1)-1 appropriately clarifies that an initial communication can be initiated by the consumer. The Bureau's creation of limited-content messages, which it has erroneously defined not to be communications under Proposed § 1006.2(d) and therefore not initial communications, means that more consumers will be contacting debt collectors without ever having received § 1006.18(e)(1) disclosures. Thus, this comment provides a critical clarification that any inbound communication from a consumer that results from a limited-content message is an initial communication triggering the requirement to provide § 1006.18(e) disclosures.

<u>Recommendations</u>: **If the limited-content message proposal is not withdrawn, the Bureau should:**

- **Require strict adherence to the required or optional content in the proposed limited-content messages.**
- **Adopt Proposed Comment 18(e)(1)-1 to clarify that any inbound communication from a consumer that results from a limited-content message is an initial communication triggering the requirement to provide § 1006.18(e) disclosures.**

7.3 § 1006.18(f): Assumed Names

In Proposed § 1006.18(f), the Bureau would allow employees of debt collectors to use an assumed name when communicating with a person, provided they use the name consistently and the employer can identify the employee using the assumed name. The Bureau says that it is proposing this regulation as an interpretation of 15 U.S.C. § 1692e's general prohibition on false or misleading representations and § 1692d(6)'s prohibition on "the placement of telephone calls without meaningful disclosure of the caller's identity." Yet there is no statutory authority for such a provision, and it will undoubtedly lead to confusion, if not outright deception, without adequate safeguards.

The Bureau's proposal closely follows a nonbinding FTC Official Staff Commentary issued in 1988, which stated, in its discussion of 15 U.S.C. § 1692b, that:

> An individual debt collector may use an alias if it is used consistently and if it does not interfere with another party's ability to identify him (e.g., the true identity can be ascertained by the employer).[305]

When discussing 15 U.S.C. § 1692d(6), the FTC further stated:

> Aliases. A debt collector employee's use of an alias that permits identification of the debt collector (i.e., where he uses the alias consistently, and his true identity can be ascertained by the employer) constitutes a "meaningful disclosure of the caller's identity."[306]

A prior FTC staff interpretation letter came to a different conclusion:

[305] Fed. Trade Comm'n, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,103 (Dec. 13, 1988).

[306] *Id.* at 50,105.

> Finally, in answer to your inquiry as to the advisability of using aliases by phone, it is our opinion that such use would clearly violate the provisions of Section 807 and possibly Section 807(10) which prohibits "any false representation or deceptive means in collecting or attempting to collect a debt or to obtain information about the debtor."[307]

We urge the Bureau to rethink its analysis of this question. It is difficult to reconcile the prohibition in 15 U.S.C. § 1692d(6) against placement of calls without meaningful disclosure of the collector's identity with the use of aliases by collection employees. One of the most important functions of the statutory prohibition is to minimize the invisibility that anonymity provides for rogue debt collectors who conceal their identities and use vulgarities, racial slurs, or other harsh debt collection methods. The Bureau's proposal to give explicit permission to use aliases would give a competitive advantage to these rogue debt collectors, disregarding the purpose of the FDCPA of ensuring that "debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[308] The collection employees' fear that revealing their true identity will subject them to retaliation from angry consumers is at odds with the Act's purpose of eliminating the types of abusive collection practices[309] that would give rise to potential retaliatory behavior from consumers.

There are other serious problems with this interpretation. There is no federal system for recording aliases, nor are there standards to determine when and to whom the collection employee's actual identity will be revealed. Consistent use of a recorded alias could advance the purposes of this provision if a system were developed to police it, but indiscriminate use would certainly frustrate the clear purposes of the statutory requirement: to improve consumers' confidence so that they know which collector they are dealing with, and to prevent abusive collectors from avoiding liability by concealing their identities or assuming the identity of another collector. Without a reliable system for recording aliases and reasonable standards for disclosing the collector's true identity, however, aliases are by their very nature deceptive. An alias provides an illegitimate shield from responsibility for compliance with the FDCPA.

Several states have laws addressing the use of aliases in debt collection. In California, "an employee of a licensed collection agency may identify himself by using his registered alias name as long as he correctly identifies the agency he represents."[310] In Massachusetts, any debt collector communicating by telephone whose employees use aliases must submit a list of all such aliases and the persons using them to the Commissioner of Banks.[311] In Illinois, a debt collection agency must maintain a list of all pseudonyms used by an office, employee, or agent of the agency for one year after termination of employment, and the list must be available upon request by the Division of Financial and Professional Regulations.[312]

If the Bureau wants to permit the use of aliases, it must also develop a system for debt collectors to register employee names and aliases in a database that consumers can search

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[307] Krieger, FTC Informal Staff Letter (undated).

[308] 15 U.S.C. § 1692(e).

[309] 15 U.S.C. § 1692(e).

[310] Cal. Civ Code § 1788.11(b) (West).

[311] 209 Code Mass. Regs. § 18.16(16).

[312] Ill. Admin. Code tit. 68, § 1210.70.

online for the true name of a collection employee using a particular alias. The Bureau should only allow one alias per employee and should not permit any duplicate aliases at a single debt collection agency. The employer should be prohibited from recycling aliases to new employees for a period of at least three years after the last day of employment. During that time, the aliases should remain part of the searchable database, but the employer may designate employees who no longer work at the collection agency. In order to enable consumers to use the database, the Bureau should require the collector to identify the name of the debt collection agency in any communication where the alias is used.

<u>Recommendations</u>: **The Bureau should not allow the use of aliases. If it does allow the use of aliases, it should do so only if it develops a system for debt collectors to register employee names and aliases in a database that consumers can search online and:**

- **The debt collector is required to use the same alias for every call,**
- **Duplicate aliases are prohibited at the same employer, and**
- **The collection agency is identified in every call in which an alias is used.**

7.4 § 1006.18(g): Safe harbor for meaningful attorney involvement

7.4.1 Overview

Proposed § 1006.18(g) would provide a "safe harbor" for attorneys who fulfill certain minimum functions before filing a debt collection lawsuit, motion, or other paper with the court during debt collection litigation. The Bureau purports merely to provide "a clear articulation of what meaningful attorney involvement in debt collection litigation submissions means" in the preparation of debt collection lawsuits.[313] However, instead of articulating a clear and meaningful standard to protect consumers, the Bureau's proposal amounts to an overly broad "safe harbor" from all of § 1006.18 for attorneys who comply with vague, insufficient standards. The standards that the Bureau proposes are insufficient to ensure that there will be meaningful attorney involvement in debt collection pleadings, and utterly inappropriate as a basis for a blanket exemption from all liability for false, deceptive, or misleading acts when a collection attorney submits a pleading to the court.

There is ample evidence that debt collection attorneys engage in false, deceptive, and misleading conduct in the course of debt collection lawsuits against consumers. Courts have often found that such conduct did, or could be found to, violate 15 U.S.C. § 1692e.[314] Such misconduct includes:

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[313] 84 Fed. Reg. at 23,323.

[314] *See* National Consumer Law Center, Fair Debt Collection § 7.2.12.4.1 (9th ed. 2018)

- Seeking attorneys' fees where none are allowed;[315]

- Seeking impermissible interest;[316]

- Filing court documents without confirming the accuracy of the information or even reviewing the file;[317]

- Proceeding to trial without any witnesses or admissible evidence, relying on the court to award a default judgment, or asking the court to continue or dismiss the case if the consumer did appear;[318]

- Attaching fake statements to the complaint created by the debt collectors based on general information they received electronically about the debts;[319]

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[315] McCollough v. Johnson, Rodenburg & Lauinger, L.L.C, 637 F.3d 939, 949-950 (9th Cir. 2011) (debt collector attorney seeking attorney fees where he did not have, and then could not obtain, authentic evidence that the fees were authorized by the terms of the pertinent credit card account was FDCPA violation); Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24, 28-29 (6th Cir. 2007) (affidavit claiming attorney fees was deceptive when collector may not have been entitled to any fees); Powers v. Credit Mgmt. Servs., Inc., 2016 WL 612251, at *13 (D. Neb. Feb. 2, 2016) (where there was no right to collect interest and attorney fees on the debts absent a judgment, it was misleading to represent otherwise in the complaint); Lockett v. Freedman, 2004 WL 856516, at *2, 5 (N.D. Ill. Apr. 21, 2004) (refusing to dismiss claim that collection attorney violated FDCPA by verifying complaint on personal knowledge, when in fact he lacked personal knowledge and some of the facts alleged in the complaint were inaccurate).

[316] Stratton v. Portfolio Recovery Assocs., L.L.C., 770 F.3d 443, 451 (6th Cir. 2014) (debt buyer did not have the right to collect interest on the consumer's debt, and statement to the contrary in collection suit was a false representation of the character and amount of the debt); Wade v. Account Resolution Corp., 2016 WL 4415353, at *2 (E.D. Mo. Aug. 19, 2016) (consumer plausibly alleged that collection agency and its attorneys violated FDCPA when they added prejudgment interest to default judgment where, according to affidavit of claim, no interest was accruing on debt prior to judgment); Powers v. Credit Mgmt. Servs., Inc., 2016 WL 612251, at *13 (D. Neb. Feb. 2, 2016).

[317] Maxwell v. St. Francis Health Ctr., 2017 WL 4037732, at *7 (D. Kan. Sept. 13, 2017) (false affidavit claiming that a careful investigation had been undertaken of plaintiff's military service was a knowing or reckless misrepresentation); Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs.,P.C., 114 F. Supp. 3d 1342, 1349 (N.D. Ga. 2015) (denying motion to dismiss § 1692e claims where "the few attorneys on staff were allegedly left to essentially skim and sign the prepared pleadings" taking "less than a minute to approve each suit"); Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283, 290 (D.N.J. 2014) (finding a violation of § 1692e where "neither [reviewing attorney] nor any other member of Pressler's staff reviewed, or otherwise had knowledge of, the contract between Bock and the bank, including any choice of law, choice of venue, or dispute resolution clause governing disputes between Bock and his creditor . . . Nor did [reviewing attorney] or anyone else at Pressler review the agreement by which Bock's original creditor allegedly assigned this debt to Pressler's client, Midland.").

[318] *Demarais v. Gurstel Chargo, P.A.,* 869 F.3d 685, 695-696 (8th Cir. 2017) ("Interpreting the FDCPA to prohibit debt collectors from falsely threatening to proceed to trial—coercing consumers and their attorneys to prepare for and appear at a trial that the debt collector did not intend to pursue—preserves creditors' judicial remedies.").

[319] Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 613 (6th Cir. 2009). *See also* Rice v. Javitch Block & Rathbone, L.L.P., 2011 WL 3861701, at *7, 8 (S.D. Ohio Aug. 31, 2011) (exhibits that facially resembled credit card statements but were created for lawsuit could be misleading and deceptive); Manlapaz v. Unifund CCR Partners, 2009 WL 3015166, at *3, 4 (N.D. Ill. Sept. 15, 2009) (document's

- Misrepresenting amounts due;[320] and

- Filing a motion for default judgment misrepresenting that the consumer had not responded to the court proceedings;[321]

- Filing affidavits containing false or fraudulent statements;[322]

- Threatening or initiating a collection suit without possessing original account-level documentation;[323] and

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appearance as bill previously sent to plaintiff, when it was actually created for purpose of suit, may qualify as misrepresentation).

[320] *Heintz v. Jenkins,* 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). *See also* Stratton v. Portfolio Recovery Assocs., L.L.C., 770 F.3d 443, 451; McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 949-950; Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 613; Eckert v. LVNV Funding L.L.C., 647 F. Supp. 2d 1096, 1104 (E.D. Mo. 2009); Kirk v. Gobel, 622 F. Supp. 2d 1039, 1046 (E.D. Wash. 2009); Sanz v. Fernandez, 633 F. Supp. 2d 1356, 1363 (S.D. Fla. 2009); Manlapaz v. Unifund CCR Partners, 2009 WL 3015166, at *2, 3; Moore v. Diversified Collection Services, Inc., 2009 WL 1873654, at *4 (E.D.N.Y. June 29, 2009); Capital Credit & Collection Serv., Inc. v. Armani, 206 P.3d 1114, 1121 (Or. Ct. App. 2009).

[321] *See* Polanco v. NCO Portfolio Mgmt., Inc., 132 F. Supp. 3d 567, 583 (S.D.N.Y. Sept. 23, 2015) (debt collector used "sewer service" to fraudulently obtain default judgment against debtor by failing to serve debtor and then filing a fraudulent affidavit attesting to service); Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128, 138 (D. Mass. 2007) (filing of fraudulent motion for default). *See also* Pate v. Law Office of Joe Pezzuto, L.L.C., 2014 WL 12586733, at *4 (C.D. Cal. June 16, 2014) (collection attorney stated that consumer's telephone call was a sufficient answer to collection complaint and that no further action was necessary, and then took default judgment against consumer).

[322] *See* Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24, 28-29 (6th Cir. 2007) (affidavit seeking collection attorney fees attached to debt collection complaint falsely created deceptive impression that Ohio law would permit recovery of collection attorney fees in suit against consumer when that recovery was prohibited by Ohio law); Skinner v. Mountain Lion Acquisitions, Inc., 2014 WL 3853424, at *3 (N.D. Cal. Aug. 1, 2014) (allegations that defendants knowingly obtained and used a forged declaration of employee of creditor in an attempt to collect debt); Simmons v. Portfolio Recovery Assocs., 2012 WL 222935, at *5 (E.D. Tenn. Jan. 25, 2012) (debt collector filed affidavits that contained false or deceptive representations about the status or character of the underlying debt, and engaged in a pattern and practice of filing similar lawsuits). *See also* Consumer Fin. Prot. Bureau v. Pressler & Pressler, L.L.P., 2016-CFPB-0009 (Apr. 25, 2016); Consumer Fin. Prot. Bur. v. New Century Fin. Serv., Inc., 2016-CFPB-0010 (Apr. 25, 2016), Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., 114 F. Supp. 3d 1342 (N.D. Ga. 2015); *In re* Portfolio Recovery Assocs., File No. 2015 CFPB 0023, Consent Order (Sept. 9, 2015); *In re* Encore Capital Group, 2015-CFPB-0022, Consent Order (Sept. 9, 2015).

[323]*See* Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs.,P.C., 114 F. Supp. 3d 1342, 1349 (N.D. Ga. 2015); Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283, 290 (D.N.J. 2014). *See also In re* Pressler & Pressler, L.L.P., File No. 2016-CFPB-0009, Consent Order (Apr. 25, 2016); *In re* New Century Fin. Servs., Inc., File No. 2016-CFPB-0010, Consent Order (Apr. 25, 2016); *In re* Portfolio Recovery Assocs., File No. 2015 CFPB 0023, Consent Order (Sept. 9, 2015); *In re* Encore Capital Group, 2015-CFPB-0022, Consent Order (Sept. 9, 2015).

- Misrepresenting that a debt was owed when the lawyer had reason to believe it was not owed.[324]

The effect of this safe harbor will be to institutionalize the very lawsuit mills that the Bureau has endeavored to stop in the past.[325] As discussed below, this would serve only to undermine the inclusion of attorney conduct in the FDCPA. There is no justification for the sweeping exemptions proposed here. This proposed safe harbor should be withdrawn. Instead, the Bureau should move forward with the promulgation of a strong rule addressing the integrity of information received and reviewed by debt collectors regarding consumer debts, including by debt collectors in collection lawsuits.[326]

7.4.2 The proposed safe harbor is based on an overly lax standard and exceeds the Bureau's authority.

If the safe harbor is implemented as proposed, the requirements in § 1006.18(g)(1) and (2) will not be sufficient to ensure meaningful attorney involvement in debt collection actions. Filing a lawsuit to collect a debt from a consumer is a specialized type of litigation that warrants extra care and guidance. The Bureau has clearly recognized that there is a high risk of harm to consumers from debt collection lawsuits filed without proper support.[327]

The least sophisticated consumer served with a debt collection lawsuit signed by an attorney is likely to believe that the attorney has reviewed the account and determined that the creditor has a valid claim and that the lawsuit is an accurate statement of the consumer's obligation.[328] This belief can lead consumers to either pay up or give up, resulting in a default judgment against them.[329] Many consumers do not defend collection lawsuits, and debt collectors are able to obtain default judgments based on inaccurate or incomplete information.[330] Once a creditor has a judgment, harsh collection methods like garnishment of wages or bank accounts typically become available. If a consumer does defend a lawsuit, it is time-consuming and expensive and

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[324] *See* Mason v. Midland Funding L.L.C., 2017 WL 6994577, at *33 (N.D. Ga. July 27, 2017), *adopted by* 2017 WL 8186866 (N.D. Ga. Sept. 29, 2017) (collection lawyers used false affidavits and should have known they could not prove their claims).

[325] See the discussion of prior CFPB consent orders in § 7.4.3, *infra*.

[326] *See* Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting (June 8, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-consumer-advisory-board-meeting-june-2017/ ("[W]e have now decided to consolidate all the issues of 'right consumer, right amount' into the separate rule we will be developing for first-party creditors, which will now cover these intertwined issues for third-party collectors and debt buyers as well.").

[327] SBREFA Outline at 12.

[328] *See* Consumer Fin. Prot. Bureau v. Hanna & Assocs., 114 F. Supp. 3d 1342, 1366-67 (N.D. Ga. 2015).

[329] *Id.*

[330] *Id. See also* National Consumer Law Center, Fair Debt Collection § 1.4.9.3 (9th ed. 2018) (collecting data about default judgments in debt collection litigation).

the vast majority of consumers are not represented by counsel.[331] As the court noted in a case brought by the Bureau against an attorney accused of just this type of wrongful behavior: "if an attorney wants to take advantage of the fear that serving a complaint would inspire in a debtor, the lawyer should at the very least ensure that he has become professionally involved in the decision to file the lawsuit."[332]

The Bureau bases the requirements of Proposed § 1006.18(g)(2)(A)-(C) on Rule 11(b)(2)-(4) of the Federal Rules of Civil Procedure.[333] Rule 11 is a very general, overarching rule for all attorneys filing federal civil lawsuits of any kind. It establishes only the minimum level of due diligence that an attorney must follow to avoid legal censure by the court. Those standards are far lower than what is needed to protect consumers from abusive collection litigation practices. For example, Rule 11 provides no clear articulation of what an attorney must review before and during debt collection litigation.

Another reason that the CFPB should not base its standard on Rule 11 is the fact that Congress did not adopt this standard when it specifically looked at the question of FDCPA coverage for collection attorneys. In 1986, when Congress amended the FDCPA to explicitly apply the statutory requirements to lawyers collecting debts, a report from the House stated that "[t]he Committee finds that current law does not adequately protect consumers from attorney debt collection abuses."[334] Rule 11 formed part of the current law in 1986 that was rejected as inadequate. Moreover, when the 1986 amendment to the FDCPA was challenged by debt collectors, the United States Supreme Court had before it the argument that Rule 11 sufficiently deterred inappropriate behavior by attorneys litigating collection cases against consumers.[335] The Supreme Court did not address the Rule 11 argument, but clearly was not persuaded by this argument as it ruled against the debt collector.[336] Instead, the Supreme Court found that it was appropriate to apply the FDCPA to the collection activities of lawyers.

By basing the standard on Rule 11, the Bureau would effectively exempt attorneys from a core protection of the Act, in disregard of Congress's 1986 decision to amend the statute to include them. The proposed rule would also purport to override.Congress's deliberate decision to limit defenses to those that meet the definition of a bona fide error. Taking these steps would be arbitrary and capricious, and would exceed the Bureau's authority.

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[331] National Consumer Law Center, Fair Debt Collection § 1.4.9.4 (9th ed. 2018) (collecting data about consumer representation in debt collection litigation).

[332] *See* Consumer Fin. Prot. Bureau v. Hanna & Assocs., 114 F. Supp. 3d 1342, 1366 (N.D. Ga. 2015).

[333] Without explanation, however, the Bureau did not include the language of Fed. R. Civ. P. 11(b)(1) that the pleading…"is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation…"

[334] H.R. Rep. No.405, 99th Cong., 1st Sess. 7, *reprinted int* 1986 U.S.C.C.A.N. 1752, 1758.

[335] The debt collector's brief argued to the Court that the FDCPA was not necessary to control attorneys' litigation activities collecting debts. The brief stated:

> More than half the states have adopted, in whole or in part, the Federal Rules of Civil Procedure. . .This includes Rule 11, which at the time the attorney amendment was deleted from the Act, forbade attorneys from filing lawsuits not "well-grounded in fact" or not "warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law."

Brief on the Merits of Petitioners, Heintz v. Jenkins, 1994 WL 706068, at 20 (U.S. 1994),

[336] Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).

Because of the heightened risk of harm in debt collection cases, rules to protect consumers from abusive collection litigation practices must go beyond the basic requirements of Rule 11. We walk through the other profound deficiencies in the proposal in the subsections that follow.

7.4.3 The Bureau's failure to specify the information that a collection attorney must review before filing suit will allow unfounded, deceptive, and abusive collection practices to continue.

A fundamental problem with the proposed rule is its vague and lax statement of what the attorney must review. It would require merely that the attorney "[r]evie[w] information supporting such pleading and determin[e], to the best of the attorney's knowledge, information, and belief, that…"

A. The claims, defenses, and other legal contentions are warranted by existing law;

B. The factual contentions have evidentiary support; and

C. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.[337]

To determine whether a debt collection claim is warranted by existing law and the factual contentions have evidentiary support, an attorney must at least examine the contract or other documents that establish the obligation and the plaintiff's right to enforce it, an account statement showing the calculation of the balance, and documents showing any disputes about the debt. More particularly, the attorney should obtain and review at least the following original, account-level documents before filing or threatening to file a collection lawsuit:

- *To prove the proper balance owed:*
    - A charge-off statement, billing statement, periodic statement, or other document generated by the creditor that reflects the balance at default;
    - A copy of any settlement or repayment agreements; and
    - A post-default itemization of amount owed distinguishing among principal, interest, and fees.

- *To prove that the consumer has agreed to be responsible for the debt:*
    - A signed account application and contract or promissory note proving the consumer's agreement to the debt, or, if no such document exists, documentation showing that the consumer has agreed to be responsible for the debt; and
    - Documentation that a consumer is a co-signor or has otherwise agreed to be responsible for the debt (*if attempting to collect from someone other than the primary obligor*).

[337] Proposed § 1006.18(g)(2).

- *To prove that the collector or creditor has the right to charge interest or fees added after default and to establish choice of law:*
    - A copy of the terms and conditions in effect during the term of the contract and/or at default to justify any interest or fees included in the claim (*if attempting to collect contractual fees or interest post-default*).
- *To establish the creditor's right to collect on the debt:*
    - Documentation of the chain of title, including proof that the original creditor sold the debt allegedly owed by the individual consumer to the first debt buyer, and proof of each subsequent sale in the chain (*for debts that have been sold*).

The proposed rule fails to require these basic steps. The requirement to review "information supporting such pleading" is utterly vague. A collection attorney could argue that simply reviewing poor-quality information met the standard. That might include information received from a long chain of debt collectors that held the debt, a debt buyer's self-serving affidavit, or a summary spreadsheet with just a name, the last few digits of an account number and an amount alleged to be owed.

The Bureau has found that the quality and accuracy of information a debt collector receives degrades as it gets transferred from a creditor to different debt collectors over time, and firms may not have the "incentives to establish higher standards for the transfer of information."[338] If the proposed rule is adopted, collection attorneys will argue that they need not look beyond the information they have in hand from the creditor or a prior debt collector, even if that information is incomplete or inaccurate. Moreover, the proposed rule would incentivize attorneys to limit their external review so that they would not know, have information about, or believe that the claims, defenses, factual contentions, and denials in the pleadings were false or inaccurate.

Filing suit without conducting a real review of actual documents not only leads to the filing of unfounded suits with inaccurate, deceptive allegations, but also inevitably leads to further abuses as the case progress. For example, in *Demarais v. Gurstel Chargo, P.A.,*[339] collection attorneys falsely threatened to proceed to trial when, in fact, they had not obtained the evidence necessary to meet their burden of proof at such a trial. When a consumer such as the plaintiff appeared for trial, the collection attorneys were unprepared to go forward: they had no creditor representatives, no witnesses and no evidence. Instead, they obtained a continuance. On the plaintiff's second trial date, they again arrived with no evidence, and the case was dismissed. This was, in fact, their pattern, and part of a scheme to obtain judgments against consumers based on the hope that the consumer would fail to appear for one of the trial dates.

As *Demarais* illustrates, the filing of a collection action initiates a lawsuit in which the plaintiff will have the burden of proving that the consumer owes the debt and owes it to the plaintiff. Collection suits typically move quickly, leaving little time for a collection attorney to obtain the necessary evidence, much less to analyze and evaluate it if the attorney has not obtained it before filing. The failure to require collection attorneys to obtain and review the necessary substantiation before filing suit inevitably leads to the abuses that *Demarais* documents.

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[338] SBREFA Outline at 7.

[339] 869 F.3d 685, 695-696 (8th Cir. 2017).

The consent orders that the Bureau has entered into with other debt collection law firms have required the firms to do far more than what is proposed in § 1006.18(g). For example, the consent order with Hanna & Associates[340] prohibited the firm from filing lawsuits or threatening to sue unless debt collection attorneys have specific "original account level documentation"[341] showing that the debt is accurate and enforceable. Namely, before the firm can file, or threaten to file, a collection lawsuit, it must possess documentation with "the [c]onsumer's name, the last four digits of the account number associated with the [d]ebt at the time of [c]harge-off, the claimed amount, excluding any post [c]harge-off payments, and if Defendants are suing under a breach of contract theory, the contractual terms and conditions applicable to the debt."[342] Further, before filing a lawsuit, the attorneys in the firm must fulfill several specific components to ensure that they have reviewed certain information and documents to support their claims.[343] The components include logging into a case management system in a manner that will create an electronic record showing that the attorney reviewed the consumer's account, and reviewing specific original account level documentation.[344]

Similarly, under the consent order with *Pressler and Pressler, L.L.P.*, the firm's attorneys must obtain and review delineated, original account-level documents and information showing that the debt is accurate and enforceable before threatening to file or filing a collection lawsuit.[345]

The proposed rule represents a retreat from these essential requirements. Instead of rolling back these common-sense requirements, the Bureau should use them as a starting point in crafting a rule that would protect consumers by ensuring true meaningful attorney involvement before threatening to file or filing collection lawsuits.

7.4.4 The proposed rule fails to make it clear that a cursory review is insufficient.

As discussed in the preceding section, the proposed rule is excessively lax in its statement of what material an attorney must review in order to make the determinations that would qualify the attorney for the proposed safe harbor. It is also inadequate in its failure to make it clear that a cursory review of that material is insufficient. The Bureau should make it clear that a cursory review is insufficient. Otherwise, baseless collection actions will continue to be filed, and collection firms will now try to argue that a minimal review of unreliable summary information entitles them to a safe harbor.

Proposed § 1006.18(g) would make the safe harbor available to an attorney who:

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340 Consumer Fin. Prot. Bureau v. Hanna & Assocs., Civ. Action No. 1:14-cv-02211, Consent Order (N.D. Ga. Dec. 28, 2015).

341 *Id.* at 5 ("'Original Account-Level Documentation' means: i. any documentation that a Creditor or that Creditor's agent (such as a servicer) provided to a Consumer about a Debt; ii. a complete transactional history of a Debt, created by a Creditor or that Creditor's agent (such as a servicer); or iii. a copy of a judgment, awarded to a Creditor or entered on or before the Effective Date.").

342 *Id.*

343 *Id.* at 7-9.

344 *Id.*

345 *In re* Pressler & Pressler, L.L.P., File No. 2016-CFPB-0009, Consent Order at 12-15 (Apr. 25, 2016).

1. Drafts or reviews the pleading, written motion, or other paper; and

2. Reviews information supporting such pleading, written motion, or other paper and determines, to the best of the attorney's knowledge, information, and belief, that, as applicable:

    i. The claims, defenses, and other legal contentions are warranted by existing law;
    ii. The factual contentions have evidentiary support; and
    iii. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

The first problem with this language is the use of the term "review" without any guidance or explanation. The Bureau should clarify that these reviews must be comprehensive to ensure the integrity of the filing. For example, in the *Bureau of Consumer Financial Protection v. Forster & Garbus, L.L.P.,* a case that was filed shortly after the proposed safe harbor was announced, the Bureau complained that the law firm was not "meaningfully involved in reviewing the merits of the lawsuits, including conducting any inquiry into the facts, or in preparing the pleadings."[346] In that case, the collection attorney did "review" the complaint for "a minute or two."[347] Without further clarification by the Bureau, courts might find that this sort of momentary review complies with § 1006.18(g)(1). The Bureau should clarify that momentarily reviewing a document does not constitute meaningful involvement in the filing of pleadings.

The next phrase, "to the best of the attorney's knowledge, information, and belief…" is vague and utterly subjective. It is also circular. If the attorney reviews only unreliable, degraded information, then an unfounded, inaccurate determination that a claim has merit will almost inherently be to the best of the attorney's knowledge, information, and belief.

Next, the proposed rule requires the attorney's review to determine that, "(A) The claims, defenses, and other legal contentions are warranted by existing law…" It is unclear what an attorney has to do under the proposed rule to review information to determine whether claims are "warranted by existing law." As described above, under the vague standard of § 1006.18(g)(2) collection attorneys will argue that momentarily reviewing unspecified information that supports the claims, defenses, and other legal contentions in the court filing is sufficient to determine if the claims are "warranted." This contradicts courts that have allowed claims for violations of § 1692e where:

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[346] Bureau of Consumer Fin. Prot v. Forster & Garbus, L.L.P., Civ. Action No. 2:19-cv-02928, Complaint at paras. 12, 15, 21, 26, 27, 28 (May 17, 2019) (alleging that the law firm did not "conduct any inquiry into the facts surrounding an alleged debt or request supporting documentation, such as...payment histories...account applications, billing statements, copies of payments, cash-advance check copies, the terms and conditions governing an account, consumer correspondence... warranties or disclaimers of warranties related to debt sales...cash-advance check copies...or any original or supporting documents from its clients before filing suit.").

[347] *Id*. at para. 25.

- an attorney reviewed the case for four seconds before filing;[348]

- a collection firm with only three attorneys filed thousands of suits, thus providing little time for review;[349]

- a collection law firm relied on its client telling it that a debt was overdue, and on conclusory affidavits in filing a collection suit;[350]

- a firm of only three attorneys filed over 13,000 complaints in one year, which would leave no time for a meaningful review;[351] and

- attorneys reviewed pleadings for no more than one minute before signing, and one attorney signed an average of 1,300 collection suits each week.[352]

The Bureau should adopt a comment stating that the attorney's review must be sufficient to make a reasonable, individualized evaluation of the merits of the proposed filing and to identify errors or deficiencies in it, and that a cursory review is insufficient.

The proposed rule also requires the attorney's review to determine that "(B) The factual contentions have evidentiary support…" However, the rule fails to make it explicit that the attorney must review that evidence, or even have access to it. The rule's failure to make this explicit might lead collection firms to believe that they will be entitled to a safe harbor if they merely review some assurance by a third party that the necessary evidence exists somewhere.

7.4.5 Potential limitations on future enforcement

Adopting the proposed safe harbor could limit enforcement actions by the Bureau, including *Bureau of Consumer Financial Protection v. Forster & Garbus, L,L,P,*, which was filed shortly after the proposed rule was released*.* If the Bureau's proposed rule § 1006.18(g) is implemented, as detailed above, the *Forster* attorneys will certainly try to avail themselves of the safe harbor and escape liability for their conduct even if, as alleged, they conducted only a cursory review of the filings and information related to the matter before submitting pleadings with the court.[353] Other attorneys will follow suit and argue that they fall under the safe harbor for performing minimal reviews of poor-quality information to support their filings.

7.4.6 The proposed safe harbor for meaningful attorney involvement will interfere with the Bureau's ability to provide much-needed comprehensive requirements for information substantiation by debt collectors.

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[348] Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283, 305 (D.N.J. 2014).

[349] Isaacs v. Malen & Assocs., P.C., 2013 WL 4734904 (S.D.N.Y. Aug. 14, 2013).

[350] Miller v. Wolpoff & Abramson, L.L.P, 321 F.3d 292, 304 (2d Cir. 2003).

[351] Diaz v. Portfolio Recovery Assocs., L.L.C., 2012 WL 661456 (E.D.N.Y. Feb. 28, 2012).

[352] Consumer Fin. Prot. Bureau v. Hanna & Assocs., 114 F. Supp. 3d 1342, 1349 (N.D. Ga. 2015).

[353] Bureau of Consumer Fin. Prot. v. Forster & Garbus, L.L.P., Civ. Action No. 2:19-cv-02928, Complaint at paras. 12, 15,, 21, 26, 27, 28 (E.D.N.Y. May 17, 2019).

In its SBREFA Outline, the Bureau proposed that debt collectors should be required to have "reasonable support" for the claims alleged in a debt collection lawsuit, and provided a list of documents and information that would constitute such support in Appendix D.[354] The topic of information substantiation was a major focus of that outline as the Bureau attempted to identify how to ensure that the right consumer was contacted about the right amount by a party with the right to collect.[355] The National Consumer Law Center offered detailed comments about how to improve upon the Bureau's proposal.[356] Ultimately, then-Director Cordray decided that this piece of the rulemaking needed to be combined with a rulemaking for first-party creditors.[357]

The current proposal represents an abandonment of the goal of requiring information substantiation for debt collectors, including for collection attorneys. Instead, the Bureau has essentially reversed its former position, and is now willing to provide a safe harbor from liability for collection lawsuits with <u>no</u> meaningful substantiation. This safe harbor will interfere with the Bureau's ability to provide comprehensive rules for information substantiation in the future. The Bureau should withdraw the proposed safe harbor and, instead, continue to engage in a joint first-party creditor and third-party collector rulemaking around how it can ensure information substantiation by debt collectors, including collection attorneys, to make sure that the right party is contacted about the correct amount and by someone with authority to collect.

Alternatively, if the Bureau does move forward with this safe harbor proposal, the Bureau should create specific requirements for all debt collectors and attorneys filing debt collection lawsuits based on the documents listed in Appendix D of the SBREFA Outline, as well as documents and information outlined in the *Forster* matter and recent Bureau consent orders addressing a lack of meaningful attorney involvement in filing debt collection lawsuits.[358] As set forth in §

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[354] SBREFA Outline at 12, Appx. D.

[355] *See generally* SBREFA Outline.

[356] National Consumer Law Center, Comments to the CFPB on its Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered, (Feb. 28, 2017), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-coll-sbrefa-cmmnts-02282017.pdf.

[357] Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting (June 8, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-consumer-advisory-board-meeting-june-2017/ ("[W]e have now decided to consolidate all the issues of 'right consumer, right amount' into the separate rule we will be developing for first-party creditors, which will now cover these intertwined issues for third-party collectors and debt buyers as well.").

[358] *In re* Pressler & Pressler, L.L.P., File No. 2016-CFPB-0009, Consent Order at 12- 15 (Apr. 25, 2016); Consumer Fin. Prot. Bureau v. Hanna & Assocs., Civ. Action No. 1:14-cv-02211, Consent Order para. 129 (N.D. Ga. Dec. 28, 2015). *See also* Consent Order*, In re* Encore Capital Group, 2015-CFPB-0022, Consent Order (Sept. 9, 2015) (Encore is "prohibited from making any representation, expressly or by implication, that a Consumer owes a Debt to Encore or as to the amount of a Debt owed or allegedly owed to Encore unless, at the time of making the representation, Encore can substantiate the representation. Without limiting the foregoing, such substantiation must include reviewing Original Account-Level Documentation reflecting the Consumer's name and the claimed amount"); *In re* Portfolio Recovery Assocs., File No. 2015 CFPB 0023, Consent Order para. 116 (Sept. 9, 2015) (Sept. 9, 2015) (PRA is prohibited from "[m]aking any representation, expressly or by implication, that a Consumer owes a Debt to Respondent or as to the amount of a Debt unless, at the time of making the representation, Respondent can substantiate the representation. Without limiting the foregoing, such substantiation must include reviewing Original Account-Level Documentation reflecting the Consumer's name and the claimed amount").

7.4.3, *supra*, this should include requiring collection attorneys to review original account-level documentation of alleged indebtedness to make independent determinations for each case that they are filing a lawsuit against the right person and for the right amount, and that their client has the legal authority to do so. Moreover, the Bureau should clarify that debt collectors cannot rely on conclusory affidavits from original creditors, or summary information transferred from original creditors or prior account owners via summary forms like spreadsheets or databases. Providing a specific list of documents and information attorneys should obtain and review would better achieve the Bureau's goal of promoting meaningful attorney involvement in debt collection litigation and protecting consumers from harm that occurs from unsubstantiated lawsuits.

7.4.7 The proposed safe harbor is overbroad.

In addition to all its other flaws, the proposed safe harbor rule appears to be overbroad in the extent of the safe harbor it offers. In its discussion of meaningful attorney involvement under the statute, the Bureau cites to FDCPA § 1692e(3), which prohibits any false representation or implication that any individual is an attorney or that a communication is from an attorney, as well as § 1692e(10), which prohibits the use of false representations or deceptive means to collect a debt.[359] However, it appears that, as written, Proposed § 1006.18(g) would afford a safe harbor for *any* false, deceptive, or misleading act in connection with the submission of pleadings, not just a safe harbor against claims for lack of meaningful involvement, as the title of § 1006.18(g) suggests.

Such an expansive safe harbor is entirely unjustifiable. The Bureau does not point to any specific language from either statutory section that justifies the extensive safe harbor proposed. Nor does the Bureau offer an interpretation of § 1692e that would explain this broad exemption for all of § 1006.18. The Bureau should not go forward with the safe harbor rule, but if it does it should limit the safe harbor to §§ 1692e(3) and (10).

Recommendations: **The Bureau should:**

- **Withdraw the safe harbor proposal (Proposed § 1006.18(g));**
- **If it does not withdraw the proposal, it should, at the very least, (1) provide a list of documents and information, as outlined above, that debt collectors and attorneys are required to obtain and review before threatening to or bringing a collection suit; (2) make it clear that a cursory review of the documents and information is insufficient; and (3) narrow the scope of the safe harbor to §§ 1692e(3) and (10).**

[359] 84 Fed. Reg. at 23,323.

8. § 1006.22: Unfair or unconscionable means

8.1 Overview

Sections 1006.22(a) through (e) generally restate the existing statute.[360] Our review focuses on the new content in §§ 1006.22(f) and (g), which relate to communications with consumers. We have serious concerns about these proposals. An overriding concern, affecting both this and other parts of the proposed rules, is the failure to require prior, direct, affirmative consumer consent to receive debt collection messages at a particular email address.

8.2 § 1006.22(f): Restrictions on use of certain media

8.2.1 § 1006.22(f)(1): Prohibition on communicating by postcard

Proposed § 1006.22(f)(1) prohibits "communicat[ing] with a consumer regarding a debt by postcard." This language is copied verbatim from 15 U.S.C. § 1692f(7) and is unobjectionable. However, as discussed in our comments regarding § 1006.2(j) in § 3.6, *supra*, if the Bureau retains the proposed limited-content message rule, this prohibition will not apply to those messages, because the proposed definition of "communicate" in § 1006.2(d) has been modified to exclude limited-content messages. This means that debt collectors would be allowed to send limited-content messages by postcard.

A collection postcard with a limited-content message risks violating consumer privacy because it will be viewable to multiple people in the consumer's household and others while in transit. Even though the message does not specifically mention the debt, people will soon become familiar with limited-content messages and associate them with debt collection. If the message on the postcard refers to an "account," as Proposed § 1006.2(j)(2)(iii) would allow, it will be unmistakable as a debt collection message. Moreover, since postcards are a lower-cost mail option,[361] debt collectors may send them more frequently than regular postal mail, increasing the opportunities for privacy violations.

The Bureau should withdraw its limited-content message proposal entirely. However, if it does not do so, it should modify § 1006.22(f)(1) to clarify that a debt collector must not, "[c]ommunicate *or attempt to communicate* with a consumer regarding a debt by postcard." Since the definition of "attempt to communicate" includes limited-content messages pursuant to Proposed § 1006.2(b), this will ensure that limited-content messages are covered by § 1006.22(f)(1).

[360] 84 Fed. Reg. at 23,324.

[361] For example, with bulk mailing campaigns the price of postage per postcard may be as low as $0.19 per postcard if debt collectors qualify for USPS Marketing Mail. *See* USPS, Mailing and Shipping Prices, *available at* https://www.usps.com/business/prices.htm. At most, a first class postcard stamp is $0.35 *(id.),* still a significant savings from the cost of printing and sending a letter, which the CFPB estimates at $0.50 to $0.80 each. 84 Fed. Reg. at 23,308.

***Recommendation*: The CFPB should amend § 1006.22(f)(1) to include attempts to communicate.**

8.2.2 § 1006.22(f)(3): Communication via work email address

8.2.2.1 The Bureau should prohibit collectors from using any email address without the consumer's consent.

Proposed rule § 1006.22(f)(3) would prohibit a debt collector from using an email address the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector received prior consent from the consumer or an email from the consumer from that email address.

An email sent by a debt collector does not just go to a consumer directly but rather, passes through an average of about six computers or more before it reaches the consumer.[362] Even if a consumer deletes a debt collection email, it is still fully stored and searchable by the employer, co-workers, and a host of other people.[363] An email is the modern-day equivalent of a postcard, in that it passes through different service providers, giving many different people the ability to read it. However, unlike a postcard, an email remains available and searchable, potentially forever.[364]

Employers can, and frequently do, read their employees' emails, and such debt collection emails to consumers "present a particularly high risk of third-party disclosure"[365] in violation of § 1692c(b) of the FDCPA. Such disclosures would result in an invasion of a consumer's privacy and could result in additional harm, including loss of a job, being passed over for a promotion, or loss of security clearance.[366] As noted by Congress, disclosures like these can have devastating consequences.[367] For example, such contact can be particularly harmful to servicemembers,

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[362] *See* Bob Seeman, CEO of CyberCurb, *Email is Like Mailing a Postcard* (Nov. 18, 2017), *available* at https://www.advisorycloud.com/board-of-directors-articles/email-is-like-mailing-a-postcard.

[363] *Id.* ("The average email is fully stored and searchable on an average of about six computers, sometimes many more: your own computer, your company's email computer, your company's Internet service provider's computer, the email destination user's Internet service provider's computer, the email destination user's company's computer, and the destination user's computer...the recipient's employer generally need no permission to access your email.").

[364] *Id.* ("A person in the IT department at a company is able to know more about what is going on at the company than the CEO...storage is so cheap and abundant that many companies keep all emails for years, perhaps forever.").

[365] 84 Fed. Reg. at 23,324.

[366] 84 Fed. Reg. at 23,324-23,325.

[367] In drafting the Act, the legislative committee found that "...this legislation adopts an extremely important protection...: it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs." S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

who often experience extreme stress as a result of debts and debt collection, which can negatively impact military careers.[368] In a 2013 study, financial stress was found to be the second leading cause of suicide among 57 Army Reserve suicides.[369] As the Bureau correctly notes, even an unsolicited email to a consumer's work email address that does not contain debt collection information could cause harm to the consumer if the employer sees it and inquires about the message.[370]

As discussed previously in our comments on § 1006.6(d)(3) in § 4.4.3, *supra*, the Bureau should require debt collectors to obtain consent from the consumer before using any email address--not just email addresses the collector "knows or should know" are provided by a consumer's employer. Adopting an affirmative consent requirement would eliminate the problem of third-party disclosures to employers that will inevitably happen in cases where the debt collector sends an email to an address that turns out to be a workplace email address.

***Recommendation*: The Bureau should require affirmative consumer consent before using any email address, whether or not it is, or appears to be, provided by the consumer's employer.**

8.2.2.2 If the Bureau persists in allowing collectors to use email addresses without the consumer's consent, it should tighten the proposed rule in a number of ways.

While we strongly believe that anything other than an affirmative consent requirement will lead to consumer harm, the remainder of our comments on this section focuses on how the current approach can be improved, short of requiring prior consent from the consumer to the collector for all emails.

Proposed Comment 22(f)(3) -1 clarifies that a consumer who receives an unwanted email at a workplace email address can follow the instructions required by § 1006.6(e) to opt out of email messages to that email address or request not to receive emails at that address pursuant to § 1006.14(h). As we have indicated in our comments to both of these sections in §§ 4.5 and 6.4, the Bureau should clarify that consumers can opt out through any reasonable method, including orally.

Proposed § 1006.18(f)(3) would allow debt collectors to email consumers at work email addresses if the collector "has received directly from the consumer . . . prior consent to use that email address." Comment 22(f)(3)-1 refers to Comment 6(b)(4)(i)-2 to interpret the meaning of "prior consent." This section appropriately clarifies that prior consent of the consumer to communicate in ways that would otherwise be prohibited by § 1006.18(f)(3) must be given directly to the debt collector and does not transfer from the original creditor or a prior debt collector.

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[368] *See* Holly Petraeus, Consumer Fin. Prot. Bureau, *Are unpaid debts a military career-killer?* (Jan. 9, 2015), *available at* https://www.consumerfinance.gov/about-us/blog/are-unpaid-debts-a-military-career-killer/.

[369] Timothy L. Hale, Searching for Answers: A Panel Review of Army Reserve Suicides, Double Eagle 6 (Sept. 2014) (study examined primary stressors leading to suicide).

[370] 84 Fed. Reg. at 23,325.

Prohibiting consent from transferring from the original creditor to a debt collector is very important. A consumer might consent to receive monthly account statements at a work email address without anticipating that a future default on the account might lead to the account being transferred to a debt collector. However, the Bureau should also clarify that debt collectors should ask for personal email addresses and should never solicit workplace email addresses, although a workplace email address may be used when the consumer has provided prior direct consent.

Proposed § 1006.18(f)(3) would also allow debt collectors to email consumers at work email addresses if the collector "has received . . . an email from that email address." Comment 22(f)(3)-2 elaborates with this example:

> A debt collector who receives an email directly from a consumer from an email address provided by the consumer's employer may communicate or attempt to communicate with the consumer at that email address, even if the consumer's email does not provide prior consent to the debt collector. For example, assume a debt collector has provided to a consumer a validation notice pursuant to § 1006.34 but has not otherwise communicated or attempted to communicate with the consumer. Assume further that the consumer subsequently sends an email directly to the debt collector from an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer; that the consumer's email requests additional information about the debt but does not give prior consent to the debt collector's use of that email address; and that the debt collector neither knows nor has reason to know that the consumer's employer prohibits the consumer from receiving communications in connection with the collection of a debt. Section 1006.22(f)(3) permits the debt collector to communicate or attempt to communicate with the consumer using that email address.[371]

In some cases, consumers may have access to email only through their employer's computer. Additionally, many may not think about the sensitive nature of their correspondence and may send emails from a workplace email address that could elicit a response that provides information about the debt, triggering the same consequences described above. Moreover, people frequently manage multiple email accounts from a single device (*e.g.* a mobile phone) and may inadvertently send a message from a workplace email address when they intended to use a private email address.

In light of these concerns, the Bureau should revise § 1006.18(f)(3) to permit collectors who receive a message from an email address that they know or should know is a workplace email address to send only a single follow-up email to confirm that the consumer consents to communications with the collector via that email address. If, however, the collector knows that the consumer's employer prohibits such communications at work, the collector should not respond via email without first verifying, via another channel, the consumer's ability to receive collection emails at work.

The Bureau's Comment at 22(f)(3)-3 sets out three examples of when a debt collector "knows or should know" an email address is a work email address:

[371] 84 Fed. Reg. at 23,376.

1. [T]he email address's top-level domain name is one ordinarily associated with work email addresses (*e.g.,* .gov or .mil),

2. [T]he email address's domain name includes a corporate name that is not commonly associated with non-work email addresses (e.g., springsidemortgage.com), or

3. [T]he debt collector knows the identity of the consumer's employer and the email address's domain name includes the employer's name or an abbreviation of the employer's name (*e.g.*, the debt collector knows that the consumer works at Example Mortgage Company and the email address is examplemortgagecompany.com or exmoc.com).

Each of these examples involves reviewing the domain name used in the email address. As such, if the domain name does not clearly indicate that the email is for a workplace, a debt collector could feel free to send email messages that include personal, financial information about a consumer, the debt collector would be exempt from any liability for third-party disclosures if it complies with Proposed § 1006.6(d)(3). Indeed, Proposed Comment 22(f)(3)-3 explicitly states, "[i]n the absence of contrary information, a debt collector neither would know nor should know that an email address is provided to the consumer by the consumer's employer if the email address's domain name is one commonly associated with a provider of non-work email addresses."

The CFPB's discussion gives the following examples of "domain names that are commonly associated with a provider of non-work email addresses": gmail.com, yahoo.com, hotmail.com, aol.com, or msn.com.[372] This provides debt collectors with overly broad discretion to send emails to addresses that either do not clearly contain business-related domain names or that do include one of the delineated "non-work email address" domain names. Comment 22(f)(3)-3 ignores the fact that many small businesses still use Gmail, Hotmail, or other common domain names to conduct business without obtaining business email accounts.

While the best way to fix this problem is to require debt collectors to obtain consent from the consumer before using any particular email address, the Bureau should, at a minimum, require debt collectors to consider the email username, in addition to the domain name as proposed, and prohibit debt collectors from contacting people at email addresses when the username seems to indicate a workplace email (absent the consumer's consent). For example, debt collectors should treat both AnaThePlumber@gmail.com and Ana@ThePlumber.com as workplace email addresses.

Proposed § 1006.6(b)(3), implementing § 1692c(a)(3), already prohibits workplace communications and attempted communications "if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communications." The comments to § 1006.22(f) should cross-reference this prohibition, because it represents another reason that a debt collector would be prohibited from using a workplace email.

The rule as proposed also puts an unfair burden on the consumer to prove the elusive standard of what a debt collector "knows or should know." If the domain name did not clearly indicate a business address, the burden would be on the consumer to obtain information from the debt

[372] 84 Fed. Reg. 23,325.

collector to somehow ascertain and prove if and how the debt collector knew or should have known that the address was a workplace email, a difficult burden to meet.

Finally, we note that, as drafted, these restrictions on email messages also apply to "limited-content messages."[373] As drafted, Proposed §1006.22(f)(3) provides that a debt collector must not "communicate or attempt to communicate…." The definition of "attempt to communicate" at § 1006.2(b) specifies that "attempt to communicate includes providing a limited-content message." As noted in our comments regarding Proposed § 1006.2(j) (the Bureau's limited-content message proposal) in § 3.6, *supra*, people will quickly come to identify limited-content messages as debt collection messages. Employers are particularly likely to have the sophistication to recognize them. In order to prevent the harms of receiving debt collection emails at work, we therefore agree that, if the Bureau goes forward with its limited-content message proposal, § 1006.22(f)(3) needs to apply to "limited-content messages" as well as other types of collection communications.

***Recommendations*: The Bureau should prohibit a debt collector from communicating or attempting to communicate with a consumer using an email address unless the debt collector has received directly from the consumer prior consent to use that email address. If the Bureau persists in allowing collectors to send messages to an email address without the consumer's prior affirmative consent, it should:**

- **Clarify that consumers can opt out of receiving email messages through any reasonable method, including orally.**
- **Require that any consent to use a work email address must be received directly from the consumer.**
- **Permit collectors who receive a message from an email address that they know or should know is a work email address to send only a single follow-up email to confirm that the consumer consents to receive messages from the collector at that address.**
- **Require collectors to treat any email address as a work email address if the username indicates that it relates to the consumer's workplace.**

8.2.3 § 1006.22(f)(4): Communication via Social Media

8.2.3.1 Publicly-viewable social media

Proposed § 1006.22(f)(4) states that debt collectors must not, "communicate or attempt to communicate with a consumer in connection with the collection of a debt by a social media

[373] As noted in our comments on § 1006.2(j) in § 3.6.3.2, *supra*, email is also an inappropriate method for delivery of limited-content messages outside of the workplace.

platform that is viewable by a person other than the persons described in §1 006.6(d)(1)(i) through (vi)." These categories of people are the consumer; the consumer's attorney; a consumer reporting agency, if otherwise permitted by law; the creditor; the creditor's attorney; and the debt collector's attorney. Thus, the rule would allow debt collectors to post debt collection messages on a social media platform that is viewable by the consumer and these individuals, but no one else. We are not aware of any such platform that would allow this, and we believe that the Bureau can safely shorten this provision to prohibit communicating via a social media platform that is "viewable by a person other than *the consumer*."

The prohibition described here should apply broadly to any electronic posting or sharing of information that is viewable by any person other than the consumer, and not just to social media platforms. For example, in addition to prohibiting debt collectors from posting on a Facebook Timeline, Twitter feed, or LinkedIn article, the Bureau should prohibit debt collectors from communicating or attempting to communicate with the consumer via a post in the comments to a consumer's blog post, in a group text, in a chat room discussion (excluding a private chat between the debt collector and the consumer), or any other online medium that might not be invented yet where such messages would be viewable by the public. Section 1006.22(f)(4) does not go far enough by restricting the prohibition to "social media platforms."

The prohibition against public electronic postings should also extend to deceased consumers and consumers as defined in § 1006.6(a). Debt collectors should not be able to post publicly about a decedent's alleged debt on a deceased person's social media account, blog, or other public-facing space online. As detailed in our comments on Proposed § 1006.6(a), surviving relatives, whether a spouse, parent, or someone acting as an administrator, executor, or personal representative of the estate, are particularly vulnerable to coercive debt collection conduct. Decedent-debt collectors may attempt to impose moral obligations on surviving relatives or prey on a relative's desire to protect the name of a deceased family member.

Proposed Comment 22(f)(4)-1 clarifies that the prohibition in § 1006.22(f)(4) applies to limited-content messages. This is an important protection because, as noted in our comments regarding Proposed §1006.2(j) (the Bureau's limited-content message proposal) in § 3.6, *supra*, people will quickly come to identify limited-content messages as debt collection messages. Employers are particularly likely to have the sophistication to recognize them.

8.2.3.2 Private social media messages and other direct messages

Proposed Comment 22(f)(4)-1 also clarifies that, if the social media platform has the capacity to send private messages, § 1006.22(f)(4) does not prohibit sending a private message. As we discussed in our comments to § 1006.6(d)(3) in § 4.4.3, *supra*, debt collectors should have to obtain prior consent from the consumer before communicating with the consumer electronically, including via private messages on a social media platform.

There are a variety of reasons that consent may be particularly important for private messages via social media platforms.

- First, consumers may not even see private messages from people that they are not connected to on social media. For example, Facebook treats messages from unknown people differently, placing them in a different folder. Consumers who had consented to such messages would be aware to check for them.

- Second, as discussed in our comments regarding Proposed § 1006.6(d)(3) in § 4.4.3, *supra*, there is a high risk of connecting with the wrong person using private messages via some social media or direct messaging platforms. If a debt collector searches for someone with a common name, there likely will be several people with the same name. The debt collector would have to guess which one is the consumer and may send the consumer's personal financial information to the wrong person with the same name. Due to these privacy concerns, the Bureau should clarify that social media private messages do not qualify for the safe harbor in § 1006.6(d)(3).

- Third, consumers may have concerns about the security of the information that is being transferred electronically. With many private messaging applications, the information is transferred via insecure plain text and can be accessed relatively easily by third parties.[374] To protect their right to privacy and the security of their information, consumers should be able to choose which messaging application, if any they use for communications from a debt collector.

Recommendation: The Bureau should:

- **Extend the prohibition on public posts beyond social media to cover other types of electronic communications that may be viewable to the public.**

- **Clarify that the prohibition against public electronic postings should also extend to deceased consumers and consumers as defined in § 1006.6(a).**

- **Prohibit contact via private messaging in any social media or direct message platform without first obtaining consent from the consumer.**

8.3 § 1066.22(g):Safe harbor for certain emails and text messages related to the collection of a debt

Under proposed rule § 1006.22(g), the Bureau provides yet another unnecessary safe harbor for debt collectors. This safe harbor would protect debt collectors that use an email address or telephone number for text messages obtained in one of the three methods outlined by § 1006.6(d)(3) from liability under § 1006.22(a) for "revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt." As we discussed in our comments on § 1006.6(d)(3), we have significant concerns about the proposed methods outlined by § 1006.6(d)(3), as well as their effectiveness at preventing third-party disclosure. As a result, the additional safe harbor under § 1006.22(a) should not be granted for compliance with those same inadequate procedures.

[374] *See* Miriam Cihodariu, Heimdal Security, *The Best Encrypted Messaging Apps You Should Use Today* (last updated July 20, 2019), ***available at*** https://heimdalsecurity.com/blog/the-best-encrypted-messaging-apps/; Megan Squire, *End-to-End Encryption Isn't Enough Security for "Real People,"* Scientific American, Aug. 15, 2017, ***available at*** https://www.scientificamerican.com/article/end-to-end-encryption-isn-rsquo-t-enough-security-for-ldquo-real-people-rdquo/.

Moreover, the section-by-section analysis discusses the Bureau's decision to abandon a proposal from the SBREFA Outline that would have prohibited a debt collector from sending an email message to the consumer if the "from" or "subject" lines contained information revealing that the email was about a debt.[375] This is disappointing. Such a requirement is simply the updated version of the prohibition in § 1006.22(f)(2) against "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail, except that a debt collector may use the debt collector's business name on an envelope if such name does not indicate that the debt collector is in the debt collection business." The Bureau should issue a comment to § 1006.22(f)(2) explaining the application of this provision to modern communication techniques.

The Bureau expresses concern that, without a "from" or "subject" line revealing the debt collection purpose of an email message, a consumer is less likely to open the message.[376] However, the same can be said of postal mail—consumers may be more likely to discard a collector's letter as junk mail if nothing on the envelope indicates that it is from a collector. Congress clearly made the determination, here and in many other sections of the FDCPA, that the fact that an unfair technique might be more effective in inducing payment should not be a reason to allow it. In any event, the most effective way to get consumers to open debt collection emails is to obtain consumer consent before sending them, so that consumers will anticipate them and can also be alert to check spam filters.

***Recommendations*: The CFPB should:**

- **Withdraw the proposed safe harbor from liability under § 1006.22(a) for debt collectors that send email or text messages using one of the methods outlined in § 1006.6(d)(3).**
- **Clarify that the prohibitions in § 1006.22(f)(2) prohibit "from" or "subject" lines in an email message that would indicate it is about a debt or from a debt collector.**

8.4 Ongoing monitoring

In its discussion, the Bureau notes:

> As to electronic media more generally, the Bureau plans to monitor their evolution and use by debt collectors, as well as any trends in FDCPA section 808 litigation concerning such media, to identify issues that pose a risk of consumer harm or require clarification as part of any future rulemakings.[377]

This kind of ongoing monitoring and willingness to revise the rules will be critical to the Bureau's ability to respond to emerging abusive practices., We urge the Bureau, in order to best capture

[375] 84 Fed. Reg. 23,327.

[376] 84 Fed. Reg. at 23,327.

[377] 84 Fed. Reg. at 23,324.

these complaints, to modify the questions that consumers answer in the complaint portal to better identify which complaints relate to electronic communications.

***Recommendation*: The CFPB should modify the consumer complaint portal to better capture consumer complaints about electronic communications.**

9. § 1006.26 Collection on time-barred debts

9.1 The Bureau should prohibit all efforts to collect on time-barred debt

The problems with filing—or threatening to file—lawsuits relating to time-barred debt was described by the court in *Kimber v. Federal Financial Corp.*:[378]

> [A] debt collector's filing of a lawsuit on a debt that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt. . . . [T]ime-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy, and this is no less true in the consumer context. As with any defendant sued on a stale claim, the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt. Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care—that sufficient to protect the least sophisticated consumer.[379]

The Bureau has also recognized that debt collectors obtain judgments on time-barred debt despite the existence of viable defenses based on the statute of limitations and that they often use the threat of suit on time-barred debt, either "expressly or by implication," to induce consumers to pay on debts they do not otherwise have to pay or do not even owe.[380]

Collecting on time-barred debts is unfair, deceptive, and abusive, and the Bureau should not permit the activity:

- Unfair: Collecting time-barred debts causes substantial injury to consumers, particularly the least sophisticated consumers, who do not understand that the statute of limitations has run or that this fact provides them with a legal defense. They are particularly unlikely to understand the counterintuitive consequence of acceding to the collector's request and making a small payment: that after such a payment – in some states – the consumer loses a full defense to the debt because the debt is revived and the statute of limitations begins to run again.[381] And even with disclosures explaining that consumers

[378] 668 F. Supp. 1480 (M.D. Ala. 1987).

[379] *Id* at 1487.

[380] SBREFA Outline at 19-20.

[381] *See* Fed. Trade Comm'n, Time-Barred Debts (July 2013), *available at* https://www.consumer.ftc.gov/articles/0117-time-barred-debts ("In some states, if you pay **any amount** on

cannot be sued, and that paying on the debt may lead to the loss of the valuable defense that the debt is time-barred, it is highly unlikely that the least sophisticated consumer will comprehend this confusing set of circumstances and be able to navigate reasonably through the collector's demands, the disclosures, and the consequences. Such injury is not reasonably avoidable by consumers due to the complexity involved in understanding what a statute of limitations is, which limitations period applies to their debt, and when the relevant period has run. This substantial injury is not outweighed by any countervailing benefits to consumers or to competition.

- Deceptive: Attempts to collect time-barred debt mislead consumers who will reasonably believe that the collector has a legally enforceable right to collect the amount sought. Aggressive collection attempts, even without express threats to sue, deceive consumers into paying debts for which they have a complete defense because of the implicit threats involved in these collection activities. This deception is material, because it causes consumers to make payments on debts when otherwise they would not do so.

- Abusive: Collecting time-barred debts takes unreasonable advantage of consumers' reasonable reliance on the expectation that debt collectors will attempt to collect only legally enforceable debts.

In light of the unfairness, deception, and abusiveness inherent in the pursuit of time-barred debt and the inability of disclosures to adequately protect consumers, we strongly urge the CFPB to ban all efforts to collect time-barred debt - whether by litigation or other means.

Although the CFPB's proposal falls far short of the needed prohibition on the collection of time-barred debt, we review the elements of the current proposal below to highlight its shortcomings and propose ways it can be strengthened.

***Recommendation*: The Bureau should prohibit all efforts to collect on time-barred debt.**

9.2 § 1006.26(b): A debt collector should be held to a strict liability standard when bringing or threatening to bring legal action on a time-barred debt.

9.2.1 The proposed rule's "know or should know" standard would conflict with the statute.

Proposed § 1006.26(b) would state: "A debt collector must not bring or threaten to bring a legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred debt." This proposed rule goes beyond the CFPB's authority in that it is inconsistent

a time-barred debt or even promise to pay, the debt is 'revived.' This means the clock resets and a new statute of limitations period begins. It also often means the collector can sue you to collect the full amount of the debt, which may include additional interest and fees.") (emphasis in original). *See also* National Consumer Law Center, Collection Actions § 3.6.8.3.1 (4th ed. 2017).

with the FDCPA's strict liability standard and its extension of only a narrowly framed bona fide error defense to debt collectors. The proposal represents a step backward from the Bureau's SBREFA Outline, which proposed to prohibit suit and threats of suit on time-barred debt, period.[382]

The majority of courts that have evaluated the filing of suit, threatening to file suit, or misrepresenting the legal status on a time-barred debt have found that such conduct violates the FDCPA.[383] Further, the majority of circuit courts and many lower courts have imposed or implied a strict liability standard so that a showing of knowledge or intent is not required to find a debt collector liable for suing, threatening to sue, or misrepresenting the legal status of a time-barred debt.[384]

Except for a narrow carve-out for bona fide errors at 15 U.S.C. § 1692k(c), the FDCPA is generally a strict liability statute.[385] Proposed § 1006.26(b) would only prohibit a debt collector

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[382] SBREFA Outline at 19.

[383] *See, e.g.,* Buchanan v. Northland Group, Inc., 776 F.3d 393 (6th Cir. 2015) (finding that a misrepresentation about the limitations period is a "straightforward" violation of § 1692e(2)(A)); Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076 (7th Cir. 2013) (reversing lower court's denial of certification of an FDCPA class action against a debt buyer that was bringing suits against consumers on old natural gas bills); Jackson v. Midland Funding, L.L.C., 468 Fed. Appx. 123 (3d Cir. 2012) (affirming judgment against debt buyer arising from its filing of a time-barred collection suit); Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582, 590, 595 (D. Md. 1999) (holding that misrepresentation of statute of limitations was violation of FDCPA). *See also* Fed.Trade Comm'n, Collecting Consumer Debts: The Challenges of Change – A Workshop Report.62-66 (Feb. 2009), *available at* https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

[384] Pantoja v. Portfolio Recovery Assocs., L.L.C., 852 F.3d 679, 683-685 (7th Cir. 2017) (it is settled law that debt collector who sues or threatens to sue on a time-barred debt violates the FDCPA: "'The plain language of the FDCPA prohibits ... threatening to take actions that the collector cannot take,'" quoting *McMahon v. LVNV Funding, L.L.C.*, 744 F.3d at 1021); Buchanan v. Northland Group, Inc., 776 F.3d 393, 399 (6th Cir. 2015) ("'A misrepresentation about the limitations period amounts to a "straightforward" violation of § 1692e(2)(A),'" quoting *McMahon v. LVNV Funding, L.L.C.*, 744 F.3d at 1020); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010, 1020-21 (7th Cir. 2014) (if a debt collector uses language in its dunning letter that would mislead an unsophisticated consumer about the legal status of the debt,.the collector has committed a "straightforward" violation of the FDCPA); Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1083-84 (7th Cir. 2013) ("All the debt collection suits against the class members were time-barred and hence violated the Fair Debt Collection Practices Act…unless it should turn out that the defendant can dock in the safe harbor of 15 U.S.C. § 1692k(c)...or that the defendant has defenses, such as equitable tolling or equitable estoppel, to the bar of the statute of limitations."); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F3d 939, 948 (9th Cir. 2011) (FDCPA is a strict liability statute, and the plaintiff does not have to prove knowledge or intent; there is a narrow exception for a bona fide error defense, which debt collector did not meet when filing lawsuit on time-barred debt); Thompson v. Midland Funding, 375 F. Supp 3d 774, 778-784 (N.D. Ky. 2019) ("Because the FDCPA is a strict liability statute, a plaintiff need not prove knowledge…Midland's act of filing a lawsuit to collect time-barred debt constituted a 'threat' to the least sophisticated consumer"); Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290, 298, 299, 303 (E.D. N.Y. 2008) (FDCPA is a strict liability statute and a consumer need not show intentional conduct by the debt collector; threatening legal action debt collector could not take violated FDCPA); Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582, 590, 595 (D. Md. 1999) (misrepresentation of statute of limitations was violation of FDCPA; "The FDCPA is a strict liability statute … and a plaintiff need only prove one violation of the Act to trigger liability").

[385] Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 134 (2d Cir. 2017); Stratton v. Portfolio Recovery Assocs., L.L.C., 770 F.3d 443 (6th Cir. 2014); Glover v. F.D.I.C., 698 F.3d 139 (3d Cir.

from bringing or threatening to bring a legal action against a consumer to collect a debt that the debt collector "knows or should know" is a time-barred debt. By including the language "knows or should know," the Bureau purports to create an exception from the statute's strict liability standard.

In particular, the Bureau's proposal would be inconsistent with the statute's narrow, carefully-crafted bona fide error defense at § 1692k(c). The CFPB should not and cannot modify the specific, narrow conditions that Congress set forth for this defense. The proposed "know or should have known" standard seems designed to excuse errors of state law that would not qualify as bona fide errors under the FDCPA.[386]

The conflict between the statute and the proposed rule is particularly clear since the Bureau is basing the proposed rule on its interpretation of 15 U.S.C. § 1692e.[387] Neither the general prohibition under 15 U.S.C. §1 692e against "any false, deceptive, or misleading representation or means in connection with the collection of any debt," nor the specific prohibitions in §1692e(2)(A) and (5) of false representation of "the character, amount, or legal status of any debt" and threats to take actions that cannot legally be taken, contains any knowledge requirement. The CFPB exceeds the scope of its rulemaking authority in § 1692*l*(d) by adding a knowledge requirement to a proposed regulation based on the interpretation of those statutory provisions.

The CFPB's proposed standard will also incentivize debt collectors to deliberately choose not to pay attention to the statute of limitations, because by paying attention they are at risk of "knowing" that a debt is time-barred. It is because of this risk of harm both to consumers and to the businesses of debt collectors who do not use such misleading tactics that a strict liability requirement is needed.

9.2.2 Debt collectors may argue that eliminating the strict liability standard for legal action on time-barred debt also changes the burden of proof.

Currently, a consumer can allege in an FDCPA complaint that suit was filed or threatened on a time-barred debt in violation of 15 U.S.C. § 1692e or § 1692f. The parties would then engage in discovery regarding whether the debt was, in fact, time-barred.

Under the proposed rule, however, debt collectors will argue that consumers have the burden of proof in order to bring a claim under § 1006.26(b). Having to prove that the debt collector knew or should have known that the debt was time-barred would place a new – and often impossible – burden of proof on the consumer. Leaving the consumer with the unfair task of trying to prove what a debt collector "knows or should know" about a time-barred debt would significantly limit the ability of consumers to litigate these claims. Indeed, the Bureau has admitted that "[i]t sometimes may be difficult, however, to determine whether a 'know or should have known'

2012); McLean v. Ray, 488 Fed. Appx. 677 (4th Cir. 2012); Clark v. Capital Credit and Collection Servs., Inc., 460 F.3d 1162, 1177 (9th Cir. 2006); Picht v. John R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir. 2001). *See also* 15 U.S.C. § 1692k ("Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable").

[386] Errors regarding interpretation of state law are not eligible for FDCPA's bona fide error defense. *See* National Consumer Law Center, Fair Debt Collection § 12.2.3 (9th ed. 2018).

[387] 84 Fed. Reg. at 23,329.

standard has been met. Such uncertainty could increase litigation costs and make enforcement of proposed § 1006.26(b) more difficult."[388] We agree.

9.2.3 A strict liability standard on time-barred debt does not create a substantial burden for debt collectors.

Holding debt collectors to a strict liability standard for suing or threatening to sue on time-barred debt would not create a substantial burden for debt collectors. As the Bureau has recognized, debt collectors generally are familiar with the concept of statutes of limitations and with the concept of time-barred debt.[389] In fact, the Bureau itself notes that "many debt collectors already determine whether the statute of limitations applicable to a debt has expired."[390] And if they are not already conducting a proper review, holding them to a strict standard will encourage them to do so and will prevent collectors who do not engage in this practice from gaining a competitive advantage.

Recommendation: **The Bureau should eliminate the "know or should have known" standard so that § 1006.26(b) reads: "A debt collector must not bring or threaten to bring a legal action against a consumer to collect a debt that is a time-barred debt."**

9.3 The Bureau should clarify the application of § 1006.26 to proofs of claim in bankruptcy.

The CFPB should clarify that the prohibition against bringing a legal action on time-barred debt in § 1006.26(b) includes the filing of a proof of claim in a consumer's bankruptcy. As in a civil lawsuit, filing a proof of claim on a time-barred debt is subject to an objection that would result in the disallowance of the claim. Unlike a civil lawsuit, in which a defendant is expected to file a response, however, a claim in bankruptcy is automatically "deemed allowed" under 11 U.S.C. § 501(a), and becomes payable without any additional pleading requirements, submission of proof, or court review if no objection is filed. Debt collectors therefore file time-barred proofs of claim in consumers' bankruptcies at a minimal cost. They know that, in most cases, they will not receive an objection, the debt will be incorporated into the debtor's payment plan, and the debt collector will get paid on the debt. The Bureau has already articulated to the Supreme Court its well-founded position that the filing of a proof of claim that is time-barred, and therefore unenforceable, in a bankruptcy is unfair in violation of the FDCPA.[391]

In *Midland Funding L.L.C. v. Johnson*,[392] the Supreme Court held that filing a proof of claim on a time-barred debt was not an unfair, deceptive, or unconscionable practice in violation of the

[388] 84 Fed. Reg. at 23,329.

[389] 84 Fed. Reg. at 23,328.

[390] 84 Fed. Reg. at 23,329.

[391] Brief for the United States as Amicus Curiae, Midland Funding, L.L.C. v. Johnson, 2016 WL 7422733, , at.*9 (U.S. Dec. 2016) (brief joined by the CFPB).

[392] 137 S. Ct. 1407, 1413, 1414, 197 L. Ed. 2d (U.S. 2017).

FDCPA. However, it characterized the question of whether it was unfair and unconscionable as a "closer question" than the question of deception. Moreover, nothing in the Court's decision suggests that it considered its interpretation to "follow[] from the unambiguous terms of the statute," thereby leaving "no room for agency discretion."[393] As a result, the CFPB has discretion to make its own reasonable interpretation that the filing of time-barred proofs of claim is unfair, and its interpretation would be entitled to deference from the courts.[394] The *Midland* decision is thus not an obstacle to a rule prohibiting the filing of time-barred proofs of claim in a consumer's bankruptcy, and the Bureau should adopt such a rule.

At a minimum, the Bureau should require debt collectors to state in a large, bold font "THIS DEBT IS TIME-BARRED" or "THE STATUTE OF LIMITATIONS ON THIS DEBT HAS EXPIRED" either on the proof of claim form (Official Form 410) or on the supporting statement submitted with the proof of claim for debts based on an open-end or revolving consumer credit agreement as required by Bankruptcy Rule 3001(c)(3)(A). This would be consistent with the Supreme Court's decision in *Midland* that a time-barred proof of claim was not misleading because it was "obviously time-barred" and disclosed on its face that the claim was barred by the statute of limitations.[395] The Supreme Court also recognized that a trustee has "the burden of investigating claims to see if one is stale."[396] Providing a clear, up-front message that the debt is time-barred will ensure that trustees and debtors' attorneys, who are managing hundreds, if not thousands, of cases and claims, have a fair opportunity to respond appropriately to the filing of the time-barred claim. It will also provide some help to *pro se* bankruptcy petitioners, in that it increases the likelihood that they will be alerted to the possibility of objecting to the claim.

Debt collectors are familiar with the statutes of limitations applicable to the specific debt they are collecting, particularly in light of the many decisions holding that bringing or threatening to bring a legal action against a consumer to collect a time-barred debt violates the FDCPA, and collectors generally have sufficient information when they receive a debt for collection to determine whether or not it is time-barred.[397] At the least, if the Bureau fails to flatly prohibit the filing of a proof of claim for a time-barred debt, collectors should be required to provide a clear disclosure on the face of the proof of claim stating that the statute of limitations has expired.

Recommendations:

- **The CFPB should prohibit debt collectors from filing a proof of claim in a consumer's bankruptcy on a time-barred debt or,**
- **If it does not prohibit these filings, the CFPB should require debt**

[393] *See* National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 969, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

[394] *Id*. at 982-983 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). *Accord*, Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1242 (10th Cir. 2008).

[395] Midland Funding L.L.C. v. Johnson, 137 S. Ct. 1407, 1413, 197 L. Ed. 2d 790 (2017).

[396] *Id.* at 1410.

[397] 84 Fed. Reg. at 23,328.

collectors to state in a large, bold font "THIS DEBT IS TIME-BARRED" or "THE STATUTE OF LIMITATIONS ON THIS DEBT HAS EXPIRED" on the proof of claim or supporting statement submitted with the proof of claim.

9.4 § 1006.26(c) and Appendix B: Time-barred debt disclosures

The Bureau has reserved § 1006.26(c) and Appendix B for proposals regarding disclosures debt collectors must provide to consumers when collecting time-barred debt.[398] We remain deeply skeptical of the ability of any disclosure to fully inform consumers, especially the least sophisticated consumers that the FDCPA is designed to protect,[399] of the numerous and complex issues related to the collection of time-barred debt. For this reason, the Bureau should simply prohibit the collection of time-barred debt as discussed above. However, the remainder of our comments in this section focus on how to make any disclosures that the CFPB adopts as effective as possible.

Testing. We support consumer testing of disclosures to determine language that will be effective in providing the protections necessary and an opportunity for stakeholders to comment on the report of such testing.[400] We have filed comments previously about consumer testing of time-barred debt disclosures[401] and continue to urge that the CFPB focus on comprehension by the least sophisticated consumer - not just what disclosures "work best" among a variety of inadequate options. We also reiterate our concern that an exclusive focus on online testing will not be the best method to determine the understanding of the least sophisticated consumer.[402]

Required Use. Debt collectors should be required to provide any disclosure adopted by the CFPB rather than providing a safe harbor for debt collectors that choose to use it. Moreover, debt collectors should be held strictly liable for failure to provide the time-barred debt disclosure. The Bureau should not limit the requirement that collectors provide a time-barred debt

[398] 84 Fed. Reg. at 23,329.

[399] To accomplish the consumer protection purpose of the FDCPA, the courts apply a "least sophisticated" or "unsophisticated" consumer standard to analyze many of the protections of the FDCPA. *See, e.g.,* National Consumer Law Center, Fair Debt Collection § 3.2.1 (9th ed. 2018), updated at www.nclc.org/library.

[400] 84 Fed. Reg. at 23,329.

[401] National Consumer Law Center, Comments to the Consumer Financial Protection Bureau on its Debt Collection Quantitative Disclosure Testing (Dec.4, 2017), *available at* https://www.nclc.org/images/pdf/debt_collection/comments-to-cfpb-discl-testing-2017.pdf; National Consumer Law Center, Comments to the Consumer Financial Protection Bureau on its Debt Collection Quantitative Disclosure Testing (Aug. 4, 2017), *available at* https://www.nclc.org/images/pdf/debt_collection/comments-to-cfpb-re-disclosure-testing.pdf.

[402] Level of formal education can also serve as a rough proxy for consumer sophistication in debt collection situations. There is a risk of oversampling individuals with more formal education as a result of conducting an online survey. Research shows that 98% of college graduates use the internet, compared to 71% of individuals with less than a high school education. Pew Research Center, Internet/Broadband Fact Sheet, Who Uses the Internet (June 12, 2019), ***available at*** http://www.pewinternet.org/fact-sheet/internet-broadband/ (data from 2019 highlighting differences in internet usage based on formal education).

disclosure to cases where the debt collector "knows or should know" that the debt is time-barred as the Bureau has proposed in § 1006.26(b) for the reasons discussed in our comments in § 9.2, *supra*. Rather, debt collectors should be required to know whether the debt is time-barred, and to always provide the disclosure whenever it is.

Included in Every Communication. In order to maximize the effectiveness of any disclosure, the Bureau must *require the disclosure about time-barred debt to be made in each communication*, whether oral or written. Absent such a requirement, the collector could imply that it can still sue to collect the debt (for example, by offering to settle the debt) in a communication where it is not required to make a time-barred debt disclosure. Moreover, a consumer may not have noticed the time-barred debt disclosure in the validation notice or another document crowded with additional information. Repeating the disclosure at each contact makes it more likely that the least sophisticated consumer will understand what it means.

One Determination Binds Subsequent Collectors. To prevent consumer confusion that might result from "recalculations" regarding the time-barred nature of the debt, the CFPB should require the determination by one collector that a debt is time-barred to be binding on any subsequent collectors. This would prevent debt collector A from delivering a time-barred debt disclosure and then transferring the account to collector B, who then decided that the debt was not time-barred and proceeded to collect on the debt without providing any disclosures.

***Recommendations*: The Bureau should:**

- **Conduct consumer testing of disclosures to determine language that will be effective in providing the protections necessary and give stakeholders an opportunity to comment on the report of such testing.**
- **Require that debt collectors provide any disclosures adopted by the CFPB rather than providing a safe harbor for debt collectors. Require the disclosures about time-barred debt to be made in each communication, whether oral or in writing.**
- **Make the determination by one collector that a debt is time-barred binding on any subsequent collectors.**

9.5 Additional protections are needed for time-barred debt

In the absence of a complete ban on collecting time-barred debt, the Bureau should implement the following changes.

9.5.1 Limit collection efforts on time-barred debt to written communications.

Even if the time-barred debt disclosure is made in every communication, as recommended above, any disclosure about time-barred debt will be confusing for many people who are confronted with the conflicting messages "you need to pay me $600 right now" and "if you don't pay me, I am not allowed to sue you." The Bureau would reduce such confusion if it limited collection efforts for time-barred debt to written communications. Written communications would allow consumers the opportunity to review the message and reflect on the information, or to consult others regarding the meaning of the time-barred debt disclosure and how they should respond. Requiring all communications to be written would also make it more likely that consumers would comprehend the counterintuitive risk that by making a small partial payment on the debt they may revive the debt, and as a result lose a complete defense to a suit on the debt in court.

9.5.2 Require collectors to determine and disclose when a debt is obsolete and that it can no longer appear on a credit report.

To protect consumers from making erroneous assumptions about the effect of time-barred debt on their credit scores, the Bureau should also require a disclosure about whether the time-barred debt is obsolete for purposes of reporting on the consumer's credit report.[403] Since credit reports and scores are used for everything from loans to employment to housing, a consumer may prioritize payment on a time-barred or obsolete debt for fear it will result in negative credit reporting if left unpaid. Consumers should also be informed when their debts are obsolete but not time-barred. For example, in a state with a 10-year statute of limitations, an 8-year old debt would be obsolete for credit reporting purposes but not time-barred.

Similarly, for non-obsolete debts, consumers should be specifically informed when the collector is furnishing information about a particular debt to CRAs (or that the collector has immediate, concrete plans to begin furnishing this information to CRAs).[404] The CFPB should require the collector to provide this information regardless of whether the debt is time-barred. However, where information about a non-obsolete debt is not being furnished to a CRA and the collector has no immediate, concrete plans to furnish it, consumers should not be informed that the information could be furnished. Threatening to take an action that the collector does not intend to take is a violation of the FDCPA.[405]

Once one collector has determined that a debt is obsolete, that determination should bind all subsequent collectors. In addition, any obsolescence disclosure should be delivered at the same time as the time-barred debt disclosure. Consumer testing should take into account the fact that the disclosures would be delivered together, and should test the disclosures together.

9.5.3 Prohibit offering to "settle" a time-barred debt.

[403] *See* SBREFA Outline at 23.

[404] There is a requirement under the FCRA that furnishers provide a "negative information" notice before they furnish information to a CRA. However, debt collectors are not required to provide this notice because it applies only to financial institutions that extend credit. 15 U.S.C. § 1681s-2(a)(7). Furthermore, the notice is very non-specific, boilerplate, and of limited value. See National Consumer Law Center, Fair Credit Reporting § 6.9 (9th ed. 2018), updated at www.nclc.org/library.

[405] 15 U.S.C. § 1692e(5) ("threat to take any action . . . that is not intended to be taken").

As the Bureau has recognized and pointed out to two appellate courts, offering to "settle" a time-barred debt is likely to deceive the least sophisticated consumer.[406] If the Bureau adopts a time-barred debt proposal, but does not require disclosure of that fact in each communication, a collector would be able to include a time-barred debt disclosure in an initial validation notice and then make an offer to "settle" the time-barred debt in a subsequent communication in which the disclosure is not required. As the Seventh Circuit noted, "it is plausible that an unsophisticated consumer would believe a letter that offers to 'settle' a debt implies that the debt is legally enforceable."[407] To prevent collectors from gaming the system, the Bureau should simply prohibit these misleading offers to "settle" a time-barred debt.

9.5.4 Prohibit suit or threat of suit on revived debts.

In some states, making a payment or acknowledging a debt months or years after the statute has run can restart the statute of limitations period all over again.[408] Even if an effective disclosure can be created about time-barred debt, notifying consumers about the possibility of revival is too complicated, and it is extremely counterintuitive that making a small payment on a debt could have negative consequences. The risks and unfairness of this situation were noted in the CFPB's SBREFA Outline.[409] To effectively protect consumers from unfair or deceptive practices designed to get a consumer to revive a debt so that the collector can lawfully sue, the CFPB should prohibit collectors from suing or threatening to sue on revived debts.

Recommendations: **The Bureau should:**

- **Limit collection efforts on time-barred debt to written communications.**
- **Require collectors to determine and disclose when a debt is obsolete and that it can no longer appear on a credit report.**
- **Prohibit offering to "settle" a time-barred debt.**
- **Prohibit suing or threatening to sue a consumer on a revived debt.**

10. § 1006.30: Other Prohibited Practices

[406] Brief of Amicus Curiae CFPB and FTC, Delgado v. Capital Management Services, at.2 (7th Cir. Aug. 14, 2013); Brief of Amicus Curiae CFPB and FTC, Buchanan v. Northland Group, Inc. (6th Cir. Mar. 10, 2014).

[407] McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014). *See also* Pantoja v. Portfolio Recovery Assocs., L.L.C., 852 F.3d 679 (7th Cir. 2017) (offering to settle a time-barred debt without providing a complete disclosure of the consequences violated § 1692e.)

[408] National Consumer Law Center, Collection Actions § 3.6.8.3 (4th ed. 2017).

[409] SBREFA Outline at 21-22.

10.1 § 1006.30(a): Required communication prior to furnishing information to CRAs

Proposed § 1006.30(a) would prohibit collectors from reporting a debt to a credit reporting agency without first communicating with the consumer about the debt. We agree with the Bureau's recognition of the harm that can occur when a consumer is unaware that a debt collector has reported a debt on a credit report until the consumer applies for credit, a job, or housing, and we agree that this proposal would help consumers.[410]

However, the notice that the proposed regulation would require debt collectors to provide is inadequate. Proposed Comment 30(a)-1 says that "a debt collector has communicated with the consumer about the debt if the debt collector conveys information regarding a debt directly or indirectly to the consumer through any medium." Indirect notice is not adequate to inform the consumer about the debt before it is reported to a CRA. Direct notice is necessary.

Moreover, even if the information is conveyed directly via a validation notice, we reiterate our objection to allowing collectors to provide those notices electronically without fully complying with consent requirements of the E-SIGN Act. We refer the Bureau to our comments on Proposed § 1006.42 in § 13, *infra*.

The CFPB should explicitly require a debt collector to communicate with a consumer directly about a debt before a collector furnishes information about the debt to a CRA. The CFPB should clarify that electronic notice satisfies this requirement only where the consumer has specifically consented to receive electronic communications from the collector.

We agree with Comment 30(a)-1 that a debt collector cannot provide adequate notice to comply with § 1006.30(a) by leaving a limited-content message.

<u>Recommendation:</u> **The Bureau should:**

- **Require a debt collector to communicate with a consumer <u>directly</u> about the debt before providing information about a debt to the CRA and before a collector furnishes information about the debt to a CRA. Indirect communications are not adequate.**
- **Clarify that electronic notice satisfies this requirement only where the consumer has specifically consented to receive electronic communications from that debt collector.**

10.2 § 1006.30(b): Prohibition on the sale, transfer, or placement of certain debts

[410] 84 Fed. Reg. at 23,330.

10.2.1 The Bureau should expand the types of conduct prohibited by Proposed § 1006.30(b)(1), and should clarify and expand the types of debt to which the prohibition applies.

Proposed § 1006.30(b)(1) appropriately prohibits the sale, transfer, or placement of debt if the collector knows or should know that the debt has been paid or settled, discharged in bankruptcy, or subject to an identity theft report. These accounts are no longer appropriate for collection, either because the money is no longer owed or because the person being contacted is not responsible for the debt. Thus, there is no legitimate business purpose in selling, transferring, or placing these debts for collection.

The CFPB should add to the prohibition language to explicitly ban the collection of these debts, so that the regulation would read: “must not sell, transfer, *collect*, or place for collection.” This addition is necessary to make it clear that the actual act of collection is prohibited, as well as placing the account for collection with another debt collector. In addition, in the case of debt for which an identity theft report has been made, the CFPB should ban reporting of the debt to any credit reporting agency.

The CFPB should also provide additional guidance about two of the types of debt to which this prohibition would apply. First, it should clarify that a debt has been “settled” if the consumer has entered into a payment agreement and is paying as agreed, and that the term “settled” is not limited to completed repayment agreements. Second, it should clarify in a comment that the collector should perform a PACER search or other similar bankruptcy data scrub in order to screen for bankruptcy discharges.

Transfers of Mortgage Servicing After Bankruptcy Discharge. The Bureau requests comment on any potential disruptions that Proposed § 1006.30(b)(1)(i) would cause for secured debts, such as preventing servicing transfers or foreclosure activity related to mortgage loans. Section 1006.30(b) defines a series of “prohibited practices” by debt collectors. One prohibited practice is to “sell, transfer, or place for collection a debt if the debt collector knows or should know that . . . [t]he debt has been discharged in bankruptcy” § 1006.30(b)(1)(i)(B). A mortgage servicer is a debt collector under the FDCPA if it began to service the loan when it was already in default. Proposed § 1006.30(b)(1)(i) would apply to a mortgage servicer that transferred servicing rights to a pool of loans and within the pool there were loans that met two criteria: (1) the borrower had obtained a discharge of personal liability on the debt, and (2) the loan was in default when the servicer acquired the servicing rights. Under proposed § 1006.30(b)(1)(i), the transfer of servicing rights to such loans would be a “prohibited practice.” The rule includes an exception from liability for instances where the transfer occurs as the result of a “merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the debt collector’s assets.” § 1006.30(b)(2)(iv). This exception might shield from liability certain large-scale transfers of servicing rights. However, the exception would not exclude servicing transfers of a more limited scope, and these transfers would fall under the prohibition.

Proposed § 1006.30(b)(1)(i) is overly broad, because it applies to transfers of mortgage servicing rights that can lead to collection activity that is lawful under the Bankruptcy Code. The discharge order in a chapter 7 bankruptcy case prohibits collection of the discharged mortgage debt only as a personal liability of the debtor. After the discharge, the owner of the loan (or a debt collector acting on the owner’s behalf) may nevertheless conduct a foreclosure sale if the borrower defaults on payments due under the loan obligation.[411] The Bankruptcy Code includes an exception to the discharge order that applies specifically to enforcement of residential mortgage debt following a bankruptcy discharge. 11 U.S.C. § 524(j). Section 524(j) allows post-discharge debt collection limited "to seeking or obtaining periodic payments" due under the mortgage when the creditor seeks the payments as an alternative to exercise of its right to foreclose.

This issue can be resolved by limiting the scope of proposed § 1006.30(b)(1)(i) to exclude its application to transfers of servicing of residential mortgage loans. At the same time, the Bureau must exercise care not to create a broad exemption for servicing transfers involving discharged mortgage debt. The only objective of this comment is to point out that the transfer of servicing rights involving discharged mortgage debt in and of itself should not trigger FDCPA liability. The rule should reinforce the need for servicers to identify discharged mortgage debt and ensure that no actions are taken to collect on discharged debt as a personal liability of the debtor. We propose the following amended text as an additional exception under § 1006.30(b)(2) to address these concerns:

Where a debtor has discharged personal liability on secured mortgage debt and the creditor's right to enforcement of the secured claim against the property remains unaffected by the bankruptcy, a debt collector may sell, transfer, or place the debt for collection subject to the following conditions: (1) the transferring debt collector must clearly identify the debt as one for which the personal liability of the debtor has been discharged in bankruptcy; and (2) the transferring debt collector shall remain liable for violations of the FDCPA resulting from actions of the transferee entity caused by the transferor's failure to identify clearly the discharged nature of the debt.

Identity Theft. The identity theft category also needs to be revised. Proposed Comment 30(b)(1)(i)(C)-1 is helpful in stating that "[a] debt collector knows or should know that an identity theft report was filed if . . . the debt collector has received a copy of the identity theft report." However, the comment should further clarify that the collector cannot require the consumer to 1) file a complaint with the police, or 2) complete a specific identity theft form required by the collector. Debt collectors should not insist on police reports, because consumers cannot always obtain them. In some cases, police may refuse to provide such reports, and in other cases the consumer may have reasons not to file such a report with the police. For example, a consumer may fear making a report against an abuser in a case of domestic violence. Even if a police report is obtained, some police report recipients are rejecting these reports because they are not signed in a specific way. Moreover, police reports may fail to report each individual debt even when the consumer provides a list.

Collectors should not be permitted to require their own specific form, because this can multiply the amount of work on consumers who are already struggling to respond to identity theft by having to fill out a new form for each creditor or collector. The CFPB should instead make it clear that all collectors must accept the FTC identity theft report form, thereby furthering the FTC's goal of reducing the need for police reports in most cases involving identity theft.[412]

[411] Johnson v. Home State Bank, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991).

[412] Fed. Trade Comm'n, Most ID theft victims don't need a police report (Apr. 27, 2017), *available at* https://www.consumer.ftc.gov/blog/2017/04/most-id-theft-victims-dont-need-police-report (noting that debt collectors sometimes insist that consumers produce police reports).

Other Debts. Proposed § 1006.30(b) correctly focuses on prohibiting the sale, transfer, collection, or placement for collection of categories of debts that are extinguished, uncollectible, or which consumers likely do not owe.[413] With that in mind, the Bureau should expand the list to include: (1) debts that have been extinguished pursuant to state law;[414] (2) debts with unresolved consumer disputes; (3) debts lacking original account-level documentation establishing who owes the debt, the amount owed, and clear evidence of ownership; and (4) time-barred debts. In addition, the CFPB should prohibit the sale or transfer of any debt that is currently subject to litigation.

If the CFPB does not prohibit the collection of time-barred debt, as discussed in our comments on §1006.26 in §9.1, *supra*, it should, at a minimum, ban the sale or transfer of time-barred debt. The more a debt is sold and resold, the greater the chance of unfair, deceptive, and abusive practices. Collectors that buy debt that is not legally collectible may be more likely to engage in risky practices, violate the law, and harm consumers. These may also be smaller collectors with weaker legal compliance regimes. Allowing the sale, transfer, or placement of time-barred debt increases the risk that a subsequent debt collector will attempt to coerce payment from a consumer, such as threatening or taking legal action on a time-barred debt.

<u>Recommendations:</u> **The CFPB should:**

- **Add to the language of Proposed § 1006.30(b) to say "must not sell, transfer, *collect*, or place for collection…," and that, if an identity theft report has been filed regarding a debt, a collector must not report that debt to a credit reporting agency.**

- **Clarify that a debt has been "settled" if the consumer has entered into a payment agreement and is paying as agreed.**

- **Clarify that the collector should perform a PACER search, or other similar bankruptcy data scrub, in order to screen for bankruptcy discharges.**

- **Clarify that, where a debtor has discharged personal liability on secured mortgage debt and the creditor's right to enforcement of the secured claim against the property remains unaffected by the bankruptcy, a debt collector may sell, transfer, or place the debt for collection subject to the following conditions: (1) the transferring debt collector must clearly**

[413] 84 Fed. Reg. at 23,331.

[414] Miss. Code Ann. § 15-1-3(1) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."); N.C. Gen. Stat. § 58-70-115(4) ("No collection agency shall collect or attempt to collect any debt by use of any unfair practices. Such practices include, but are not limited to, the following: … (4) When the collection agency is a debt buyer or is acting on behalf of a debt buyer, bringing suit or initiating an arbitration proceeding against the debtor or otherwise attempting to collect on a debt when the collection agency knows, or reasonably should know, that such collection is barred by the applicable statute of limitations."); Wis. Stat. Ann. § 893.05 ("When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.").

identify the debt as one for which the personal liability of the debtor has been discharged in bankruptcy; and (2) the transferring debt collector shall remain liable for violations of the FDCPA resulting from actions of the transferee entity caused by the transferor's failure to identify clearly the discharged nature of the debt.

- **Clarify that the collector cannot require the consumer to (1) file an identity theft complaint with the police; or (2) complete a specific identity theft form required by the collector.**

- **Expand the list of debts that cannot be sold, transferred, collected, or placed for collection to include: (1) debts that have been extinguished pursuant to state law; (2) debts with unresolved consumer disputes; (3) debt lacking original account level documentation establishing who owes the debt, the amount owed, and clear evidence of ownership; and (4) time-barred debts.**

10.2.2 The exceptions in Proposed § 1006.30(b)(2) should be narrowed.

Despite the CFPB' recognition that the categories of debt listed in § 1006.30(b)(1) should not be sold, transferred, or placed for collection, the CFPB proposes to allow debt collectors to sell, transfer, or place for collection these categories of debt in four specific scenarios.

There is no legal basis for a collector to collect any of the categories of debt that are subject to the prohibition in Proposed § 1006.30(b)(1), so these debts do not have any legitimate value in the marketplace. We do not object to the proposal to allow these debts to be transferred back to the debt's owner (§ 1006.30(b)(2)(i)), transferred to a previous owner if the transfer is authorized (§ 1006.30(b)(2)(ii)), or transferred as the result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the debt collector's assets (§ 1006.30(b)(2)(iv)). However, these three exceptions all involve transfers, not sales or placement for collection. To remove any ambiguity, the exception in all three cases should be narrowed to allow only for transferring of these debts.

Additionally, it is incorrect to assume that consumers will be unlikely to experience problems if their account is transferred to the debt's owner or a prior owner. Original creditors can and do engage in abusive collection practices.[415] The CFPB should require debt collectors that transfer accounts to the owner or prior owner of the debt pursuant to one of the exceptions in § 1006.30(b)(2) to clearly disclose to the recipient the applicable category of debt being transferred. In future rulemakings governing collection practices by original creditors collecting their own debts, the CFPB should include a prohibition on collecting these same categories of debts.

[415] *See, e.g.,* April Kuehnhoff and Ana Girón Vives, National Consumer Law Center, Consumer Complaints about Debt Collection: Analysis of Unpublished Data from the FTC Appx. B (Feb. 2019), *available at* https://www.nclc.org/images/pdf/pr-reports/report-analysis-debt-coll-ftc-data.pdf (listing top 50 debt collection complaint recipients and including original creditors).

We have additional concerns regarding exception iii, which would authorize collectors to securitize or pledge as collateral a portfolio of debts that contains accounts that are subject to prohibitions on sale, transfer, or placement for collection. This is inappropriate. Debts that have been paid, discharged in bankruptcy, or result from identify theft cannot legally be collected. These debts would have value as collateral or as a securitization only if the collector or some later owner of the debt expected to engage in illegal collection activity regarding these debts. Since pledging such debts as collateral or securitizing them would imply that they have value and that collection activity is appropriate, the CFPB should not allow it.

<u>Recommendation:</u>

- **The exceptions listed in Proposed § 1006.30(b)(2)(i), (ii), and (iv) should be narrowed to be only an exception allowing for transferring of the debt.**
- **The exception in Proposed § 1006.30(b)(2)(iii) should be eliminated as unnecessary.**
- **The CFPB should require debt collectors transferring accounts to the owner or prior owner of the debt pursuant to one of the exceptions in Proposed § 1006.30(b)(2) to clearly disclose the applicable category of debt being transferred.**

11. § 1006.34: Notice for validation of debts

11.1 § 1006.34(a): Validation information required and exceptions

11.1.1 Overview

Proposed § 1006.34 addresses the FDCPA's requirements under 15 U.S.C. § 1692g regarding validation of debts. Proposed § 1006.34(a), discussed in this section, provides that, unless the exception in § 1006.34(a)(2) applies, a debt collector must provide a consumer with validation information. The type of information that is required, set forth in Proposed § 1006.34(c), is discussed in § 11.3, *infra*.

We have two serious concerns regarding Proposed § 1006.34(a) and its related Official Interpretations. First, the proposal to require a validation notice to be sent to the representative of a deceased consumer's estate only if a notice was not previously sent to the consumer is shortsighted and counterproductive. Second, the proposal to allow collectors to provide validation information orally is both utterly impractical and beyond the Bureau's authority.

11.1.2 Validation notices for decedent debt

Proposed Comment 34(a)(1)-1 states that the validation information required by § 1006.34(a)(1) must be provided to a person who is authorized to act on behalf of the deceased consumer's estate if the debt collector knows or should know that the consumer is deceased, and the debt collector has not previously provided the validation information to the deceased consumer.

As recommended in our discussion of § 1006.6(a) in § 4.1, *supra*, the Bureau should make significant revisions to the proposed comments that discuss who is encompassed by the term "a person who is authorized to act on behalf of the deceased consumer's estate."

The Bureau should also require a new validation notice to a person authorized to act on behalf of the deceased consumer's estate even if a copy was previously provided to the deceased consumer. Debt collectors cannot assume that an estate administrator, executor, or other "authorized person" will have possession of or access to a validation notice that was previously sent to the deceased consumer. Receipt of the validation information would give the representative of the estate information about the debt, amounts alleged to be owed, and the creditor, as well as time to evaluate the debt and act accordingly.

Recommendation: **The Bureau should require a new validation notice to such person authorized to act on behalf of the deceased consumer's estate even if a copy was previously provided to the deceased consumer.**

11.1.3 § 1006.34(a)(1)(i): Providing validation information in writing or electronically

Proposed § 1006.34(a)(1)(i) would require the validation information that is in written or electronic validation notices to be sent in accordance with § 1006.42, either in the initial communication or within five days of the initial communication. Please see our discussion of § 1006.42 in § 13, *infra*, for an extensive list of concerns about the proposals in that section.

11.1.4 § 1006.34(a)(1)(ii): Providing validation information orally

The CFPB next proposes to allow debt collectors to provide validation information orally, despite significantly increasing the amount of validation information that would be provided to consumers, as discussed in § 1006.34(c). Oral notice of an expanded list of validation information is not merely "impractical," as the CFPB recognizes,[416] but would be an unfair and deceptive practice that may prevent consumers from identifying their debts or exercising their FDCPA rights, contrary to Congressional intent.[417]

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[416] 84 Fed. Reg. at 23,334 n.423.

[417] *See* National Consumer Law Center, Fair Debt Collection § 9.3.4 (9th ed. 2018) (discussing legislative history).

This proposal will be harmful to the least sophisticated consumer that the FDCPA is designed to protect,[418] because it would provide a large amount of information orally in a short period of time without providing a paper copy that the consumer could keep and review later, discuss with friends, or bring to an attorney. Many consumers do not have a pen and paper handy to take notes when a debt collector calls, or are unable to take notes at all (*e.g.*, a consumer talking on the phone while driving, or trying to care for children while answering a collection call). Those who are able to take notes may write down information incorrectly. As a result, most consumers receiving an oral disclosure of validation information will not remember, or have access to, key information about the debt or their debt collection rights.

A major purpose of the debt validation notice is to ensure that the consumer can avoid mistaken claims, without having to go to court, simply by requiring the collector to verify the debt. This purpose is frustrated by oral notice of verification rights, since the content of the notice is too long and involved to be effectively conveyed orally as part of a dunning conversation.[419] In addition, oral notice allows a sharp operator to excuse its failure to provide any validation notice by later falsely asserting that it had given notice orally. The result is a swearing contest, with the possibility that a sharp operator may be the more skilled witness.

The CFPB should instead require validation notices to be provided in writing to all consumers, permitting electronic delivery to consumers where the debt collector has obtained consumer consent pursuant to the E-SIGN Act. If a debt collector does provide oral notice of validation information, the CFPB should clarify that the debt collector must always follow up with a validation notice in writing (or electronically, with the consumer's E-SIGN Act consent) if the consumer has not already received one.

***Recommendation*: The Bureau should require validation notices to be provided in writing to all consumers, and should state that it is not only a violation of § 1692g(a) of the FDCPA but also an unfair and deceptive practice to provide validation information by exclusively oral notice.**

11.2 § 1006.34(b): Definitions

11.2.1 Overview

[418] The CFPB recognizes that the courts have applied a "least sophisticated" or "unsophisticated" consumer standard in interpreting claims under §§ 1692e and 1692f. *See* 84 Fed. Reg. at 23,283. Additionally, courts have applied a least sophisticated consumer standard when analyzing claims under § 1692g. *See, e.g.,* Sims v. GC Servs. L.P., 445 F.3d 959, 963 (7th Cir. 2006) ("In reviewing the collection letters to determine whether they violate the FDCPA, we view the letters from the 'standpoint of the so-called unsophisticated consumer or debtor.'") (citation omitted); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991) ("Statutory notice under the Act is to be interpreted from the perspective of the 'least sophisticated debtor.'"); Swanson v. Southern Oregon Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988) ("In this circuit, the impact of language alleged to violate section 1692g is judged under the 'least sophisticated debtor' standard.").

[419] *See* Swanson v. Southern Oregon Credit Serv., 869 F.2d 1222, 1225 (9th Cir. 1988) (verification notice must be provided effectively).

In Proposed § 1006.34(b), the CFPB proposes new definitions that would apply for the purpose of § 1006.34. We comment on four of the proposed definitions below. While we have many concerns about the proposed definitions, our most significant concerns relate to the proposed itemization date.

11.2.2 § 1006.34(b)(1): Clear and conspicuous

Proposed § 1006.34(b) defines the term "clear and conspicuous." In general, the definition requires "disclosures that are readily understandable." Given ongoing concerns about consumer comprehension of validation notices,[420] we think that even this general standard will be difficult to meet. The CFPB has proposed a model validation notice in Appendix B of the proposed rule,[421] and we raise concerns throughout our discussion of § 1006.34 about how understandable this model notice is, especially for the least sophisticated consumer.

For written and electronic disclosures, the "clear and conspicuous" definition requires the location and type size to be "readily noticeable" to consumers. The CFPB should be more specific and require at least a 12-point font size in all written and electronic disclosures.

For oral disclosures, the CFPB proposes that "the disclosures also must be given at a volume and speed sufficient for the consumer to hear and comprehend them." As we discuss in our comments regarding § 1006.34(a)(1)(ii) in § 11.1.4, *supra*, we think that consumers will not be able to comprehend or retain the large volume of information proposed in § 1006.34(c) if debt collectors are allowed to present validation information orally without following up with a written copy. Even if the debt collector is speaking loudly and slowly, we think that the result will be the same, and we urge the CFPB to clarify that oral disclosures do not satisfy § 1006.34(a)(1).

Recommendations: **The Bureau should:**

- **Require at least a 12-point font size for written and electronic disclosures.**
- **Require validation notices to be provided in writing to all consumers, and clarify that it violates § 1692g(a) of the FDCPA and is an unfair and deceptive practice to provide validation information by exclusively oral notice.**

11.2.3 § 1006.34(b)(2): Initial communication

The CFPB proposes to define the term "initial communication" to mean "the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, regarding the debt to the consumer." The definition then notes that pleadings in a civil

[420] *See, e.g.,* Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 70 SMU L. Rev. 63 (2017).

[421] 84 Fed. Reg. at 23,409.

action and certain types of forms or notices are excluded from the definition of initial communications, restating § 1692g(d) and (e).

In its discussion, the CFPB asks if an email or text message should count as an initial communication if the consumer does not respond to the message.[422] Yes, an unanswered text or email to a consumer should count as an initial communication triggering the requirement to provide a written validation notice.[423] The consumer may have opened the message without responding, or may have seen information in the subject line or a preview pane without opening the message.[424] Indeed, it is likely that many or most consumers will not respond to an initial email or text message. The Bureau should clarify that debt collectors cannot assume that unanswered messages are unseen for the purpose of triggering the five-day clock to provide a validation notice.

***Recommendation*:** **The Bureau should require debt collectors to treat unanswered text or email messages as initial communications and provide written validation notices.**

11.2.4 § 1006.34(b)(3): Itemization date

11.2.4.1 Overview

The CFPB proposes to define itemization date as one of four "reference dates for which a debt collector can ascertain the amount of the debt." The four reference dates are: (1) the last statement date, (2) the charge-off date, (3) the last payment date, and (4) the transaction date. The Bureau states that it selected the four reference dates as convenient dates where debt collectors will be able to determine the account balance at that time[425] and then use that balance for calculations, such as the amount of interest or fees that have accrued since the itemization date (§ 1006.34(c)(2)(ix)).

One of the main intended benefits of the validation notice is to help consumers identify the debt and determine whether it is theirs and whether the amount owed is correct.[426] Debts can quickly

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[422] 84 Fed. Reg. at 23,335.

[423] The validation notice should be sent in writing by postal mail if the consumer has not responded to the message, because there would be no confirmation that the consumer is actually receiving electronic messages at that email address or phone number.

[424] For example, § 1006.42(b)(2) would require specific information to be included in the subject line of the email that would convey information about the alleged debt without the consumer even opening the email. Please see our comments about this section in § 13.2.3, *infra*, for more about our concerns with this approach.

[425] 84 Fed. Reg. at 23,335.

[426] *See* S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("Another significant feature of this legislation is its provision requiring the validation of debts. After initially contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed. If the consumer disputes the validity of the debt within 30 days, the debt collector must cease collection until he sends the consumer verification. This provision will eliminate the

become unrecognizable due to the addition of fees and interest (whether legitimate or unauthorized). Disclosing a date could help the consumer identify the debt – if the date is one that will have some meaning to the consumer.

Unfortunately, however, as discussed below, the Bureau's proposal allows the disclosure of itemization dates that will not help consumers identify the debt, but are more likely to confuse them. The likelihood of confusion will be particularly high, since the Bureau is proposing to allow each collector to choose one of four reference dates to use. This will mean that there will be no consistency among the dates that different collectors use, even for the same debt.

Another possible purpose of the disclosures that the CFPB proposes to base on the itemization date is to show the consumer how the debt is increasing. Identifying a date for the beginning balance is a necessary predicate for such a disclosure, but allowing a choice among four possible dates, which may vary from collector to collector, will lead to significantly different information being provided to consumers: the beginning balance and interest, fees, payments, and credits since then will vary from collector to collector. For example, the amount of interest that has accrued since charge-off versus the amount of interest accrued since the last payment date may be very different.

Consumer confusion is particularly likely if an itemization date is disclosed without explanation, as in the current model validation notice.[427] For example, if the date of the last periodic statement is used without explanation, the consumer may think that it is intended as the date of the transaction, which might be years earlier.

Thorough and rigorous consumer testing is necessary before the Bureau can claim to have any basis for making decisions about these disclosures. Among other things, the Bureau should test:

- Whether the proposed itemization dates and other potential itemization dates like the date of default, tested one-by-one, enhance or impede consumer understanding;

- What itemization date is most meaningful to consumers;

- Whether it is confusing to consumers to disclose an itemization date without explaining what the date references, and whether an explanation of the itemization date can dispel that confusion; and

- Whether the itemization of interest, fees, payments, and credits is more helpful to consumers when using a particular itemization date.

In its discussion of this portion of the proposed rule,[428] the Bureau expresses concern that creditors currently may not be recording certain dates and passing them on to collectors. This is not a reason to provide an array of possible dates that the collector may choose, or to allow the use of dates that will lead to consumer confusion. Once the Bureau's consumer testing enables

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recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.").

[427] 84 Fed. Reg. at 23,409 (listing the date – January 2, 2017 – without an explanation about the significance of that date).

[428] 84 Fed. Reg. at 23,335-23,336.

it to determine what dates are helpful to disclose to consumers and what dates are unhelpful or confusing, it should use its Dodd-Frank rulemaking authority to require creditors to record that date and pass it on to collectors, and should require each collector to pass it on to the next collector.

In the remainder of this section, we offer some more specific comments about the four current reference dates.

Recommendations**:** **The Bureau should:**

- **Reevaluate its proposed definition of an itemization date.**
- **Conduct thorough and rigorous consumer testing to determine what dates will help consumers and whether use of any of the proposed itemization dates helps consumers or causes confusion.**
- **Require creditors to record the date or dates that will be needed for the validation notice, and to pass them on to collectors, and require each collector to pass the dates on to the next collector.**

11.2.4.2 Selecting an itemization date

Comment 34(b)(3)-1 says that once a debt collector has chosen a particular date as the itemization date, the debt collector has to use that date consistently to provide all disclosures. However, the proposed rule would not limit the ability of future debt collectors to choose a different reference date if the account is transferred from debt collector A to debt collector B. As a result, collector A and collector B could present different information in the validation notice based on these different itemization dates. This will certainly lead to consumer confusion. As noted above, the CFPB should reevaluate its entire approach here, but in any event it should, at a minimum, require all future debt collectors to use the same reference date as the itemization date as the one chosen by collector A.

Recommendation**:** **The CFPB should require all future debt collectors to use the same reference date.**

11.2.4.2.1 Last statement date

The first proposed reference date is the date of the last periodic statement provided to the consumer. Comment 34(b)(3)(i)-1 clarifies that this could be a statement provided by a creditor or a third party acting on behalf of a creditor.

The date of the last periodic statement is unlikely to be a meaningful or recognizable date for the consumer. It is unlikely to help the consumer identify the debt, and is more likely to be confusing. Moreover, calculating interest from this date will fail to itemize interest that may have previously accrued. For example, an original creditor may continue to send statements for months after a consumer defaults on an account, and interest and penalties may be accruing between the date of default and the date that the last periodic statement is sent.

The Bureau should not allow use of the last statement date as an itemization date without testing whether it is confusing or helpful to consumers as discussed in § 11.2.4.1, *supra*.

The CFPB asks in its discussion if the validation notice provided by a prior debt collector should count as a last periodic statement.[429] This is a terrible idea. Not only will the date of a prior validation notice not be meaningful to the consumer, but an itemization from that date will not provide information that will help the consumer recognize the debt.

<u>Recommendation</u>: **The CFPB should not use the last statement date as one of the reference dates without conducting thorough consumer testing as to whether it is confusing or helpful.**

11.2.4.2.2 Charge-off date

The second proposed reference date is the charge-off date. Once again, this date is unlikely to be a meaningful or recognizable date and will not help a consumer identify the debt. Calculating interest from this date will fail to itemize interest that may have previously accrued (*e.g.*, a credit card account is typically charged off 180 days after default, and interest and penalties may be accruing between the date of default and the charge-off date). The Bureau should not allow use of the charge-off date as an itemization date without testing whether it is confusing or helpful to consumers as discussed in § 11.2.4.1, *supra*.

<u>Recommendation</u>: **The CFPB should not use the charge-off date as one of the reference dates without conducting thorough consumer testing as to whether it is confusing or helpful to consumers.**

11.2.4.2.3 Last payment date

The third proposed reference date is the last payment date. A consumer might have a general idea of when a particular bill was last paid, especially if the consumer fell behind on bills due to a significant life event such as job loss, divorce, illness, or death in the family. However, the Bureau should not assume that this is the case without testing whether the last payment date is confusing or helpful to consumers in identifying the debt as discussed in § 11.2.4.1.

Moreover, if the last payment date is the date that a partial payment was made on an account after the account was already in collections, this date is likely to be totally unrecognizable. The CFPB should clarify that date of last payment means the date of the last payment to the original

[429] 84 Fed. Reg. at 23,336.

creditor by the consumer,[430] which will provide the most meaningful itemization information to the consumer.

***Recommendation*:**

- **The CFPB should not use the last payment date as one of the reference dates without conducting thorough consumer testing as to whether it is confusing or helpful in enabling the consumer to recognize the debt.**
- **If the CFPB allows use of the last payment date as the itemization date, it should, at a minimum, limit the last payment date to the date of last payment to the original creditor.**

11.2.4.2.4 Transaction date

The fourth proposed reference date is the transaction date. Comment 34(b)(3)(iv)-1 clarifies that the transaction date is the "date that a creditor provided, or made available, a good or service to a consumer."

The transaction date might be a meaningful concept for consumers. We recommend that the CFPB test whether a disclosure of the transaction date helps consumers recognize the debt as discussed in § 11.2.4.1, *supra*.

Determining the transaction date is straightforward with one-time transactions such as a loan, an emergency room visit, or a purchase of goods. It is less obvious with contracts such as gym memberships, cell phone contracts, or lawn care service contracts that involve the provision of a series of services or other benefits over time. Proposed Comment 34(b)(3)(iv)-1 recognizes this, but, instead of providing a clear standard, it further muddies the water by saying that if there is a contract for a service there would be two transaction dates - the date that the contract was signed and the date that the service was provided - and the debt collector can choose either one. The CFPB's consumer testing should include an evaluation of what standard for identifying the transaction date for these types of transactions will be most helpful and least confusing to consumers.

***Recommendation*: The CFPB should conduct consumer testing to determine whether a disclosure of the transaction date helps consumers recognize the debt, and to determine what standard for identifying the transaction date will be most helpful and least confusing to consumers when the transaction involves the provision of a series of services or other benefits over time.**

11.2.5 § 1006.34(b)(5): Validation period

[430] Third-party payments like insurance payments on a medical debt also should not be used as the date of the last payment.

Proposed § 1006.34(b)(5) would define validation period as "the period starting on the date that a debt collector provides the validation information . . . and ending 30 days after the consumer receives or is assumed to receive the validation information."

The CFPB should change the vague term "provides" to the more precise "sends," which would apply whether the validation notice is sent electronically or by mail. As discussed in our comments on § 1006.34(a)(1)(ii) in § 1.1.4, *supra*, the CFPB should require written or electronic (with E-SIGN Act consent) delivery of a validation notice in additional to any oral delivery of validation information. Thus, the validation period should start only on the date that the validation notice is sent.

As for the ending date, the proposed rule says that the validation period ends "30 days after the consumer receives or is assumed to receive the validation information." However, these will be different dates for any consumer who receives the validation notice sooner than five days after it is sent. The importance of having just one definition of when the validation period ends is underscored by the fact that the Bureau's model validation notice[431] states a specific date by which consumers must dispute the debt or ask for the name and address of the original creditor.[432] If the CFPB retains the current definition, it would need to disclose both potential end dates, which would be confusing to consumers. To avoid any confusion, the text should be modified to say "and ending 30 days after the consumer is assumed to receive the validation information."

This section further states that, "[f]or purposes of determining the end of the validation period, the debt collector may assume that a consumer receives the validation information on any date that is at least five days (excluding legal public holidays, Saturdays, and Sundays) after the debt collector provides it." According to the United States Postal Service, delivery times for standard mail, the type of mail service used for bulk mail such as flyers, advertisements, newsletters, and catalogs, range from three to eighteen days.[433] The CFPB should amend the proposed rule to specifically require debt collectors to use first-class mail given the significant risk that a validation notice mailed with standard mail would not arrive in the anticipated five-day window. Moreover, although the delivery times for first-class mail in the United States range from two to five days according to the Postal Service,[434] we recommend that the CFPB change five to seven days (excluding legal public holidays, Saturdays, and Sundays) to give an additional buffer for delays that may occur due to service disruptions that may result from severe weather or other causes. If the Bureau does not require collectors to use first-class mail to send validation notices, it should significantly increase the amount of time that must pass before the debt collector can assume receipt, to account for slower service standards for other classes of mail.

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[431] 84 Fed. Reg. at 23,409 (listing November 12, 2019 as the end of the validation period).

[432] As discussed in § 11.3.4, *infra,* we have serious concerns that this date creates the false impression implication that consumers cannot dispute the debt or request the name and address of the original creditor after these dates.

[433] United States Postal Service, Originating Service Standards: Standard for SCF 299 (July 1, 2019), *available at* https://ribbs.usps.gov/modernservicestandards/ssmaps/find_map.cfm (note that some originating zip codes showed a 3-16 day range; map produced by selecting standard for mail class).

[434] United States Postal Service, Originating Service Standards: First Class for SCF 985 (July 1, 2019), available at https://ribbs.usps.gov/modernservicestandards/ssmaps/find_map.cfm (note that using different originating zip codes did not appear to alter this 2-5 day range; map produced by selecting first-class for mail class).

In its discussion, the Bureau asks if "different timing presumptions should apply depending on whether a validation notice is delivered by mail or electronically."[435] There should be only one method for calculating the validation period. The CFPB should not use different validation periods for electronic and paper delivery of validation notices.

***Recommendations*:**

- **The Bureau should define the validation period as ending 30 days after the consumer is assumed to receive the validation information.**
- **The CFPB should require validation notices that are mailed to be sent by first class mail and should extend the period after which receipt can be presumed from five to seven days. Alternatively, if it does not require use of first class mail, the Bureau should significantly increase the amount of time that must pass before the debt collector can assume receipt, to account for slower service standards for other classes of mail.**
- **The Bureau should not set different validation periods for electronic and paper delivery of notices.**

11.3 § 1006.34(c): Validation information

11.3.1 Overview

Proposed § 1006.34(a)(1) would require debt collectors to provide the validation information set forth in § 1006.34(c).[436] Unless otherwise indicated, all of the information in this section is mandatory.

We have a number of concerns about the proposal. While it includes some helpful innovations, such as a tear-off response form, a number of the rules are likely to result in confusing or misleading disclosures. The special rule for certain residential mortgage debt needs to be reworked, and the provisions for consumers who are not proficient in English are too weak. Both the model validation notice and many aspects of the disclosures and formats required by the proposed rule need much more robust consumer testing.

11.3.2 § 1006.34(c)(1): Debt collector communication disclosure

[435] 84 Fed. Reg. at 23,338.

[436] There is a limited exception at § 1006.34(a)(2) for consumers who have paid before the date on which the debt collector would have to provide a validation notice after the initial communication.

Proposed §1006.34(c) would require the validation notice to include "[t]he statement required by § 1006.18(e)." That section parallels § 1692e(11) and requires the collector to disclose in the initial communication that it is attempting to collect a debt and that any information obtained will be used for that purpose, and, in subsequent communications, that the communication is from a debt collector. As written, Proposed § 1006.34(c)(1) does not make it completely clear whether the validation notice must provide just the information for an initial disclosure, just the information for a subsequent disclosure, or all of the information. The most logical position is to require all of the information, and the model form does so.[437] The CFPB should amend this section to require that the validation notice provide all of the information for both initial and subsequent disclosures.

<u>Recommendation</u>: **The Bureau should require validation notices to include all of the disclosures in § 1006.18(e).**

11.3.3 § 1006.34(c)(2): Information about the debt

Proposed § 1006.34(c)(2) provides a list of ten categories of information about the debt that must be provided as part of the validation information except as provided by the special rules for certain residential mortgage debts in § 1006.34(c)(5). This section significantly expands on the information about a debt that debt collectors are required to provide under § 1692g(a) of the FDCPA.[438] The additional information may help consumers recognize whether the referenced account is their account and may help them assess whether the amount is correct. The CFPB's discussion of this section explains that, unless otherwise noted, the information is mandatory and not conditioned on availability.[439]

Debt Collector's Name and Mailing Address. The first piece of information required is the debt collector's name and mailing address. The CFPB should also require debt collectors to list information about any other means of contacting it, including a phone number, a number at which it can be contacted by text message (if different from the number for incoming calls), an email address, and any other method that the debt collector uses to accept communications from consumers. This will facilitate consumer contacts with debt collectors in the consumer's preferred communication channel.

For example, a modified version of the model validation notice might look like this:

North South Group
P.O. Box 121212
Pasadena, CA 91111-2222
www.NorthSouthGroup.com
(800) 123-4567 (phone calls)

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[437] 84 Fed. Reg. at 23,409 ("North South Group is a debt collector. We are trying to collect a debt that you owe to Bank of Rockville. We will use any information you give us to help collect the debt.").

[438] Currently, the debt collector must provide the following information about a debt: the amount of the debt and the name of the creditor to whom the debt is owed. § 1692g(a)(1)-(2). The FDCPA also mandates information about consumer protections, which we discuss in our comments regarding § 1006.34(c)(3) in § 11.3.4, *infra*.

[439] 84 Fed. Reg. at 23,339.

(626) 555-1212 (text messages)
ConsumerResponse@NorthSouthGroup.com

Consumer's Name and Mailing Address. The second piece of required information is the consumer's name and mailing address. Including the consumer's name and mailing address is particularly important if a consumer receives an electronic validation notice and therefore does not receive an envelope addressed to the consumer at the consumer's mailing address. Both the consumer's name and address are helpful for the consumer to identify whether the debt collector may be contacting them in error (*e.g.*, if the address is for a location where the consumer never lived).

Comment 34(c)(2)(ii)-1 clarifies that the consumer's name "is what the debt collector reasonably determines is the most complete version of the name." The comment explains that the debt collector can use other, unspecified sources to obtain additional name information. A debt collector in possession of the consumer's first, middle, and last names would have to disclose all of this information, in addition to any suffix. Disclosing all name information is important to help consumers determine whether a collector is actually seeking a different consumer with a similar name (*e.g.*, same first and last name but different middle name, or same name with a senior, not a junior).

Name of the Merchant Brand. The third piece of required information is the name of the merchant brand, if any, associated with a credit card debt. Comment 34(c)(2)(iii)-1 provides an example. This information is important, because consumers using credit cards that are branded for a particular card are likely to think of the card by its store name and not by the name of the credit card company that actually issued the card. This information would be required only "to the extent available to the debt collector."

The CFPB notes that it believes that merchant brands are unique to credit cards, but increasingly the name of a hospital may act as a brand for an umbrella of service providers. A consumer might recognize the name of the hospital but not the name of the physician group, laboratory, or durable medical goods provider to which the consumer owes money as the result of visiting that hospital. The hospital name should be treated in the same manner as the merchant brand, and should be listed when other service providers at that facility are listed as the creditor. Otherwise, as with merchant branded cards where only the issuer is listed, the consumer may not recognize the debt that is the subject of the bill, or may notice and ignore it out of confusion.

Name of Creditor on Itemization Date. The fourth piece of information is "the name of the creditor to whom the debt was owed on the itemization date." The identity of the creditor is a key piece of information for consumers, as it will help them determine whether the debt is theirs. However, listing the name of the creditor as of the itemization date may confuse consumers rather than helping them. Under the Bureau's proposed definition, discussed in § 11.2.4, *supra*, the itemization date may be any one of four dates, some of which may be years after the debt was incurred. As a result, the creditor listed may be a debt buyer that the consumer has never heard of. In contrast, providing information about the name of the original creditor would be valuable to consumers. However, we see no need to tie this information to one of four possible itemization dates as discussed at § 1006.34(b)(3). The CFPB should change this item to read "the name[440] of the original creditor, if different from the current creditor."

Another issue is that this requirement is being promulgated under the CFPB's Dodd-Frank authority and not its FDCPA authority, so it applies only to consumer financial product or service debt. As discussed in § 2.3, *supra*, the CFPB should issue this requirement under both sources of authority.

Account Number on Itemization Date. The fifth piece of information is any account number associated with the debt on the itemization date or a truncated version of that number. Comment 34(c)(2)(v) says that any truncated number must remain recognizable and, as an example, mentions providing the last four digits of a credit card number. Account numbers may be helpful to consumers who can use them to check their own records to try to identify the debt or check to see if the alleged amount is correct.

Name of Current Creditor. The sixth piece of information is the name of the creditor to which the debt is currently owed. This item implements the existing requirement of § 1692g(a)(2) and interprets that requirement to apply specifically to the current creditor rather than the original creditor.

Itemization Date. The seventh piece of information is the itemization date. As currently defined by § 1006.34(b)(3), the itemization date will not be helpful for consumers. First, debt collectors will be able to choose from four different "reference dates" that are convenient to the debt collector. Many of those reference dates will not be recognizable to the consumer, especially since the debt collector would not have to tell the consumer the basis for the date it is choosing, but would instead simply list the date, leaving the consumer to try to put the pieces together. Moreover, it will be difficult for consumer advocates to help explain to consumers the meaning of that date, because there will be four separate possible reference dates to explain, and dates like the charge-off date are technical concepts with which many consumers will not be familiar. Please see our comments regarding § 1006.34(b)(3) in § 11.2.4, *supra*, for more specific concerns about the definition of the itemization date that the CFPB proposed, as well as a proposal for additional consumer testing.

Amount of the Debt on the Itemization Date. The eighth piece of information is the amount of the debt on the itemization date. Comment 34(c)(2)(viii)-1 clarifies that the "amount of the debt on the itemization date includes any fees, interest, or other charges owed as of that date." This is precisely the problem. While a consumer might recall a $300 debt, interest and fees can quickly make that number unrecognizable, negating the primary purpose of the itemization date. Please see our comments regarding § 1006.34(b)(3) in § 11.2.4, *supra*, for more specific concerns about the definition of the itemization date that the CFPB proposed, as well as a proposal for additional consumer testing.

Itemization since the Itemization Date. The ninth piece of information is "an itemization of the current amount of the debt in a tabular format reflecting interest, fees, payments, and credits since the itemization date." Comment 34(c)(2)(ix) clarifies that the table must include a row for each item, even if the value for that item is zero.

[440] The original creditor's address is less likely to be important to the consumer than the name, and need not be provided on a validation notice.

As discussed with the seventh and eighth pieces of information, we have concerns about the itemization date's definition. While an itemization of the debt would be very beneficial for consumers to clarify principal, interest, and fees owed, as well as summarize any payments made, these amounts will vary significantly based on which reference date the debt collector chooses.

To add to the confusion, a consumer could get a validation notice from one debt collector using one itemization date one month, and another validation notice using a different itemization date from a different debt collector the next month. Even if the current amount of the debt remains the same, consumers will be confused as to why the other items in the table increased (or decreased).

Please see our comments regarding § 1006.34(b)(3) in § 11.2.4, *supra*, for more specific concerns about the definition of itemization date that the CFPB proposed, as well as a proposal for additional consumer testing.

Current Amount of the Debt. The tenth piece of information is the current amount of the debt. This item implements the existing requirement of § 1692g(a)(1) and interprets that requirement to apply specifically to the current amount of the debt. Proposed Comment 34(c)(2)(x) states that, for mortgage debt subject to Regulation Z, the debt collector may comply with the requirement by stating the total balance of the outstanding mortgage rather than the current amount due. The Bureau should revise this comment to require the validation notice for a residential mortgage to state both the current amount of the total unpaid balance owed as of the date the notice is provided <u>and</u> the arrearage owed as of the same date ("the total amount needed to bring the account current"). While the total unpaid balance is important information, the amount needed to bring the account current is the critically important information the borrower needs to know. Under most form mortgages and under most state laws, homeowners in default can pay the arrearage owed on their mortgages up until close to the time of a foreclosure sale and thereby stop the foreclosure process. If the validation notice refers only to the total mortgage debt, and leaves out any mention of the amount needed to reinstate, this suggests there is no longer a right to reinstate. This makes the validation notice inconsistent with the periodic statement requirement of Regulation Z and will be confusing to consumers.

<u>Recommendations</u>: **The Bureau should:**

- **List all methods of response to the debt collector, not just name and mailing address.**
- **Treat the name of the hospital like a merchant brand for other bills related to a hospital stay.**
- **Require the validation notice to state the name of the original creditor, if different from the current creditor.**
- **Revise Comment 34(c)(2)(x) to require the validation notice for a residential mortgage to state both the current amount of the total unpaid balance owed as of the date the notice is provided <u>and</u> the arrearage owed as of the same date.**

11.3.4 § 1006.34(c)(3): Information about consumer protections

11.3.4.1 Introduction

Proposed § 1006.34(c)(3) lists six pieces of information about consumer protections in debt collection that the CFPB proposes to require validation notices to contain pursuant to § 1006.34(a)(1). The proposed rule would make some improvements in the way consumers are informed of these rights. For example, it would require the validation notice to disclose a specific end date for the validation period, and the fact that, if the consumer requests verification of the debt or original-creditor information, the collector will cease collection until it responds. The Bureau also proposes to endorse the view of the majority of courts that an oral dispute is sufficient to counter the presumption of validity under § 1692g(a)(3), even though a dispute must be in writing to trigger certain other obligations on the collector's part.

However, we are very disappointed that the Bureau has not done more to resolve the many problems caused by different treatment of oral and written disputes. The likelihood of erroneous claims has increased as the debt buying industry has grown. The existence of different rules for oral disputes and written disputes undercuts the goal of weeding out wrongful claims, complicates the validation notice, and confuses consumers.

The Bureau could have done much more to resolve these problems given the Bureau's FDCPA and Dodd-Frank rulemaking authority. Indeed, collectors should be required to investigate and respond to all disputes with documentation showing that the consumer owes the debt, regardless of when or how the consumer communicates the dispute.

Our comments on §§ 1006.34 and 1006.38 will focus on the Bureau's proposals, not what it should have proposed. Nonetheless, we urge the Bureau to consider a bolder approach in future rulemakings – one that would ensure that consumers' objections to erroneous claims are not stifled, but are encouraged.

11.3.4.2 Right to dispute

Proposed § 1006.34(c)(3)(i) would require debt collectors to provide specific notice about the consumer's right to dispute the debt. Specifically, this section requires:

> A statement that specifies what date the debt collector will consider the end date of the validation period and states that, if the consumer notifies the debt collector in writing before the end of the validation period that the debt, or any portion of the debt, is disputed, the debt collector must cease collection of the debt, or the disputed portion of the debt, until the debt collector sends the consumer either the verification of the debt or a copy of a judgment.

The model validation notice[441] provides sample language to convey this information, shown here with the portions required by § 1006.34(c)(3)(i) underlined:

[441] 84 Fed. Reg. at 23,409.

> “**Call**[442] **or <u>write</u>**[443] **<u>to us by November 12, 2019, to dispute all or part of the debt</u>.** If you do not, we will assume that our information is correct. <u>If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt.</u>

This section would specify that, to comply with § 1692g(a)(4) of the FDCPA, debt collectors must identify an exact end date for the validation period instead of saying within 30 days of receipt of the notice. Specifying the exact day that the validation period expires provides more clarity to consumers.

However, as drafted, the language of the model form will leave consumers with the <u>false</u> impression that the right to dispute the debt expires on November 12, 2019. That is simply not true. Other sections of the FDCPA still protect consumers who dispute debts outside of the validation period, after the 30-day period has run,. For example, § 1692e(8) prohibits “[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, *including the failure to communicate that a disputed debt is disputed*.”[444] The CFPB should use consumer testing to determine how to explain to consumers that they can continue to dispute debts even after the validation period has run.

Proposed § 1006.34(c)(3)(i) would also supplement the requirements of § 1692g(a)(4) of the FDCPA by adding a requirement that debt collectors inform consumers that they will cease collection on a disputed debt until verification is provided. In its discussion of this section, the CFPB notes that participants in the Bureau’s consumer testing said that this information was important and would encourage them to dispute the debt.[445] We agree that this information will be beneficial to consumers and we support its inclusion.

Finally, the Bureau should also specify that the collector must treat the consumer’s dispute or request for the identity of the original creditor as timely if it is either postmarked or received within the validation period.

<u>Recommendations</u>: **The Bureau should:**

- **Use consumer testing to revise the language in the model validation notice to avoid creating the false impression that consumers cannot submit disputes after the validation period has run.**

[442] Proposed § 1006.34(c)(3)(i) requires written notice, but § 1006.34(c)(3)(iii) allows for oral notice. Please see the discussion of § 1006.34(c)(3)(iii) in § 11.3.4.4, *infra*.

[443] In § 1006.34(c)(3)(v), the CFPB would require the debt collector to provide notice about the right to file a dispute electronically. Please see the discussion of that section in § 11.3.4.5, *infra*.

[444] A consumer does not need to submit a written dispute with a debt collector within the validation period in order to trigger the protection of § 1692e(8). Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998). *See also* Sayles v. Advanced Recovery Sys., Inc., 865 F.3d 246, 249 (5th Cir. 2017) (“§ 809’s debt dispute and verification requirements do not carry over to § 807(8)”).

[445] 84 Fed. Reg. at 23,343.

- **Amend the proposed regulation to specify that the collector must treat the consumer's dispute or request for the identity of the original creditor as timely if it is either postmarked or received within the validation period.**

11.3.4.3 Right to obtain information about the original creditor

Proposed § 1006.34(c)(3)(ii) would require debt collectors to provide specific notice about the consumer's right to obtain the name and address of the original creditor. Specifically, this section requires the validation notice to include:

> A statement that specifies what date the debt collector will consider the end date of the validation period and states that, if the consumer requests in writing before the end of the validation period the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector sends the consumer the name and address of the original creditor, if different from the current creditor.[446]

The model validation notice[447] provides sample language to convey this information:

> **Write[448] to ask for the name and address of the original creditor.** If you write by November 12, 2019, we will stop collection until we send you that information.

This section would add greater specificity to the requirements in §1692g(a)(5) of the FDCPA by requiring debt collectors to specify an end date for the validation period instead of saying within 30 days of receipt of the notice. Specifying the exact end date will provide more clarity to consumers, and we support this proposal.

This section would also supplement the requirements of §1692g(a)(5) of the FDCPA by stating that debt collectors must inform consumers that they will cease collection after a request for original-creditor information is made in writing until such information is provided. We agree that this information could be beneficial to consumers and support its inclusion.

The tear-off portion of the model validation notice omits the "if different from the current creditor" language contained in § 1692g(a)(5) of the FDCPA and §1006.34(c)(3)(ii) of the proposed rules. Omitting this phrase makes the statement a little bit shorter and may make it easier for some consumers to understand. Thus, we support its exclusion. However, if such language is excluded, the CFPB should clarify that the debt collector must respond to all requests for the name and address of the original creditor, even if they are the same as the current creditor. Moreover, as discussed in § 11.3.3, *supra*, the CFPB should simply require the validation notice to state the name of the original creditor. If the CFPB adopts that change, it could shorten this to a request for the address of the original creditor.

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[446] *See also* § 11.2.5, *supra* (discussion of the validation period).

[447] 84 Fed. Reg. at 23,409.

[448] Proposed § 1006.34(c)(3)(v) would require the debt collector to provide notice about the right to request original-creditor information electronically. Please see our discussion of that section in § 11.3.4.6, *infra*.

<u>Recommendations</u>: **The Bureau should:**

- **Require collectors to respond to all requests for the name and address of the original creditor, even if it is not different from the current creditor.**

11.3.4.4 Assumption of validity notice

Section 1006.34(c)(3)(iii) would require debt collectors to provide specific notice about the assumption of validity created by § 1692g(a)(3) of the FDCPA. Specifically, this section would require:

> A statement that specifies what date the debt collector will consider the end date of the validation period and states that, unless the consumer contacts the debt collector to dispute the validity of the debt, or any portion of the debt, before the end of the validation period, the debt collector will assume that the debt is valid.

The model validation notice[449] provides sample language to convey this information, shown here with the portions required by § 1006.34(c)(3)(iii) underlined:

> **<u>Call or write to us by November 12, 2019, to dispute all or part of the debt.</u>** <u>If you do not, we will assume that our information is correct.</u> If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt.

In contrast to § 1006.34(c)(3)(i) and (ii), which require consumers to dispute or request original-creditor information in writing in order to trigger the collector's duty to cease collection activity and provide a response, the language from the model validation notice says that consumers can "call or write" to dispute a debt. In its written discussion of the proposed rule, the CFPB states that it proposes to interpret § 1692g(a)(3) to allow oral disputes.[450] In other words, the proposed rule would allow consumers to call to dispute a debt for the purpose of countering the assumption of validity, but they would still have to dispute the debt in writing in order to trigger the collection pause or verification of the debt.[451] (Consumers would also still have to request original-creditor information in writing.[452])

We agree with this position. Section 1692g(a)(3) of the FDCPA does not require that a dispute be written for purposes of the assumption of validity, and such a requirement should not be read into it.[453] Furthermore, as the Bureau points out, sections of the FDCPA other than § 1692g

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[449] 84 Fed. Reg. at 23,409.

[450] 84 Fed. Reg. at 23,344.

[451] *Id.* ("While Model Form B-3 would alert consumers to an oral dispute option, the form would clarify that only a written dispute would invoke verification rights pursuant to FDCPA sections [§ 1692g (a)(4) and (5) or § 1006.34(c)(3)(i) and (ii) of the proposed rule].").

[452] *Id.*

[453] Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 491 (4th Cir. 2014) ("section 1692g(a)(3) permits consumers to dispute the validity of a debt orally, and it does not impose a writing requirement");

provide various protections to consumers who dispute debts, without requiring that the dispute be in writing.[454] To require disputes to be in writing for all of these purposes would be arbitrary and capricious, and contrary to the statute.

However, the Bureau should take additional steps. First, its conclusion that a collector must recognize oral disputes for purposes other than § 1692g(a)(4) is found only in its discussion. To provide clarity to debt collectors, consumers, and enforcement agencies, it should adopt an official comment stating this position.

Second, the Bureau must improve the model validation notice, which, as currently written, is likely to cause great confusion among consumers about the effect of disputing a debt orally and to lead consumers to waive their § 1692g(a)(4) rights unintentionally.

Research shows that consumers already do not understand that they need to dispute a debt in writing to trigger certain FDCPA protections.[455] In other contexts the CFPB has required disclosures next to phone numbers where it is not sufficient for consumers to exercise their rights orally.[456]

Unsophisticated consumers, and indeed many sophisticated consumers, will fail to notice or understand the nuances of what the CFPB is proposing – all of which is supposed to be captured by the switch from "call or write" in one sentence to "write" two sentences later, despite the fact that both § 1006.34(c)(3)(i) and (iii) involve disputes and even share an overlapping disclosure in the model validation notice.[457] As a result, many consumers will be tricked into thinking that calling is sufficient to exercise their FDCPA rights due to the misleading language in the CFPB's model validation notice. The CFPB needs to go back to the drawing board.

Hooks v. Forman, Holt, Eliades & Ravin, L.L.C., 717 F.3d 282, 286 (2d Cir. 2013) (same); Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078, 1081 (9th Cir. 2005) (same).

[454] 84 Fed. Reg. at 23,344 (citing *Camacho v. Bridgeport Fin. Inc.,* 430 F.3d 1078, 1082 (9th Cir. 2005), which states: "Oral dispute of a debt precludes the debt collector from communicating the debtor's credit information to others without including the fact that the debt is in dispute. 15 U.S.C. § 1692e(8); Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir.1998). Additionally, if a consumer owes multiple debts and makes a payment, the debt collector is prohibited from applying such payment to a debt which is in dispute. 15 U.S.C. § 1692h.").

[455] *See* Jeff Sovern, Kate E. Walton, & Nathan Frishberg, *Validation and Verification Vignettes: More Results from an Empirical Study of Consumer Understanding of Debt Collection Validation Notices*, 71 Rutgers U. L. Rev. 189, 258 (2018) ("more than a third of the respondents--perhaps many more--said that they would call rather than write when asked an open-ended question about how they would respond to the dunning letter"); Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 70 SMU L. Rev. 63, 94 (2017) ("Our survey results suggest that to the extent that respondents realized they could obtain verification of the debt, they did not take in that such demands needed to be in writing. In the three conditions with a validation notice, a substantial majority of respondents believed a phone call would be sufficient."). *See also* SBREFA Outline at 43 ("Consumers appear to submit a large share of their disputes orally….").

[456] *See* Official Interpretations 12 C.F.R. § 1026.7(a)(9)-2 ("A telephone number… may be included, but the mailing address for billing-error inquiries, which is the required disclosure, must be clear and conspicuous. The address is deemed to be clear and conspicuous if a precautionary instruction is included that telephoning . . . will not preserve the consumer's billing rights…."); Official Interpretations 12 C.F.R. § 1026.7(b)(9)-2 (same).

[457] 84 Fed. Reg. at 23,409.

In § 11.4.2, *infra*, we urge the CFPB to conduct much more robust consumer testing before promulgating a model validation notice. We urge the Bureau to include a particular focus in the consumer testing on whether consumers correctly distinguish between the effect of an oral request and the effect of a written one. If the notice does not clearly communicate that the consumer will have fewer rights disputing a debt only orally, it will mislead consumers into waiving important rights.

<u>Recommendations</u>: **The Bureau should:**

- **Adopt a comment that expresses its interpretation of § 1692g(a)(3) as not requiring the consumer's dispute to be in writing.**
- **Amend the misleading disclosures in the model validation notice, after conducting robust and thorough consumer testing.**

11.3.4.5 Explanation of where to obtain additional information

Section 1006.34(c)(3)(iv) would require debt collectors to notify consumers that there is additional information on the Bureau's website at a particular URL. The model validation notice[458] provides a sample of one interpretation of this requirement:

> **Learn more about your rights under federal law.** For instance, you have the right to stop or limit how we contact you. Go to www.consumerfinance.gov.

This language would be required only if the debt collector was collecting consumer financial product or service debt. The Bureau does not explain why this proposed rule is issued under only its Dodd Frank authority instead of both its FDCPA and Dodd Frank authority. As discussed in our comments on § 1006.1(c) in §2.3, *supra*, the Bureau should issue all provisions under both statutes to avoid the limitations of Dodd Frank coverage.

This proposal will be significantly less beneficial for consumers than the statement of rights that the CFPB proposed in its SBREFA Outline as a separate document to accompany the validation notice.[459] In contrast to the statement of rights, which would have been immediately available to the consumer in the same place and at the same time as the validation notice, the current proposal will require the consumer to navigate to a particular location online.[460] This, of course, requires reliable internet access, which will be a barrier for many low-income consumers.[461] Those who can access the information online may not be able to readily print it, requiring them to review the information on a screen - potentially a small screen like a mobile phone. Moreover, there is no mention of translation of this critical information into Spanish or other languages, as

[458] 84 Fed. Reg. at 23,409.

[459] *Contrast* SBREFA Outline at Appx. G.

[460] Consumers receiving the validation notice electronically may be able to click on the link, but they may be wary of doing so due to concerns about malware.

[461] *See* National Consumer Law Center, Millions of Americans Have Limited or No Meaningful Access to the Internet (Aug. 2019), *available at* https://www.nclc.org/issues/ib-limited-access-to-internet.html.

proposed in the SBREFA Outline.[462] For all these reasons, the CFPB should require a statement of rights to accompany the validation notice rather than simply providing a link to the CFPB's website.

If the CFPB does move forward with requiring a URL instead of a statement of rights that would be included with every validation notice, it must create a statement of rights landing page for consumers instead of a general link to the CFPB website.[463] Additionally, it should create a very simple URL for that webpage to make it easier for consumers to type, and make a clear and conspicuous link from the CFPB home page to that webpage. Moreover, the CFPB should study analytics for its website to determine how it can increase the visibility of this webpage and promote greater traffic to it from other agencies like the FTC. It should also translate the statement of rights information into key languages.

***Recommendations*:** **The Bureau should:**

- **Require debt collectors to provide a statement of rights with each validation notice.**
- **Create a prominent statement of debt collection rights webpage.**
- **Translate the statement of rights into key languages.**

11.3.4.6 Notice of electronic communication options

Proposed § 1006.34(c)(3)(v) would require a debt collector that sends electronic validation notices to notify consumers that they can electronically dispute the debt, request the original creditor's name and address, or request a validation notice in Spanish. The model validation notice[464] provides samples of one interpretation of these requirements:

> We accept disputes electronically at www.example.com/dispute.
>
> We accept such requests electronically at www.example.com/request.

The model validation notice does not contain information about how to electronically request a validation notice in Spanish.

Proposed Comment 34(c)(3)(v)-1 suggests the same model language for disputes and provides similar model language for original-creditor requests.[465] It also clarifies that a debt collector that accepts requests or disputes through multiple channels need only list one channel on the validation notice.

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[462] *See* SBREFA Outline at Appx. G.

[463] The CFPB says that it is developing "a reference document" that it would publish on its website before the proposed final rule. 84 Fed. Reg. at 23,344.

[464] 84 Fed. Reg. at 23,409.

[465] "We accept original creditor information requests electronically." Comment 34(c)(3)(v)-1.

The CFPB's discussion of the proposed rule says that § 1006.34(c)(3)(v)'s requirements will apply if the debt collector sends electronic validation notices at all, regardless of whether a particular validation notice was sent electronically.[466] The CFPB needs to clarify this in a comment, and should amend the language of the proposed rule from "if the debt collector sends a validation notice electronically" to "if the debt collector sends *any validation notices electronically*" in order to make the text of the proposed rule clearer.

The CFPB also needs to clarify in a comment that disputes and requests for original-creditor information that are submitted electronically count as being provided in writing. This, in turn, means that the debt collector will have to stop collection until it provides verification or responds to the request for original-creditor information as provided by § 1006.34(c)(3)(i) and (ii).

Recommendations: **The Bureau should:**

- **Amend the proposed rule to say "if the debt collector sends any validation notices electronically" it must accept disputes, requests for original-creditor information, and requests for translated validation notices electronically.**
- **Clarify in a comment that disputes and requests for original-creditor information that are submitted electronically count as being provided in writing pursuant to § 1006.34(c)(3)(i) and (ii).**

11.3.4.7 Opt-out statement

For validation notices delivered in the body of an email pursuant to § 1006.42(b)(1) or (c)(2)(i), Proposed § 1006.34(c)(3)(vi) would require debt collectors to provide the statement required by § 1006.6(e) about how the consumer can opt out of further electronic communications. As we explain in our comments regarding § 1006.42 in § 13, *supra*, the CFPB should require debt collectors to obtain opt-in consent from consumers that complies with the E-SIGN Act before sending any validation notices electronically. However, it remains important to have robust opt-out rights even once the consumer has opted in to receiving electronic communications. As we explain in our comment on § 1006.6(e), consumers should be allowed to opt out by any reasonable method.

The Bureau should add validation notices delivered in the body of an email pursuant to § 1006.42(e)(2) to the list of when opt-out notices must be provided together with the validation notice. Otherwise, there would be an avenue for electronically providing validation notices in the body of an email that was not covered by the requirement to include an opt-out statement.

Proposed Comment 34(c)(3)(vi)-1 explains that opt-out notices are not needed for validation notices sent by hyperlink pursuant to § 1006.42(c)(2)(ii) because the email or text that is used to send the hyperlink will already provide the opt-out. The proposed comment also says that delivery of a validation notice by electronic means "is not rendered ineffective because a

[466] 84 Fed. Reg. at 23,344.

consumer opts out of future electronic communications.” However, as discussed in our comments on § 1006.42 in § 13.2.4, *infra*, delivery of a validation notice by electronic means should be deemed ineffective where the debt collector does not have evidence that the notice was actually opened.[467]

***Recommendation*:** **The Bureau should add a requirement to provide an opt-out notice in validation notices that are delivered in the body of an email pursuant to § 1006.42(e)(2).**

11.3.5 § 1006.34(c)(4): Consumer response information

11.3.5.1 Overview

Proposed § 1006.34(c)(4) would designate as required three categories of validation information to explain to consumers how to respond to validation notices: (1) dispute prompts, (2) original-creditor information prompts, and (3) mailing addresses. If provided electronically or in writing, this section would have to appear at the bottom of the notice under the heading “How do you want to respond?” and “Check all that apply.”

We agree that consumers are often confused about how to exercise their FDCPA rights and we support efforts to make this clearer. However, we have a number of specific suggestions for changes to better protect consumers.

As we have discussed in our comments regarding § 1006.34(a)(1)(ii) in § 11.1.4, *supra*, the CFPB should prohibit oral delivery of this expanded list of validation information. However, if it does not do this, it must provide guidance about how to provide this list of options in a meaningful way in an oral disclosure, especially given that, as currently proposed, the consumer could dispute the debt orally but the debt collector would not have to stop collection or provide verification of the debt[468] while requests for original-creditor information would have to be made in writing. This will be extremely confusing to consumers and is yet another reason that the CFPB should require validation notices to be provided in writing (or electronically, with E-SIGN Act consent).

11.3.5.2 Proximity to payment information

The proposed rule would require the consumer response information to be segregated from the other required validation information described in §§ 1006.34(c)(1)-(3) and the optional validation information described in §§ 1006.34(d)(i), (ii), (iv), and (v). However, we are very concerned that it could be combined with the optional statement under § 1006.34(d)(iii)(B) that “I

[467] *See* Lavallee v. Med-1 Sols., L.L.C., 2017 WL 4340342, at *2 (S.D. Ind. Sept. 29, 2017) (“Med-1 Solutions know too, however, that Ms. Lavallee never viewed or accessed the .pdf “secure package” document for either debt. That is because the vendor’s system “records any attempt to view [the .pdf document, or “secure package”]” and there was no record of any attempt to view the secure packages.”), *aff’d*, 932 F.3d 1049 (7th Cir. 2019).

[468] Proposed § 1006.34(c)(3)(i), (iii); 84 Fed. Reg. at 23,344.

enclosed this amount" with a fillable box to list the amount. Combining the dispute tear-off portion of the letter with a payment coupon sends the implicit message that the consumer must make a payment in order to dispute a debt, request original-creditor information, or ask for a copy of the form in Spanish. To avoid this consumer confusion, the CFPB should amend the model validation notice to separate payment from other possible actions. Moreover, it should amend § 1006.34(d)(iii) to clearly prohibit the payment prompt from appearing with the segregated consumer response information.

***Recommendation*:** **The Bureau should amend the model validation notice to separate payment from other possible consumer responses.**

11.3.5.3 Dispute prompts

Proposed § 1006.34(c)(4)(i) would require these (or similar) statements (shown here with formatting taken from the model validation notice):

- ☐ **I want to dispute the debt because I think:**
    - ☐ This is not my debt.
    - ☐ The amount is wrong.
    - ☐ Other (please describe on reverse or attach additional information).

Both of the first two subcategories are important. More than 62,000 of the consumer complaints filed with the CFPB identified "Debt is not mine/yours" as a complaint topic,[469] and "attempted to collect wrong amount" was identified by more than 16,000 consumer complaints.[470]

The CFPB should also add the following as dispute categories:

- ☐ I already paid or settled this debt.
- ☐ This debt was the result of identity theft.
- ☐ This debt was discharged in bankruptcy.

[469] As of August 6, 2019, the CFPB had received 62,654 debt collection complaints from consumers who reported that the debt was not theirs. Consumer Fin. Prot. Bureau, Consumer Complaint Database, *available at* https://www.consumerfinance.gov/data-research/consumer-complaints/ (data includes subcategory of "debt is not yours" under "attempts to collect debt not owed" and "debt is not mine" under "continued attempts to collect debt not owed").

[470] As of August 6, 2019, the CFPB had received 16,739 debt collection complaints from consumers who reported that their debt was paid. Consumer Fin. Prot. Bureau, Consumer Complaint Database, *available at* https://www.consumerfinance.gov/data-research/consumer-complaints/ (data includes subcategory of "attempt to collect wrong amount").

More than 27,000 consumers have complained that they already paid the debt,[471] nearly 15,000 have identified the debt as resulting from identity theft,[472] and more than 4,600 have complained about facing collection for discharged debts.[473] Moreover, the CFPB should review its complaints and the debt collection complaints received by the FTC to see if there are additional categories of common debt collection complaints that should be listed as dispute prompts.

***<u>Recommendation</u>:* The CFPB should add the following categories of dispute prompts: (1) I already paid or settled this debt, (2) This debt was the result of identity theft, and (3) This debt was discharged in bankruptcy.**

11.3.5.4 Original-creditor information prompt

Proposed § 1006.34(c)(4)(ii) would require a separate prompt for original-creditor information. This could be beneficial to consumers and we support its inclusion.

As discussed in our comments regarding § 1006.34(c)(2)(iv) in § 11.3.3, *supra*, the CFPB should require, or at least clearly permit, debt collectors to disclose the name of the original creditor automatically to avoid the need for consumers to make a separate request for this information unless they need to request the original creditor's address.

As we discussed in our comments regarding § 1006.34(c)(3)(ii) in § 11.3.4.2, *supra*, the CFPB should require debt collectors to respond to requests for original-creditor information even if the current creditor is the same as the original creditor. This will avoid consumer confusion and is particularly necessary in light of the CFPB's proposal to simplify the disclosure about requesting original-creditor information by omitting "if different from the current creditor."

11.3.5.5 Additional information

The CFPB should add additional checkboxes to the tear-off document to allow consumers to easily exercise their rights under § 1692c(c). For example, additional checkboxes could say:

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471 As of August 6, 2019, the CFPB had received 27,101 debt collection complaints from consumers who reported that their debt was paid. Consumer Fin. Prot. Bureau, Consumer Complaint Database, *available at* https://www.consumerfinance.gov/data-research/consumer-complaints/ (data includes subcategory of "debt was paid" under both "attempts to collect debt not owed" and "continued attempts to collect debt not owed").

472 As of August 6, 2019, the CFPB had received 14,928 debt collection complaints from consumers who reported that the debt was the result of identity theft. Consumer Fin. Prot. Bureau, Consumer Complaint Database, *available at* https://www.consumerfinance.gov/data-research/consumer-complaints/ (data includes subcategory of "debt was the result of identity theft" under both "attempts to collect debt not owed" and "continued attempts to collect debt not owed").

473 As of August 6, 2019, the CFPB had received 4,622 debt collection complaints from consumers who reported that their debt was discharged in bankruptcy. Consumer Fin. Prot. Bureau, Consumer Complaint Database, *available at* https://www.consumerfinance.gov/data-research/consumer-complaints/ (data includes subcategory of "debt was already discharged in bankruptcy and is no longer owed" under "attempts to collect debt not owed" and "Debt was discharged in bankruptcy" under "continued attempts to collect debt not owed").

- ☐ I refuse to pay this debt.
- ☐ Stop all communication about this debt.

***<u>Recommendation</u>:* The CFPB should add prompts to the tear-off portion of the model validation notice to help consumers exercise their rights under § 1692c(c).**

11.3.6 § 1006.34(c)(5): Special rule for certain residential mortgage debt

11.3.6.1 The impact of exemptions to Regulation Z's obligation to provide periodic statements

Proposed § 1006.34(c)(5) would create a special rule for residential mortgage debt that is subject to 12 C.F.R. § 1026.41, the mortgage servicing provisions of Regulation Z (adopted under the Truth in Lending Act). The proposed rule would state that a debt collector need not give certain validation information—the itemization date, the amount of the debt on that date, and an itemization of the debt—as long as it gives the consumer the most recent periodic statement.

The proposed rule is problematic for two reasons. First, it purports to apply to any residential mortgage "debt" that is subject to Regulation Z's requirement that mortgage servicers provide periodic account statements to borrowers. 12 C.F.R. §.1026.41. However, contrary to what the proposed rule implies, the circumstances under which servicers must provide the periodic statements are not static. The requirement to provide the statements does not apply at all times to a "debt." Second, and compounding this first problem, the proposed rule directs a debt collector to provide "a copy of the most recent periodic statement provided to the consumer under Regulation Z." The "most recent" periodic statement provided to the consumer may in fact be so old that it is useless. Or worse, in view of the current status of the account, it may give the consumer information that is highly misleading or patently false.[474]

A mortgage servicer's obligation to provide periodic statements may be limited significantly by the exemptions under Regulation Z. The exemptions are not always tied to a particular loan. Instead, they depend upon other circumstances that exist at a given time. The circumstantial nature of the exemptions is particularly clear in three areas, namely the exemptions that apply to coupon books (§ 1026.41(e)(3)); certain consumers in bankruptcy (§ 1026.41(e)(5)); and charged-off loans (§ 1026(e)(6)). As discussed below, the proposed special validation notice rule for mortgage debt fails to take into account how these exemptions work.

11.3.6.1.1 The coupon book exemption

[474] The Bureau recognizes that "[w]here the § 1026.41(b) periodic statement was not provided, a debt collector collecting debts related thereto would not be able to satisfy proposed § 1006.34(c)(2)(vii) through (ix) by providing a consumer, at the same time as the validation notice, a copy of the most recent periodic statement provided to the consumer under § 1026.41(b)" in footnote 504 of the proposed rule but must provide this clarification in the proposed rule itself. 84 Fed. Reg. 23,347 n.504.

Regulation Z allows an exemption from the obligation to provide periodic statements if the mortgage servicer has given the borrower a coupon book that includes certain specific account information.[475] However, the servicer's obligations under the coupon book exemption change when a borrower becomes more than 45 days delinquent during any billing cycle.[476] When a borrower reaches 45 days of delinquency, the servicer must provide delinquency information separately in writing, including an account history going back for up to six months.[477]

The Bureau's proposed FDCPA rule fails to expressly address whether a servicer can comply with Proposed § 1006.34(c)(5) by satisfying the coupon book requirements in Regulation Z, 12 C.F.R. § 1026.41(e)(3). If a servicer contends that the "most recent periodic statement provided to the consumer" can be a coupon book prepared months or years earlier, it will not give the consumer the important account and delinquency information required by Regulation Z. Debt collectors' validation notice letters are often directed at accounts in default, and these borrowers need the account information Regulation Z mandates that is not found in coupon books, such as an explanation of the amount due, past payment breakdown, transaction activity and partial payment information as required by 12 C.F.R. § 1026.41(d)(2) through (5).

The proposed rule should be revised to make it clear that a servicer cannot satisfy the validation notice requirement by providing the most recent coupon book given to the borrower. Nor should the rule allow the delinquency information required by 12 C.F.R. § 1026.41(e)(3)(iv) to satisfy the validation notice requirement. While the delinquency information is very useful to borrowers, Regulation Z does not require that the coupon as modified pursuant to 12 C.F.R. § 1026.41(e)(iv) contain all the information that must be included in the validation notice and under 12 C.F.R. § 1026.41(d). In particular, the delinquency information does not include the current amount of the debt or an itemization showing interest, fees, payments, and credits, which Proposed § 1006.34(c)(viii) and (ix) would require for validation notices. To avoid confusion for borrowers and servicers, there should be no exception to the validation notice requirement for servicers who have provided coupon books in compliance with 12 C.F.R. § 1026.41(e)(3).

11.3.6.1.2 The bankruptcy exemption

Reliance on the "most recent periodic statement provided to the consumer under Regulation Z" is particularly troubling given Regulation Z's exemption for "certain consumers in bankruptcy."[478] Regulation Z's bankruptcy exception is also not a static exemption that applies generally to a "debt." The exemption may apply to a consumer in an active bankruptcy case or to a consumer who has obtained a bankruptcy discharge of personal liability on a mortgage debt. However, the exemption applies to these debtors only in limited circumstances. These circumstances are subject to change, so that the exemption may apply to the debt at certain times in connection with a bankruptcy case, but not at other times.

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[475] 12 C.F.R. § 1026.41(e)(3).

[476] 12 C.F.R. § 1026.41(e)(3)(iv).

[477] 12 C.F.R. §1026.41(d)(8).

[478] 12 C.F.R. § 1026.41(e)(5).

For example, the bankruptcy exemption may be triggered by the consumer's filing of a chapter 7 case with a statement indicating an intent to surrender the mortgaged property.[479] However, this exemption ceases to apply if the consumer later resumes making regular payments on the mortgage.[480] The bankruptcy exemption also takes effect when a lender obtains relief from the bankruptcy stay. In this instance, the obligation to provide monthly statements may be resurrected if the borrower later reinstates the loan and requests periodic statements.[481]

In the bankruptcy context, a debt collector cannot rely on a fixed definition of a "debt" in order to determine when to apply the proposed exception to the FDCPA validation notice requirements. Given the potential changes of circumstances, the "most recent periodic statement provided to the consumer under Regulation Z" may be outdated and misleading. On the other hand, the full content required for a validation notice under the proposed FDCPA rule for all debts would provide accurate and useful information to the residential mortgage consumer.

11.3.6.1.3 Charged-off loans

A third exemption under the Regulation Z periodic statement rules applies when a mortgage servicer has temporarily ceased the accrual of interest and fees on a debt.[482] As was the case with the coupon book and bankruptcy exemptions, the suspension of the duty to provide periodic mortgage statements for a charged-off loan can change at any time. The servicer must resume providing periodic statements whenever the creditor decides to resume demanding fees or interest on the account.[483] In many cases, the initial communication from a debt collector coincides with such a decision. Here again, the "most recent periodic statement" provided to the consumer regarding the debt could be the final notice before the charge-off, potentially sent several years earlier.

There are other circumstances where a servicer may cease the delivery of periodic statements, including but not limited to after acceleration of a loan or during a foreclosure action. In any circumstance where a servicer discontinues sending periodic statements to a consumer, the "most recent periodic statement" could provide outdated, inaccurate account information. For this reason, the Bureau must make clear that the "Special Rule for Residential Mortgage Debt" does not apply in circumstances where there has been any suspension of periodic statements due to the acceleration of a loan or pendency of foreclosure.

11.3.6.2 The impact of transfers of servicing rights

In addition to the Regulation Z exemptions, servicing transfers present a major obstacle to reliance on a past periodic statement as a substitute for a current FDCPA validation letter.

Transfers of mortgage servicing rights became common over the past decade, and they occur with increasing frequency today. Servicing transfers are often a trigger for communications that

[479] 12 C.F.R. § 1026.41(e)(5)(i)(B)(4).

[480] *Id.*

[481] 12 C.F.R. § 1026.41(e)(5)(i)(B)(5).

[482] 12 C.F.R. § 1026.41(e)(6).

[483] *Id.*

require the FDCPA validation information. Servicing transfers require exchanges of massive quantities of data, and consumers routinely suffer when the inevitable glitches occur. Software programs and accounting systems used by the transferor and transferee entity are often incompatible. Documents are lost. When one servicer modifies a loan and reduces payments, the next servicer may never receive the modification records. From consumer complaints and its ongoing efforts to regulate servicing transfers, the Bureau is certainly aware of the frequency and severity of these problems.

To address this problem, the Bureau should require that a transferee servicer (assuming that it meets the FDCPA's definition of debt collector) that uses the special rule for residential mortgage debt can comply with that rule only by providing a periodic statement that it—not a predecessor servicer—has prepared. In the alternative, if the transferee servicer relies on a periodic statement prepared by a predecessor servicer, the rule should require the transferee servicer to conduct its own reasonable investigation in order to ensure the accuracy of the statement. In all cases, the periodic statement must have been provided within the current billing cycle and not more than 31 days before the date of the validation notice.

Recommendation: **The Bureau should revise Proposed § 1006.34(c)(5) to read:**

Special rule for certain residential mortgage debt**. For residential mortgage debt currently subject to Regulation Z, 12 C.F.R. § 1026.41, a debt collector need not provide the validation information described in paragraphs (c)(2)(vii) through (ix) of this section if the debt collector:**

(i) Provides the consumer at the same time as the validation notice, a copy of the most recent periodic statement provided to the consumer under Regulation Z, 12 CFR 1026.41(b);

(ii) Refers to that periodic statement in the validation notice; and

(iii) The most recent periodic statement was provided within the current billing cycle and not more than 31 days before the date of the validation notice and meets the requirements of 12 C.F.R. § 1026.41(b), (c), and (d). If any entity other than the current servicer provided the most recent periodic statement, the debt collector must either conduct a reasonable investigation to verify the accuracy of the prior entity's periodic statement or prepare its own periodic statement.

11.4 § 1006.34(d): Form of validation information

Proposed § 1006.34(d) sets for a number of rules regarding the form of the validation information. It is discussed in the following subsections, except that the requirement that debt collectors provide the validation information in a clear and conspicuous manner, set forth in Proposed § 100.34(d)(1)(i), is discussed in § 11.2.2, *supra*, in connection with our comments regarding § 1006.34(b)(1), and the provisions in Proposed § 1006.34(d)(vi) regarding Spanish language disclosures is discussed in § 11.5, *infra*, as part of our overall discussion of language access issues.

11.4.1 Proposed Comment 34(d)(1)(ii)-1: Modification of validation notice when consumer is deceased

Proposed Comment 34(d)(1)(ii)-1(i) notes that a validation notice sent to someone who is "authorized to act on behalf of the deceased consumer's estate"[484] may substitute the name of the deceased consumer for "you" in the validation notice. This substitution would be appropriate in some places (*e.g.* "We are trying to collect a debt that [name of deceased] owe[d] to Bank of Rockville.") but not in others ("We will use any information you give us to help collect the debt."). Moreover, additional modifications would be necessary to make it clear to the executor or administrator why they were receiving a letter about the deceased's debts, such as a disclosure stating, "We are contacting you as the executor for [name of deceased]'s estate. You are not personally responsible for this debt."[485] We recommend that the CFPB provide a separate model validation notice for communicating with executors and administrators of the deceased's estate.

One of the reasons that we recommend a second model form for collectors to use when the consumer is deceased is that Proposed § 1006.34(d)(1)(ii) requires the content, format, and placement of mandatory validation information defined in § 1006.34(c) and any optional disclosures allowed by § 1006.34(d)(3) to be "substantially similar" to the model validation notice in Appendix B. Given the vague nature of the "substantially similar" standard, we think that few debt collectors are likely to deviate from the model form and risk liability absent a clarification that a particular deviation is permissible.

Recommendations: **The CFPB should provide a separate model validation notice for communicating with executors and administrators of the deceased's estate.**

11.4.2 § 1006.34(d)(2): Safe harbor

The CFPB proposes to grant a safe harbor for §§ 1006.34(a)(1)(i) and 1006.34(d)(1) to debt collectors that use the model validation notice. In its discussion, the CFPB notes that the model validation notice "was developed over multiple rounds of consumer testing . . . [t]he Bureau believes that this form effectively discloses the information described in proposed §1006.34(c)."[486]

[484] See also our comments regarding § 1006.6(a) in § 4.1, *supra*, which discuss our concerns about the lack of clarity of the definition of this term.

[485] Please see our comments on § 1006.18(a) in § 7.

[486] 84 Fed. Reg. at 23,348.

We support the adoption of a model validation notice that is understandable to the least sophisticated consumer that the FDCPA is designed to protect.[487] A widely adopted model notice would make it easier for consumer advocates to explain the content of a model notice to consumers with resources like annotated model validation notices. However, we are concerned about the adequacy of the consumer testing that occurred here. Specifically, it appears that the CFPB tested specific model validation notices with only 30 consumers for cognitive testing and 30 consumers for usability testing.[488] The CFPB estimates that 140 million validation notices are sent annually,[489] but it is prepared to adopt a model validation notice that was tested with only 60 consumers. We have serious concerns about the ability of such testing to adequately evaluate comprehension of the model validation notice by the least sophisticated consumer. This is particularly true given that all testing took place prior to the release of the SBREFA Outline in July 2016[490] even though the model validation notice changed from the SBREFA Outline[491] to the current proposal.[492] We urge the CFPB to conduct additional consumer testing to engage a larger group of testers with a particular focus on comprehension by the least sophisticated consumer before adopting a model validation notice or creating any safe harbors. Throughout these comments, we point out specific language in the model notice that is likely to be confusing to consumers and that additional testing should explore in detail.

If more robust consumer testing confirms that a particular model validation notice is comprehensible to the least sophisticated consumer, it is reasonable to grant narrowly crafted safe harbors to encourage its use. However, one of the two sections that the Bureau proposes to grant a safe harbor from is incorrect. Section 1006.34(a)(1)(i), the first proposed safe harbor, prescribes when and how the collector must send the validation notice. Using a model form provides no assurance that the collector has complied with these requirements - simply using the model validation notice does not mean that the debt collector sent the validation notice in an initial communication or within five days of the initial communication as required by § 1006.34(a)(1)(i). Granting a safe harbor for this requirement would be arbitrary and capricious, and beyond the Bureau's authority. The Bureau should therefore delete the reference to § 1006.34(a)(1)(i). Section 1006.34(d)(1), the second proposed safe harbor, requires the validation information to be clear and conspicuous. This is a reasonable safe harbor for a model validation notice if it has been shown through rigorous consumer testing to be clear to consumers.

***Recommendations*:** **The CFPB should:**

- **Conduct more extensive consumer testing of the model validation notice that it proposes to adopt, with a focus on comprehension by the least sophisticated consumer, before creating a safe harbor for use of the**

[487] *See* National Consumer Law Center, Fair Debt Collection § 3.2.1 (9th ed. 2018) (discussing least sophisticated consumer standard).

[488] 84 Fed. Reg. at 23,279. We note that there were additional focus group conversations discussing disclosures more generally that took place before the cognitive and usability studies, but it is not clear how many consumers were involved in those conversations. *See id.*

[489] 84 Fed. Reg. at 23,389.

[490] 84 Fed. Reg. at 23,279.

[491] SBEFA Outline at Appx. F.

[492] 84 Fed. Reg. at 23,409.

model validation notice.

- **Amend § 1006.34(d)(2) to provide a safe harbor from § 1006.34(a)(1), not § 1006.34(a)(1)(i).**

11.4.3 § 1006.34(d)(3): Optional disclosures

In addition to the mandatory validation information described in § 1006.34(c), the proposed rule lists six optional categories of validation information. The CFPB's discussion states that these additional disclosures would not be viewed as overshadowing or inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor in violation of § 1692g(b) of the FDCPA or § 1006.38(b) of the proposed regulations.

Debt Collector's Phone Number. The first optional disclosure is the debt collector's telephone contact information. As we stated previously in our discussion of § 1006.34(c)(2)(i)'s requirement to include the debt collector's name and mailing address, the CFPB should require debt collectors to list information about any other means of contacting the debt collector, including phone number, number where the debt collector can be contacted by text (if different from the number for incoming calls), email, and any other method that the debt collector uses to accept communications from consumers. This will facilitate consumer contacts with debt collectors in the consumer's preferred communication channel. This contact information should be mandatory, not optional.

Reference Code. The second optional disclosure is a reference code that the debt collector uses to identify the account. We do not object to the inclusion of the reference code so long as it is clearly distinct from the account number. As presented in the validation notice, this information is kept separate from the account number, which should minimize the potential for confusion.

Payment Disclosures. The third category of optional disclosures presents two payment disclosures. One disclosure permits debt collectors to include the statement "[c]ontact us about your payment options" as long as it is no more prominent than the mandatory validation information. To avoid any implication that this is a mandatory instruction to the consumer, the CFPB should specify that this statement can be included only as part of a list of optional steps that the consumer can take, as it is in the model form.

The other disclosure that would be permitted is "I enclosed this amount," together with payment instructions and a prompt. As we previously commented in § 11.3.5.2, *supra*, in our discussion of § 1006.34(c)(4), we are concerned about the inclusion of this statement in the tear-off portion of the letter. Combining the dispute tear-off portion of the letter with a payment coupon sends the implicit message that the consumer must make a payment in order to dispute a debt, request original-creditor information, or ask for a copy of the form in Spanish. To avoid this consumer confusion, the CFPB should amend the model validation notice to separate the statement about an enclosed payment from other possible actions.

The CFPB's discussion construes prior similar objections as opposed to combining payment disclosures with validation information.[493] However, the concern raised here is specifically

[493] 84 Fed. Reg. at 23,350.

about the combination of a tear-off form for disputes and a payment coupon, and the potential for consumer confusion. As mentioned above in our discussion of § 1006.34(d)(2), additional consumer testing should be run on the model validation notice. This additional testing should include exploration of whether combining a dispute tear-off form and a payment coupon causes consumer confusion for the least sophisticated consumer.

Disclosures Required by Law. The fourth category of optional disclosures is disclosures required by applicable law, which would be permitted on the reverse side (second page) of the validation notice with a statement on the front (first page) that is substantially similar to the statement "Review state law disclosures on reverse side, if applicable." Comment 34(d)(3)(iv) broadly defines what qualifies as a required disclosure to include disclosures required by state statutes or regulations and judicial decisions or orders.

We are concerned that debt collectors will take a kitchen sink approach, including all possible disclosures instead of the ones that are relevant to the current consumer. This would be overwhelming for most consumers. The CFPB should prohibit debt collectors from including any disclosure that is not required in the jurisdiction where the consumer lives. For example, disclosures required by states other than Colorado should be prohibited if the consumer lives in Colorado. This should significantly decrease the number of disclosures. Similarly, the debt collector should not be allowed to include safe harbor language suggested by a U.S. Court of Appeals for a Circuit in another part of the country. In addition, these disclosures should be separately labeled as "Disclosures Required by Your State" or "Disclosures Required by Local Federal Courts."

We do not believe that any of the CFPB's consumer testing of the model validation notice has included the disclosures described by Comment 34(d)(3)(iv). As discussed in § 11.4.2, *supra*, the CFPB should engage in additional consumer testing of the proposed model validation notice. This consumer testing should also examine the effect of including the proposed state-specific information on the clarity of the validation notice.

Disclosures about Electronic Communication Options. The fifth category of optional disclosures is information about the debt collector's website and email address. As discussed in § 11.3.3, *supra*, we think that debt collectors should have to disclose all of the methods that consumers can use to contact them to facilitate interaction. The fifth category also allows debt collectors that did not provide the validation information electronically to give the consumer information about how to use an electronic method of communication to dispute a debt, ask for original-creditor information, or request a copy of the validation notice in Spanish. As we have stated in our comments at § 11.3.4.5, *supra*, regarding §1006.34(c)(3)(v), the CFPB should require all debt collectors to accept disputes, requests for original-creditor information, and requests for a translated validation notice in Spanish through any communication channel that the debt collector uses to communicate with consumers (even if that communication channel was not used to send the validation notice).

Spanish Translation Disclosures. The sixth category of optional disclosures are Spanish-language translation disclosures. Please see our discussion of language access at § 11.5 of these comments, *infra*.

***Recommendations*:** **The CFPB should:**

- **Require debt collectors to list on the validation notice all of the means that consumers can contact them.**
- **Specify that the optional disclosure "Contact us about your payment options" can be included only as a part of a list of optional steps that the consumer can take.**
- **Prohibit the optional disclosure about a payment that the consumer is enclosing from being included in the tear-off form.**
- **Require debt collectors to accept disputes, requests for original-creditor information, and requests for translation through any of the communication channels that debt collectors use to communicate with consumers.**
- **Prohibit debt collectors from including any disclosure that is not required in the jurisdiction where the consumer lives.**
- **Conduct consumer testing, focusing on the effect of including additional state-specific information on the clarity of the validation notice.**

11.4.4 § 1006.34(d)(4): Validation notices delivered electronically

Proposed § 1006.34(d)(4) provides that debt collectors that provide validation notices electronically may display the following prompts as fillable fields: dispute prompt, original-creditor information request prompt, Spanish-translation request prompt, and the payment enclosure prompt.

The "enclosed payment" prompt raises particular concerns about exploitation by scammers who will mimic legitimate debt collectors and try to get consumers to make payments on non-existent or "phantom" debts. As consumer advocates, we would caution consumers against making payments via payment enclosure prompts in an email or other electronic message, especially from someone they have never heard of before. The CFPB should evaluate how fillable payment prompts might be a target for scammers and investigate other approaches that better protect consumers.

This section also allows debt collectors to embed hyperlinks that link to the debt collector's website or permit consumers to respond to the dispute and original-creditor prompts. If the CFPB does not require a statement of rights to accompany each validation notice, the CFPB should also require an embedded link to the statement of rights document on its website as discussed at § 1006.34(c)(3)(iv).

11.5 Language Access: §§ 1006.34(d)(3)(vi) and 1006.34(e)

11.5.1 Overview

Consumers with limited English proficiency ("LEP" consumers) need clear information regarding their rights in the debt collection process. We urge the Bureau to expand its proposed approach to language access. As discussed below, the Bureau should require inclusion in all validation notices of a notification in Spanish alerting the recipient that the letter is regarding collection of a debt and that the recipient has the option to request a translated notice, with information on how to request the translated notice. It should make the provision of the translated debt validation notice automatic in appropriate circumstances without requiring a consumer request. While we recognize that the costs of a requirement to provide a translation of the debt validation notice must be considered, those costs are limited, and a translated validation notice provides crucial value to LEP consumers. Costs are further limited when the CFPB provides a model translation that can easily be adapted by a collector and mailed along with a notice that is already being sent. The comments that follow discuss these issues and our recommendations in detail.

11.5.2 The CFPB's LEP proposals

11.5.2.1 Introduction

Proposed §§ 1006.34(d)(3)(vi) and 1006.34(e) would:

1. Permit debt collectors to include a phrase in the standard validation notice indicating (in Spanish) that the consumer can contact the collector to request the form in Spanish;[494]

2. Permit debt collectors to include an additional phrase in the standard validation notice that instructs the consumer how to obtain the form in Spanish;[495]

3. Permit debt collectors to include on a consumer response form the statement in Spanish "I want this form in Spanish;"[496]

4. Permit debt collectors to provide a complete and accurate translation of the validation notice into any language;[497] and

5. Provide that the validation notice is deemed complete and accurate if it uses translated language published on the Bureau's website.[498]

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[494] Proposed § 1006.34(d)(3)(vi)(A). *See also* 84 Fed. Reg. at 23,351-23,352 (CFPB's section-by-section analysis of its LEP proposals).

[495] Proposed § 1006.34(d)(3)(vi)(A)..

[496] Proposed § 1006.34(d)(3)(vi)(B).

[497] Proposed § 1006.34(e).

[498] Proposed Comment § 1006.34(e)-1.

We urge the Bureau to take advantage of this critical moment and broaden its plan by making these steps mandatory under certain circumstances, in addition to other recommendations discussed below. In particular, requiring access to Spanish-language notices would substantially increase language access in the debt collection process.

11.5.2.2 CFPB authority

The CFPB has the authority to take substantial steps toward providing meaningful language access for consumers. Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act[499] established the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[500] The CFPB is entrusted with implementing and enforcing the federal consumer financial laws "for the purpose of ensuring that *all consumers have access* to markets for consumer financial products and services and that markets for consumer financial products and services are *fair*, *transparent*, and competitive."[501] Moreover, § 1032(a) of the Dodd-Frank Act authorizes the Bureau to prescribe rules to ensure that the features of consumer financial products are disclosed fairly, accurately, and effectively. The Bureau relied on this authority in proposing § 1006.34(e), which would allow collectors to send the validation notice completely and accurately translated into any non-English language, provided the collector also sends it in English. The Bureau should expand the proposed rule in order to more fully meet the goal of ensuring that the features of debt collection are fully, accurately, and effectively disclosed.

11.5.2.3 Importance of the proposal related to translated validation notices, and need for expanded protections

As the demographics of the United States evolve, the number of U.S. residents for whom English is not a first language and who speak English with limited proficiency has increased dramatically. In the most recent statistics from the American Community Survey in 2017, it is estimated that 25.9 million individuals, some 8.5% of the U.S. population, were considered limited English proficient (LEP). Limited English proficient refers to anyone above the age of five who reported speaking English less than "very well," according to the U.S. Census Bureau. The U.S. has the second largest number of Spanish speakers of any country in the world, following only Mexico.[502] About 83% of all LEP residents speak one of eight languages: Spanish, Chinese (including Mandarin and Cantonese), Vietnamese, Korean, Tagalog, Arabic, Russian and Haitian Creole. About 63.3% of the LEP population speaks Spanish, followed by Chinese,

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[499] 12 U.S.C. §§ 5481 *et seq.*

[500] 12 U.S.C. § 5491(a). S*ee also Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 686-87 (D.C. Cir. 2015) (summarizing the CFPB's authority in implementing and enforcing the federal financial consumer laws).

[501] 12 U.S.C. § 5511(a) (emphasis added). The CFPB's framework is analogous to Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182, which prohibits discrimination by public accommodations and services operated by private entities. The ADA provides a national mandate to ensure meaningful access for persons with disabilities, 42 U.S.C. § 12101, similar to the CFPB's mandate to ensure all consumers have access to the markets for consumer financial products and services.

[502] Stephen Burgen, *U.S. now has more Spanish speakers than Spain – only Mexico has more*, The Guardian, June 29, 2015 (citing a report by the Cervantes Institute, *Español, Una Lenga Viva*).

spoken by about 7.3% of the LEP population.[503] These individuals use financial products and services, but those who are not proficient in English have greater difficulty navigating the marketplace and resolving challenges when they arise.

Many lenders conduct market research to tailor their sales pitches to members of the LEP community, including advertising financial products to LEP consumers in their own languages. Borrowers facing delinquency and default, however, too often face an English-only system, creating additional barriers to responding to debt collection efforts and overcoming financial distress.

Debt collection is a significant issue in many LEP communities. For example, the metropolitan area in the U.S. with the highest proportion of the population with a debt in collections reported in their credit file, McAllen, TX, is 85% Latino,[504] with 32% of the working-age population considered to be LEP.[505] Because LEP populations tend to experience poverty at much greater rates, they also are likely to face greater challenges paying their debts. In 2013, about 25% of LEP individuals lived in households with an annual income below the official federal poverty line—nearly twice as high as the share of English-proficient persons.[506]

Debt collection abuses in the LEP community are reflected in several FTC enforcement actions addressing abusive debt collection targeting Spanish-speaking debtors.[507] The joint FTC-CFPB Debt Collection and the Latino Community Roundtable in October 2014 also highlighted debt collection challenges in LEP communities.[508] Participants reported that LEP debtors tend to be less likely to challenge any representations made by a debt collector, including the amount owed.[509] Translation issues result in problems, such as LEP debtors believing that a caller from

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503 U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates, American Community Survey tbl. B16001 (accessed July 27, 2019), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

504 Caroline Ratcliffe et al., Urban Inst., Delinquent Debt in America (2014), *available at* http://www.urban.org/research/publication/delinquent-debt-america/view/full_report.

505 Fred Dews, Brookings Now, Brookings Inst., *Six Questions about the Limited English Proficient Workforce* (Sept. 24, 2014), *available at* https://www.brookings.edu/blog/brookings-now/2014/09/24/six-questions-about-the-limited-english-proficient-lep-workforce/.

506 Jie Zong & Jeanne Batalova, Migration Policy Inst.,*The Limited English Proficient Population in the United States* (July 8, 2015), *available at* http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states.

507 FTC vs. Centro Natural Corp., No. 14-23879-CIV, Complaint (S.D. Fl. Oct. 20, 2014) ($1.5 million judgment against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief), *available at* https://www.ftc.gov/system/files/documents/cases/141023centrocmpt.pdf.; FTC v. RTB Enters.,Inc. , No. 4:14-cv-01691, Complaint (S.D. Tex. June 19, 2014) (monetary judgment of $4 million against abusive Texas-based debt collector that targeted Spanish and English speakers), complaint available at https://www.ftc.gov/system/files/documents/cases/140625rtbcmpt.pdf.; FTC v. Rincon Mgmt. Servs., L.L.C., No. 5:11-cv-01623-VAP-SP, Complaint (C.D. Cal. Mar. 26, 2014) (monetary judgment of over $23 million against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111026rinconcmpt.pdf.

508 A video of the roundtable and a Spanish language transcript are available at http://www.consumerfinance.gov/about-us/blog/live-from-long-beach/.

509 *Id.*

a “debt collection agency” is in fact from a government agency. Even when translated documents are provided, they may be only partially translated, failing to provide meaningful access while also concealing key facts about the situation.[510] Work with our partners in the field also reveals challenges for LEP debtors. For example, translation problems may result in the use of the word “delinquent” (“delincuente”), calling to mind criminal penalties even where none apply.[511]

The CFPB’s Fall 2016 Supervisory Highlights publication further underlines the importance of providing LEP protections in debt collection. The CFPB stated that it continues to encourage lenders to assist LEP consumers.[512] It also noted that examiners have observed financial institutions providing services in languages other than English, including to LEP consumers, such as marketing and servicing of loans, collection of customer language information, translation of monthly statements and payment assistance forms, oral customer assistance including multilingual/bilingual staff, and quality assurance testing and monitoring of non-English services. These market changes are welcome developments. However, the CFPB’s 2017 survey of consumers showed that only 79% of consumers contacted about a debt in collection were able to communicate in their preferred language.[513] Given that a large majority of the respondents likely were native English speakers, the fact that over 20% of those surveyed had been unable to communicate with a debt collector in their preferred language is significant.[514]

A report by the Kleimann Communications Group from 2017, produced for Freddie Mac and Fannie Mae, found that where translated documents are not available, LEP borrowers must resort to relying on friends and family members to convey crucial financial information.[515] Placing the burden of interpreting technical, legal, or financial information on individuals who lack professional training and knowledge of financial transactions or the implications of debt collection compromises the consumer’s ability to make a well-informed decision. It also means that sensitive financial information will be revealed to the third party who is doing the translation.

Requiring enhanced LEP access at the debt collection phase is an important part of assuring that consumers have fair market access throughout the life of the loan, including at a stage that may have a long-term impact on their credit history. A failure to provide information to LEP borrowers in their preferred language limits their ability to enforce critical consumer rights.

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[510] *Id.*

[511] Telephone interview with Carla Leticia Sanchez-Adams, Texas RioGrande Legal Aid, Jan. 9, 2017.

[512] *See* Consumer Fin. Prot. Bureau, Supervisory Highlights: Fall 2016, at 22, *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

[513] Consumer Fin. Prot. Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB’s Survey of Consumer Views on Debt (Jan. 2017), *available at* http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[514] The CFPB did not release the data for responses to the question “Is English your preferred language?” The CFPB noted that the 79% who communicated in their preferred language was lower than expected, although the CFPB believed that some respondents might have misunderstood the question. *See id.* at 47 n.34.

[515] Kleimann Communication Group, Language Access for Limited English Proficiency Borrowers: Final Report 14 (April 2017), *available at* https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-Access-FinalReport-June-2017.pdf.

Misconceptions about the laws surrounding debt collection abound in immigrant communities, and are heightened by language barriers. The potential for harassment and exploitation caused by this informational and language gap is substantial.

We support the Bureau's effort to incorporate LEP protections into the debt collection regulations. However, we urge the Bureau to expand the translation *options* into reasonable *requirements*, and we provide more detailed recommendations below.

11.5.3 Recommendations to expand protections for LEP consumers

11.5.3.1 Introduction

In its proposal, the Bureau has identified two steps that could significantly increase the extent to which the features of debt collection are fully, accurately, and effectively disclosed, without imposing an undue burden on the collection industry. These two steps are, first, including in the validation notice a phrase explaining how a consumer may obtain the letter in Spanish, and, second, providing a complete and accurate translation of the validation notice into any language when appropriate.[516]

While these two steps would greatly advance the goals the Bureau aims to fulfill, they will not move the needle if they remain merely voluntary. In order to make a meaningful difference in providing clear disclosures to LEP consumers, mandates are necessary.

As discussed below, we urge the Bureau to require the Spanish phrase in all validation notices, and to require the translated validation notice in reasonable circumstances, including any time a consumer so requests. We note that the notice will be most effective if the statement tells the reader that the letter is an attempt to collect a debt and also provides contact information for the collector. We also outline additional recommendations that would support the goal of effective and full disclosures for LEP consumers.

11.5.3.2 The CFPB should require the Spanish phrase in all validation notices, and require a translated notice under certain circumstances.

More than 16 million individuals, approximately 5.4% of the United States population ages five and over recorded in the American Community Survey, are Spanish speakers with limited

[516] 84 Fed. Reg. at 23,351.

English proficiency.[517] It is likely that this number is even higher than reported given concerns about undercounting immigrants generally[518] and Latinos specifically.[519]

The Bureau should require debt collectors to include in every validation notice a statement that describes what the notice is and notifies consumers that they may request it in Spanish. This information should be at the top of the notice, centered, directly below the phrase on the model form that states: "North South Group is a debt collector. We are trying to collect a debt that you owe to Bank of Rockville. We will use any information you give us to help collect the debt." The Spanish disclosure could be those exact three phrases translated into Spanish, followed by the additional phrase "Póngase en contacto con nosotros para solicitar una copia de este formulario en español." Or, a shorter option would be: "Esta notificacion intenta colectar una deuda. Póngase en contacto con nosotros para solicitar una copia de este formulario en español." This statement translates as: "This notification is an attempt to collect a debt. Contact us to request a copy of this form in Spanish."[520] Whichever option the Bureau elects, the Spanish notification must inform Spanish-speaking consumers of what this form is, so that they understand why they might want to request the form in Spanish. Accordingly, this Spanish notification must be at the top of the letter, easily visible, rather than buried in a subsection.

Brief information should also be provided in Spanish on how to contact the collector for a translated copy (such as a phone number, email address, or returning the tear-off form with the right box checked). It is essential that the reader be told what the document is, as well as that it can be obtained in Spanish. Without knowing the nature of the document, the reader may not know the importance of understanding its contents. This required information should be in bold font and located at the top of the notice, immediately below the phrase "We will use any information you give us to help collect the debt."

In addition to including the Spanish statement in all validation notices, the Bureau should require collectors to automatically provide a translated validation notice in the consumer's preferred language without waiting for a consumer request whenever the Bureau has published a model translation on its website and any one of the following is true:

- The collector has already communicated with the consumer in the non-English language before sending a validation notice;
- The collector has received information in the file from the creditor or a prior collector indicating the consumer's language preference;

[517] U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates, American Community Survey tbl. B16001 (accessed July 27, 2019), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (16.4 million individuals age five and over are estimated to be Spanish speakers who speak English less than "very well").

[518] *See* The Leadership Conference, Immigrants and the Census, *available at* http://www.civilrights.org/census/messaging/immigrants.html.

[519] William P. O'Hare et al., Child Trends, The Invisible Ones: How Latino Children Are Left Out of Our Nation's Census Count (Apr. 2016), *available at* https://www.scribd.com/document/314525078/The-Invisible-Ones-How-Latino-Children-Are-Left-Out-of-Our-Nation-s-Census-Count.

[520] Spanish translations were developed in cooperation with members of the Americans for Financial Reform (AFR) language access working group who are native Spanish speakers.

- The collector receives a request from the consumer seeking any information in the consumer's preferred language, including the proposed tear-off portion of the validation notice; or

- A collector later communicates with the consumer in a non-English language, in which case the collector should be required to send the translated validation notice at that time.

Because approximately 63% of the LEP population speaks Spanish, requiring collectors to notify consumers that a Spanish translation is available and to send the translated notice upon any of these triggers would meaningfully augment consumer understanding for millions of LEP consumers with debts in collection. Of course, requiring that collectors simply provide the validation notice in Spanish to all consumers at the same time they originally provide it in English would be even more effective, and might be less costly for collectors to implement. The relative costs and convenience of sending the Spanish validation notice to some versus all consumers is discussed in § 11.5.4.1, *infra*.

In some cases, the collector may learn that the consumer has a preference for a language other than English or Spanish after sending out the validation notice. If the language is one for which the Bureau has at that time published a model translation, collectors should be required to re-send the validation notice in the relevant language within five business days of learning that the consumer has a preference for one of the languages in which the CFPB has provided translated documents.[521]

Using a translation provided by the Bureau would limit both collectors' translation costs and their litigation risk, especially under the Bureau's proposal that any translation adopted from the Bureau's website would be deemed complete and accurate.

11.5.3.3 The Bureau should translate the validation notice Into additional languages.

After Spanish, the top seven languages spoken by LEP individuals are Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole, spoken in the aggregate by over five million individuals in the United States.[522] These seven languages plus Spanish, which we refer to as the top LEP languages, should be targeted by the CFPB for access to translated documents. By the time the final regulations are in effect, the Bureau should translate, conduct consumer testing on the translations, and publish on its website the validation notice in these top eight languages. In future years, as immigration patterns change, different languages may become the top LEP languages, and the CFPB should expand its translation services and requirements to encompass the most common languages.

Mistranslation or poor translation of the validation notice exposes consumers to the risk of significant harms if their rights are not explained clearly and accurately. An example from a legal services organization in Texas illustrates the potential problem: an elderly debtor was told

[521] One way this could occur is if the validation notice goes out and, at the top, the collector includes a statement that translations into other languages are available, and provides a website and phone number for requesting such documents. This is discussed further below.

[522]U.S. Census Bureau, *2017 American Community Survey 1-Year Estimates*, American Community Survey tbl. B16001 (accessed July 27, 2019), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

repeatedly by a Spanish-speaking collector that his debt was “delinquent,” but the debt collector incorrectly translated the term as “delincuente” instead of “moroso” or “atrasado.” The term “delicuente” in Spanish means “criminal” (used as a noun), or “showing a tendency to commit a crime” (when used as an adjective). The debtor believed he was being accused of a crime for not paying an unidentified debt, causing him severe distress that impacted his physical health.[523] By providing model translations on its website, the Bureau could prevent the consumer harm that arises when poor translation or mistranslation happens in the context of collections that already are being conducted in languages other than English.

By providing complete and accurate translations of the validation notice accessible to speakers of the top eight LEP languages, the CFPB would be able to ensure that most LEP debtors in the country receive this key disclosure of rights in a form they can understand. When notices are available in languages other than Spanish, the Bureau should include on the model validation notice relevant information indicating that they are available. This could be done by prominently printing the names of other languages available onto the validation notice in those languages and then providing a web link or phone number for requesting translated disclosures. For example, once the Bureau has translated the validation notice into these additional languages, the validation form could include the following line:

中文 Tiếng Việt ⌧⌧⌧ Tagalog Русский العربية Kreyòl Ayisyen - (800) 222-1234 or www.northsouthgroup.com

This information should be presented in addition to the short, translated explanation in Spanish, since it is the most prevalent LEP language.

In addition to adopting these two narrow requirements and providing model translations, the CFPB should expand its proposal in the limited ways described below.

11.5.3.4 The Bureau should consider including a proposed disclaimer regarding services available in-language.

If collectors raise concerns about providing a translated validation notice in the consumer’s preferred language, the Bureau could include in the translated notice an additional sentence that would serve as a disclaimer, notifying the consumer that other information may not be available in the preferred language. For example, a translated statement could be provided as follows:

“Although you are receiving this Debt Validation Notice in [Language], other communications may occur in English.”

However, if the collector provides for oral communication in the consumer’s preferred language, and if it includes the optional disclaimer, it should be required to disclose immediately after the disclaimer, “You may speak with a representative in [Language] by dialing ___.” This additional information about available oral interpretation is necessary in order to give complete and accurate information, so that a disclaimer of further services in-language would not be deceptive or misleading. This optional disclaimer (and, where appropriate, disclosure of the availability of oral interpretation) would be printed only on the translated debt validation notice, not the English notice.

[523] Telephone interview with Carla Leticia Sanchez-Adams, Texas RioGrande Legal Aid, Jan. 9, 2017.

11.5.3.5 The Bureau should adopt certain aspects of its proposals.

We support adoption of the following aspects of the proposed rule:

- Adopt the proposal to include in the tear-off form a check box, "I want to receive this form in Spanish" as required by Proposed § 1006.34(d)(vi)(B), but the proper translation should be, "Quiero este formulario en español."

- Adopt Proposed Comment 34(e)-1, which deems a validation notice using the CFPB's published translation as complete and accurate, while also permitting a collector to create its own complete and accurate translation.

"Formulario" is the proper Spanish translation of the word "form." The word "forma" is not a proper translation, and will lead to confusion among many Spanish speakers. In order to ensure the accuracy of its translation of the explanation of how to obtain a translated notice, and the translated notices themselves, the Bureau should conduct consumer testing of each of these with consumers from different regions and Spanish dialects.

The CFPB should:

- Carry out consumer testing of the translated statements to be included in the validation notice, as well as any translations of the entire validation notice.

We support the Bureau's Proposed Comment 34(e)-1, which would deem the translations published by the Bureau to be complete and accurate. Relying on the Bureau's translation will be less costly to collectors and, since the Bureau can engage in consumer testing, should improve the clarity of the translation. It is also appropriate to shield collectors from liability if they use a translation that has been vetted by the Bureau and that the Bureau believes to be complete and accurate.

11.5.3.6 Language preference information should be collected, retained, and transferred.

In order to make these limited translation requirements meaningful, collectors must be required to collect and retain information about language preference. Collectors should be required to have reasonable systems in place to record language preference once it is known, to ensure that translated validation notices are sent as appropriate, and to enable the collector to pass that information along to the original creditor and any future collector. Systematically recording such information will allow collectors to:

- provide validation notices in the appropriate language (where CFPB translations exist, or if they become available);

- assign calls to bilingual employees, where available;

- respond more quickly to oral inquiries from LEP consumers using bilingual staff or language line resources, where available;

- ensure that LEP consumers can access any other services or information that the collector makes available in-language; and

- transmit this information to other debt buyers, debt collectors, or the original creditor.

An expression of language preference should be treated as a request for a translated validation notice, triggering the obligation to track such information and provide the translated notice if the CFPB has made a model translation available on its website.

As of 2016, one-quarter of debt collectors already maintained language preference information in the file in a form that could be transmitted to their subsequent collectors.[524] The fact that one-quarter of collectors already had capacity to track language preference and transmit such information means these systems could be used as a basis for developing industry-wide protocols. Transfer of such data would aid debt buyers and debt collectors in complying with the debt collection regulations and may even facilitate more effective collection.

11.5.4. Responses to specific questions posed by the Bureau

We respond below to the questions posed by the Bureau in relation to its language access proposal.[525]

11.5.4.1 Benefits, costs, and risks of allowing and requiring translated validation notices

Significant Benefits: Making translated validation notices available to LEP borrowers would enhance access to crucial information for these consumers while increasing the likelihood that collectors would be able to reach them and obtain payment. As a significant portion of the population is LEP, as discussed above, providing translated validation notices covers important portions of the market.

Mandating a notice to consumers in Spanish, stating that a translated validation notice is available, would ensure that consumers whose primary language is Spanish have access to validation information. Merely permitting, rather than mandating, the notice would create uncertainty regarding whether consumers could expect such information and inhibit the ability of collectors to communicate with consumers. Moreover, the burden of adding a brief statement in an existing document is minimal, at most.

Limited risk: Providing brief statements of the availability of translated validation notices, and the translated notices themselves where they have been posted by the Bureau, would not pose a significant risk to collectors. Such actions would not create an obligation to provide further services in-language where they are not available. As noted above, the Bureau should provide a disclaimer statement on model translated notices telling the consumer that additional in-language services may not be available (although the Bureau should also provide an alternative statement that a collector that makes oral translation available should use). Such a disclaimer will prevent any misunderstanding on the part of consumers regarding the scope of the

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[524] Josh Adams, ACA International, *Business Practices and Capabilities within the Debt Collection Industry* (Nov. 2016).

[525] *See* 84 Fed. Reg. at 23,351-23,352.

translations they should expect to receive.[526] Relying on model translations vetted by the Bureau would also limit collector liability for flawed translations. This is an additional reason why we support the Bureau's proposal to deem a translation complete and accurate if the collector uses the Bureau's published translation.

Limited cost: The cost of adding a brief statement in Spanish on the English validation notice, stating that a translated version is available, provides key language access without imposing any significant cost burden on collectors. The language would essentially be pre-incorporated into the model validation notice, making its addition essentially free. A mandate streamlines the process, rather than leaving collectors to add it to their own forms or determine when to add it.

While providing translated validation notices may cause collectors to incur some costs, the benefits outweigh the costs because of the importance of providing language access and the limited nature of the additional obligation to collectors. The rule we propose limits provision of the translated notice only to circumstances where an actual LEP consumer will receive the information. Moreover, our research indicates that collectors' computer systems will be able to maintain such information once it is entered as part of routine recordkeeping. To the extent that collectors are raising concerns about cost, the Bureau should examine the elements of such concerns, rather than basing any decisions on summary or conclusory information provided by collectors (such as a total dollar cost without any documentation or breakdown).

The cost of keeping track of which consumers should receive a translated notice and sending it to them in a separate mailing should not be significant. Yet some collectors might conclude that it is cheaper or less cumbersome for them to simply mail a Spanish validation notice to all consumers when they originally mail the English version. At most, sending the Spanish notice in all mailings requires one extra piece of paper. It should not drive up the cost of postage and would not involve an additional envelope. Using mail merge technology that is commonly used by collectors, it would simply require filtering the same data fields from the English letter (amount owed, name of collector, name of creditor, etc.) into the Spanish translated template. This is fast and easy to do using technology that is commonplace in the market. Therefore, sending the Spanish validation notice to all consumers might be even less costly than sending it only to individuals who request the translated version. Moreover, to the extent that consumers have consented to receive the validation notice electronically, there would be essentially no cost to the debt collector to provide the Spanish translation automatically in addition to the English one.

11.5.4.2 Sample instructions

As we noted above, we recommend that the Bureau require all collectors to include at least the following brief notifications in the validation notice:

- The validation notice should disclose: "Esta notificacion intenta colectar una deuda. Póngase en contacto con nosotros para solicitar una copia de este formulario en español." This statement translates as: "This notification is an attempt to collect a debt.

[526] *See* Consumer Fin. Prot. Bureau, Spotlight on Serving Limited English Proficient Consumers: Language Access in the Consumer Financial Marketplace 22 (Nov. 2017), *available at* https://www.consumerfinance.gov/data-research/research-reports/spotlight-serving-limited-english-proficient-consumers/ (indicating that some institutions use disclosures or other forms of messaging to inform customers and set expectations about the scope of language access available).

Contact us to request a copy of this form in Spanish."[527]

- On a tear-off that the consumer can return to the collector with a box checked, the text should include the statement: "Quiero esta formulario[528] en español."

- Brief information also should be provided in Spanish on how to contact the collector for a translated copy (such as a phone number, email address, and mailing address for a tear-off sheet). For example: "Por teléfono: 1-800-222-2345; En linea: www.NorthSouthGroup.com/spanish."

11.5.4.3 Benefits or risks of supplemental language explaining how to get the form in Spanish

In order for the brief Spanish notice on the English validation notice to be effective, the statement telling consumers that they can receive the notice in Spanish, for example, needs to be accompanied by two other pieces of information. First, they need to be told *what* the notice contains, *i.e.*, that it is an attempt to collect a debt, so they know that it is important to understand it. Second, they need to be told *how* to get the translated notice. Otherwise, a notice that a Spanish version is available has little meaning. Thus, the brief Spanish notice on the validation notice should contain three elements, as described above: that the letter is an attempt to collect a debt; that the notice is available in Spanish (or other languages where applicable); and how to contact the collector to obtain the translated notice (plus any pertinent information on the availability of oral interpretation, where applicable).

<u>Recommendations</u>: **The CFPB should adjust its proposed rule regarding access to translations as follows:**

- **Require all collectors to include in the validation notice a brief notification in Spanish that explains what the notice is and states that the consumer may request it in Spanish. For example: "Esta notificación intenta colectar una deuda. Póngase en contacto con nosotros para solicitar una copia de este formulario en español." This statement translates as: "This notification is an attempt to collect a debt. Contact us to request a copy of this form in Spanish." Brief information should also be provided in Spanish on how to contact the collector for a translated copy (such as a phone number, email address, and mailing address for a tear-off sheet). This required information should be in bold font and located at the top of the notice, immediately below the phrase "We will use any information you give us to help collect the debt."**

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[527] Spanish translations were developed in cooperation with members of the Americans for Financial Reform (AFR) language access working group who are native Spanish speakers. In the alternative to this short phrase, the Bureau could translate the three-sentence disclosure at the top of the model notice into Spanish, followed by "Póngase en contacto con nosotros para solicitar una copia de este formulario en español."

[528] As noted below, the word "formulario" should be used, as "forma" is not a proper Spanish word.

- **Require all collectors to provide a complete and accurate translation of the debt validation notice in the consumer's preferred language, provided that the Bureau has published on its website a translation of the validation notice into that language, upon any of the following triggers being met:**
    - **Collector has already communicated with the consumer in the non-English language before first sending a validation notice;**
    - **Collector has received information in the file from the creditor or a prior collector indicating the consumer's non-English language preference;**
    - **Collector receives a request from the consumer seeking any information in the consumer's preferred language, including the proposed tear-off portion of the validation notice; or**
    - **Collector later communicates with the consumer in a non-English language.**

The translated validation notice would be sent either with the English-language notice or after the English notice, depending on when the collector's obligation is triggered.

- **Adopt the proposal to include in the tear-off form a check box "I want to receive this form in Spanish," but the proper translation should be, "Quiero este <u>formulario</u> en español."**
- **Provide translations of the validation notice on its website, and deem complete and accurate a validation notice using the CFPB's published translation, while also permitting a collector to create its own complete and accurate translation.**
- **Before finalizing the rule, carry out consumer testing of the translated short phrases to be included in the validation notice, as well as any translations of the entire validation notice.**
- **Require collectors to track language preference information in their computer systems and transfer such information to the original creditor and any subsequent collectors.**

12. § 1006.38 Disputes and requests for original-creditor information

12. 1 § 1006.38: Generally

12.1.1 Overview

Section 1006.38 contains proposed regulations issued under § 1692g(b) and (c) of the FDCPA, covering prohibited actions during the validation period and required responses to disputes and requests for original-creditor information.

12.1.2 Comment 38-1: Decedent debt

In Proposed Comment 38-1 the Bureau clarifies that, if a debt collector knows or should know that a consumer is deceased and a person authorized to act on behalf of the estate requests the name and address of the original creditor or submits a dispute timely in writing, that person operates as the consumer for purposes of § 1006.38. However, the debt collector must respond only if the deceased consumer had not previously disputed the debt or requested the creditor information, and the dispute or request for original-creditor information is "timely" submitted during the validation period. Section 1006.34(b)(5) would define the validation period as: "the period starting on the date that a debt collector provides the validation information described in paragraph (c) of this section and ending 30 days after the consumer receives or is assumed to receive the validation information. For purposes of determining the end of the validation period, the debt collector may assume that a consumer receives the validation information on any date that is at least five days (excluding legal public holidays, Saturdays, and Sundays) after the debt collector provides it."

As recommended in our discussion of § 1006.6(a) at § 4.1, *supra*, the Bureau should clarify who is encompassed by the term "a person who is authorized to act on behalf of the deceased consumer's estate." Next, as recommended in our discussion of Proposed Comment 34(a)(1)-1 at § 11.1.2, *supra*, the Bureau should require a new validation notice to a person authorized to act on behalf of the deceased consumer's estate, even if a copy was previously provided to the deceased consumer. We reiterate those comments here.

The Bureau should amend Proposed Comment 38-1 to say that the validation period runs from the date the validation notice is sent to the person authorized to act on behalf of the deceased consumer's estate. It is highly unlikely that, if the consumer passes away during the brief window represented by the validation period, the person authorized to act on behalf of the deceased consumer's estate will be able to go through the paperwork of the deceased consumer to identify validation periods on alleged debts that may be expiring soon, investigate the validity of such claims, and make disputes or request original-creditor information as needed. In short, limiting this comment to disputes that would have been "timely" based on the validation notice provided to the deceased consumer effectively means that almost no authorized representatives will be able to utilize the dispute period.

The CFPB should also amend this comment to require debt collectors to respond to a dispute or request for original-creditor information submitted by an authorized representative even if one was previously provided to the deceased consumer, and even if the request was duplicative. In many cases, personal representatives will not be able to locate key documents that were possessed by the deceased and that are crucial to knowing how to respond to claims against the estate. Providing such information again, or responding to additional disputes, will not represent a significant burden to the debt collector. Indeed, the debt collector should give an authorized representative information and documents regarding any prior request for original-creditor information or disputes submitted by the deceased consumer and all responses provided by the debt collector to the deceased consumer without waiting for a request, since it is unlikely that the authorized representative would know to request them.

<u>Recommendations</u>: **The Bureau should:**

- **Amend Proposed Comment 38-1 to say that the time period for submitting a request for the name and address of the original creditor or to dispute the debt should start when the defined authorized person receives a validation notice from the collector under § 1006.34.**

- **Require debt collectors to respond to any disputes or requests for original- creditor information by the "authorized person," even if duplicative.**

- **Require debt collectors to automatically provide information and documents regarding any prior request for original-creditor information or disputes submitted by the deceased consumer and all responses provided by the debt collector to the deceased consumer.**

12.1.3 Comment 38-2: Definition of "in writing"

In Proposed Comment 38-2, the CFPB proposes to clarify that the requirement under Proposed § 1006.38(c) and (d)(2) that requests for original-creditor information and disputes to be "in writing" is satisfied by:

- Delivery of a written document by mail;

- Return of the consumer response tear-off form described in § 1006.34(c)(4);

- "[U]sing a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as an email address or a website portal"; or

- Delivery of a written document in person or by courier.

We support the inclusion of each of these methods of complying with the "in writing" requirement, including the inclusion of any electronic communication channel being used by the debt collector to communicate with consumers.

12.2 § 1006.38(a): Definitions

Proposed § 1006.38(a) would define the term "duplicative dispute" for the purposes of this section as:

> [A] dispute submitted by the consumer in writing within the validation period that: (i) Is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied the requirements of paragraph (d)(2)(i) of this section; and (ii) Does not include new and material information to support the dispute.

Comment 38(a)(1)-1 clarifies that "[a] later dispute can be substantially the same as an earlier dispute even if the later dispute does not repeat verbatim the language of the earlier dispute." Comment 38(a)(1)-2 clarifies that "[i]nformation is new if the consumer did not provide the information when submitting an earlier dispute. Information is material if it is reasonably likely to change the verification the debt collector provided or would have provided in response to the earlier dispute." As an example, it states that a copy of a cancelled check showing payment that had not previously been submitted would be new and material information.

It is very unlikely that consumers would submit a duplicative dispute as defined here, because the definition would require submitting not one but two disputes in writing during the brief validation period.[529] In addition, the proposed rule defines a duplicative request as one that is submitted after the collector has already responded. Since collectors are not required to respond in the validation period, this makes it even less likely that a consumer would file a duplicative dispute during that time period.

However, to the extent that two disputes are submitted as defined, the proposed definition gives too much discretion to debt collectors. As outlined, debt collectors will be left to determine whether the disputes are "substantially the same." Similarly, this definition allows debt collectors to treat disputes as duplicative if any additional information is not "likely to change the verification," but whether or not new information is going to change the verification is also up to the discretion of the debt collector. See our comments regarding § 1006.38(d) in § 12.5, *infra*, for discussion of the proposed application of this definition.

The Bureau also notes that, for the purpose of § 1006.38, the term "validation period" has the meaning set forth in the definition at § 1006.34(b)(5). Please see our comments about that section in § 11.2.5, *supra*, for a discussion of the definition of "validation period."

***Recommendation*:** **The Bureau should amend the proposed definition of "duplicative dispute" to provide more objective criteria for when a dispute is duplicative.**

12.3 § 1006.38(b): Overshadowing of rights to dispute or request original-creditor information

[529] As the CFPB previously acknowledged, "[c]onsumers appear to submit a large share of their disputes orally or more than 30 days after receipt of a validation notice . . ." SBREFA Outline at 43.

The text of Proposed § 1006.38(b) restates the prohibition on overshadowing contained in § 1692g(b), with only minor modifications. We do not have any concerns about the manner in which it was restated.

12.4 § 1006.38(c): Requests for original-creditor information

Proposed § 1006.38(c) restates the requirement in § 1692g(b) that debt collectors cease collection of the debt until the debt collector provides original-creditor information if the consumer submits a written request for such information within the validation period. This section further states that debt collectors must "provide," rather than "mail" as required by the FDCPA, the information "in writing or electronically in a manner permitted by § 1006.42." Please see our comments on § 1006.42 in § 13, *supra,* for a detailed discussion of our concerns about the proposals contained in that section.

12.5 § 1006.38(d): Disputes

12.5.1 Admission of liability

Proposed § 1006.38(d)(1) restates the provision in § 1692g(c) that failure to dispute a debt is not an admission of liability, with only minor modifications. We do not have any concerns about the manner in which it was restated.

12.5.2 Response to disputes

12.5.2.1 Responding to disputes generally

Proposed § 1006.38(d)(2) and (d)(2)(i) restate the requirement in § 1692g(b) that, if the consumer submits a written dispute within the validation period, the debt collector must cease collection of the debt until it provides verification of the debt or a copy of a judgment. Section (d)(2)(i) further states that the debt collector must "provide," rather than "mail" as required by the FDCPA, the verification or copy of the judgment "in writing or electronically in a manner permitted by § 1006.42." Please see our comments on §1 006.42 in § 13, *infra*, for a detailed discussion of our concerns about the proposals contained in that section.

12.5.2.2 Responding to duplicative disputes

The proposed rule provides other steps that debt collectors can take to respond in the case of a dispute that the debt collector "reasonably determines is a duplicative dispute." Specifically, Proposed § 1006.38(d)(2)(ii) would allow the debt collector either to provide a copy of the verification or judgment that was previously provided in response to the initial dispute under § 1006.38(d)(i) or to notify the consumer that the dispute is duplicative, explain why the debt collector believes it is duplicative, and simply refer to the prior response to the dispute.

Comment 38(d)(2)(ii)-1 clarifies that the debt collector could comply with the explanation prong "if the notice states that the dispute is substantially the same as an earlier dispute submitted by the consumer and the consumer has not included any new and material information in support of the earlier dispute." Comment 38(d)(2)(ii)-1 clarifies that the reference to the prior response prong is satisfied if "the notice states that the debt collector responded to the earlier dispute and provides the date of that response." The notice would have to be "in writing or electronically in a manner permitted by §1006.42." Please see our comments on Proposed § 1006.42 in § 13, *infra*, for a detailed discussion of our concerns about the proposals contained in that section.

As discussed in our comments regarding § 1006.38(a)(1) in § 12.2, *supra*, we are concerned that the definition of "duplicative dispute" leaves too much to the discretion of the debt collector. Similarly, this proposal for alternative responses to duplicative debts creates an additional layer of discretion for debt collectors who "reasonably determine[]" that the debt is duplicative. We are concerned that there will be too much room for debt collectors to unfairly treat disputes as duplicative.

In its discussion of duplicative disputes, the CFPB notes that "[c]onsumers may submit repeat disputes for various reasons" and lists desire to avoid paying their debts, disagreement with the outcome of an earlier dispute, and unfamiliarity with the dispute process as possible reasons. Another reason that consumers submit duplicate disputes is because of the unsatisfactory nature of the answers that they receive from debt collectors in response to disputes. Indeed, some courts have interpreted the verification requirement to impose minimal obligations on the debt collector.[530] Unfortunately, the CFPB's proposed treatment of disputes in this rulemaking would not require debt collectors to review or provide copies of original, account-level documentation substantiating the debt to consumers who make a dispute.[531] The CFPB should reduce the number of duplicative disputes by mandating that debt collectors review and provide copies of original, account-level documentation in response to consumer disputes and prohibiting debt collectors from responding to disputes by parroting summary data found in the collector's database.

The CFPB cites as the justification for this provision the fact that 10-20% of consumer disputes are duplicative.[532] However, the CFPB acknowledges that it does not know how many of these would be "repeat disputes filed within the 30-day validation period."[533] As we stated in our comments regarding § 1006.38(a)(1) in § 12.2, *supra*, it is unlikely that there are many duplicative disputes within the narrow time frame of the validation period. The CFPB should eliminate the alternative response to disputes proposed in § 1006.38(d)(2)(ii)(A) or, at a minimum, limit debt collector discretion in the definition of duplicative debt.

Recommendations: **The CFPB should:**

- **Prevent duplicative disputes by requiring debt collectors to review and provide copies of original, account-level documentation in response to**

[530] *See, e.g.,* Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999) ("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"). *See also* Walton v. EOS CCA*,* 885 F.3d 1024, 1028 (7th Cir. 2018) (following *Chaudhry*); Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1173 (9th Cir. 2006) (following *Chaudhry*).

[531] *Contrast* SBREFA Outline at 10, Appx. D.

[532] 84 Fed. Reg. at 23,354.

[533] 84 Fed. Reg. at 23,354 n.536.

consumer disputes.

- **Eliminate the alternative response to disputes proposed in § 1006.38(d)(2)(ii)(A) or, at a minimum, limit debt collector discretion in the definition of duplicative debt.**

13. §1006.42 - Providing required disclosures

13.1 Overview of concerns about electronic disclosures in the proposed rules

13.1.1 Introduction

When Congress passed the FDCPA in 1977, it regarded verification rights and the written validation notice as a "significant feature" designed to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."[534]

The Bureau proposes to allow collectors to deem critical disclosures to have been provided electronically either by complying with the consent and other provisions of E-SIGN, or through a set of "alternative procedures" that are set forth in Proposed § 1006.42(c). The problem is that, for the reasons discussed below, the "alternative procedures" do not ensure that consumers will actually receive the electronic disclosures.

While some consumers regularly engage in electronic transactions, access to the internet varies considerably, as discussed in § 13.1.2, *infra*. Many of the concerns that we discuss below relate to the Bureau's failure to adequately address the reality of unequal access and what electronic disclosures will mean for consumers with unequal access.

Section 1006.42's interaction with the E-SIGN Act (E-SIGN) is also at the heart of our concerns about the Bureau's proposal. Section 13.1.3 provides background about the E-SIGN Act and §13.3.2 summarizes our concerns with the Bureau's interpretation.

13.1.2 Access to the internet is not universal

Census data shows that over 40 million Americans – approximately 13% of the population[535] - have no internet subscription in their homes. This includes the nearly 22 million Americans with

[534] S. REP. 95-382, 4, 1977 U.S.C.C.A.N. 1695, 1699.

[535] Census Bureau American Community Survey, Types of Internet Subscriptions by Selected Characteristics (2017), available at: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (21,914,826 with

a computer who lack an internet subscription,[536] and more than 18.5 million Americans without a computer.[537] People who are less likely to have access to the internet at home than average, include:

- Older Americans (65 and over) – 12.4 million (25.3%)[538]
- Black or African American – 7.8 million (19.7% of total)[539]
- Hispanic or Latino – 9.1 million (15.8% of total)[540]
- American Indian and Alaska Native – 680,671 (15.7%)[541]
- Native Hawaiian and Pacific Islander –103,023 (17.5%)[542]
- Less than a high school education – 8.1 million (32%)[543]
- High school graduate, some college, or associate's degree – 18.8 million (15.5%)[544]

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a computer but without an internet subscription + 18,532,067 without a computer = 40,446,893 / 317,631,941 total U.S. population X 100 = 12.7%).

536 "An Internet 'subscription' refers to a type of service that someone pays for to access the Internet such as a cellular data plan, broadband such as cable, fiber optic or DSL, or other type of service. This will normally refer to a service that someone is billed for directly for Internet alone or sometimes as part of a bundle." Census Bureau American Community Survey, Types of Internet Subscriptions by Selected Characteristics: View Table Notes (2017), available at: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

537 "The category 'No computer in household' consists of those who said 'No' to all of the following types of computers: Desktop or laptop; smartphone; tablet or other portable wireless computer; and some other type of computer." *Id.*

538 Census Bureau American Community Survey, Types of Internet Subscriptions by Selected Characteristics (2017), available at: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (3,773,274 with computer but no subscription plus 8,676,502 without computer equals 12,449,776 with no subscription or no computer, or 25.3% of total).

539 *Id.* (4,265,560 with computer but no subscription plus 3,542,849 without computer equals 7,808,409, or 19.7% of total).

540 *Id.* (5,781,694 with computer but no subscription plus 3,344,857 without computer equals 9,126,551, or 15.8% of total).

541 *Id.* (350,559 with computer but no subscription plus 330,202 without computer equals 680,671, or 15.7% of total).

542 *Id.* (59,808 with computer but no subscription plus 43,215 without computer equals 103,023, or 17.5% of total).

543 *Id.* (3,162,697 with computer but no subscription plus 4,951,834 without computer equals 8,114,531, or 32% of total).

544 *Id.* (9,345,171 with computer but no subscription plus 9,499,711 without computer equals 18,844,882, or 15.5% of total).

- Unemployed – 1.2 million (14.1%)[545]

- Not in labor force – 19.1 million (21.4%)[546]

Census data also shows that, among those households with an annual income below $20,000, approximately 7.5 million households (40.3%) have no internet subscription[547] through any mechanism.[548] Another 9.5 million households (18%) earning between $20,000 and $74,999 and 2.3 million households (4.9%) earning more than $75,000 per year also lacked an internet subscription.[549]

Additionally, the digital divide between urban and rural America remains an enduring one. Only 63% of Americans in rural areas have access to broadband internet at home and "15% of rural adults say they *never* go online, compared with less than one-in-ten of those who live in urban communities (9%) and those who live in the suburbs (6%)."[550] People in rural areas are also less likely to live near public wi-fi, such as public libraries, that would allow them online access.

Consumers who do have internet access at home may not always be able to rely on that access. "Among families who have home Internet access, half (52%) say their access is too slow, one quarter (26%) say too many people share the same computer, and one fifth (20%) say their Internet has been cut off in the last year due to lack of payment."[551]

According to one report, "one quarter (23%) of families below the median income level and one third (33%) of those below the poverty level rely on mobile-only Internet access."[552] Consumers who rely exclusively on internet access via smart phones may face strict data limits, especially if trying to keep phone costs low.[553] "Among families with mobile-only access, three in ten (29%)

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[545] *Id.* (749,241 with computer but no subscription plus 436,310 without computer equals 1,185,551, or 14.1% of total).

[546] *Id.* (7,500,320 with computer but no subscription plus 11,633,755 without computer equals 19,131,075, or 21.4%).

[547] "An Internet 'subscription' refers to a type of service that someone pays for to access the Internet such as a cellular data plan, broadband such as cable, fiber optic or DSL, or other type of service. This will normally refer to a service that someone is billed for directly for Internet alone or sometimes as part of a bundle." Census Bureau American Community Survey, Types of Computers and Internet Subscriptions: View Table Notes (2017), available at: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[548] Census Bureau American Community Survey, Types of Computers and Internet Subscriptions (2017), available at: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[549] *Id.*

[550] Pew Research Center, "Digital gap between rural and nonrural America persists" (2019), available at: https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/.

[551] Rideout, V. J. & Katz, V.S. *Opportunity for all? Technology and learning in lower-income families*, The Joan Ganz Cooney Center at 5 (2016), available at: http://digitalequityforlearning.org/wp-content/uploads/2015/12/jgcc_opportunityforall.pdf.

[552] *Id.*

[553] *See* Miller, G.E., "The Cheapest Data Plans for Mobile Phones," 20Something Finance (2019), available at: https://20somethingfinance.com/cheapest-data-plan-smartphones/ (Some limited-data plans

say they have hit the data limits on their plan in the past year, one-quarter (24%) say they have had their phone service cut off in the past year due to lack of payment, and one fifth (21%) say too many people share the same phone for them to be able to get the time on it that they need."[554] People who rely on mobile devices for their primary internet connections may face challenges printing and storing important documents. Storing important files on their phones can also leave them vulnerable to deletion or loss if a phone is damaged, missing, or stolen. Moreover, documents are difficult to read on small screens.

13.1.3 The E-SIGN Act's requirements

When Congress passed the E-SIGN Act in 2000, paving the way for electronic records to replace requirements for writings, it took special care to ensure that consumers would be able to actually access those electronic records. This special treatment, designed to ensure consumers' ability to receive and read important electronic records, was evidenced by E-SIGN's mandate of a very specific regimen for consumer consent in E-SIGN.

E-SIGN's consumer consent provision applies whenever a law requires information to be given to a consumer in writing. Since § 1692g of the FDCPA requires the validation notice, the collector's response to a dispute, and the collector's response to a request for original-creditor information to be given to the consumer in writing, a collector can provide this information electronically only if it complies with these E-SIGN requirements.

These requirements consist of two steps. First, the business must provide detailed disclosures to the consumer concerning the meaning of the consent, the ability to request paper copies, and the ability to cancel the consent. Second, and most importantly, E-SIGN requires that the consumer consent electronically "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information."[555] This means that consumers must demonstrate, not just affirm, that they have access to the equipment and programs necessary to receive, open, and read the relevant electronic documents.[556] Only if the consumer consents in this specific way after receiving these specific disclosures does electronic provision of a document or disclosure satisfy a statutory requirement that the document or disclosure be provided in writing.[557]

E-SIGN's consent requirement affords the consumer three separate, *invaluable* protections:

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charge by the gigabyte, discouraging low-income families from too much internet use, while prepaid limited-data plans range from $25 to $65, with varying data caps.).

[554] Rideout, V. J. & Katz, V.S. *Opportunity for all? Technology and learning in lower-income families*, The Joan Ganz Cooney Center at 5 (2016), available at: http://digitalequityforlearning.org/wp-content/uploads/2015/12/jgcc_opportunityforall.pdf.

[555] 15 U.S.C. § 7001(c)(1)(C)(ii). *See also* 146 Cong. Rec. S5224 (June 15, 2000) (statement of Senators Hollings, Wyden, and Sarbanes) ("The Act requires that consumers consent electronically—or confirm their consent electronically—in either case, in a manner that allows the consumer to test his capacity to access and retain the electronic records that will be provided to him.").

[556] *See* 146 Cong. Rec. S5216 (June 15, 2000) (comments of Senator Wyden) ("Reasonably demonstrates means just that. It means the consumer can prove his or her ability to access the electronic information that will be provided.").

[557] 15 U.S.C. § 7004(c).

- It ensures that the consumer has access to a computer and the internet to be able to access information provided electronically;

- It ensures that the consumer's means of access to electronically provided information includes the software necessary to read the electronic records provided;

- It underscores to the consumer the fact that, by electronically consenting, the consumer is agreeing to receive the described information electronically in the future.[558]

The importance of ensuring that E-SIGN's consent requirement is maintained is underscored by a joint report to Congress by the Federal Trade Commission and the Department of Commerce. The report emphasized that the purpose of the consent requirement is to "ensure that consumers who choose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions."[559] The report concluded E-SIGN's consumer consent provision "provides substantial benefits as a preventive measure against deceptive and fraudulent practices in the electronic marketplace."[560]

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558 Senator Leahy emphasized these protections when, regarding the passage of E-SIGN, he stated on the floor of the Senate:

> [This bill] avoids facilitating predatory or unlawful practices. . . . [It] will ensure informed and effective consumer consent to replacement of paper notices and disclosures with electronic notices and disclosures, so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher.
>
> * * *
>
> I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. <u>Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information. (*Emphasis added).*</u>

146 Cong. Rec. S5219–S5222 (daily ed. June 15, 2000) (statement of Senator Leahy).

559 Fed. Trade Comm'n, Elec. Signatures in Global and Nat'l Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii) at 12 (June 2001), *available at* https://www.ftc.gov/reports/report-congress-electronic-signatures-global-national-commerce-act-consumer-consent.

560 *Id*. at 12 ("Moreover, this provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent state and federal laws that contain a "writing" requirement. The consumer consent provision in Section 101(c)(1)(C)(ii) provides substantial benefits as a preventive measure against deceptive and fraudulent practices in the electronic marketplace."). *See also* Federal Trade Commission, Consumer Sentinel Network Data Book for January- December 2016 (Mar. 2017), available at https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf (detailing consumer complaint data for 2016; showing that 42% of all complaints were related to fraud, and of the consumers who identified the company's method of contact, 14% said they were approached online; of the consumers who reported fraud complaints against foreign companies and identified the method of contact, 48% said they were also approached online).

13.2 §1006.42(a) and (b): Providing required disclosures; Requirements for certain disclosures provided electronically

13.2.1 Introduction

Proposed §1006.42(a)(1) would require that "[a] debt collector who provides disclosures required by this part in writing or electronically must do so (1) in a manner that is reasonably expected to provide actual notice and (2) in a form that the consumer may keep and access later." The Bureau refers to these two requirements as its "actual notice and retainability requirements."[561] Since the proposed rule refers to disclosures required by "this part," it appears that it applies to all of the disclosures required by the proposed set of rules, which the Bureau has designated as "Part 1006" or "Regulation F."[562]

The CFPB's discussion explains that the requirement that disclosures be provided "in a manner that is reasonably expected to provide actual notice" is not intended to "require a debt collector to ensure a consumer's actual receipt of required disclosures; it would require instead a reasonable expectation of actual notice."[563] Nonetheless, Comment 42(a)(1)-1 clarifies that a debt collector "who receives a notice that the disclosure was not delivered has not provided the disclosure in a manner that is reasonably expected to provide actual notice."

Proposed §1006.42(b) spells out the steps a collector must take to comply with the actual notice and retainability requirements. In the next four subsections we express our concerns about the limited consumer protections provided by these requirements.

13.2.2 § 1006.42(b)(1): E-SIGN Act consent

The first requirement is that the debt collector obtain affirmative E-SIGN Act consent from the consumer before providing validation notices, responses to requests for original-creditor information, and responses to disputes electronically. Proposed § 1006.42(b)(1) appropriately requires the debt collector to obtain its own consent rather than transferring consent from the original creditor to the debt collector or otherwise allowing the debt collector to rely upon consent obtained by another party.

However, the CFPB would allow debt collectors to comply with alternative procedures under §1006.42(c) instead of complying with the E-SIGN Act. The CFPB should eliminate this exception and simply require compliance with the E-SIGN Act, which represents a comprehensive federal law designed to protect consumers. We comment in detail on the problems with the proposed exceptions in §§ 13.3 *infra*.

***Recommendation*: The Bureau should require collectors to obtain E-SIGN consent to provide validation notices, responses to requests for original-creditor information, and responses to disputes electronically.**

[561] 84 Fed. Reg. at 23,406.

[562] *See* Proposed § 1006.1(a).

[563] 84 Fed. Reg. at 23,355.

13.2.3 § 1006.42(b)(2): Identify purpose in subject line or first line of text

The second requirement is that debt collectors "[i]dentify the purpose of the communication by including, in the subject line of an email or in the first line of a text message transmitting the disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount." The CFPB explains that the goal of this provision is to make it more likely that consumers will open these messages, especially when they have not had any prior contact with the debt collector and do not recognize the name of the sender. Comment 42(b)(2)-1 provides examples of acceptable additional pieces of information and we provide examples of what this might look like together with the required name of the creditor in Table 1.

Table 1: Examples of Compliance with §1006.42(b)(2)

Additional Piece of Information Identifying the Debt, Other than the Amount Pursuant to Comment 42(b)(2)-1	Example of Subject Line of Email or First Line of Text Might Look Like Pursuant to §1006.42(b)(2)
truncated account number	Midland Funding, LLC, 7389
name of the original creditor	PRA, LLC, Bank of America
name of any store brand associated with the debt	Synchrony Bank, The Gap, Inc.
date of sale of a product or service giving rise to the debt	Capital One, July 23, 2013
physical address of service	Bayfront Health St. Petersburg, 701 6th St S, St. Petersburg, FL 33701
billing mailing address on the account	LVNV Funding, LLC, P.O Box 742596, Cincinnati, OH 45274-2596

These proposed subject lines are unlikely to lead many consumers to open the email or read the text message. Consumers are unlikely to recognize the name of a debt buyer that now owns and is collecting on the account and is listed as the creditor. Likewise, truncated account numbers, the date giving rise to a debt, the billing address, and even the physical address of service (absent the name of the original creditor) will be unlikely to be meaningful to the consumer without context. The store brand associated with the debt and the original creditor's name are likely to be the most meaningful. However, including the name of the original creditor may also lead to the disclosure of personal information (e.g., if the message pops up on a consumer's phone in a manner that is visible to people nearby). This will be particularly problematic if the original creditor is a medical facility and the name of the original creditor reveals sensitive health information (e.g. Dana-Farber Cancer Institute or Addiction Treatment Center of New England).

Consumers who see the odd subject lines may also simply mark the message as spam. If even a small fraction of these electronic validation notices being sent out as emails are marked as spam by consumers, email providers will also mark other similar messages as spam in other accounts and potentially by other senders if everyone is using the model validation notice.[564]

On balance, the likelihood that this proposal will cause messages to be marked as spam or result in harmful disclosures outweighs the potential benefit of this proposal. The CFPB should eliminate this requirement and instead replace it with more robust monitoring to ensure consumers' actual receipt of messages. Moreover, the best way to reach consumers with electronic validation notices, responses to requests for original-creditor information, and responses to disputes is by obtaining their consent pursuant to the E-SIGN Act. Consumers who consent to receive such disclosures electronically will be aware that they are coming and will know to check spam filters if the messages have not been received.

***Recommendation*: The CFPB should not require the subject line of an email or the first line of a text message to identify the creditor and an additional piece of information identifying the account.**

13.2.4 § 1006.42(b)(3): Notification of undeliverability

The third requirement specifies that debt collectors must permit "receipt of notifications of undeliverability" and monitor for such notices. Section 1006.42(b)(3) further says that receiving an undeliverability notice means that the debt collector cannot have a reasonable expectation of actual notice for that delivery attempt.

This requirement is grossly inadequate as a method of determining that consumers actually receive the critical information that the FDCPA requires. There are many times that the consumer might not have actual notice even though there was no "notification of undeliverability." For example:

- The consumer may have set up the email account for a limited purpose – such as while attending a particular school - and may not use that account years later when the email is sent to it.

- The consumer may no longer use the email account and may have forgotten the password.

- The message may have been marked as spam and delivered to a spam quarantine folder that very few consumers regularly check.

- The message may have never been delivered to the consumer's account at all because their e-mail provider considered it too spammy for even the spam quarantine folder (this

[564] *See, e.g.,* James Vincent, The Verge, "Gmail is now blocking 100 million extra spam messages every day with AI" (Feb. 6, 2019), available at https://www.theverge.com/2019/2/6/18213453/gmail-tensorflow-machine-learning-spam-100-million ("While rule-based filters can block the most obvious spam, machine learning looks for new patterns that might suggest an email is not to be trusted.").

happens to a lot of bulk email).[565]

- The message may have been deleted from the spam quarantine folder automatically after it was held for 30 days.[566]

- The consumer may have deleted the message without opening it.

- The consumer may check their e-mail account infrequently or not at all.

In the case of text messages, the phone number may have been reassigned to a new user,[567] which is such a typical occurrence that the Federal Communications Commission has designed an entire database for callers to check before sending robocalls to old telephone numbers.[568] If a text message is successfully transmitted to a wrong number, it will not generate an undeliverability notification.

Rather than just rely on undeliverability notifications, the CFPB should require debt collectors to monitor open rates and should preclude a reasonable expectation of actual notice where the debt collector has not received 1) any indication that the message was opened or 2) direct confirmation of receipt from the consumer. At a minimum, the CFPB should clarify that debt collectors do not have a reasonable expectation of actual notice where their records indicate that the message was not opened by the consumer.[569] When a reasonable expectation of actual

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565 Some spam messages are silently dropped by the email provider such that they never even appear in a spam folder and do not trigger a notice of undeliverability. *See, e.g.,* Spam Database Lookup, What is a DNSBL, available at: https://www.dnsbl.info/ ("Domain Name System Blacklists, also known as DNSBL's or DNS Blacklists, are spam blocking lists that allow a website administrator to block messages from specific systems that have a history of sending spam. . . If the maintainer of a DNS Blacklist has in the past received spam of any kind from a specific domain name, that server would be 'blacklisted' and all messages sent from it would be either flagged or rejected from all sites that use that specific list.").

566 *See, e.g.,* Apple, iCloud: Manage junk mail in Mail on iCloud.com, available at https://support.apple.com/kb/ph2649?locale=en_US ("messages in the Junk folder are automatically deleted after 30 days"); Google, Gmail messages are missing: I still can't find certain emails, available at https://support.google.com/mail/answer/7015314?hl=en&ref_topic=3394593 ("After 30 days, emails are permanently deleted from Spam."); Microsoft, Restore deleted email messages in Outlook.com, available at https://support.office.com/en-us/article/restore-deleted-email-messages-in-outlook-com-cf06ab1b-ae0b-418c-a4d9-4e895f83ed50 ("Email is automatically removed from the Junk Email folder after 30 days and is not recoverable."); Yahoo, Are the Trash and Spam folders regularly emptied?, available at https://sg.help.yahoo.com/kb/trash-spam-folders-regularly-emptied-sln3518.html ("Spam is deleted after 30 days.").

567 "Approximately 35 million numbers are disconnected and made available for reassignment to new consumers each year." Advanced Methods to Target and Eliminate Unlawful Robocalls, 83 FR 17631, 17632 (Apr. 23, 2018).

568 *See* Federal Communications, Commission, FCC Creates Reassigned Numbers Database to Combat Unwanted Robocalls (Dec. 12, 2019), available at: https://www.fcc.gov/document/fcc-creates-reassigned-numbers-database-combat-unwanted-robocalls.

569 *See, e.g.,* Lavallee v. Med-1 Sols., LLC, 2017 WL 4340342, at *2 (S.D. Ind. Sept. 29, 2017), aff'd Lavallee v. Med-1 Sols., LLC, 932 F.3d 1049 (7th Cir. 2019) ("Med-1 Solutions know too, however, that Ms. Lavallee never viewed or accessed the .pdf "secure package" document for either debt. That is because the vendor's system "records any attempt to view [the .pdf document, or "secure package"]" and there was no record of any attempt to view the secure packages.")

notice is precluded under these standards, the debt collector should be required to mail a paper disclosure to the consumer.

However, because of the high possibility that the wrong person could have opened the message, even monitoring for open rates will not make the use of the alternative procedures for E-SIGN compliance in §1006.42(c) acceptable.

***Recommendation*: The Bureau should not allow collectors to rely on undeliverability notices, but should require them to resend validation notices, responses to requests for original-creditor information, and responses to disputes by mail if the consumer has not opened the electronic message conveying the information or confirmed its receipt.**

13.2.5 § 1006.42(b)(4): Readability on different size screens

The fourth requirement specifies that, for validation notices only, the disclosure must be readable on "a screen of any commercially available size and via commercially available screen readers." Comment 42(b)(4)-1 provides examples of how to achieve the important goals of readability on mobile devices with a responsive format and accessibility for people with disabilities by making the message machine readable. These are important consumer protections, and they will be even more widely adopted if the CFPB releases source code that would comply with these requirements, as it proposes to do.[570] However, mobile format compatibility and machine readable formats will not make validation notices in electronic format the right choice for every consumer. The discussion in the next section explains some of the barriers to access that make it critical to pair this proposal with actual E-SIGN Act compliance rather than the alternative approaches proposed in §1006.42(c).

***Recommendation*: The Bureau should follow through on its proposal to release source code that will help collectors ensure that electronically-sent validation notices are readable on different screen sizes.**

13.3 §1006.42(c): Alternative procedures for providing certain disclosures electronically

13.3.1 Overview

Proposed §1006.42(c) provides complicated, multi-part procedures that a collector can follow as an alternative to compliance with the E-SIGN Act for the electronic delivery of validation notices, responses to requests for original-creditor information, and responses to disputes. The creation

570 84 Fed. Reg. at 23,360 n.567 ("In connection with this proposal, the Bureau intends to make available on its website the source code for a version of the validation notice that would comply with proposed § 1006.42(b)(4)."). It is not clear if this would be different from the code that is already available on GitHub at: https://github.com/cfpb/debt-collection-files.

of these proposed alternatives exceeds the Bureau's authority to interpret E-SIGN, as explained in detail in §13.3.2, *infra*.

Although strict adherence to the E-SIGN Act is necessary to protect consumers, we offer detailed comments in §§13.3.3 and 13.3.4 on how to reduce the consumer harm that the current proposal would cause in case the CFPB does not withdraw its proposal to allow these alternative means of compliance. However, even if the CFPB adopts our recommendations, the alternative procedures would still be arbitrary and capricious and beyond the Bureau's authority.

13.3.2 The Bureau lacks the legal authority to create an alternative to E-SIGN compliance.

There are two E-SIGN provisions under which a federal agency may change the rules for consumer consent. First, § 7004(b) grants federal agencies limited interpretative authority. Second, § 7004(d) allows federal agencies to exempt types of records from the consent requirement in § 7001(c) in certain circumstances. As discussed in the next two subsections, neither provision permits the CFPB to allow the alternate procedures proposed in § 1006.42(c).

13.3.2.1 The alternate procedures cannot be justified under the limited interpretive authority that the E-SIGN Act grants to federal agencies.

The limited authority that Congress gave federal agencies to interpret E-SIGN cannot justify the Bureau's proposal to allow alternate procedures in place of E-SIGN's consumer consent requirement. In §7004(b)(2), Congress explicitly limited this interpretative authority as follows:

> **(2) Limitations on interpretation authority.**
>
> Notwithstanding paragraph (1), a Federal regulatory agency shall not adopt any regulation, order, or guidance described in paragraph (1) . . . unless—
> (A) such regulation, order, or guidance is consistent with section 7001 of this title;
> (B) such regulation, order, or guidance does not add to the requirements of such section; and
> (C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that—
> (i) there is a substantial justification for the regulation, order, or guidance; . . .[571]

The Bureau's proposal to allow alternative procedures in place of E-SIGN compliance fails to meet both clause (A) and (C) of these requirements.

First, since the proposal dispenses with E-SIGN's consumer consent requirement, it is not consistent with §7001 of E-SIGN. To be "consistent with § 7001," the regulation must require the consumer consent mandated in §7001(c), including the requirement that the consumer demonstrate the ability to access information in the electronic form that the collector will use.

[571] 15 U.S.C. § 7004(b)(2) (emphasis added).

Although the collector would have to use an email address or mobile number that “the creditor or a prior debt collector could have used,” in accordance with E-SIGN’s consent provisions,[572] that does not mean that the current collector may do so or that the alternative procedures are consistent with §7001(b)(2). Consent to receive electronic disclosures from a different party does not transfer to a new party. E-SIGN is quite clear that the consumer’s consent applies, at most, only “during the course of the parties’ relationship.”[573] Collection activity by the third-party debt collectors to which the FDCPA applies is not within the relationship between the consumer and the original creditor. Indeed, that relationship has frequently ended altogether by the time a debt is in the hands of a debt buyer or other debt collector.

The proposed alternate procedures also fail to take into account the fact that the consumer’s consent under E-SIGN can be limited to a single transaction with that party, or to identified categories of records.[574] Even if consent given to one party transferred to another party, the proposed procedures appear to authorize electronic communications without regard to the scope of the consumer’s consent.

Moreover, under E-SIGN’s consent provisions, consumers have the clear right to withdraw consent.[575] Yet nothing in the alternative procedures requires that the collector ensure that the consumer has not withdrawn the consent the consumer gave to the previous collector or the creditor. The proposed right to opt out of receiving electronic disclosures is not of value here, because, pursuant to § 1006.42(c)(2)(B) and (d)(2)(iv), the notice providing information about the right to opt out can be included in a message sent to the email address or telephone number that the consumer once gave some other party E-SIGN consent to use[576] – the very address or phone number that the collector wants to use to send the validation notice, original-creditor information, or dispute response. The farther in the past the consumer gave consent, the less likely it is that messages sent to that email address or telephone number will reach the consumer. And even if the email address or telephone number still belongs to the consumer, it may be caught in a spam filter, or the consumer may delete an unrecognized email as spam or phishing.

The proposed alternative procedures are additionally inconsistent with E-SIGN because they fail to require the consumer to demonstrate the ability to access the information that will be provided

[572] Proposed §1006.42(c)(1).

[573] 15 U.S.C. § 7001(c)(1)(B)(ii). Allowing the consumer’s consent to transfer to a different party would also be inconsistent with E-SIGN’s requirement that the consumer be informed of “the hardware and software requirements for access to and retention of the electronic records,” and demonstrate the ability to access them. 15 U.S.C. § 7001(c)(1)(C). Consent given to one party provides no assurance that a consumer will have the hardware and software necessary to access and retain a different party’s electronic records at a later point in time.

[574] 15 U.S.C. § 7001(c)(1)(B)(ii).

[575] See 15 U.S.C. §§ 7001(c)(1)(A) (“the consumer has affirmatively consented to such use and has not withdrawn such consent”); 7001(c)(1)(B)(i) (discussing “the right of the consumer to withdraw the consent”); 7001(c)(1)(B)(iii) (addressing “the procedures the consumer must use to withdraw consent”).

[576] *See* §§ 1006.42(d)(1) (allowing the opt-out notice, when sent by the collector, to be included in a “communication,” without requiring that the communication use a different channel than the email address or phone number that the collector plans to use to send the validation notice, original-creditor information, or dispute response), 1006.42(d)(2) (requiring that the opt-out notice, when sent by the creditor, be sent to the email address or phone number that the collector plans to use to send the validation notice, original-creditor information, or dispute response).

electronically. This is a key requirement of E-SIGN, found in 15 U.S.C. § 7001(c)(1)(C)(ii). It ensures, among other things, that the email address or telephone number that will be used is viable and accessible to the consumer. Under the proposed rules, the electronic channel may have been used in the long distant past unless the creditor provided the opt-out message (in which case the debt collector must send the hyperlink no more than 30 days after the creditor sent the opt-out message).[577] But even then, there is no requirement of any confirmation that the email or text message sent by the creditor was received. The requirement is simply that the creditor has *sent* the communication.

As noted above, the Bureau's authority to interpret E-SIGN's requirements is also limited by 15 U.S.C. § 7004(b)(2)(C)(i), which requires there to be "a substantial justification" for the interpretation. There is no justification -- let alone substantial justification -- for the proposed alternative. The alternative procedures would mean that validation notices and other important disclosures would not reach consumers; they would result in disclosure of sensitive financial information to third parties who received misdirected electronic communications; and they would undermine law enforcement agencies' warnings against opening unexpected messages from unknown senders. The risks and harms that the alternative procedures would cause outweigh any supposed benefit.

13.3.2.2 The alternate procedures cannot be justified under the limited exemption authority that the E-SIGN Act grants to federal agencies.

Section 7004(d) of E-SIGN does explicitly permit federal agencies to "exempt without condition a specified category or type of record from the requirements relating to consent." However, there are two conditions imposed on such an exemption: 1) that the exemption "is necessary to eliminate a substantial burden on electronic commerce" and 2) that the exemption "will not increase the material risk of harm to consumers." The CFPB has not met either condition in its proposal to allow alternative procedures for delivery of critically important writings at issue.

First, the CFPB has failed to show that electronic commerce is substantially burdened by requiring that consumer consent be obtained before records required to be in writing can be provided electronically. Indeed, no such showing could possibly be made. In the nineteen years since E-SIGN passed in 2000, electronic commerce and electronic communications between businesses and consumers have been widely adopted.[578] All of this growth has proceeded with almost no federal agency exemptions from the consent provisions. A search of the entire Code of Federal Regulations reveals only two such exemptions, both extremely minor and narrow – one for electronic transmission of certain prospectuses for registered investment companies[579] and the other for electronic transmission of notices, reports, and election information regarding certain employee deferred compensation plans.[580] If E-SIGN was burdening electronic commerce, one would expect to find some widespread and significant exercise of this exemption authority.

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[577] *See* § 1006.42(d)(2).

[578] See, e.g., Pew Research Center, Online Shopping and E-Commerce (Dec. 10, 2016), available at: https://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce/ (approximately 80% of Americans are online shoppers and 15% buy online on a weekly basis).

[579] 17 C.F.R. § 230.160.

[580] 26 C.F.R. § 1.401(a)-21.

Moreover, the CFPB has not pointed to any evidence in the record that shows a burden on electronic commerce, let alone a substantial burden. Instead, it relies on unsubstantiated speculation that there “may” be such a burden.[581] The Bureau’s conclusion thus exceeds its statutory authority, is arbitrary and capricious and is an abuse of discretion.

Second, even if the CFPB could show a substantial burden on electronic commerce caused by requiring compliance with E-SIGN’s consent provision, the statute also requires that the CFPB must show that the exemption would "not increase the material risk of harm to consumers.” The CFPB has not made this showing either. Indeed, failure to require compliance with E-SIGN’s consumer consent requirements will create a serious risk that consumers will not receive the critical records that they are entitled to receive under the FDCPA; that electronic communications with sensitive information will reach third parties; and that the efforts of law enforcement agencies to warn consumers not to click on hyperlinks from unknown sources or open emails from unknown recipients will be undermined.

In short, the proposed exemption exceeds the limited authority that the E-SIGN Act grants to federal agencies to interpret or grant exemptions from its requirements.

***Recommendation*: The CFPB should withdraw the proposal at §1006.42(c) to allow collectors make disclosures without complying with the E-SIGN Act.**

13.3.3 §1006.42(c)(1): Identifying an email address or phone number that can be used

Proposed § 1006.42(c)(1) provides that, when delivering validation notices, responses to requests for original-creditor information, and responses to disputes electronically, debt collectors must use an email address or a phone number “that the creditor or a prior debt collector could have used to provide electronic disclosures related to that debt in accordance with section 101(c) of the E-SIGN Act.” Section 101(c) is 15 U.S.C. § 7001(c), which sets forth E-SIGN’s detailed consumer consent requirements.

Under this proposal, it would not matter how long ago the E-SIGN Act consent was granted. In the case of credit card accounts, for example, E-SIGN Act consent may have been granted years before the alleged default led to the current collection. The email address or phone number that the consumer listed when opening the account may now be different than the one listed years ago. Nor does the Bureau require that the previous creditor or collector ever actually sent a message to that email address or number, that the consumer ever confirmed receiving a message at that address or number, or even that the address or number is still accessible at this later date. As such, the collector’s possession of an old email address or telephone number is not a meaningful indication of any agreement by the consumer to receive electronic notices instead of paper ones. As discussed in our comments regarding §1006.6(d)(3) in § 4.4.3, *supra*, a consumer who gives meaningful consent to the original creditor to provide documents electronically is likely not thinking about the possibility of default and whether the type of communication that they are authorizing might be likely to be seen by a third party if the account someday went into collections.

[581] 84 Fed. Reg. at 23,361.

In addition, the Bureau has failed to take into account the frequency of reassignment of cell phone numbers. As noted elsewhere in these comments, approximately 35 million numbers are disconnected and made available for reassignment to new consumers each year.[582] Sending text messages with sensitive financial information to telephone numbers based on E-SIGN consent given long ago to a different entity will inevitably result in their reaching third parties, potentially creating TCPA liability for the collector.

Comment 42(c)(1)-1 clarifies that if the consumer has opted out "following instructions provided pursuant to §1006.6(e)" then that email address or phone number cannot be used. The consumer's right to opt out of receiving electronic communications in no way resolves these problems. Collectors should be allowed to communicate electronically with consumers only if the consumer has affirmatively consented, rather than merely failing to opt out. In addition, § 1006.6(e) requires the opt-out right to be included in emails and text messages. If those are going to outdated addresses or phone numbers because the collector has not obtained E-SIGN consent, the consumer will never see them.

***Recommendations*: The Bureau should not allow a collector to use an email address or phone number to deliver validation notices, responses to disputes, or responses to requests for original-creditor information based on E-SIGN consent that the consumer gave to the creditor or a prior debt collector.**

13.3.4 §1006.42(c)(2): Method of delivery of disclosures

13.3.4.1 Introduction

Proposed § 1006.42(c)(2) provides that in order to comply with the alternative procedure for the delivery of validation notices, responses to requests for original-creditor information, and responses to disputes, debt collectors must, in addition to using an email address or phone number for text messages identified in §1006.42(c)(1), use one of the following methods to deliver the disclosure: 1) placing the disclosure in the body of an email or 2) placing the disclosure on a website and providing a hyperlink to that website via email or text message. We examine both of these methods of delivery.

13.3.4.2 §1006.42(c)(2)(i): The first method of delivery

The first method of delivery at that would be allowed by Proposed §1006.42(c)(2)(i) is placing the validation notice, response to a request for original-creditor information, or response to a dispute in the body of an email addressed to the consumer. Comment 42(c)(2)(i)-1 clarifies that, "[a] debt collector places a disclosure in the body of an email if the disclosure's content is viewable within the email itself."

[582] FCC, In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls CG Docket No. 17-59, at Para. 6. https://ecfsapi.fcc.gov/file/03263039800626/FCC-18-177A1.pdf, citing North American Numbering Plan Administrator Number Resource Utilization/Forecast Reports (average of aggregate numbers for the period January 1, 2013 through December 31, 2016).

In some cases, placing the disclosure in the body of the email may result in inadvertent disclosures to third parties. For example, some consumers check their email in public places (e.g. computers at a public library). This problem can be avoided, however, if the consumer provides E-SIGN consent directly to the debt collector and is, therefore, aware that the message is coming and able to take steps to find a private place to view the message. Moreover, by getting consent directly from the consumer, the debt collector will also avoid other problems like inadvertently mailing the validation notice to a work email address that may also cause third-party disclosures.

The CFPB should clarify that §1006.42(c)(2)(i) prohibits debt collectors from attaching a document with the disclosure. Experts frequently warn consumers about the dangers of opening attachments from unknown senders due to the dangers of infecting computers with malware. Prohibiting information from being provided via attachment will protect consumers against these risks.

As discussed in our comments regarding Proposed §1006.22(f)(3) in § 8.2.2, *supra*, email content is viewable by multiple parties in transit. As such, we strongly disagree with the CFPB's statement that "providing a disclosure in the body of an email may pose no more risk of third-party interception than delivery by mail."[583] Email is not a medium that guarantees end-to-end encryption.[584]

***Recommendations*: The CFPB should:**

- **Require debt collectors to obtain E-SIGN Act consent from the consumer before placing a validation notice, a response to a request for original-creditor information, or a response to a dispute in the body of the email addressed to the consumer.State in a comment that a collector cannot comply with Proposed §1006.42(c)(2)(i) by attaching a document with the disclosure to an email**

13.3.4.3 §1006.42(c)(2)(ii): The second permissible method of delivery

The second method of delivery that would be allowed by Proposed §1006.42(c)(2)(ii) involves placing the validation notice, response to a request for original-creditor information, or response to a dispute online and providing a hyperlink to the materials. Specifically, the proposed rule says the disclosure may be placed:

> (ii) On a secure website that is accessible by clicking on a clear and conspicuous hyperlink included within an electronic communication sent to an email address or a telephone number described in paragraph (c)(1) of this section, provided that:

[583] 84 Fed. Reg. at 23,363.

[584] *See* Maria Korolov, Is universal end-to-end encrypted email possible [or even desirable?, CSO (Sept. 29, 2017), available at: https://www.csoonline.com/article/3224410/is-universal-end-to-end-encrypted-email-possible-or-even-desirable.html ("People expect their email to be private between them and the recipient, but in reality, the contents of your email are exposed during transmission. Full end-to-end encryption would mean that only the receiver of the email can decrypt their messages, but sharing public keys and agreeing on a common encryption standard can be tricky for most users.").

(A) The disclosure is accessible on the website for a reasonable period of time and can be saved or printed;
(B) The consumer receives notice and an opportunity to opt out of hyperlinked delivery as described in paragraph (d) of this section; and
(C) The consumer, during the opt-out period, has not opted out.

This proposal allows the debt collector to send a hyperlink to an email address or phone number for text messages so long as, pursuant to §1006.42(c)(1), the consumer once upon a time provided E-SIGN Act consent to a creditor or prior debt collector. This is a terrible idea for the reasons discussed here and in our comments regarding §1006.42(d) in § 13.4, *infra*, which addresses notice and the opportunity to opt out of hyperlinked delivery.

Although the proposed regulation requires that the information be placed on "a secure website," the Bureau does not define this requirement. We consider some possible meanings of "secure." Debt collectors could argue that "secure website" only means that the materials are posted to a HTTPS[585] website. However, this would not protect the private information from being viewable by other parties with the links or even from being indexed by search engines like Google. Just e-mailing or texting 'secret' URLs around that give access to this information could also lead to the hyperlink falling into the wrong hands, because neither e-mail nor text is an end-to-end encrypted communication channel.[586]

Another interpretation of "secure" is that accessing the document would require a password or some other identification procedures. While this definition of secure would keep the consumer's information private, it raises its own problems. For example, if the hyperlinked document is secured by a password, how would the consumer obtain the password? One answer might be using information that the consumer has like the consumer's birthdate or last four digits of a social security number. However that solution asks the consumer to connect to a document with a hyperlink from an unknown party (see discussion below) and then provide sensitive personal information. Understandably, consumers will be hesitant to provide such information.

Instead, the CFPB should clarify that "secure" requires both an HTTPS website and an adequate authentication mechanism. The authentication mechanism could be a two-factor authentication: e-mail the 'secret' URL to the consumer, and when they click on it, send the consumer a text message with a code that they need to provide to see the information. Of course, this would require both the consumer's email address and phone number, which would

[585] Google, Secure your site with HTTPS, available at https://support.google.com/webmasters/answer/6073543?hl=en ("HTTPS (Hypertext Transfer Protocol Secure) is an internet communication protocol that protects the integrity and confidentiality of data between the user's computer and the site. Users expect a secure and private online experience when using a website.").

[586] *See* Maria Korolov, Is universal end-to-end encrypted email possible [or even desirable?, CSO (Sept. 29, 2017), available at: https://www.csoonline.com/article/3224410/is-universal-end-to-end-encrypted-email-possible-or-even-desirable.html ("People expect their email to be private between them and the recipient, but in reality, the contents of your email are exposed during transmission. Full end-to-end encryption would mean that only the receiver of the email can decrypt their messages, but sharing public keys and agreeing on a common encryption standard can be tricky for most users."); Electronic Frontier Foundation, Surveillance Self-Defense, available at: https://ssd.eff.org/en/module/communicating-others ("When you send a text message (also known as SMS) on a phone, the text is not encrypted at all.").

be much easier to obtain if the debt collector simply obtained E-SIGN Act consent from the consumer.

This method of delivery would require consumers to click on a hyperlink. As the CFPB itself notes, “[f]ederal agencies have advised consumers against clicking on hyperlinks provided by unfamiliar senders,” and “consumer email services can be configured to block hyperlinks from unrecognized senders.”[587] Moreover, the first Circuit Court to address this issue recently rejected the use of hyperlinks to deliver validation notices, concluding that an email with a hyperlink that initiated a series of steps by which a consumer could obtain a validation notice did not satisfy the requirements of §1692g(a) of the FDCPA because the email did not actually contain the required disclosures.[588] The minimal procedures proposed to provide consumers notice and opportunity to opt out of hyperlinks do not include any reasonable assurance that the email with the hyperlink will not be sent to spam or that the consumer will recognize an email or text from a debt collector or be comfortable clicking on a hyperlink. At a minimum, if the CFPB retains its proposal for hyperlinks, it should require the debt collector to ensure that the hyperlinked disclosure was actually accessed. If it was not accessed, the collector should be required to provide the disclosure by another means.

This proposal would require the disclosure to be accessible for “a reasonable period of time,” but once again a “reasonable period” is not defined. The CFPB should clarify that unless the consumer asks for the materials to be taken down, the disclosure should remain available at that hyperlink for the full period covered by the proposed record retention policy described in Proposed §1006.100.

The proposal also requires that it be possible for the consumer to save or print the hyperlinked disclosure.[589] Unfortunately, many consumers, especially those who view documents on a mobile phone, will not have access to printers. As a result, the information in the hyperlink should be designed so that the consumer can email it to his or her own email, as a way of preserving it, And the page should include directions to the reader on how to do this from a mobile phone.

The final requirement debt collectors must comply with before providing a hyperlinked disclosure is to give the consumer an opt-out notice. If the consumer has opted out, the proposed rule prohibits the collector from providing the hyperlinked disclosure. The details for how to provide an opt-out are provided in §1006.42(d) and discussed in the next section.

***Recommendations*:**

- **The Bureau should not allow validation notices, responses to requests for original-creditor information, or responses to disputes to be delivered by hyperlink.**

[587] 84 Fed. Reg. at 23,363.

[588] Lavallee v. Med-1 Sols., LLC, 932 F.3d 1049, 1055-56 (7th Cir. 2019) (“At best, the emails provided a digital pathway to access the required information.”).

[589] Proposed § 1006.42(c)(2)(ii)(A).

- **If the Bureau does allow delivery of this information by hyperlink, it should require collectors to:**
    - **Adopt specifically-defined, robust security measures.**
    - **Send a copy of the document by mail to any consumer who does not click on the hyperlink.**

13.4 §1006.42(d): Notice and opportunity to opt out of hyperlinked delivery

13.4.1 Overview

As noted above, Proposed §1006.42(c)(2)(ii) requires a collector to send the consumer an opt-out notice as a condition of using hyperlinks to deliver validation notices, responses to requests for original-creditor information, and responses to disputes. Proposed §1006.42(d) outlines two methods that debt collectors can use to provide this notice . The collector must either 1) communicate certain information to the consumer or 2) confirm that, no more than 30 days earlier, the creditor communicated a somewhat similar set of information to the consumer.

As discussed in the previous section, hyperlinks are clearly a completely inappropriate method of providing electronic disclosures where the debt collector has not obtained E-SIGN Act consent from the consumer prior to providing the hyperlinked disclosure. The procedures proposed by §1006.42(d) for giving the consumer the opt-out notice are as deeply flawed as the rest of the proposal. The next sections describe several specific concerns: the Bureau's approval of communicating the opt-out right in a telephone conversation; its failure to require a reasonable opt-out period; its failure to prohibit the electronic transmission of further disclosures if the consumer has not opened a previous disclosure; and its approval of a collector's reliance on an opt-out notice sent by a creditor that is not the original creditor.

13.4.2 The Bureau should not allow the opt-out right to be conveyed in a telephone conversation.

13.4.2.1 §1006.42(d)(1): Communication by the debt collector

Proposed §1006.42(d)(1) spells out the method the debt collector must use to provide the opt-out notice to the consumer if it chooses this option rather than relying on a creditor's earlier provision of an opt-out notice. When the collector provides the opt-out notice, the notice must include the following information:

- the name of the consumer who allegedly owes the debt,
- the creditor's name,
- the email address or phone number from which the debt collector will send the hyperlinked disclosure,

- the email address or phone number to which the debt collector will send the hyperlinked disclosure,

- the consumer's ability to opt out, and

- instructions for opting out and "a reasonable period" to do so.

This is far too much information to be conveyed effectively in a telephone conversation. Moreover, if this information were to be conveyed in a telephone call, it would have to be on top of the §1692e(11) disclosures that will be made at the beginning of the call, and on top of basic information that will likely be provided on the call such as the amount of the debt and the original creditor's name. The oral description of this opt-out notice can also, according to Proposed Comment 42(d)(1)-4, be combined with the opt-out notice required by Proposed §1006.6(d)(3)(i)(B)(1), further complicating the conversation.[590] Moreover, Proposed Comment 42(d)(1)-2 says that if the opt-out notice is provided in a conversation discussing multiple debts, the debt collector must state the name of the consumer who allegedly owes the debt and the name of the creditor to whom the debt is currently owed for each account. This will add still more information, making it even less likely that the consumer will be able to understand all of the disclosures that are being provided.

For these reasons, the CFPB should revise the proposed rule to require the collector to deliver the opt-out notice in a form other than an oral conversation. It should be provided in a form that the consumer can read and keep.

13.4.2.2 §1006.42(d)(2): Communication by the creditor

As noted in the preceding section, instead of providing the opt-out notice itself, a debt collector can comply with the opt-out notice requirement by confirming that, no more than 30 days before it sends the hyperlinked disclosure, the creditor communicated with the consumer using the email address or, in the case of a text message, the telephone number that the collector plans to use. Pursuant to Proposed §1006.42(d)(2), the creditor's communication with the consumer must have informed the consumer of:

- the placement or sale of the debt,

- the name of the debt collector,

- the debt collector's option to use email or text to provide "any legally required notice,"

- the email address or phone number from which the debt collector will send the hyperlinked disclosure,

- the consumer's ability to opt out, and

- instructions for opting out and "a reasonable period" to do so.

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590 Please see our discussion regarding the similar Proposed Comment 6(d)(3)(i)(B)(1)-3 at § 4.4.3.2.2, *supra*.

As is true for opt-out notices provided by collectors, this notice can be further complicated by other information. First, Proposed Comment 42(d)(2)-3 states that this notice can be combined with the opt-out notice required by Proposed §1006.6(d)(3)(i)(B)(1). Second, Proposed Comment 42(d)(2)-1 states that an opt-out notice provided by a creditor may apply to multiple debts that are being sold to or placed with the same debt collector at the same time.

It is unrealistic to expect all of this information to be conveyed effectively to a consumer in a telephone conversation. Consumers—particularly the least sophisticated consumers that the FDCPA is intended to protect--are unlikely to be able to absorb all of this information in a phone conversation, much less remember it for later reference.

***Recommendation*: If the CFPB does not eliminate the proposal to allow hyperlinked delivery of electronic disclosures, it should revise Proposed § 1006.42(d)(1) and (d)(2) to require the collector or creditor to deliver the opt-out notice in writing .**

13.4.3 The proposed comments to § 1006.42(d)(1)(vi) allow collectors to set too short an opt-out period for written and electronic notices.

Proposed § 1006.42(d)(1)(vi) requires the opt-out notice to specify "a reasonable period within which to opt out." This requirement applies both to opt-out notices sent by collectors and to those sent by creditors.[591] Proposed Comment 42(d)(2)-2 states that, if the opt-out notice is delivered in writing or electronically, the opt-out period must be more than five days. Thus, this rule would allow the opt-out period to be as little as six days.

A six-day opt-out period is unnecessarily short. As the debt collector will need very little time to send an email or text message, the CFPB should require an opt-out period of at least 28 days, allowing the collector 48 hours to send the message and still comply with the 30-day limit on the amount of time that can pass between delivery of the opt-out notice by the creditor and delivery of the electronic notice with the hyperlink by the debt collector.[592]

Comment 42(d)(2)-2 also says that, when the collector gives the consumer the opt-out notice in a telephone or in-person conversation, the collector may require the consumer to exercise the opt-out right before the call is over. Such a short time limit is entirely inconsistent with the Bureau's recognition that the opt-out period must be at least six days in the case of written or electronic notice. The inadequate opt-out period is just one more flaw in the proposal to allow the opt-out notice to be communicated orally. The CFPB should prohibit oral communication of the opt-out notice, but if it declines to do so it should, at the very least, require the consumer to be given a 28-day opt-out period when the opt-out notice is communicated orally as well as when it is communicated electronically or in writing.

***Recommendation*: If the CFPB does not eliminate the proposal to allow hyperlinked delivery of electronic disclosures, it should revise Comment**

[591] *See* Proposed §§ 1006.42(d)(2)(iv) (incorporating this requirement for opt-out notices sent by creditors).

[592] Proposed Comment 42(d)(2)-2.

42(d)(2)-2 to state that the opt-out period must be at least 28 days, and it should specify that this opt-out period is required regardless of the method by which the opt-out right is communicated.

13.4.4 Collectors should not be allowed to continue sending disclosures to an email address or phone number if the consumer has not opened a previous disclosure that was sent by hyperlink.

Proposed Comment 42(d)-1 states: "A debt collector's or a creditor's communication with a consumer pursuant to § 1006.42(d)(1) or (2), respectively, applies to all disclosures covered by § 1006.42(a) that the debt collector thereafter sends regarding that debt, unless the consumer later designates that email address or, in the case of text messages, that telephone number, as unavailable for the debt collector's use, such as by opting out pursuant to the instructions required by § 1006.6(e)." This comment seems intended to clarify that, once the consumer has been given the notice and opportunity to opt out, the collector can provide any and all future disclosures by sending them electronically to the email address or telephone number in question. We understand this to mean that if the debt collector provides a notice and opportunity to opt out before sending a validation notice, the debt collector would not need to provide an additional notice and opportunity to opt out before providing a response to a request for original-creditor information or a response to a dispute.

This proposed comment illustrates the CFPB's over-reliance on the very loose and ineffective procedures it has proposed for text messages and emails. Sending an email message or text message under the procedures the CFPB proposes to authorize provides no assurance that the message will actually reach the consumer, as opposed to reaching some third party, ending up in the inbox of an unused email address, or being waylaid by a spam filter. The failure of the consumer to respond to an opt-out notice provides no assurance that the consumer has received the notice and is agreeable to receiving the information electronically. On the contrary, it suggests that the consumer did not receive it or did not notice amidst numerous other disclosures.

***Recommendation*: If the CFPB does not eliminate the proposal to allow hyperlinked delivery of electronic disclosures, it should amend Proposed § 1006.42(d) to prohibit collectors from sending further electronic notices to consumers who did not access the first hyperlinked disclosure.**

13.4.5: The Bureau should not allow collectors to rely on an opt-out notice sent by a creditor.

There are significant additional problems with the portion of the rule that allows a collector to rely on an opt-out notice that a creditor sent. First, Proposed § 1006.42(d)(2) says that "the creditor," not just the original creditor, can send the notice. That means that any creditor subsequent to the original creditor could provide such notice. The CFPB should restrict the ability to send such notices to original creditors, since it is far more likely that a consumer would recognize and open an email message from the original creditor than a subsequent creditor that the consumer does not know.

Second, Proposed § 1006.42(d)(2) allows a collector to provide a hyperlinked notice without having given the consumer an opt-out notice if it "confirm[s]" that the creditor sent an opt-out notice to the consumer no more than 30 days earlier. The proposal does not specify how the debt collector is expected to "confirm" this. If the creditor misrepresents its compliance and the debt collector relies on that misrepresentation, the creditor may not be a covered party under the FDCPA, creating difficulty in enforcing these requirements.

For these reasons, even if it declines to withdraw the other portions of § 1006.42(d), the Bureau should withdraw § 1006.42(d)(2). Failing that, the Bureau should at least allow a collector to rely only on an opt-out notice provided by the original creditor.

Recommendation: **The Bureau should withdraw Proposed § 1006.42(d)(2). If it does not do so, it should at least revise it to provide that a collector can rely only on an opt-out notice provided by the original creditor.**

13.5 §1006.42(e): Safe harbors

13.5.1 Overview

Proposed §1006.42(e) provides two safe harbors, one for disclosures provided by mail and the other for validation notices contained in the initial communication. Compliance with either proposed safe harbor would establish compliance with the actual notice and retainability requirements of §1006.42(a). Both safe harbors should be withdrawn.

13.5.2 §1006.42(e)(1): Disclosures provided by mail

Proposed §1006.42(e)(1) provides that a debt collector that mails a printed copy of a disclosure to the consumer's residential address satisfies the actual notice and retainability requirements of §1006.42(a) unless the debt collector receives a notice that the disclosure was not delivered. This section leaves unaddressed what is often the real question - what is the consumer's residential address? Debt collectors may encounter multiple addresses for a consumer, while trying to determine which one to use. This provision gives no guidance on what debt collectors should be doing to ensure that notice is going to the right consumer at the right address. Unfortunately, it is not enough to rely on mail to be forwarded or returned as undeliverable.[593] Given these practical difficulties, this safe harbor is arbitrary and should not be permitted. It could be used to claim compliance with requirements to send validation notices without doing any kind of due diligence to ensure that the consumer is likely to receive the validation notice at that address.

Proposed Comment 42(e)(1)-1 clarifies that the debt collector has not complied with this safe harbor if the debt collector "knows or should know at the time of mailing that the consumer does

[593] For example, in 2006, Boston Globe reporters sent out 100 misaddressed letters to test the small claims courts' service by first class mail; they found that only 52 were returned. Beth Healy, "Dignity Faces a Steamroller," Boston Globe (July 31, 2006), available at: https://www.bostonglobe.com/metro/2006/07/31/dignity-faces-steamroller/SoK0TBVHzOzjLEpNqNrVYN/story.html

not currently reside at that location." However, the comments do not further define when a debt collector "knows or should know," nor do they specify any steps a collector must take to determine whether the address is correct. The limitations in this comment are not enough to resolve the problems with the safe harbor.

13.5.3 §1006.42(e)(2): Validation notice contained in the initial communication

Although the language of the provision is incredibly convoluted, we understand the safe harbor created by Proposed §1006.42(e)(2) to mean that, if the debt collector provides a validation notice in the body of an email that is the initial communication with the consumer, the debt collector will be considered to have complied with §1006.42(a)'s actual notice and retainability requirements without complying with the E-SIGN Act as outlined by §1006.42(b)(1) or even the alternatives to E-SIGN Act compliance in §1006.42(c)(1). Instead, the debt collector would only have to obtain an email address by using one of the methods outlined in §1006.6(d)(3).

As discussed at length in § 4.4.3, *supra*, the procedures for obtaining email addresses and phone numbers set forth in Proposed § 1006.6(d)(3) are utterly unreliable. Those procedures will lead not only to disclosure of sensitive information to third parties in violation of § 1006.6(d), but they are wholly insufficient to ensure that that the consumer will receive their validation notices.[594] The Bureau's proposal is arbitrary and capricious as the Bureau has utterly failed to articulate a satisfactory explanation that shows rationally that consumers will actually get notice of these communications, and the Bureau has entirely failed to consider the high likelihood that many consumers will not.

***Recommendation*: The CFPB should withdraw both parts of the safe harbor proposal.**

14. § 1006.100 Record Retention

14.1 Overview

The Bureau proposes Rule § 1006.100 to require debt collectors to "retain evidence of compliance with [Regulation F] starting on the date that the debt collector begins collection activity on a debt until three years after a) the debt collector's last communication or attempted communication in connection with the collection of the debt; or b) the debt is settled, discharged, or transferred to the debt owner or another collector."[595] The Bureau states that its goal in adding this rule is to "promote effective and efficient enforcement and supervision of Regulation

[594] Due to the fact that the proposed safe harbor only applies to initial communications, the debt collector will primarily be able to avail itself of this safe harbor if the creditor provided the opt-out notice in §§1006.6(d)(3)(i)(B) or (C). (A consumer is unlikely to initiate a conversation with a debt collector by email without any contact from the debt collector under §1006.6(d)(3)(i)(A), and a debt collector cannot provide the opt-out notice required in §1006.6(d)(3)(i)(B) without having an initial conversation with the consumer.) If creditors are willing to provide these types of notices, we predict that debt collectors will prefer this safe harbor to all other methods.

[595] 12 C.F.R. § 1006.100(a)(1), (2).

F" and "to ensure access to evidence that the debt collector performed the actions and made the disclosures required by the regulation."[596] The implementation of a record retention policy is important, but should be further honed to ensure consistent and efficient application.

14.2 When a Debt Collector Should Begin to Retain Evidence of Compliance

Proposed § 1006.100(a) requires a collector to retain evidence of compliance "starting on the date that the debt collector begins collection activity on a debt until three years after a) the debt collector's last communication or attempted communication in connection with the collection of the debt; or b) the debt is settled, discharged, or transferred to the debt owner or another collector."

While the Bureau states that it believes that this language makes the time that such retention requirements begin "easily determinable," it is not so clear which activities would constitute "collection activity" and which would not. "Collection activity" is not defined in the statute, and collection activity does not just start with the first communication, or even attempt to communicate, from a debt collector to a consumer. Increasingly, debt collectors and debt buyers are using analytics to analyze a consumer's debt both before and after the debt is obtained for collection. After the debt is obtained, they use these programs to analyze the consumer and to target their collection attempts to the accounts or consumers that will be most likely to pay on the debt.[597]

At a minimum, a debt collector should be required to retain records on accounts as soon as the debt collector obtains the account whether through a purchase, transfer, assignment or other method. This will ensure that evidence of all such activity is captured, leaving no room for ambiguity as to when such a retention period should start. Moreover, it will ensure that any evidence of disparate impacts in who the debt collector targets for collection or particular types of collection is preserved.

14.3 When the Three-Year Retention Period Ends Should Be Clarified

When the three-year retention period is ends is also unclear and vague. Proposed § 1006.100(a) provides that "[a] debt collector must retain evidence of compliance...until three years after 1) the debt collector's last communication or attempted communication in connection with the collection of the debt; or 2) the debt is settled, discharged, or transferred to the debt owner or another collector."

The term "last communication" in (a)(1) is confusing. As proposed, the obligation ends three years after the collector's last communication with *anyone* in connection with the collection of the debt, not just the consumer. This definition is vague enough to include a final communication about the debt with any person regardless of the content of that communication or the person involved in the communication. This could include a communication with a debt

[596] 84 Fed. Reg. at 23,367.

[597] *See, e.g.,* Debt Recovery, *available at* www.ebureau.com (discussing use of scores to predict likelihood of contact or collection); Segmentation/Prioritization/Contact Solutions, *available at* http://www.transunion.com (discussing scoring accounts with a "Collection Prioritization Engine" to identify who is likely to pay).

collector's co-worker about the debt or with a clerk at the court where a lawsuit was filed. A determination of "last communication" would be difficult for the debt collector and CFPB to determine. This certainly does not promote the Bureau's goal of promoting effective and efficient enforcement of Regulation F.

The Bureau should specify a definitive end date that is not open to interpretation. Where the debt has not been reduced to judgment, the Bureau should clarify that the "last communication" is the notice that the debt collector sends the consumer to say that:

- the debt has been fully paid (or paid in accordance with a settlement agreement);
- the debt is being transferred to another debt collector (or back to the original creditor) (and in this communication the collector should provide the name and contact information of the new debt collector, or original creditor);
- any remaining debt is being extinguished; or
- the debt collector is terminating all debt collection efforts regarding the debt, including credit reporting and sending an IRS form 1099.

We do not believe that most debt collectors currently provide such a communication, but the CFPB should require its provision in order to trigger the start of the three-year record retention clock.

Where a collector obtains a judgment on a debt or acquires a debt that has already been reduced to judgment, the retention period should be:

- until the judgment is satisfied;
- the judgment is extinguished by the passage of time;
- or until three years after assignment of the *judgment* to another collector.

Failing to retain records regarding judgments on consumer debt is increasingly resulting in the transfer of judgment debts to a debt collector that then tries to collect on the debt regardless of the status of the judgment. Requiring debt collectors to retain documents as recommended when a judgment has been entered would help ensure compliance with Regulation F.

14.4 The Bureau Should Clarify What Documents Should Be Retained

Proposed § 1006.100(a) would require the retention of "evidence of compliance" with the Regulation, which is another vague term. Use of this vague language would leave it to the discretion of the debt collector to determine what constitutes such evidence. Instead, the Bureau should use the language proposed in its SBREFA Outline[598] that would explicitly require the debt collector to "retain records documenting the actions it took with respect to a debt." This would include all documents related to the subject debt and all activity taken on the debt, and would eliminate the need for the debt collector to determine whether a particular record would

[598] SBREFA Outline at 35.

support compliance with the proposed Rule. While Proposed Comment 1006.100-1 lists some important examples of documents that the debt collector *could* retain, the Bureau should make retention of all relevant records mandatory. This should include all of the documents it listed in its SBREFA Outline, including:

> all records the debt collector relied upon for the information in the validation notice and to support claims of indebtedness, for example, the information the debt collector obtained before beginning to collect, the representations the debt collector received from the creditor before beginning to collect, and the records the debt collector relied upon in responding to a dispute. It also would encompass all records related to the debt collector's interactions with the consumer, for example, written communications to and from the consumer, oral communications to and from the consumer, and individual collector notes.[599]

The Bureau should also require retention of additional documents to address specific collection situations. In cases where the consumer has made a payment, the debt collector should be required to retain the consumer's contact information, the name of the original creditor, the date and amount of every payment the collector or any predecessor collector received, the amount of the debt when the collector received the debt for collection, and the amount and date of any interest or fee collected from the consumer by the collector. In some states, judgments against consumers may be collectible for decades,[600] so it is essential that debt collectors be required to retain accurate records about the original amount of the judgment, any assignments of the judgment, the interest on the judgment, and all payments made, in addition to the records identified by the Bureau in Proposed Comment 1006.100-1.

Recommendations**: The Bureau should:**

- **Clarify that a debt collector must begin to retain records on the date the debt collector obtains the debt.**
- **Clarify how collectors are to determine when the record retention period ends.**
- **For judgment debts, provide that the record retention period lasts until the judgment is satisfied or extinguished by the passage of time, or until three years after it has been assigned to another collector.**
- **Define what counts as a "last communication" for purposes of record retention for debts that have not been reduced to a judgment.**
- **Specifically require the retention of the documents listed in the Bureau's SBREFA Outline, plus detailed records of payments, interest, fees, the amount of any judgment, and any assignment of a judgment.**

[599] SBREFA Outline at 37.

[600] See National Consumer Law Center, Collection Actions § 12.15 (3d ed. 2014) (50-state overview of statutes of limitations for enforcement of judgments).

14.5 Recordkeeping and Credit Reporting

The CFPB should also note in this rulemaking that collectors furnishing information to CRAs also have recordkeeping requirements under the CPFB's FCRA Furnisher Accuracy and Integrity Guidelines. Section III(c) of those Guidelines requires furnishers to develop policies and procedures that address the need for "[m]aintaining records for a reasonable period of time, not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute."[601] The CFPB should synchronize the time period for both recordkeeping requirements, applying the period that is longest under either the debt collection rule or the Furnisher Accuracy and Integrity Guidelines.

15. § 1006.104 Relation to State Laws

Proposed § 1006.104, Relation to State Laws, is the same as current 15 U.S.C. § 1692n, except that the proposed regulation applies to both the Act and "corresponding provisions." Comment 104-1 reads "[a] disclosure required by applicable State law that describes additional protections under State law does not contradict the requirements of the Act or the corresponding provisions of this part." We support this clarification.

16. § 1006.108 Exemption for State Regulation and Appendix A to Part 1006

Proposed § 1006.108 restates 15 U.S.C. § 1692*o*. It refers to Appendix A, a restatement of the current 12 C.F.R. Subpart A, for the procedures and criteria whereby states may apply to the Bureau for an exemption from the FDCPA. The proposed rule ensures that states applying for an exemption show that:

> [U]nder the laws of that state, any class of debt collection practices within that state is subject to requirements that are substantially similar to, or provide greater protection for consumers than, those imposed under [15 U.S.C. §§ 1692a through 1692j] and the corresponding provisions of this part, and that there is adequate provision for State enforcement of such requirements.[602]

We support the language in § 1006.108(a) requiring that states' provisions be substantially similar to or provide greater protection for consumers than those imposed under 15 U.S.C. §§ 1692a through 1692j of the FDCPA in order to qualify for an exemption.

In Appendix A's section VI(b)(ii), the Bureau imposes a specific two-year time period for a state that has received an exemption to submit reports to the Bureau regarding enforcement of the state's law in the preceding two years. This regular time period replaces the prior requirement under 12 C.F.R. § 1006.6(b) to submit reports "from time to time," and will provide better

[601] 12 C.F.R. § 1022, Appx. E(III)(c).

[602] Proposed § 1006.108(a).

accountability by states. The Bureau should add to this provision that it will review the report to ensure continued compliance with the exemption determination criteria in section IV.

The Bureau should also add a new section VI(b)(iii) to require that, when a state informs the Bureau within 30 days of any change in the applicable state laws or there is an amendment to the FDCPA or its regulations, the state must provide a report outlining its continued eligibility for the exemption. This new section should also require the Bureau to conduct a review in light of these changes to ensure continued compliance with the exemption determination criteria in section IV.

As a final comment, Appendix A's section VI(d) needs additional clarification. The section currently reads:

> After an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part.

The CFPB should clarify that, if an exemption is granted, the state law provisions that parallel the FDCPA and its regulations now constitute federal law.

***Recommendations*: With respect to states that are granted an exemption from the FDCPA, the CFPB should:**

- **Adopt the proposed two-year time period for states to submit reports to the Bureau regarding enforcement of the state law.**
- **Add to Appendix A that the Bureau will review the states' reports to determine their eligibility for a continued exemption.**
- **Add a new section to Appendix A requiring a state that has received an exemption to provide a report outlining its continued compliance after changes in relevant state or federal laws, and stating that the Bureau will review the report to ensure the state's continued eligibility for the exemption.**

17. Appendix C to Part 1006—Issuance of Advisory Opinions

We support the Bureau's proposal to include a list of advisory opinions that it has issued and to amend that list as new advisory opinions are issued. However, the proposal does not address the continued legal validity, if any, of advisory opinions issued by the FTC.

The FTC issued four advisory opinions on the FDCPA between 2000 and 2009.[603] In 2010, the Dodd-Frank Act amended the FDCPA in a variety of ways, including transferring authority to

[603] The FTC advisory opinions are reproduced at National Consumer Law Center, Fair Debt Collection, Appx. C.1 (9th ed. 2018), updated at www.nclc.org/library.

issue advisory opinions under 15 U.S.C. § 1692k(e) from the FTC to the CFPB.[604] The 2010 amendment did not address the continued legal force of previous FTC advisory opinions when authority to issue advisory opinions was transferred to the CFPB.[605] The CFPB should take this opportunity to state clearly that these former advisory opinions by the FTC no longer have any legal authority under 15 U.S.C. § 1692k(e) because they were not issued by the Bureau.

The NPRM also proposes allowing requests for advisory opinions to be submitted to the Bureau. Advisory opinions can create unforeseen risks to consumers. They can result in interpretations that favor one business model over that of competitors, or that set confusing, or even conflicting, standards. Over time, advisory opinions can create a large private body of case law that adds complexity to both legal compliance and consumer protection. The issuance of advisory opinions also has the potential to violate the Administrative Procedures Act. For these reasons, the Bureau should not encourage requests for advisory opinions or make a practice of issuing them. Instead of issuing advisory opinions, the Bureau should engage in notice and comment rulemaking where needed to amend its regulations or issue official interpretations.[606] This will ensure consideration of all viewpoints and ramifications and more careful, thoughtful attention to market-wide issues instead of incremental individual opinions that cumulatively change (and confuse) the law over time. Moreover, now that there is an official interpretation of the regulations, the commentary can fulfill the role previously played by advisory opinions.

If the CFPB is going to continue to issue advisory opinions, it should issue such opinions in extremely limited circumstances given the protection from liability afforded acts in compliance with advisory opinions provided by 15 U.S.C. § 1692k(e). Moreover, it should adopt a transparent process for the receipt and review of petitions for advisory opinions. Petitions should be posted publicly, and public comments should be allowed for at least a 60-day period. In addition to publishing any advisory opinions that result from this process, the CFPB should publish any denials of requests for advisory opinions.

<u>Recommendations</u>**: The Bureau should:**

- **Clarify that old FTC advisory opinions no longer have any legal authority under 15 U.S.C. § 1692k(e).**

- **Engage in notice and comment rulemaking to amend the regulation or its commentary instead of issuing advisory opinions, or**

- **If it continues to adopt advisory opinions, it should do so in limited circumstances after posting all requests for FDCPA advisory opinions publicly, allowing a 60-day comment period, and publishing all opinions and denials.**

[604] Pub. L. No. 111-203, tit. X, § 1089(1), 124 Stat. 1376 (July 21, 2010); 15 U.S.C. § 1692k(e).

[605] *Id*.

[606] *See also* Coalition comments in response to the CFPB's Request for Information Regarding Bureau Guidance and Implementation Support (July 2, 2018), *available at* https://www.nclc.org/images/pdf/rulemaking/coalition-comm-guidance-cfpb-rfi.pdf.

18. The Bureau's Introduction to Official Interpretations

The Bureau's Introduction to the Official Interpretations explains their role and the system for numbering them. In addition, it spells out a procedure to request an Official Interpretation.

As discussed in the prior section, revisions to the regulation or the Official Interpretations are preferable to issuance of advisory opinions. Official Interpretations will be issued only after notice and comment rulemaking, will be organized in a systematic way, will by their very nature be easily accessible to industry, consumers, and the public, and will run less risk of favoring one business over another or of creating conflicting or confusing standards. We therefore encourage the Bureau to use its authority to adopt Official Interpretations rather than issuing advisory opinions.

The Introduction, however, should be revised to state explicitly that the Bureau will engage in notice and comment rulemaking where needed to add to or amend the Official Interpretations. This will create the appropriate transparency and deliberative process.

***Recommendation*: The Bureau should amend the Introduction to the Official Interpretations to explain that it will engage in notice and comment rulemaking to add to or amend its Official interpretations.**