CBA | CONSUMER BANKERS ASSOCIATION

Via Electronic Mail

Director Kathleen L. Kraninger
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Re: Comments in Response to the Notice of Proposed Rulemaking under Regulation F
Docket No. CFPB-2019-0022

Director Kraninger,

This letter is submitted by the Consumer Bankers Association ("CBA")[1] in response to the Bureau of Consumer Financial Protection's ("Bureau") notice requesting public comment on the proposed rulemaking ("NPRM") that was published in the *Federal Register* on May 21, 2019 at 84 FR 23274 and proposes to amend Regulation F, 12 CFR part 1006, to prescribe rules under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. (the "Proposed Rules").

CBA and its members have two significant interests in the Proposed Rules. First, CBA's members, as providers of a variety of consumer credit products, engage in collections efforts when consumer accounts become delinquent, and therefore have a great interest in ensuring that the applicability of the Proposed Rules is explicitly limited to third-party debt collectors, and does not extend to creditors collecting their own debts. As discussed in detail below, Congress recognized that creditors' collection efforts are very different from those initiated by third-party debt collectors. The Bureau should make this distinction clear in the final rules and ensure that it does not introduce uncertainty by creating the possibility for rules that are designed for third-party collections to be applied to creditors.

Second, CBA's members assign accounts to third-party debt collectors, and have the responsibility to appropriately monitor such debt collectors. The Proposed Rules would impact the operations of debt collectors utilized by CBA members, and would also create new obligations for CBA members in terms of their management and oversight of collection agencies and law firms. For these reasons, CBA and its members have a strong interest in the adoption of debt collection rules that are clear and operationally feasible to implement and monitor.

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1 The Consumer Bankers Association is the trade association for today's leaders in retail banking – banking services geared towards consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

Clear and feasible rules will not only make the rules easier to implement, but they will also allow the consumer protection benefits intended by the proposed rules to be realized without negatively impacting the availability and cost of credit. The Bureau acknowledged this potential consequence in the NPRM,[2] and empirical research validates the concern that restrictions on contact with consumer debtors can have the impact of reducing access to credit, increasing consumer delinquencies and reducing consumer credit scores. As noted in the NRPM, an empirical study performed by the Federal Reserve Bank of New York found that state laws restricting debt collection

> lead[] to a decrease in access to credit and to a deterioration in indicators of financial health. Specifically, we find a sizable and significant reduction in auto loan balances, a significant decline in credit card and non-traditional finance balances, a significant decrease in auto and credit card originations, a sizable and significant increase in delinquent credit card balances and non-traditional finance balances, and a small but statistically significant reduction in credit scores.[3]

If the overall impact of the proposed rules is to significantly decrease the opportunity for contact between debt collectors and consumers – or between creditors and consumers – CBA believes that the impact on access to, and cost of, credit will be substantial, and will affect those consumers with the lowest credit scores and the least access to credit disproportionately. Fortunately, there are several revisions that the Bureau can make to the proposed rules to ameliorate these impacts, and those are discussed below.

I. THE BUREAU SHOULD MAKE CLEAR THAT THE FINAL RULES APPLY ONLY TO DEBT COLLECTORS AS DEFINED BY THE FDCPA.

Although the NPRM states that the Proposed Rules are intended to apply only to third-party "debt collectors" as that term is defined in the FDCPA at 15 U.S.C § 1692a(6), there are several aspects of the NPRM that are likely to create confusion about whether some provisions of the Proposed Rules may be applied to creditors and other parties not covered by the FDCPA. In particular, the Bureau has used its UDAAP authority under the Dodd-Frank Act to prohibit unfair, deceptive, or abusive acts or practices ("UDAAP") to support some provisions of the Proposed Rules. This raises a question about whether those provisions would be applicable to creditors and servicers who are subject to the Bureau's UDAAP authority.[4]

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2 *See* NPRM at 349 ("Any restriction on debt collection may reduce repayment of debts, providing a benefit to some consumers who owe debts and an offsetting cost to creditors and debt collectors. A decrease in repayment will in turn lower the expected return to lending. This can lead lenders to increase interest rates and other borrowing costs and to restrict availability of credit, particularly to higher-risk borrowers.")

3 *See* Fonseca, Strair & Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, FRBNY Staff Report No. 814 (May 2017), at 15.

4 By "creditors and servicers," we refer to entities that either own or service consumer debt prior to it being in default, and who would therefore be excluded from the definition of "debt collector" under the FDCPA. *See* 15 U.S.C. § 1692a(6)(A), (F)(ii) & (F)(iii).

Consistent with the FDCPA's text, the Bureau has recognized throughout this rulemaking that the FDCPA applies to debt collectors and not original creditors or their pre-delinquency servicing partners collecting in the creditor's name. For instance, in November 2013, the Bureau published its Advance Notice of Proposed Rulemaking, which stated: "When a consumer defaults on a debt, the first efforts to collect on that debt are often made by the creditor itself, either through in-house collectors or others collecting in the name of the creditor. In either case, ***first party collections are largely exempt from the FDCPA***." CFPB-2013-0033 (emphasis added).[5] Further, as discussed in greater detail in the next section of this letter, interactions that occur between consumers and their creditors are materially different from those that occur between consumers and third-party debt collectors.

However, while publicly stating that the NPRM seeks only to address third-party collection practices, the Bureau has included several ambiguous statements that could cause confusion about its intent in the final rules. For example, in the NPRM, the Bureau proposes to expand upon the FDCPA's non-exhaustive list of examples of unlawful conduct to outline additional unlawful acts for debt collectors. While those additions would seem to apply only to debt collectors as currently defined by the FDCPA, footnote 69 states:

> Where the Bureau proposes requirements pursuant only to its authority to implement and interpret sections 806 through 808 of the FDCPA, ***the Bureau does not take a position on whether such practices also would constitute an unfair, deceptive, or abusive act or practice under section 1031 of the Dodd-Frank Act.*** Where the Bureau proposes an intervention both pursuant to its authority to implement and interpret FDCPA sections 806 through 808 and pursuant to its authority to identify and prevent unfair acts or practices under Dodd-Frank Act section 1031, the section-by-section analysis explains why ***the Bureau proposes to identify the act or practice as unfair under the Dodd-Frank Act***.

NPRM at p. 31, note 69 (emphasis added). Another confusing statement in the NPRM appears in footnote 331, which states:

> ***The Bureau has not determined*** in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(ii) ***by creditors and others not covered by the FDCPA would constitute an unfair act or practice under Dodd-Frank Act 1031(c) if engaged in by those persons, rather than by an FDCPA-covered debt collector***.

NPRM at 156, n. 331 (emphasis added). *See also* NPRM at 148, n. 313 ("The Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(i) by creditors and others generally not covered by the FDCPA would

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[5] The United States Supreme Court has also acknowledged the limits of the FDCPA's definition of who is a "debt collector" subject to the statute. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721–22 (2017) ("[The FDCPA] defines debt collectors to include those who regularly seek to collect debts 'owed . . . another.' And by its plain terms this language seems to focus our attention on third party collection agents working for a debt owner—***not on a debt owner seeking to collect debts for itself***." (emphasis added).

constitute an unfair act or practice under section 1031(c) of the Dodd-Frank Act if engaged in by those persons, rather than by an FDCPA-covered debt collector. The Bureau's proposal does not address, for example, whether consumers could reasonably avoid harm from creditor contacts or whether frequent creditor contacts provide greater benefits to consumers or competition.")

The confusion caused by these comments is magnified by the Bureau's statement in the NPRM that it is relying on its rulemaking authority under the Dodd-Frank Act, in addition to that under the FDCPA, for certain provisions of the Proposed Rules. CBA believes that this reliance on dual authority is unnecessary, because the Bureau has clear authority under the FDCPA to promulgate the Proposed Rules, and indeed the FDCPA provides more specific authority to regulate the conduct of debt collectors than Dodd-Frank's general UDAAP provisions. By relying on both authorities, the Bureau creates uncertainty as to whether provisions of the Proposed Rules will be applied to creditors.

The uncertainty is further compounded by the Bureau's previous guidance related to creditor debt collection, in which the Bureau explicitly stated that it would apply certain provisions of the FDCPA to creditors collecting their own debts, pursuant to the Bureau's Dodd-Frank UDAAP authority. *See* CFPB Bulletin 2013-07. This raises the very real prospect that the Bureau may itself seek to apply provisions of the Proposed Rules to creditors and other entities not covered by the FDCPA. In addition, courts or state regulators might attempt to do so under state debt collection laws that apply to creditors collecting their own debts, many of which incorporate language from the FDCPA.[6] Further, state Attorneys General are authorized to enforce the Bureau's Dodd-Frank UDAAP authority. *See* 12 U.S.C. § 5552(a)(1).

It is significant that the Proposed Rules are the product of the Bureau's extensive research, interview, and information-gathering efforts exclusively in the *third-party* collection space and focused only on *third-party* collection issues. Until the Bureau completes a study and rulemaking that is specific to first-party collections, it is inappropriate to simply assume that the same concerns and outcomes are applicable and will protect consumers in both contexts.

Ambiguity and confusion about the application of the Proposed Rules to creditors does not serve the interests of consumers or industry. Rather, it is an invitation for divergent practices to be adopted depending on creditors' reading of the rules, and for divergent legal standards to emerge from individual supervisory examinations, CFPB and state enforcement actions, and court decisions in private litigation. The disorder and expense that this will create will impose costs on

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[6] Indeed, almost half of the states have jurisdiction-specific collections laws and regulations that apply to creditors and/or their first-party servicing partners, many of which are patterned on portions of the FDCPA. *See, e.g.*, 3 AK Admin. Code 01.210 *et seq*. (Alaska); Cal. Civ. Code §§ 1788 *et seq.* (California); Conn. Gen Stat. § 36a-645 *et seq*. (Connecticut); DC Code §§ 22-3401–22-3403 and § 28–3814 *et seq*. (District of Columbia); Fla. Stat. §§ 559.55–559.785 (Florida); O.C.G.A. § 7-3-7 *et seq.*, Ga. Comp. R. & Regs. R. 120-1-14 *et seq.* (Georgia); Haw. Rev. Stat. § 480D-1–480D-5 (Hawaii); Iowa Code §§ 537.7101–537.7103 (Iowa); La. Rev. Stat. Ann. § 9:3562 (Louisiana); MD Code, Commercial Law, § 14-201 *et seq*. (Maryland); Mass. Gen. L. 93 § 49 *et seq.*, 940 CMR § 7.00 *et seq*. (Massachusetts); MI Comp L. § 445.251 *et seq*. (Michigan); 15 CSR § 60-8.100, 15 CSR § 60-8.110 (Missouri); N.H. Rev. Stat. § 358-C:1 (New Hampshire); NY CLS Gen Bus § 600 *et seq*., 23 NYCRR 1.1 *et seq*. (New York); 6 R.C.N.Y. § 5-76 *et seq*. (New York City); N.C. Gen. Stat. Ann. § 75-50 *et seq.* (North Carolina); 15 Okl. Stat. Ann. § 753 *et seq.* (Oklahoma); Or. Rev. Stat. § 646.639 (Oregon); 73 Pa. Stat. § 2270 *et seq.* (Pennsylvania); S.C. Code § 37-5-101 *et seq.* (South Carolina); Tex. Fin. Code § 392.001 *et seq.* (Texas); VT ADC 06 031 004 (Vermont); W.Va. Code §§ 46A-2-122–46A-2-129 (West Virginia); Wisc. Stat. Ann. § 427.101 *et seq*. (Wisconsin)

the credit system in a manner that does nothing to protect consumers. CBA believes that the purpose of the rulemaking – and the objective of providing clear guidance to industry participants – can only be served by resolving these ambiguities.

CBA recommends that the Bureau remove the uncertainty about potential application of the final rules to creditors by (1) relying solely on its FDCPA authority for all provisions of the final rules; (2) including an explicit statement in the final rules that they are not intended to apply, and should not be applied, to creditors and servicers not covered by the FDCPA, and (3) stating that the definition of "debt collector" in the final rules is not intended to expand the FDCPA's coverage to creditors and servicers. By undertaking these steps, the Bureau can serve the interests of consumer protection in a manner that is clear, uniform, and provides well-defined guidance to industry participants.

II. THE BUREAU SHOULD MAKE CLEAR THAT THE PROPOSED CONTACT FREQUENCY RESTRICTIONS DO NOT APPLY TO CREDITORS

A provision of the Proposed Rules that is based partially on the Bureau's UDAAP authority – and which could have significant unintended consequences if applied to creditors collecting their own debts – is the limitation on telephone contact frequency set forth in proposed §1006.14(b)(2). There are critical aspects of creditors' relationships with their customers, and their collection efforts, that make it clear that a "one-size-fits-all" telephone contact frequency restriction would be harmful to consumers. For this reason, CBA urges the Bureau to make clear that the telephone contact frequency provisions in the NPRM do not apply to creditors.

There are two fundamental reasons why creditor debt collection efforts should not be subject to a specific frequency limit. First, because they have an ongoing customer relationship with consumers, creditors have a keen incentive to preserve that relationship through positive interactions with consumers who have fallen behind in making payments. A creditor's goal is to manage a consumer's delinquency in a manner that not only resolves the delinquency, but maintains an ongoing customer relationship. This natural incentive is the primary reason that Congress exempted creditors from the FDCPA.[7]

As applied to telephone contacts, this incentive means that creditors are motivated to limit their contact attempts to those that are necessary to successfully reach the consumer to communicate about the debt. Notably, the Bureau's experience supports the conclusion that creditors follow this incentive voluntarily. Despite the fact that the Bureau has conducted numerous examinations of creditors' collection activities, and has brought numerous enforcement actions against creditors related to collection practices, CBA is unaware of any Bureau enforcement action related to a creditor's telephone call frequency, and creditor telephone call frequency has not been discussed in any edition of the Bureau's *Supervisory Highlights*.

The second reason why creditor collection efforts are different from those of third-party collectors arises from the fact that the consequences of non-payment for a consumer can be dramatically more significant during earlier-stage creditor collections than in third-party post-

[7] *See* S. Rep. No. 95-382, at 2 (1977) (stating that creditors were exempted because it was believed that their incentive to protect ongoing customer relationships made them less likely to engage in abusive collection practices).

charge-off collections. Creditors typically attempt to collect their own debts in very early-stage delinquency through to the point of charge-off. During this period, the consumer is exposed to the accrual of additional interest on outstanding credit obligations, and late fees may also accrue if scheduled payments are missed. Most creditors furnish a consumer's payment history to consumer reporting agencies, and the degree of delinquency is reflected in increments of 30 days, up to the point of charge-off.[8]

As a consumer debt becomes more delinquent, the resulting impacts on the consumer quickly grow more significant, usually increasing monthly until the account is charged off. This, in turn, makes it critically important for creditors to contact consumers. Many creditors, including CBA members, offer alternative payment arrangements to consumers who are unable to make payments as scheduled under their credit agreements, such as hardship and disaster relief programs. Reducing the ability of creditors to contact consumers will directly impact consumers' ability to take advantage of such programs and avoid the negative effects of increasingly-delinquent debts. And this impact is borne out by data: a survey conducted of CBA members showed that, on average, a creditor needs to make 11.5 attempts to establish contact with a customer, and 13 attempts to obtain a payment or promise to pay. Imposing the call frequency restrictions in the proposed rules to creditors would therefore extend the time needed to contact a consumer over a period of weeks, which would operate to the consumer's detriment.

For secured credit obligations, the potential consumer impacts of delinquency are even greater and more urgent, thereby making even more important a creditor's ability to make contact with the consumer. An auto finance contract will be placed for repossession once it reaches a certain level of delinquency (usually 60-90 days past due), in the absence of an arrangement with the consumer to bring the account current. As an account nears the point of a repossession assignment, the consumer's interest is not served by a rule that would limit creditor contact efforts; to the contrary, such efforts give the consumer the greatest opportunity to avoid the repossession.

Likewise, for obligations secured by a residential mortgage, the consumer faces the possibility of foreclosure if the account becomes severely delinquent, and the Bureau's mortgage servicing rules recognize that creditors and servicers should undertake significant efforts to reach consumers and consider alternatives to foreclosure.[9] In particular, when a consumer submits a loss mitigation application, the servicer is required to "exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application." *See* 12 C.F.R. § 1026.41(b)(1). If the application is incomplete, the servicer is required to provide the consumer with a deadline for submitting additional information to make it complete. *See* § 1026.41(b)(2)(ii). If the servicer offers a loss mitigation option to the consumer, the consumer has a 7-day or 14-day period to accept or reject the offer (depending on the proximity to foreclosure). *See* § 1026.41(e). The loss mitigation process is a complicated one, with which consumers frequently need substantial assistance and reminders, and imposing a telephone call

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[8] Consumer Data Industry Association, *Industry Standard for Reporting Account Delinquency*, §§ 2-2, 4-11, 4-12, Credit Reporting Resource Guide (2017).

[9] *See* 12 CFR § 1024.41.

frequency limit would directly interfere with this process and create consumer harm that could be avoided by more frequent contact.

Application of the telephone contact limits in the Proposed Rules to creditors could directly impede their ability to assist consumers in avoiding all of the above impacts, and thereby increase the incidence of those impacts on consumers. Alternative communication channels such as email and text messages, are not a substitute for telephone calls, both because those channels are not available to be used for large numbers of consumer accounts and because email and text messages are not well-suited to complex interactions such as evaluating a consumer for a hardship program or loss mitigation options.

With regard to availability, while creditors typically give consumers the option of receiving communications by email, a significant number of consumers do not choose this option – either because they do not wish to receive email communications or because they may not have easy access to email. A CBA survey of its members regarding this issue showed that, on average, from 63% to 78% of consumers in various types of consumer portfolios provided consent to receive communications via email. While the majority of consumers in most portfolios have provided email addresses, significant minorities have not, which means that email communications cannot take the place of telephone calls for those consumers. Moreover, it is important to note that the percentages of accounts with email addresses include work emails, which the Bureau is proposing to restrict use of in ways not applicable to non-work addresses. The removal of work email addresses would reduce, perhaps by a significant degree, the percentage of consumers who could be reached by email, and may eliminate email altogether as a viable contact option if there is not a feasible way to differentiate between work and non-work email addresses, as discussed in Sections IV and V, below.

Similarly, because of the restrictions of the Telephone Consumer Protection Act, text messaging as a method of communication is limited to those consumers who have provided consent to receive text messages. As part of the same survey mentioned in the previous paragraph, CBA asked its members what percentage of consumers in various portfolios had provided consent to receive text messages on mobile telephones. Members' responses showed that, on average, 67% of consumers had a mobile telephone number listed on their accounts, and of those with mobile numbers, 76% had given consent to receive text messages about their accounts. This means that, on average, only 51% of consumers can be reached through text messages. As is the case with email, this leaves large populations of consumers as to whom telephone calls may be the creditor's only available option for communicating and helping those consumers avoid the consequences of worsening delinquency.

For these reasons, CBA suggests that the Bureau draw a clear distinction between creditor and debt collector interactions with consumers so as to create certainty that any telephone call frequency limits in the final rules apply only to debt collectors. Specifically, the Bureau should make clear that the limitations are not designed or suited for application to creditors, and that creditors' telephone contacts should be evaluated for harassment based on the facts and circumstances of each case under UDAAP principles, not a "one-size-fits-all" frequency limit. Taking these steps will prevent the confusion and possible unintended consequences that may result from the ambiguity in the NPRM regarding the potential application of call frequency limits to creditors.

III. CBA SUPPORTS THE BUREAU'S PROPOSAL THAT ANY TELEPHONE CONTACT FREQUENCY LIMIT BE APPLIED ON A PER-DEBT BASIS.

With respect to third-party debt collectors, CBA supports the Bureau's proposal to apply the call frequency limit in proposed §1006.14(b)(2) on a per-debt, rather than per-consumer, basis, primarily for the reasons given by the Bureau in the NPRM: (1) a per-consumer limit could interfere with debt collectors' practice of using client-specific personnel to handle collections; (2) requiring a single call to address multiple, unrelated debts could overwhelm consumers and lead to consumer confusion about the debts and related matters such as disputes; (3) imposing a per-consumer limit could lengthen the debt collection cycle for consumers with multiple debts; and (4) creditors could avoid a per-consumer limit by selectively placing debts with debt collectors. *See* NPRM at 167-69. CBA also believes that the Bureau's proposal is more consistent with the manner in which consumers understand their debts, and that applying the frequency limits on a per-consumer basis would diminish necessary contacts between debt collectors and consumers, leading to more unresolved debts.[10]

CBA strongly agrees with the Bureau's recognition that in circumstances where a consumer has multiple debts in collection, debt collectors typically do not ask about the consumer's multiple debts in a single telephone call for a variety of reasons, including: (i) honoring contractual requirements to keep information about a creditor's debts separate from information about other creditors' debts; (ii) permitting employees who specialize in collecting certain types of debts to handle a particular debt more efficiently and effectively; and (iii) ensuring compliance with state or federal privacy laws, such as those that address medical debts. *See* NPRM at 167-168.

Counting contact attempts on a per-debt basis (and thereby allowing a debt collector to limit a telephone conversation with a consumer to a discussion of a single debt) is also more consistent with how consumers understand their debts. Consumers who have incurred debts with different creditors would have no reason to expect those unrelated debts to be discussed on a combined basis in a single phone call, and the Bureau correctly notes that doing so would likely confuse consumers. *See* NPRM at 168-69. Even when multiple accounts are with the same creditor, the consumer may still view them as separate, particularly in the case of co-branded credit cards. Consumers are likely to more strongly associate those cards with the co-brand merchant than the issuer, and indeed, the Bureau noted this as the basis for requiring the identification of the co-brand merchant in validation notices, where it is available. *See* NPRM at 239.[11] The same rationale provides further support for handling such debts separately and not combining them for collection purposes.

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[10] CBA does not express an opinion on the Bureau's treatment of student loans with respect to the telephone contact frequency limit.

[11] "For credit card debts, the merchant brand appears to be an integral part of the name of the creditor that helps consumers identify debts and determine whether they owe them. Merchant brands appear to be salient information for debts arising from use of co-branded or private-label credit cards because consumers may associate such debts more closely with merchant brands than with credit card issuers. For example, the Bureau's consumer focus group findings indicate consumers use merchant brands to recognize credit card debts." *Id.* (footnotes omitted).

Finally, as the Bureau accurately notes, if the ability of debt collectors and consumers to communicate is too greatly restricted, debt collectors could be prevented from establishing right-party contacts and resolving debts. *See* NPRM at 139. In this regard, CBA strongly supports the Bureau's conclusion that despite a preference by some consumers to avoid communicating with debt collectors, many consumers benefit from such communications because they can allow the consumer to avoid the furnishing (or continued furnishing) of negative information to consumer reporting agencies or additional fees being incurred, or the filing of a collection lawsuit. *Id.* Therefore, CBA strongly agrees with the Bureau that the proposed call frequency limit should apply to third-party debt collectors on a per-debt, rather than per-consumer, basis.

IV. THE BUREAU SHOULD ALLOW THE USE OF ALL CONSUMER-PROVIDED E-MAIL ADDRESSES AND TELEPHONE NUMBERS FOR COMMUNICATIONS, RATHER THAN EXCLUDING WORK ADDRESSES AND NUMBERS.

Proposed § 1006.6(d)(3) provides a safe harbor from liability for an unintentional third-party disclosure if the debt collector communicates with a consumer using a non-work email address or telephone number after the creditor or debt collector provides the consumer with a notice and a reasonable opportunity to opt-out, and the consumer did not opt out, or if the non-work email address or phone number was used by the creditor or a prior debt collector without any opt-out request having been received from the consumer. *See* NPRM at p. 455-57. Proposed § 1006.22(f)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email sent from that email address. *See* NPRM at p. 466.

There are two principal problems with the Bureau's proposal to treat work email addresses and telephone numbers differently from non-work email addresses and numbers.[12] First, the proposal ignores consumer choice about a preferred communication channel. By drawing an arbitrary distinction that prevents consumers from making their own evaluations, the proposal will impede communications in what may be many consumers' preferred channel, thereby reducing opportunities for debt collectors to contact consumers about unresolved debts and increasing the need for debt collectors to use escalated collection methods such as litigation. Second, as discussed more fully in the next section of this letter, the proposal ignores the reality that it often will be impossible for creditors and debt collectors to accurately differentiate between work and non-work addresses and telephone numbers.

The rationale for the Bureau's proposed different treatment of work email addresses and telephone numbers is that employers have the right to monitor email received at addresses they

[12] This issue, and many other issues discussed in the remainder of this letter, are applicable only to debt collectors, and therefore would not apply directly to CBA's members. However, CBA members will nevertheless be impacted by them, through their use of third-party debt collectors and the requirement that they exercise oversight with respect to debt collectors with which they place debts. CBA's members also have experience in managing debts placed with third-party debt collectors, and therefore CBA wishes to share its comments, even on provisions of the proposed rules that would not be applied to creditors.

provide to employees, or messages received on company-provided devices, and such monitoring could allow an employer to learn about an unpaid debt. The NPRM does not make reference to any data about the actual incidence of such monitoring by employers, and CBA believes that the risk identified by the Bureau is minimal, and in any event is a risk that a consumer is best able to evaluate when deciding whether to provide a work email address or telephone number.

Consumers have the ability to control their email and other digital communications throughout an account relationship. Such control begins with the consent a consumer gives to a creditor at the outset of an account relationship to receive messages at a particular email address or mobile telephone number, and continues to exist throughout the relationship through the consumer's ability to opt out of receiving further emails or messages at that address or number. It is common practice for creditors to include a mechanism by which customers can opt out of receiving emails and electronic messages, which customers can exercise at any time. These mechanisms are very easy to use, most commonly consisting of replying "STOP" to a text message or using an "unsubscribe" link included in an email. Indeed, the Proposed Rules would require a debt collector to provide an opt-out option in every email and text message it sends. Accordingly, a consumer's continued receipt of emails or messages at the address or telephone number he or she has provided to a creditor indicates that the consumer believes the receipt of emails or text messages at that address or telephone number is an effective way to receive communications.

The Bureau's proposal would override such an expression of consumer preference and consent based on an arbitrary distinction between work and non-work email addresses and telephone numbers that, as noted above, does not appear to be supported by any data showing significant consumer harm. It also overlooks the significant cost of eliminating work email addresses and telephone numbers as a viable communication channel (absent a new consent given directly to the debt collector). Many consumers would no longer receive email or other digital communications about their debts, despite having chosen this as their preferred communication method. This interruption in receiving messages is likely to frustrate consumer expectations about how communications about a debt will be sent, and could lead to consumers failing to receive messages that are sent in some other way than the email address or telephone number used by the creditor. This, in turn, could cause consumers not to pay delinquent debts, increasing the chances of further consequences such as negative credit reporting and possible legal collections. In CBA's view, it is fundamentally unfair to consumers to ignore their communication preferences regarding a debt, and doing so is likely to cause consumer harm.

For these reasons, CBA asks the Bureau to consider revising proposed §§1006.6(d)(3) and §1006.22(f)(3) to allow debt collectors to use consumer-provided work email addresses and telephone numbers that satisfy the other elements of the Proposed Rules.[13]

V. THE BUREAU SHOULD REVISE THE KNOWLEDGE STANDARD FOR WORK EMAIL ADDRESSES AND TELEPHONE NUMBERS.

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13 If the work/non-work distinction is maintained in the final rules, the Bureau should clarify that an instruction from an consumer (or employer) to a debt collector to cease contacting a consumer via an employer-provided email will be operative only as to that specific employee, and will not be imputed to the entirety of the employer's workforce.

In addition to ignoring consumer choice, another problem with the different treatment of work and non-work email addresses in the Proposed Rules is the impracticality of the associated "know or has reason to know" standard. Proposed § 1006.22(f)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or has reason to know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address. See NPRM at p. 466. CBA strongly believes that the "know or has reason to know" standard for assessing whether an email address is a work email address is unworkable, and would force debt collectors to err on the side of not using email addresses, effectively eliminating email as a communication channel for many consumers.

The knowledge standard is just unworkable for the purposes of proposed § 1006.6(d)(3), which requires a debt collector to "maintain[] procedures that include steps to reasonably confirm and document that" it is sending messages to non-work email addresses or telephone numbers that meet the other requirements set forth in the rule.

CBA strongly disagrees with the Bureau's view that a creditor or debt collector would know or should know whether an email address is a work email address merely by assessing the email address's domain name. *See* NPRM at p. 514. There are many ambiguous domain names that may or may not be associated with a work email address. For example, a "gmail" domain name could be used for work purposes, especially by a small business, even though it is commonly associated with personal use. Similarly, an ".edu" domain name would present difficulties in assessing whether the email address corresponds with a student or an employee of an educational institution.[14] Many other email addresses will be from domains that make it impossible for a debt collector to reliably determine whether the address is a work or personal address.

To illustrate the logistical difficulty of making such a determination, a CBA member provided data regarding the number of unique email domain names in its delinquent credit card portfolio. There were over 300,000 unique domain names within the delinquent portion of this portfolio, and two-thirds of those domains had only a single email address associated with them. Under the Proposed Rules, each domain name would have to be individually considered to determine whether or not it is employer-issued. This process could not be automated, but rather would need to be performed manually because of the large number of single-address domain names. Moreover, even such a manual process would involve guesswork, since examination of the domain name would not reliably indicate whether the address was employer-issued or not.

The challenge of identifying work-provided telephone numbers would be even greater, because there would be nothing about the number itself to inform anyone as to whether the owner of the telephone number was the consumer's employer. In addition, mobile phone numbers are frequently abandoned and reassigned by mobile network providers, and keeping up with these changes would make the challenge of identifying work numbers even greater. The only source of information would be the content of communications with the consumer, but in the absence of

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[14] The survey of CBA's members showed that an average of 2.6% of email addresses in consumer portfolios used "edu" domain names. In a large portfolio, this could encompass many thousands of accounts.

such communications (for example, at the beginning of a debt collector's activity on an account), the debt collector would have no independent way to "confirm," as the text of the proposed rule requires, that a telephone number is work-issued.

For all of these reasons, CBA strongly suggests that the Bureau reconsider the practicability of requiring a "know or has reason to know" standard for assessing whether an email address is a work or non-work address, and the reasonable procedures required for debt collectors to "confirm" that a telephone number is not work-provided.

VI. THE BUREAU SHOULD REVISE THE PROPOSED OFFICIAL COMMENTARY TO REQUIRE CONSUMER DESIGNATIONS OF INCONVENIENT TIMES TO BE SPECIFIC.

Proposed § 1006.6(b)(1)(i) provides:

> (1) *Prohibitions regarding unusual or inconvenient times or places*. A debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt:
>
> (i) At any unusual time, ***or at a time that the debt collector knows or should know is inconvenient to the consumer***. In the absence of the debt collector's knowledge of circumstances to the contrary, a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is convenient;
>
> *Id.* at 453 (emphasis added).

CBA's concern arises not so much from the text of proposed § 1006.6(b)(1)(i), which largely tracks the existing language of the FDCPA, but with proposed Comment 6(b)(1)-1(iii) and (iv), which states that a consumer's request not to communicate with him or her while "at school" is a valid designation of an inconvenient time. *Id.* at 498. In allowing "at school" to serve as such a designation, the proposed comment assumes that a debt collector would know what "at school" means for a particular consumer, and suggests that similar, indefinite statements would be considered sufficient to designate an inconvenient time.

CBA believes this approach would place an impossible compliance obligation on debt collectors. Even assuming "at school" means a time when the consumer is physically away from home (which is clearly not always the case given the availability of on-line courses), it would be impossible for a debt collector to reasonably know what hours that would be for a particular adult consumer. There are endless school schedule options for an adult student, including nights and weekends, and the amount of time spent "at school" would of course also depend on an individual's course load. In addition, a student's school schedule would likely change for each term of school, also in ways impossible for a debt collector to be aware of. Without specific information about a particular consumer's school schedule, a debt collector cannot reasonably identify the hours when a consumer would be "at school."

Consumers could make other vague statements about inconvenient times in telephone conversations that would be equally impossible for a debt collector to heed. Examples include a statement not to call "on my day off," or "when I am on call," or "when I am coaching soccer."

Like the "at school" example used in the proposed official commentary, none of these statements gives a debt collector sufficient information to know when calls should be avoided, and the Bureau should not open the door to such statements as being effective to communicate an inconvenient time.

FDCPA case law supports the straightforward proposition that a consumer must provide specifics about an inconvenient time, rather than forcing a debt collector to guess what that time might be. In *Zarichny v. Complete Payment Recovery Servs*., 80 F. Supp. 3d 610 (E.D. Pa. 2015), the court dismissed the plaintiff's claim that the debt collector's calls were inconveniently timed because the collector was aware that she was a college student and called her when a college student would be expected to be in class. *Id*. at 621. The court held that the FDCPA presumes that the hours between 8:00 a.m. and 9:00 p.m. are convenient, and where calls were placed during that timeframe without evidence that the collector was aware of idiosyncratic circumstances, the claim could not be sustained. *Id*. In other words, knowledge that the plaintiff was a student was not, without more information, sufficient to state a claim that the debt collector had called at an inconvenient time.

CBA therefore recommends that the "at school" example in the proposed comment be removed and that the official commentary make it clear that consumers are required to state specific days and times that are inconvenient in order to trigger a debt collector's obligation not to initiate contact at those times.

VII. THE BUREAU SHOULD NOT APPLY "INCONVENIENT TIME" RESTRICTIONS TO EMAIL AND OTHER ELECTRONIC MESSAGES.

Proposed § 1006.6(b)(1), which prohibits debt collectors from communicating with consumers at inconvenient times, applies on its face to all communications regardless of channel. Accordingly, it would apply not only to telephone calls but also to emails and other electronic messages. This broad coverage ignores the fundamental difference between telephone calls and other communication channels, namely that telephone calls can be intrusive while electronic communications are inherently less intrusive.

The Bureau should make clear that the inconvenient time prohibition for telephone calls does not restrict the sending of email messages or similar electronic messages (like push notifications or in-app messages), because those forms of communication can be read at the consumer's convenience, and do not cause physical disruption similar to that caused by the receipt of a phone call.[15]

There would also be significant practical obstacles to applying the inconvenient time prohibition to emails and other electronic communications. Electronic messages are often automated, and many are sent in response to an action taken by the consumer, such as an email confirming that a payment has been received or indicating that a consumer's communication has been received and will be responded to within a certain period of time. Messages of this type, however, are highly unlikely to disturb or harass consumers. Email messages can be read at any time, and consumers

15 CBA does not object to the application of inconvenient time provisions to text messages.

can even choose when to check for new messages. In addition, there are a variety of ways in which consumers can control how they are notified of new emails and other electronic messages, through options available on their mobile devices. For example, mobile devices can be set to "do not disturb" at particular times, and notifications for email and other digital messages can be turned off altogether as well. And, of course, for messages generated in response to the consumer's activity (like a payment confirmation message, or a message that a dispute has been received) would necessarily come at a time convenient to the consumer, since they would follow the consumer's action closely in time. In short, the concept of communication at an inconvenient time has no applicability to email and similar electronic messages.

To comply with the Proposed Rules, a debt collector would also have to modify its systems for sending bulk electronic communications to address each consumer's known geographical location for purposes of determining inconvenient times. The collector would then have to overlay any specific inconvenient times for individual consumers and also have a system that would avoid sending electronic communications at those times as well. Since such individualized technology does not currently exist, the inconvenient time prohibition would force the development of new systems to incorporate this requirement. This would create a significant expense for the industry, while providing little or no benefit for consumers.

The Proposed Rules appear to recognize the inherent difference between phone contacts and electronic communications by imposing frequency limits only on phone contacts. *See id.* at 114; see proposed § 1006.14(b). The Bureau should similarly recognize this inherent difference with regard to the inconvenient time prohibition and provide in the final rules that, except for text messages, the inconvenient time prohibition does not apply to electronic communications.

VIII. THE BUREAU SHOULD PROVIDE FORM LANGUAGE FOR USE AS AN OPT-OUT NOTICE IN TEXT MESSAGES.

CBA does not oppose the requirement in the proposed rules that debt collectors provide disclosure of the right to opt out in email and text messages. *See* Proposed § 1006.6(e). The rule itself does not provide any specific language to satisfy this requirement, but the proposed official commentary provides an example for text messages: "Reply STOP to stop texts to this telephone number." CBA believes that debt collectors should be given a safe harbor for using the Bureau's suggested opt-out language, and thus CBA suggests taking the example from the official commentary and placing it in the text of the rule as a safe harbor. Doing so will increase certainty and eliminate disputes about whether a particular opt-out disclosure is sufficient under the "least sophisticated consumer" standard applied in FDCPA litigation.

IX. THE BUREAU SHOULD MAKE THE MODEL VALIDATION NOTICE A STANDARDIZED FORM BY DISALLOWING FEDERAL CASE LAW FROM ALTERING THE FORM.

CBA strongly supports the Bureau's proposal to create a model validation notice for debt collectors to use to comply with 15 U.S.C. § 1692g(a). Without a model form, and guided only by the language of the FDCPA, federal courts have reached divergent conclusions about what information must – or may – be included in a validation notice,[16] resulting in needless confusion among industry participants, the inability to use a single validation notice form nationwide, and wasteful litigation over the content of validation notices that does not benefit consumers. The Bureau's proposed model validation notice, contained in the NPRM, is the solution to these problems, and can allow debt collectors to use a single form nationwide and avoid litigation about whether the form complies with the FDCPA.

The benefits of the Bureau's model validation notice, however, may not be realized because the Proposed Rules leave a significant window for federal courts to treat the Bureau's model form as non-standard, and require different disclosures in every circuit (or even district) in the United States. This window is set forth in proposed § 1006.34(d)(3)(iv), which provides that debt collectors may make "optional disclosures" that are "required by applicable law." The proposed official commentary to this provision states that "[d]isclosures required by other applicable law may include, for example, disclosure requirements established by State statutes or regulations, *as well as disclosures required by judicial decisions or orders*." *See* NPRM at 526 (emphasis added). Compounding this problem, footnote 515, on page 277 of the NPRM, cites two judicial opinions, interpreting the FDCPA, that create required disclosures relating to the amount of the debt disclosed in a validation notice that *contradict* the amount of debt disclosure required by the Bureau's proposed rule and model form.[17]

Leaving aside the confusion likely to be created by an "optional" disclosure that is "required by applicable law," the Bureau's comment in the NPRM that federal case law interpreting the FDPCA should be free to create disclosure requirements for validation notices in addition to – or contrary to – the requirements set forth in the Bureau's model form directly contradicts its utility as a model form. If debt collectors are required to survey all past FDCPA decisions to discern disclosures that are "required by judicial decisions or orders," and to continue to monitor such decisions on a constant basis and include their requirements on the Bureau's model form, the result will be more of what exists today: a lack of a uniform validation notice, and a continuation of wasteful litigation about what disclosures are actually required on a validation notice.

Moreover, the treatment of judicial decisions, and their ability to change the content of a model form, diverges significantly from other model forms promulgated by the Bureau under other federal consumer financial laws. For example, there is an extensive series of model forms available in Appendices G and H of Regulation Z, which implements the Truth in Lending Act

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[16] *See, e.g,, Caprio v. Healthcare Revenue Recovery Group, LLC*, 709 F.3d 142 (3d Cir. 2013) (adding an "in writing" disclosure requirement to the notice, which is not required in any other circuit). In addition, federal courts have created new disclosure obligations under § 1692g(a) that are not present in the statute, but have done so in ways that differ from circuit to circuit. *Compare Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000) with *Carlin v. Davidson Fink LLP*, 852 F.3d 207, 216-217 (2d Cir. 2017) (both dealing with situations in which the amount of the debt may change in the future).

[17] The cited decisions (*Avila* v. *Riexinger & Associates, LLC*, 817 F.3d 72, 77 (2d Cir. 2016) and *Miller* v. *McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872, 876 (7th Cir. 2000)) require debt collectors to disclose information about the amount of a debt in the future, when it may change because of the imposition of additional charges or fees, while the Bureau's proposed rule requires the amount of the debt to be stated as of the "itemization date" and as of the "current date" of the validation notice. *See* proposed § 1006.34(c)(2)(viii)-(x).

(TILA) (12 C.F.R. part 1026), but there is nothing in Regulation Z or the Appendices that permits federal courts interpreting the TILA to add to, or vary, the content of those model forms. To the contrary, creditors are instructed that anything other than very minor changes will cause their forms not to be deemed in compliance with the applicable disclosure requirements, and the Bureau even provides a list of minor changes that are permitted. *See* 12 C.F.R. part 1026, Comment 1 to Appendices G & H.

Likewise, the Bureau has provided model form adverse action notices under Regulation B, which implements the Equal Credit Opportunity Act (ECOA) (12 C.F.R. part 1002, Appendix C), and a variety of forms under Regulation V, which implements the Fair Credit Reporting Act (FCRA) (12 C.F.R. part 1022, Appendices B, C, D & H). However, none of those forms contains a provision that allows federal courts interpreting the ECOA or FCRA to add required disclosures to the forms. In this respect, proposed § 1006.34(d)(3)(iv) is unique.

The Bureau has comprehensively studied the appropriate content for a validation notice, taking into account FDCPA requirements and its own research on consumer understanding of information on validation notices.[18] It is eminently appropriate for the Bureau to use its specialized knowledge (and statutory authority) to promulgate a true model validation notice that satisfies the disclosure requirements of § 1692g(a). There is no reason for federal courts to be able to modify or add to the model form via the "optional disclosures" provision in proposed § 1006.34(d)(3)(iv), just as there is no reason for federal courts to be able to modify the model forms provided by the Bureau under Regulations Z, B, or V. Federal courts lack the resources and expertise possessed by the Bureau on this issue, and will decide cases based on the facts before them and the records developed by parties in private civil litigation. The result will not be better disclosure. Instead, the result will be non-uniform disclosures and continued litigation over what disclosures are required, which will threaten to frustrate the purpose of the model validation notice.

For these reasons, CBA suggests that the Bureau limit the "required by applicable law" disclosures permitted by § 1006.34(d)(3)(iv) to those required either by other federal statutes (like the Health Insurance Portability and Accountability Act, for example, in connection with medical debts) or state laws. This clarification should be made in the text of § 1006.34(d)(3)(iv) and in the official commentary accompanying it. The commentary should also state that federal courts interpreting the FDCPA are not permitted to alter or add to the model validation notice. Making these changes will make a model validation notice adopted by the Bureau a true model form that can be used nationwide, without significant variation, and will provide appropriate consumer disclosure and certainty to debt collectors about how to comply with § 1692g(a).

X. THE BUREAU SHOULD DEFINE "ORIGINAL CREDITOR" AS THE CREDITOR AT TIME OF CHARGE-OFF.

An item of information that debt collectors are required to provide to consumers, upon request, under the FDCPA and the Proposed Rules is the identity of the "original creditor," if different from the current creditor. *See* proposed § 1006.38(c). CBA suggests that the Bureau define the

[18] *See* NPRM at 22, notes 40-41.

term “original creditor,” as used in this context, to mean the creditor at the time the consumer’s account was charged off, if a debt is charged off.[19] There are two reasons for this request. First, this definition will result in consumers receiving better and clearer information. Second, it will avoid placing a large burden on creditors without a corresponding consumer benefit.

This issue is primarily of concern with respect to credit card portfolios (but also occurs with other consumer financial products, such as indirect auto finance, where the auto dealer is the original creditor, but assigns the retail installment contract immediately after origination). It is relatively common for credit card issuers to purchase account portfolios from one another, and because credit card accounts have no specific term, the accounts can remain open for many years. When the purchaser on-boards the new accounts, it services them using its system of record and typically treats the accounts in the same manner as its existing portfolios, servicing the accounts in its own name, without reference to the name of the original issuer. Consumers whose accounts are in such a portfolio will receive communications from the acquiring creditor up until the point of charge-off, including periodic statements and other correspondence.

Assuming that such an account is placed with a third-party collection agency, the identification of the creditor is intended to assist the consumer in recognizing the debt, as the Bureau explained in the NPRM. *See* NPRM at 240. And as the Bureau noted, “the consumer may be more likely to recognize the name of the creditor as of the itemization date …. This is because (as discussed in the section-by-section analysis of proposed § 1006.34(b)(3)) the itemization date is intended to reflect a notable event in a debt’s history that the consumer may recall, or for which the consumer may have records.” *Id.* In making these statements, the Bureau was addressing the distinction between the current creditor (which may be a debt buyer) and the creditor as of the “itemization date,” but the Bureau’s logic is equally applicable to a debt that was transferred from one creditor to another before charge-off. The consumer will be more likely to recognize the later creditor (since it was more recent), and will have received communications from that creditor (in the form of periodic statements and correspondence) that the consumer may still have. Defining “original creditor” as the creditor at the time of charge-off serves the same goal as the identification of the creditor as of the “itemization date,” as required by proposed § 1006.34.

Moreover, identifying a predecessor pre-charge-off creditor could cause consumer confusion, and may even prompt the consumer to contact that creditor relating to the debt. This would, of course, be fruitless, since the previous creditor would have no information about the account, and would not be able to take any action relating to the collection efforts on the account. By defining the charge-off creditor as the “original creditor” for purposes of providing information to the consumer, the Bureau could focus the consumer’s attention on the creditor with the most up-to-date records on the consumer’s account and, if that creditor still owns the account, the party with ultimate control over the debt.

The alternative definition of “original creditor” – which could reach back many years to the creditor at the time an account was originated – would provide very little useful information to

[19] Some types of debt may not be subject to charge-off, and thus CBA suggests that its proposed definition of “original creditor” only apply to charged-off debt.

consumers, and would impose a significant burden on creditors. Credit card accounts, because of the long periods over which they may remain open, could undergo several portfolio sales (or even bank acquisitions and mergers) between the time of origination and the time of charge-off. Successor creditors would find it difficult – if not impossible – to store and retrieve information about an account's origination creditor, and that challenge would increase for accounts that may have been transferred more than once. If the proposed rules required identification of origination creditors, purchasers of credit card portfolios would have to build or modify their systems to store and track this information, at significant cost. But this cost would not be matched by any real consumer benefit. As noted above, the creditor at the time of charge-off is the one with the most recent contact with the consumer, and the one the consumer should recognize and have the most recent information about. Identifying an origination creditor, perhaps from many years ago, would not be likely to assist consumers in recognizing the debt or understanding any aspect of it.

For all of these reasons, CBA suggests that the Bureau define "original creditor," as used in §§ 1006.34 and .38 of the Proposed Rules, to mean the creditor at the time of charge-off.

XI. THE BUREAU SHOULD ELIMINATE THE ITEMIZATION REQUIREMENT FOR PRE-CHARGE-OFF DEBTS WHERE CONSUMERS ARE RECEIVING MONTHLY STATEMENTS.

Section 1006.34(c)(2)(ix) requires a validation notice to contain "[a]n itemization of the current amount of the debt in a tabular format reflecting interest, fees, payments, and credits since the itemization date," and subsection (c)(2)(x) requires a statement of the current amount of the debt. These are sensible and helpful disclosures for charged-off debts, but they present an unworkable situation for a debt that may be placed with a third-party collector prior to charge off, and where interest is continuing to accrue, as reflected on monthly statements being sent by the creditor to the consumer. Under these circumstances, for a debt collector to be able to provide an accurate itemization and current balance, it would be necessary to send the validation notice on exactly the same date as the creditor generated a monthly statement, so that there would have been no changes to the debt since the "itemization date" of the last monthly statement. Otherwise, any difference in time between a statement and the validation notice would have resulted in additional interest accrual (and, possibly, the addition of late fees), which a debt collector would not be able to include in an itemization or current total unless it had real-time access to the creditor's system of record.

And even if a collector could produce an accurate itemization for a pre-charge-off debt with interest and other charges still actively accruing, providing that information in a validation notice would be likely to confuse the consumer, because it would necessarily be different from information shown on the monthly statements provided by the creditor.

This issue only affects pre-charge-off debt where interest and other charges are continuing to accrue, and the Bureau can resolve the problems created by the proposed rule in this situation by providing that subsections 34(c)(2)(ix) and (x) do not apply to a debt which is not charged off and as to which the creditor is providing monthly statements to the consumer. Making this change will resolve the impossibility of complying with the itemization and current total debt disclosures in this context, and will provide consumers with information that is consistent with their monthly statements, rather than contrary to them.

XII. DEBT COLLECTORS SHOULD BE ABLE TO INCLUDE THEIR COMPANY NAMES AND THE CREDIT PRODUCT NAME IN A LIMITED CONTENT MESSAGE.

Proposed § 1006.2(j) sets forth a "limited content message" that would not convey information regarding a debt, and therefore, could be transmitted via voicemail, text, or orally without reference to the information required to be disclosed under FDCPA sections 806(6) and 807(b) (the "mini-Miranda" disclosure). *See* NPRM at p. 57-58, 67-70. Proposed Comment 2(j) provides that a message will not qualify as a limited content message if it includes any information other than the content specified in §§ 1006.2(j)(1)-(2). *See* NPRM at p. 57, 61, 63, 67-70.

CBA strongly believes that the Proposed Rules should be revised to allow debt collectors to disclose the collector's company/business name, unless the name indicates on its face that the company is in the debt collection business, as well as the name of the credit product involved. Omitting these pieces of information from the limited content message is likely to cause a significant reduction in the response rate, as the recent proliferation of fraudulent robocalls makes it likely that a consumer would interpret the limited content message as a scam or spam message. Moreover, disclosing this information would not (with limited exceptions) convey information regarding a debt, as the FDCPA expressly recognizes that debt collectors have the right to use their business names, despite a risk of third party disclosure, as long as the name does not expressly indicate that they are in the debt collection business.[20] The identification of the credit product (i.e., "this call concerns your AAA Bank Visa Card account" also does not disclose the existence of an unpaid debt.

First, research has long shown that leaving a message is more likely to lead to returned calls, and recent studies have found that disclosure of a caller's identity results in higher rates of answered or returned calls.[21] These factors have gained far more significance due to the current prevalence of robocalls and telephone fraud, which accounted for more than 65 percent of consumer complaints to the Federal Trade Commission ("FTC") in 2018.[22] Such calls have not only become more prevalent, but also more sophisticated, with ubiquitous use of caller ID "spoofing," which leaves consumers unable to determine whether a call from an unknown number is from a scammer.[23] Indeed, the prevalence of such calls has resulted in reports, from more than 70

[20] *See* 15 U.S.C. § 1692f(8).

[21] Randomized Trial of Leaving Messages on Telephone Answering Machines for Control Recruitment in an Epidemiologic Study, Thomas D. Koepsell, Valerie McGuire, W. T. Longstreth, Jr., Lorene M. Nelson, and Gerald van Belle, American Journal of Epidemiology (1996) (finding that leaving a message increased the telephone survey response rate by about 20 percentage points).

[22] https://www.consumerreports.org/robocalls/mad-about-robocalls/

[23] https://www.consumerreports.org/robocalls/mad-about-robocalls/ (noting that "of the robocalls placed in 2018, 40 percent were scam calls trying to trick consumers into giving away valuable personal information or defraud them out of their money.").

percent of Americans, that they do not answer their phones when they do not recognize the incoming number.[24] Under these circumstances, a consumer is unlikely to distinguish between a message left by a scammer, and one left by a debt collector that to qualify as a limited content message under the Proposed Rules could only identify the name of an individual (with whom the consumer is presumably not familiar). Rather, a message identifying a legitimate business name – and one which the consumer will have seen on a validation notice – is likely the only way a consumer would be able to distinguish such calls from scammer calls– which is a necessity to increase the likelihood of a response. Accordingly, consumers would be best served by permitting debt collectors to disclose their business names and the name of the credit product in the limited content message, both of which would help the consumer to distinguish the message as a legitimate one.

While the Bureau did not directly address the disclosure of company names in the NPRM, it is evident from its analysis of whether to permit email addresses and "vanity" numbers that it is concerned that the disclosure of company names would convey that a consumer owes a debt. In particular, with respect to "vanity" numbers, the Bureau notes that it "considered permitting vanity numbers on the condition that they do not convey information about a debt," but decided against permitting such use because it "would require a case-by-case analysis to determine if a particular vanity number conveyed information about a debt … [which] could undermine the certainty that the limited-content message definition is designed to provide…."

As a preliminary matter, the FDCPA's text and well-established case law provide that collectors are permitted to disclose their names, regardless of the risk of third-party disclosure, as long as the name does not indicate that it is in the debt collection business. *See* 15 U.S.C. § 1692f(8); *see also Brown v. Van Ru Credit Corp.*, 804 F.3d 740, 742-43 (6th Cir. 2015) (holding a collector voicemail disclosing the name of the caller, the name of the business, a reference number, a toll-free number, and request for a return call did not violate the FDCPA because "[a] communication to a third party poses little threat to a debtor unless it inspires the third party to harass the debtor or else reveals potentially embarrassing or harmful information to the third party"); *Marx v. General Revenue Corp.*, 668 F.3d 1174, 1177 (10th Cir. 2011) (holding that although a fax sent to the borrower's employer disclosing the collector's name, logo, address, phone number and the borrower's account number did not violate the FDCPA because nothing in the fax conveyed or implied anything about an underlying debt); *Yount v. Midland Funding, LLC*, 2016 U.S. Dist. LEXIS 16154 *1, *10 (E.D. Tenn. 2016) (holding that a message leaving collector name, company name, and return telephone number with a request for a return call did not violate the FDCPA because it was "similar to the case in *Brown*, where the caller does nothing to reveal, either directly or indirectly, the existence of a debt" but rather, "merely reveal[ed] generic information."); *Evankavitch v. Green Tree Servicing, LLC*, 979 F. Supp. 2d 535, 539-42 (M.D. Pa. 2013) (holding messages and live calls to plaintiff's daughter and neighbor requesting a return call, did not violate the FDCPA as they were not "communications" that disclosed anything about the underlying debt); *Padilla v. Payco General American Credits, Inc.*, 161 F. Supp. 2d 264, 274 (S.D.N.Y. 2001) (holding that alleged calls to receptionist regarding salary, pay schedule and employment status did not allege a violation without information establishing that the third party "became aware" that the caller was collecting a

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[24] https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/

debt). *See also Gburek v. Litton Loan Servicing L.P.*, 614 F.3d 380, 384-85 (7th Cir. 2010) (holding that in determining what a communication is made in connection with the collection of any debt under the FDCPA, ". . . the purpose and context of the communications – viewed objectively – are important factors as well.").

Moreover, although focus on business names has increased in the internet age, courts have rejected (at least with respect to mailed communications) consumer "attempt[s] to add a research element into the unsophisticated consumer calculus." *See Davis v. MRS BPO, LLC*, No. 15 C 2303, 2015 U.S. Dist. LEXIS 91726, at *8-9 (N.D. Ill. July 15, 2015) (finding no § 1692d(8) violation based on plaintiff's assertion that "[g]oogling 'MRS BPO' reveal[ed] that it is a debt collection company," as the "research element" was "unsupported by any legal authority," and § 1692f(8) expressly permitted the defendant to include its name). As the court in *Schmid v. Transworld Sys.*, explained, these "Google hypothetical[s]" are incompatible with the purpose of the FDCPA, which, with respect to § 1692f(8), was never intended:

> to make all debt-collections letters 100% untraceable—in particular against someone motivated to take extra steps to track down the source of his neighbor's business-looking mail. Admittedly, when the FDCPA was passed in the 1970s, it would have taken some sleuthing effort to use just an address to try and identify the sender, compared to the relative ease of running an internet search today. Still, that § 1692f(8) retains the address-exception even in the Google-era reflects the reality that the provision is not trying to completely guarantee that the source of the letter will remain anonymous against an intrusive neighbor. The statute shields against markings that might "intimate" to those who glimpse "that the contents of the envelope relate to collection of delinquent debts … not anything that could conceivably be used by an inordinately curious and very determined snoop, with the help of extrinsic research, to trace the letter."

Schmid v. Transworld Sys., No. 15 C 02212, 2015 U.S. Dist. LEXIS 118708, at *17 (N.D. Ill. Sep. 4, 2015).

While it is inevitable that the prohibition on a debt collector's use of a name that indicates it is in the debt collection business has produced some ambiguity, the case law shows that courts are well-equipped to make these determinations, and suggests any concerns about uniformity or predictability are unnecessary. Accordingly, the omnipresent nature of the internet provides no basis to depart from the FDCPA's original purpose, nor does it present any reason to exclude a debt collector's business name from the limited disclosure language. And although the Bureau's goals of uniformity and predictability are certainly desirable, those ends should not come at the detriment of effective communications that consumers can differentiate from scam robocalls. Accordingly, the Bureau should permit debt collectors to state their names in limited-content messages, unless a collector's name indicates that it is in the collection business, and should also be permitted to identify the name of the credit product giving rise to the debt.

XIII. THE PROPOSED THIRD-PARTY DISCLOSURE SAFE HARBOR SHOULD INCLUDE VOICEMAIL.

Proposed § 1006.22(g) provides a safe harbor for debt collectors who send an email or text message that reveals the debt collector's name or that the communication relates to an unpaid debt. Based on current communications technology and the existing social norms related to telephone use, CBA believes the proposed safe harbor should be extended to voicemails.

The FDCPA contains no reference to answering machine or voicemail messages, which is not surprising because they – although available in 1977, when the FDCPA was enacted – did not come into common use until the late 1980s.[25] Notably, answering machines, unlike voicemail and cellular phone technology used today, consisted of "a speaker" that allowed the content of any message to be "easily heard within a certain distance." *Marisco*, 946 F. Supp. 2d at 294-95. For this reason, federal courts held there was no "no reasonable expectation of privacy in the contents" of overheard messages. *See United States v. Upton*, 763 F. Supp. 232, 243 (S.D. Ohio 1991) (no expectation of privacy in answering machine tape containing message overheard by officers who "were lawfully on the premises" where "[t]he speaker on the answering machine was turned on, [such that] incoming calls [were] clearly audible to any person present in the room.") (citing *United States v. Whitten*, 706 F.2d 1000, 1011 (9th Cir. 1983) ("motion to suppress was properly denied …. [there was] no legitimate expectation of privacy in the contents of the … call because the speaker on the recording machine had been turned on, making incoming calls clearly audible to any person present in the room where the answering device was located.")).

Nonetheless, even as answering machine use became widespread, FDCPA litigation related thereto remained negligible until 2006, when the Southern District of New York held that voicemail messages are "communications." *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006). A wave of voicemail related claims followed *Foti*, resulting in countless (often conflicting) decisions addressing, without limitation, the: (i) required/prohibited content of voicemails,[26] (ii) right to communicate with consumers by voicemail,[27] and as relevant here, (iii) liability for inadvertent third party disclosures caused by voicemail.[28]

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25 *See Zortman*, 870 F. Supp. 2d at 698 ("The FDCPA has not been significantly amended since its enactment in 1977. Technology, however, has changed significantly since then. In particular, voicemail was not available until 1977. Consumers might have had answering machines, but those machines would not have been as widely used as voicemail today.").

26 *Chalik v. Westport Recovery Corp.*, 677 F. Supp. 2d 1322, 1328 (S.D. Fla. 2009) (failure to provide "mini Miranda" disclosure in a message violates § 1692e(11)").

27 *Chalik* at 1328 (there is "no reason that a debt collector has an entitlement to use voice mail or answering machine messages" where it has "other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone.").

28 *See, e.g., Cordes v. Frederick J. Hanna & Assocs., P.C.*, 789 F. Supp. 2d 1173 (D. Minn. 2011) (Plaintiff debtor was entitled to summary judgment in suit against debt collector that left multiple messages on her home voicemail that were overheard by roommates with whom she shared the voicemail account because the FDCPA is a strict liability statute that does not require any showing of intent, but rather, turns on whether the defendant shared with or conveyed information to another); *Friedman v. Sharinn & Lipshie, P.C.*, No. 12 CV 3452 (FB) (CLP), 2013 U.S. Dist. LEXIS 64541, at *10-12 (E.D.N.Y. Mar. 28, 2013) (finding "[a] debt collector may be deemed to have 'communicated' with a third party for purposes of Section 1692c(b) when he or she leaves a voicemail message on the consumer's answering machine and that message is overheard by a third party."). The latter decisions were

The above concerns are entirely absent from current communications technology, and any reference to the "risk" posed by telephone messages reflects an antiquated view that fails to account for the current state of technology. Indeed, answering machine use was on the decline as early as the mid-1990s, when voicemail first appeared as an alternative, which did away with loudspeakers, and offered individuals the ability to maintain the privacy of their messages by maintaining separate mailboxes.[29] Even more significant changes followed the advent, and universal adoption, of cellular telephones, which are now owned by 96% of Americans,[30] and, as of December 2016, are used exclusively by a majority of American households.[31] This shift to cell phone use – and the security features they provide – highlights additional reasons to scrap any previously-held concerns regarding the privacy of voicemail messages. Indeed, these features, and the manner in which cell phones are used, makes it appropriate to treat them with the same level of privacy as email and text messages.

Accordingly, CBA asks that the Bureau to revise proposed § 1006.22(g) to extend the safe harbor to voicemails.

XIV. DEBT COLLECTORS SHOULD BE PERMITTED TO DISREGARD DISPUTES SUBMITTED BY DEBT RELIEF COMPANIES.

Proposed §1006.38(d)(2) sets forth the obligation of a debt collector to respond to a consumer's written dispute, and would require a debt collector to respond to *all* written disputes submitted during the validation period. Under FDCPA § 809(b), if a consumer disputes a debt in writing within 30 days of receiving validation information, a debt collector must stop collection of the debt until the debt collector obtains verification of the debt or a copy of a judgment against the consumer and mails either the verification or judgment to the consumer. Proposed § 1006.38(d)(2)(i) generally mirrors FDCPA § 809(b).

Additionally, proposed § 1006.38(d)(2)(ii) would establish an alternative way for debt collectors to respond to disputes that they reasonably conclude are duplicative disputes. Specifically, under proposed § 1006.38(d)(2)(ii), if a debt collector determines that a dispute is substantially the

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largely based on the "inherent risk" purportedly posed by voicemail messages, which courts found to distinguish them from other forms of communication. *See, e.g.*, *Marisco v. NCO Fin. Sys.*, 946 F. Supp. 2d 287, 294-95 (E.D.N.Y. 2013) (noting that "leaving a message on an answering machine is 'inherently risky' because it is well known that, unlike a voicemail message, a message left on an answering machine can be easily heard within a certain distance …"); *Berg v. Merchs. Ass'n Collection Div.*, 586 F. Supp. 2d 1336, 1343 (S.D. Fla. 2008) (noting that debt collector's practice of leaving messages posed "risks," which were not sufficiently minimized by including "a warning to the listener to disconnect if the listener was not the Plaintiff, and that continuing to listen to the message indicates that the listener was Plaintiff … [because, although] this would perhaps persuade other persons from continuing to listen to the message … nothing in the message would alert the Plaintiff to disconnect if he were to listen to the message in the presence of others.").

[29] Deborah Branscum, Voice Mail vs. Answering Machine, New York Times (Apr. 30, 1998).

[30] https://www.pewinternet.org/fact-sheet/mobile/ Pew Research Center Internet & Technology (last accessed August 13, 2019).

[31] Stephen J. Blumberg, Ph.D., and Julian V. Luke, National Center For Health Statistics, National Health Interview Survey Early Release Program.

same as a dispute previously submitted by the consumer in writing, for which the debt collector already has satisfied the validation requirements and does not include any new material information to support the dispute, the debt collector may notify the debtor that the dispute is duplicative, provide a brief statement of reasons for its determination, and refer the consumer to its earlier response. CBA fully supports this framework.

However, to the detriment of both debt collectors and consumers, the Proposed Rules fail to exclude debt relief companies from the dispute process, which will facilitate their abuse of the dispute system and empower them to engage in unfair and deceptive practices toward consumers. Accordingly, CBA requests that the Bureau provide an exclusion in proposed §1006.38(d)(2) similar to that adopted under the FCRA, that would allow debt collectors to disregard dispute letters prepared or submitted by debt relief companies. *See* 15 U.S.C. § 1681s-2(a)(8)(G) (allowing furnishers to disregard disputes received from credit repair organizations).

Debt relief companies are the debt collection industry's equivalent of credit repair organizations.[32] In general, a debt relief company offers to change the terms of a debt between a person and one or more creditors or debt collectors, including a reduction of the balance, interest rate, or fees owed. Debt relief companies advertise to consumers that they can renegotiate, settle, or in some way change the terms of the consumer's debt. *See* 16 C.F.R. § 310.2(o) (defining "debt relief service" as "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.").

Like credit repair organizations, debt relief companies submit to debt collectors, in mass, inaccurate and unreliable disputes in an effort to stall the debt collection process. *See* National Consumer Law Center, Federal Deception Law Ch. 10.2.4 ("Debt Elimination") at p. 2 (3d ed. 2017) (referencing common scheme involving debt relief companies "sending multiple frivolous dispute letters"); *Taylor v. Bettis, et al*, Case No. 7:09-CV-183-F, ECF No. 1 (E.D. North Carolina) (complaint against debt relief companies, alleging that "Phase Two" of defendants' scheme consisted of sending "a series of proprietary letters' to creditors and debt collectors, failure to respond to which will result in [Defendant's] demand that they zero out our customer' account and mark it paid as agreed.") (internal citations omitted). Debt relief companies often

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[32] Credit repair organizations offer to improve the credit standing of consumers for a fee, despite the fact that, in most instances, they "do nothing consumers cannot do for themselves free of charge", and thus further exacerbate the financial hardship from which these consumers – who have "limited economic means" and are "inexperienced in credit matters" to begin with – seek relief. *See, e.g.*, 1A Debtor-Creditor Law § 17.01; 15 U.S.C. § 1679(a)(1)-(2). Credit repair organizations perpetrate these schemes, in part, by submitting an overwhelming volume of inaccurate and unreliable disputes to furnishers, creating the appearance (albeit temporarily) that the organization has successfully advocated on the consumer's behalf. *See, e.g.*, 149 Cong. Rec. H. 12198, at *12223 (addressing credit repair clinics' practice of exploiting FCRA's dispute response provision "to overwhelm furnishers in an attempt to cause them to change accurate information") (statement of Rep. Cantor). When successfully employed, this tactic makes it difficult – if not economically infeasible – for furnishers to meaningfully respond to legitimate consumer disputes, degrading the entire consumer credit system. The FCRA provision authorizing furnishers to disregard disputes prepared or submitted by credit repair organizations was therefore considered a proportional and appropriate response to the threat of these unscrupulous practices, and has undoubtedly benefited both consumers and the credit industry as a whole.

target consumers with debt "by falsely promising to negotiate with their creditors to settle or otherwise reduce consumers' repayment obligations." FTC, *Debt Relief and Credit Repair Scams*, https://www.ftc.gov/news-events/media-resources/consumer-finance/debt-relief-credit-repair-scams, (last visited July 22, 2019) ("These operations often charge cash-strapped consumers a large up-front fee, but then fail to help them settle or lower their debts – if they provide any service at all.").

As a result of these practices and the growing number of bad actors emerging within the debt relief industry, the FTC and Bureau have brought scores of law enforcement actions against debt relief companies and have also partnered with states to bring hundreds of additional lawsuits. *See* FTC, *FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams*, https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown (last visited July 23, 2019) (stating that the FTC, along with 11 states and the District of Columbia commenced "the first coordinated federal-state law enforcement initiative targeting deceptive student loan debt relief scams[;] [t]his nationwide crackdown encompasses 36 actions by the FTC and state attorneys general against scammers alleged to have used deception and false promises of relief to take more than $95 million in illegal upfront fees from American consumers over a number of years."); 2019 CFPB Admin. Proc. LEXIS 98 (settling CFPB's lawsuit against Freedom Debt Relief, LLC ("FDR"), the nation's largest debt-settlement services provider, which alleged, among other things, that FDR violated the Consumer Financial Protection Act of 2010 by charging consumers without settling their debts as promised, charging consumers after having them negotiate their own settlements with creditors, and misleading consumers about the company's fees and its ability to negotiate directly with all of a consumer's creditors). The FTC has also obtained federal court orders banning over 400 debt relief companies from participating in all or specific types of debt relief businesses. *See* FTC, *Companies and People Banned From Debt Relief*, https://www.ftc.gov/enforcement/cases-proceedings/banned-mortgage-relief-debt-relief-companies-people (last visited July 23, 2019).

By submitting large numbers of frivolous disputes, debt relief companies drive up costs for debt collectors and harm consumers by burying legitimate disputes in a large volume of mass-produced documents created and transmitted by debt settlement companies. If not excluded from the dispute process, illegitimate debt relief companies will be allowed and empowered to submit large numbers of mass-produced, form disputes that have no relation to the accounts being disputed, which, in turn, will facilitate the kinds of unfair and deceptive practices identified by the FTC and the Bureau.

For these reasons, CBA requests that the Bureau consider adding the following exclusion to proposed § 1006.38(d), which would allow debt collectors to disregard disputes prepared or submitted by debt relief companies:

> (d) *Disputes.*
>
> > (3) *Exclusion of debt relief services*. Subsection (d) of this paragraph shall not apply if the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to

> the consumer by, a "debt relief service", as defined in the Telemarketing Sales Rule, 16 C.F.R. § 310.2(o).

XV. RESALE OR PLACEMENT OF ACCOUNTS SHOULD BE PERMITTED WHERE A FALSE IDENTITY THEFT REPORT HAS BEEN FILED.

CBA is aligned with the CFPB that accounts that have been settled, discharged or that are the subject of valid identity theft claims should not be sold or placed for collection. However, as the proposed rule is drafted, CBA has concerns that the Bureau has opened a door for false identity theft claims to be used by debt settlement companies or consumers to avoid the collection of legitimate debts. Proposed § 1006.30(b)(1)(i)(C) provides that "a debt collector must not sell, transfer, or place for collection a debt if the debt collector knows or should know that: . . . An identity theft report . . . was filed with respect to the debt." Proposed § 1006.30(b)(1)(i)(C) is predicated not only on the Bureau's FDCPA rulemaking authority but also on its UDAAP authority, thus raising the question of whether the prohibition would be applied to creditors who may sell consumer debts or place them with collection agencies. CBA is concerned that the prohibition on sale or placement of debt, triggered by an identity theft report being "filed," ignores those situations in which a report may be filed, investigated, and determined to be false. By making the filing of a report the sole trigger for the prohibition on sale or placement with a collection agency, the proposed rule would empower consumers, debt settlement companies and credit repair organizations to effectively block the sale and collection of debts by submitting identity theft reports, even if those reports lack merit. This result certainly does not benefit consumers, and does not support the Bureau's objective of prohibiting resale or placement of accounts that actually are the result of identity theft – an objective that CBA fully agrees with.

As the NPRM notes, FCRA section 615(f) already prohibits a person from selling, transferring for consideration, or placing for collection a debt after being notified by a consumer reporting agency that information furnished about the debt may be a result of identity theft, that an identity theft report has been filed, that a block of the information has been requested by the consumer, and the effective dates of the block. See 15 U.S.C. §§ 1681m(f) and 1681c-2(b). However, the NPRM fails to mention that a consumer reporting agency may decline to block or may rescind any block of information if it:

> reasonably determines that – (A) . . . a block was requested by the consumer in error; (B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or (C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions.

15 U.S.C. § 1681c-2(c) (emphasis added); see also the Bureau's "Summary of Consumer Identity Theft Rights" Appendix I to 12 C.F.R. Part 1022 ("The consumer reporting agency can refuse or cancel your request for a block if, for example, you don't provide the necessary documentation, or where the block results from an error or a material misrepresentation of fact made by you"). A National Consumer Law Center ("NCLC") publication has noted that "[a]pparently, this right to decline or rescind a block seeks to prevent consumers from abusing the blocking provision by requesting that genuine debts be blocked." NCLC's Fair Credit Reporting Treatise § 9.2.4.1.3 (9th ed. 2018).

Relatedly, FCRA section 623(a)(6) provides that when a consumer submits an identity theft report to a furnisher indicating that furnished information resulted from identity theft, the furnisher may not report the information to consumer reporting agencies unless the furnisher "subsequently knows or is informed by the consumer that the information is correct." 15 U.S.C. § 1681s-2(a)(6). Pursuant to Regulation V, the furnisher must conduct a reasonable investigation of a direct dispute "relating to whether there is or has been identity theft or fraud against the consumer," 12 C.F.R. § 1022.43(a)(1), but the furnisher is only required to seek deletion of the tradeline "[i]f the investigation finds that the information [previously] reported was inaccurate," 15 U.S.C. § 1022.43(e)(4).

Thus, both the FCRA and its implementing Regulation V provide checks to ensure that consumer reporting agencies and furnishers are able to conduct a reasonable investigation and prevent consumers and credit repair companies from abusing the identity theft-related consumer protections.

CBA and its members certainly agree that debts that are the result of identity theft should not be sold or subject to collection efforts. But the Bureau's laudable effort to extend identity theft-related consumer protections provided within the FCRA does not include the sensible checks provided by Congress within the FCRA to ensure that consumers, credit repair organizations, or debt settlement companies do not attempt to abuse the statutory protections. If the Bureau chooses to maintain this prohibition within the final rules, we respectfully submit it must include an exception where, *inter alia*, the debt collector or creditor reasonably identifies a material misrepresentation of fact by the consumer or determines that the consumer obtained possession of goods, services, or money as a result of the transaction. If the Bureau does not include such checks on identity theft report submissions, CBA believes the prohibition would incentivize credit repair companies, debt settlement companies and consumers to file fraudulent identity theft reports to attempt to interfere with the transfer or collection of lawfully-owed debts.

XVI. THE BUREAU SHOULD REMOVE THE "KNOWS OR SHOULD KNOW" STANDARD FROM PROPOSED § 1006.30(b)(1)(i)(C).

As noted in the preceding Section, proposed § 1006.30(b)(1)(i)(C) provides that "a debt collector must not sell, transfer, or place for collection a debt if the debt collector knows or should know that: . . . An identity theft report . . . was filed with respect to the debt." The proposed commentary to that section explains that "A debt collector knows or should know that an identity theft report was filed if, for example, the debt collector has received a copy of the identity theft report." See proposed comment 30(b)(1)(i)(C)-1. CBA believes that the ambiguous "knows or should know" standard places an impossible compliance burden on debt collectors, who may be held liable if a consumer files an identity theft report with a law enforcement agency, but does not provide a copy to the debt collector. CBA proposes that this ambiguity be resolved by simply incorporating the language from the proposed official commentary into the text of the rule, replacing "knows or should know" with a simple, clear requirement that the debt collector has received a copy of the identity theft report.

CBA fully supports the concept that § 1006.30(b)(1)(i)(C) embodies – that debts resulting from identity theft should not be sold or placed for collection. CBA believes that this protection will be more effectively implemented if there is a specific trigger for the debt collector to refrain from sale or placement, and the most obvious trigger is the one provided by the Bureau in the proposed official commentary – receiving a copy of the identity theft report. Moreover, requiring the debt collector to receive a copy of the identity theft report would make it more consistent with the corresponding provision of the FCRA, which requires a person to receive actual notification of identity theft in order to be precluded from selling or placing an account for collection.

CBA is concerned that the prohibition on sale or placement of debt, triggered by the “knows or should know” standard, would introduce uncertainty into creditors’ operations and make the same conduct subject to two different standards – one in the Bureau’s rules, and the other in the FCRA (discussed in the preceding Section).

FCRA section 615(f) is triggered by *being notified* by a consumer reporting agency that information furnished about the debt may be a result of identity theft, that an identity theft report has been filed, that a block of the information has been requested by the consumer, and the effective dates of the block. See 15 U.S.C. §§ 1681m(f) and 1681c-2(b). The notification requirement in the FCRA avoids the ambiguity inherent in a “knows or should know” standard.

CBA and its members believe that it is fully appropriate for the Bureau to preclude sale or placement of a debt subject to a legitimate identity theft report. CBA only requests that the rule be modified to require *actual notice* of the identity theft report by the debt collector receiving a copy of the report, rather than the inherently ambiguous “knows or should know” standard, which is likely to give rise to operational difficulties and litigation under the FDCPA.

XVII. CONCLUSION.

CBA appreciates the opportunity to provide these comments to the NPRM, and also appreciates the time and care taken by the Bureau in researching and formulating the proposed debt collection rules. There are numerous positive aspects to the proposed rules, and CBA believes that with the few relatively modest changes set forth in this letter, the rules will provide a clear and effective set of standards that will benefit both consumers and debt collectors. We thank the Bureau for its consideration of this letter.

Sincerely,

Stephen Congdon

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