U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

September 18, 2019

The Honorable Kathy Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Notice of Proposed Rulemaking on Debt Collection (Regulation F) RIN 3170-AA41 Docket No. CFPB-2019-0022

Dear Director Kraninger:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the Bureau of Consumer Financial Protection's (Bureau) proposed rule on *Debt Collection (Regulation F)*.[1] The Bureau is proposing to amend Regulation F, 12 CFR Part 1006, which implements the Fair Debt Collection Practices Act (FDCPA), to prescribe Federal rules governing the activities of debt collectors covered by the FDCPA. The proposal would, among other things, address communications in connection with debt collection; interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and clarify requirements for certain consumer-facing debt collection disclosures. Advocacy is concerned about the impact that the proposal may have on small entities and encourages the Bureau to take steps to mitigate that impact.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act,[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a

[1] 84 Federal Register 23274, May 21, 2019.
[2] 5 U.S.C. § 601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[5]

The Small Business Regulatory Enforcement Fairness Act

In July 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act or Dodd-Frank).[6] Section 1011 of the Act establishes the Bureau to supervise certain activities of financial institutions. Section 1100G, entitled "Small Business Fairness and Regulatory Transparency," amends 5 U.S.C. § 609(d), to require the Bureau to comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process.

The SBREFA panel process requires the Bureau to conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule, if the rule is expected to have a significant economic impact on a substantial number of small entities. This outreach is accomplished through the work of small business advocacy review panels consisting of a representative or representatives from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy. The panel solicits information and advice from small entity representatives (SERs), who are individuals who represent small entities affected by the proposal. SERs help the panel better understand the ramifications of the proposed rule. The product of a SBREFA panel's work is its panel report and recommendations on the regulatory proposal under review.

The Bureau convened a SBREFA panel on debt collection on August 23, 2016. The panel held an outreach meeting in Washington, D.C. with SERs on August 25, 2016. In advance of the panel outreach meeting, the Bureau, Advocacy, and OMB held a series of telephone conferences with the SERs to describe the small business review process, obtain important background information about each SER's current business practices, and discuss selected portions of the proposals under consideration. The panel issued its report on October 19, 2016.[7]

In addition, the Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held a

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[4] Small Business Jobs Act of 2010 (PL 111-240) § 1601.
[5] Id.
[6] Pub. L. 111-203.
[7] *The Final Report of the Small Business Review Panel on CFPB's Debt Collector and Debt Buyer Rulemaking* (hereinafter "Panel Report"), October 19, 2016.

roundtable on the proposed rule on June 26, 2019. Advocacy also participated in two roundtables that ACA organized for its small members in July 2018 and July 2019.

The Proposed Rule

The Bureau proposes to amend Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA), to prescribe federal rules governing the activities of debt collectors. The proposal focuses on debt collection communications and disclosures and also addresses related practices by debt collectors. The Bureau also proposes that FDCPA-covered debt collectors comply with certain additional disclosure-related and record retention requirements pursuant to the Bureau's rulemaking authority under title X of the Dodd-Frank Act.

The Bureau proposes to clarify how debt collectors may employ newer communication technologies in compliance with the FDCPA and to address other communications-related practices that may pose a risk of harm to consumers and create legal uncertainty for industry. The Bureau also proposes to interpret the FDCPA's consumer disclosure requirements to clarify how industry participants can comply with the law and to assist consumers in making better-informed decisions about debts they owe or allegedly owe. The Bureau's proposed rule is based primarily on its authority to issue rules to implement the FDCPA and imposes requirements on debt collectors, as that term is defined in the FDCPA. However, the Bureau proposes certain provisions of the regulation based on the Bureau's Dodd-Frank Act rulemaking authority.

The proposed rule has four subparts. Subpart A contains generally applicable provisions, such as definitions that would apply throughout the regulation. Subpart B contains proposed rules for FDCPA-covered debt collectors. Subpart C is reserved for any future debt collection rulemakings. Subpart D contains certain miscellaneous provisions. Advocacy is primarily concerned about the provisions that address debt collection communications and consumer disclosures.

Advocacy understands that the proposed rule addresses ambiguities and clarifies provisions of the FDCPA. Certain aspects of the rule like the limited content message are helpful.[8] However, additional clarifications are needed to avoid confusion and potential harm to the debt collection industry.

The Debt Collection Industry

The debt collection industry consists of debt collectors and debt buyers. Debt collectors are often employees of debt-collection agencies, though some operate independently. There are attorneys whose practice includes debt collection. The creditor pays the collector a percentage of the

[8] Section 1006.2(j) defines a limited content message as a message that includes the consumers name, request for the consumer to reply, name or names of the person that the consumer can contact, a telephone number the consumer can use to reply and applicable disclosures. A debt collector may also include optional information like a salutation, the date and time of the message and suggested dates and times to reply to the message. 84 Fed. Reg. at 23399-23400.

amount collected. Debt collectors may also refer cases to lawyers who file lawsuits against customers who have refused to pay the collection agency.

Debt buyers purchase debts from creditors when the original creditor has determined that it is unlikely that it will collect the debt. Creditors may package together numerous accounts with similar features and sell them as group. Debt buyers purchase the packages. The debt buyer pays a portion of the face value of the debt. For example, the debt buyer may pay 4 cents for every dollar of debt.[9]

<u>Advocacy Is Concerned that the Bureau's IRFA Lacks Required Economic Information</u>

When an agency issues a notice of proposed rulemaking (NPRM), it is required to perform an initial regulatory flexibility analysis (IRFA) unless it can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.[10] While Advocacy appreciates the fact that the Bureau convened a SBREFA panel and prepared an IRFA for the NPRM, Advocacy is concerned that the Bureau's IRFA may lack some of the required information.

To comply with the RFA, an agency must examine costs and other economic implications for the industry sectors targeted by the rule. Impacts include costs of compliance and economic implications that derive from additional compliance costs such as economic viability (including closure), competitiveness, productivity, and employment. The analysis should identify cost burdens for the industry sector and for the individual small entities affected.[11] The analysis should also contain descriptions of the small entities that may be impacted by the proposal[12] and a description of significant alternatives.[13]

It is important to note that that Section 603 (c) requires an agency to provide in the proposal a description of alternatives which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. An agency cannot consider alternatives that minimize any significant economic impact if the agency does not know what the economic impact of the proposed action is.

In the NPRM, the Bureau provided sufficient information about the types and number of small entities that may be impacted. However, the Bureau makes general statements about the economic impact but does not provide factual information to support the statements. For example, in terms of the limits for telephone calls and telephone conversations, the Bureau states that many debt collectors would incur costs to revise their systems to incorporate the proposed call frequency limits. There is no information in the IRFA about what it may cost to revise the

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[9] <u>Id.</u>
[10] See, 5 USC §605 (b).
[11] *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act*, page 32.
[12] See, 5 USC §603 (b).
[13] See, 5 USC §603 (c).

system. Instead the Bureau states that many small debt collectors only attempt to reach each consumer one or two times per week and are already within the frequency limits.[14]

During the SBREFA panel process the SERs provided the Bureau with information about the potential costs of the proposals. The Panel Report indicates that some of the SERs stated that the costs could range from $35,000 to $200,000.[15] This cost should be included in the agency analysis, unless the agency has a reason to believe this cost is inaccurate, in which case the agency should state that reasoning and offer a more accurate estimate.

The proposed rule may impose costs to read, understand and train employees in new practices. These costs are missing from the IRFA. The Bureau claims no significant impact for some provisions because the provisions are already part of business practices. However, if small collectors' practices will not change as a result of the provision, the Bureau should clarify what the benefit of the provision is to consumers for regulating them. The Paperwork Reduction Act section includes 1,029,500 paperwork hours.[16] This could translate into millions in recordkeeping and reporting costs. These costs should be included in the IRFA or the Bureau should explain why they are not part of the burden of this proposed rule.

<u>The Proposed Rule May Impact First Party Creditors</u>

During the SBREFA panel process, the SERs expressed concerns about the fact that first party creditors[17] were not a part of the panel process. The SERs continued to state that it was imperative that first party creditors be included because some of the requirements of the rule may impact them. In the panel report, the Bureau stated that the SBREFA process did not include others engaged in collection activity who are covered persons under the Dodd-Frank Act but who may not be "debt collectors" under the FDCPA. The Bureau stated that it expected to convene a second proceeding in the next several months for those collectors covered by the Dodd-Frank Act.[18]

The proposed rule is not limited to the requirements of the FDCPA. As noted in the preamble, the Bureau is also issuing the rule pursuant to section 1031 of the Dodd-Frank Act which prohibits unfair, deceptive, or abusive acts or practices (UDAAP).[19] Using the Bureau's UDAAP authority creates uncertainty and legal risk for first party creditors. It is also problematic since first party creditors were not in the SBREFA panel process and the Bureau did not convene a subsequent panel to address the issue of first party creditors as indicated during the third-party debt collection panel process.

Advocacy encourages the Bureau to limit the rule to its authority under the FDCPA. Doing so will prevent unintended consequences for first party creditors and assure that the Bureau is meeting its obligations under the RFA with regards to first party creditors.

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[14] 84 <u>Fed. Reg.</u> at 23394.
[15] Panel Report, page 21-22.
[16] 84 <u>Fed. Reg.</u> at 23398.
[17] A first party creditor is a creditor that is collecting its own debt. For example, a medical office may be a first party creditor. First party creditors refer debts to debt collectors.
[18] Panel Report, page 6
[19] 84 <u>Fed. Reg.</u> at 23272.

Certain Provisions of the Proposed Rule Are Problematic

Certain provisions of the proposed rule clarify problematic areas of the FDCPA and may be helpful for small entities. For example, the limited content message provides small entities with guidance about the information that can be provided in a message. However, Advocacy believes that several provisions of the rule are problematic for small entities.

Call Limits

Section 1006.14 establishes conduct that is considered harassing, oppressive or abusive conduct. It states that conduct is considered to be harassing, oppressive or abusive if a debt collector places a telephone call to a particular person in connection with the collection of a particular debt either more than seven times within seven consecutive days or within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. It excludes telephone calls that are made in response to a request for information or are made with such person's prior consent given directly to the debt collector; or not connected to the dialed number.

Advocacy appreciates the safe harbor that the Bureau has provided for debt collectors that comply with the call caps set forth in section 1006.14. However, the call limit provisions may still be problematic for small entities. If the debt collector is a law firm trying to negotiate a settlement, more than seven calls may be required. Similarly, the debt collector may need to have several calls within the same week. Likewise, a debtor may need to review records or speak to a third party, such as a spouse or parent prior to committing to payment plan. Advocacy encourages the Bureau to consider adding exceptions for calls made from the same debt collector while the particular debt collector is trying to negotiate a settlement.

Advocacy further encourages the Bureau to exempt small entities from the call limit caps. In the IRFA, the Bureau states:

> "Smaller debt collectors and debt collection law firms are less likely to have existing systems that track or limit communication frequency and may therefore face larger costs to establish systems to do so. However, many smaller debt collectors report that they generally attempt to reach each consumer by telephone only one or two times per week and generally do not speak to a consumer more than one time per week, which suggests that their practices are already within the proposed frequency limits. For such debt collectors, existing policies may be sufficient to ensure compliance with the proposed provision."[20]

If small entities are not causing the problem, they should not have to incur the expense of establishing a system to track the frequency of communications. This is the type of problem that the RFA is intended to address and Advocacy encourages the Bureau to provide an exemption from this expensive provision.

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[20] 84 Fed. Reg. at 23394-23395.

Work E-mail

The proposal also contains provision that states that it is an unfair practice to contact a consumer at an email address that the collector knows or should know is a work email address. Stating that the debt collector "should know" is problematic. To Advocacy's knowledge, there is no database that would allow a debt collector to verify whether an email address is a work email address. Moreover, a particular email address may have multiple types of users. For example, an email address that ends with ".edu" could be a student/consumer or a professor/employee. Stating that a collector "should know" may be creating an insurmountable burden. Advocacy encourages the Bureau to limit the provision to an email address that the collector knows is a work email address.

E-SIGN

The proposal generally also requires a debt collector to provide disclosures in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later. A debt collector who provides the required disclosures electronically must comply with either the E-SIGN Act or a set of alternative procedures. The proposal also includes requirements relating to the delivery and format of required electronic disclosures. The proposal includes a debt collection electronic disclosures flowchart.

While providing disclosures electronically utilizes technology, the E-SIGN requirement may be infeasible and burdensome for small entities. Advocacy encourages the Bureau to allow small entities to provide disclosures electronically without having to comply with E-SIGN. Advocacy further encourages the Bureau to allow small entities to contact consumers by other modern means such as texting.

Advocacy also suggest that the agency take steps to make the debt collection flowchart less confusing. Advocacy encourages the Bureau to work with small entities to develop a flowchart that is easier to understand.

Validation

Section 1006.34 of the proposed rule requires an itemized validation notice. Section 1006.34 (c) would require a debt collector to provide an itemized validation notice. The debt collector must provide information about the debt. The information must be itemized and include:

> (i) The debt collector's name and mailing address.
> (ii) The consumer's name and mailing address.
> (iii) If the debt is a credit card debt, the merchant brand, if any, associated with the debt, to the extent available to the debt collector.
> (iv) If the debt collector is collecting consumer financial product or service debt as defined in § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date.

(v) The account number, if any, associated with the debt on the itemization date, or a truncated version of that number.
(vi) The name of the creditor to whom the debt currently is owed.
(vii) The itemization date.
(viii) The amount of the debt on the itemization date.
(ix) An itemization of the current amount of the debt in a tabular format reflecting interest, fees, payments, and credits since the itemization date.
(x)Current amount of the debt.[21]

Itemization is problematic because first party creditors do not necessarily provide that information to debt collectors. Itemization may be difficult and unworkable for small businesses. Debt collectors only have the information that the creditors have provided. If creditors do not provide the information, the debt collectors cannot provide it to the debtor. It is also possible that the creditor may not refer the account to collections if the additional information is required.

Debt collectors may also need to change their software to comply with the itemization requirements in order to match the accounting habits of creditors. This could be expensive because it could require new programming for every new client. These costs could result in some small debt collectors losing business.[22]

Moreover, the requirement is particularly problematic for small businesses collecting medical debt. According to the participants at Advocacy's June 2019 roundtable, providing an itemized validation notice may violate the Health Insurance Portability and Accountability Act (HIPAA).[23] The information requested by the Bureau does not appear to fall within the permissive disclosures that do not require patient authorization under HIPAA.[24] Moreover, section 603(b)(5) of the RFA requires agencies to describe any laws with which the proposal may conflict. The Bureau did not include HIPAA in its analysis.

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[21] 84 Fed. Reg. at 23404

[22] ACA International, Letter to Bureau of Consumer Financial Protection, September 17, 2017, page 107.

[23] The U.S. Department of Health and Human Services ("HHS") issued the Privacy Rule to implement the requirement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Privacy Rule standards address the use and disclosure of individuals' health information—called "protected health information" by organizations subject to the Privacy Rule. The Privacy Rule protects all *"individually identifiable health information"* held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI). It prohibits the disclosure of "Individually identifiable health information" which is information, including demographic data, that relates to the individual's past, present or future physical or mental health or condition, the provision of health care to the individual, the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.[13] Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number). See, https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html.

[24] Some permissive disclosures include things such as law enforcement, child abuse or neglect reports, public health activities, notification of a patient's location, and notification to a designated individual involved with a patient's care. For additional permissive disclosures, see, 45 C.F.R. 164.506, 45 C.F.R. 510 and 45 C.F.R. 512.

Advocacy encourages the Bureau to review these requirements and provide information about possible conflicts with HIPAA in its RFA analysis. Advocacy further encourages the Bureau to work with small businesses in the debt collection industry to develop a validation notice that is workable.

Time Barred Debt

The proposed rule bars collection on debt that the collector knows or should know is barred by the statute of limitations. During the SBREFA panel process, the SERs indicated that the time barred debt provisions that were being considered were problematic.[25] The proposal would require small businesses to make a legal determination on whether a debt is time-barred.

Whether a claimed is barred by the statute of limitations is a legal defense in a judicial proceeding. Laws vary by state and it can be difficult to determine because different factors may need to be considered. Such an issue should be determined by the judicial system, not a debt collector who may or may not have legal training. Advocacy encourages the Bureau to limit the time-barred debt provisions of the rulemaking to instances such as where a court has ruled that the debt is time barred.

Debts Discharged in Bankruptcy

Similarly, proposed section 1006.30(b)(1)(i) would prohibit a debt collector from selling, transferring, or placing for collection a debt if the debt collector knows or should know that the debt has been paid or settled, discharged in bankruptcy.[26] When a debtor files for bankruptcy, the debtor lists the names of creditors. If the debtor lists the wrong address for the creditor, the creditor may not get the discharge notice. Moreover, the creditor would have to notify the debt collector of the discharge. If the first party creditor does not, the debt collector may be punished for the creditor's failure to relay the information.

Advocacy asserts that stating that the debt collector knows or should know that the debt has been discharged in bankruptcy is problematic. Rather than placing the onus on the debt collector to know or should know of the discharge, Advocacy suggests that the Bureau state that if the debtor provides the debt collector with a copy of the discharge order, the debt collector will be required to cease collection activity on that particular debt.

Retention of Records

Section 1006.100 requires a debt collector to retain evidence of compliance with this rule starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last communication or attempted communication in connection with the collection of the debt or the debt is settled, discharged, or transferred to the debt owner or to another debt collector.

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[25] Panel Report, page 25.
[26] 84 Fed. Reg. at 23414,

Record retention could be problematic for small debt collectors. It is difficult to calculate the time frame for keeping records. The provision is broad because it does not specify whether the communication is with a consumer or what needs to be retained. For example, does the requirement apply to call recordings? If so, it could be burdensome to small debt collectors.

The record retention provision is also problematic because it does not specify the end point. For example, if there is a judgement, does the three years run from the final court order or the date that the judgment is paid and the account closed?

The record retention provision as drafted is overly broad. Advocacy encourages the Bureau to work with small debt collectors to clarify and narrow the scope of the record retention requirements.

Small Entities Should Have Additional Time to Comply

As noted above, the IRFA states that larger collectors may already have some of the proposed provisions in place. The small debt collectors may not. The RFA establishes a principle of regulatory issuance that agencies shall endeavor, consistent with the rules and of applicable statutes, to fit regulatory and informational requirements to the scale of the entities subject to regulation. In this instance, the proposal would impose some requirements on small entities that may be unworkable and expensive. Some of the provisions may require changes to technology and additional training, which are expensive. Advocacy encourages the Bureau to give small entities additional time to comply, if they cannot be exempted from the requirements of the proposed rule.

Conclusion

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact me or Jennifer Smith at (202) 205-6943.

Sincerely,

/s/
Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation & Banking

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Copy to: Paul Ray
Acting Administrator
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