September 17, 2019

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Comment Intake – Debt Collection
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: ACA International, the Association of Credit & Collection Professionals, ("ACA") Comment to Docket No. CFPB-2019-0022, RIN 3170-AA41

Dear Director Kraninger and Bureau staff:

The Association of Credit and Collection Professionals ("ACA International" or "ACA") appreciates the time and attention that you will spend reviewing and considering our comments to the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau") Notice of Proposed Rulemaking (NPRM) to implement the Fair Debt Collection Practices Act (FDCPA). The Bureau's proposed Regulation F will be the first of its kind since the FDCPA was enacted in 1977. Accordingly, the CFPB's proposal will shape the future of the industry and the larger economy. ACA members have long sought clarity surrounding the use of new technologies, including several that are now decades old, that have altered how consumers communicate from the time more than 40 years ago when the FDCPA was first enacted.

To prepare the following comments, ACA conducted quantitative and qualitative studies of our membership. This included interviewing dozens of small, medium, and large collection agencies, as well as service providers. Members of the accounts receivable management industry have provided ACA written and verbal feedback and suggestions on all aspects of Proposed Regulation F. Further, ACA called upon its members to collect data, which we have aggregated and anonymized to support our observations and suggestions. At ACA's national meeting in July 2019, ACA convened panels, roundtables, and other discussions so that members of the

accounts receivable management industry could express their views on the Proposed Regulation.[1] Since the Bureau's inception, ACA members have worked diligently to provide it data and feedback about rulemaking proposals, collaborate on compliance and financial education initiatives, and help it better understand the benefits of two-way communication for consumers when facing an unpaid debt. ACA members take their obligations to consumers when collecting debt very seriously, and the input provided in this comment hopefully will provide a roadmap for how the CFPB can improve its proposal, as we both work towards our shared pursuit of improving consumer outcomes and ensuring that the accounts receivable management industry has clear rules for operating.

Executive Summary

Overall, ACA believes that the Bureau's efforts will resolve ambiguities in the FDCPA and help create uniform national standards. This will address both consumer and industry concerns by providing transparency to consumers seeking to understand their rights under the law and decrease litigation over benign technical errors. We appreciate the Bureau's efforts to provide clarity to the practice of sending electronic communications. The limited content message is also a common-sense solution for both consumers and industry to address a statutory catch-22, which has harmed the ability to leave voicemail messages, increased call volumes, and has warranted regulatory guidance for several decades. The Bureau's proposal for a model form validation notice to address the plethora of ambiguities in FDCPA §809 concerning the validation of debts is also a step in the right direction toward providing some important clarifications.

Nonetheless, as outlined in our comments, in several parts of its proposal the Bureau attempts to add new requirements that impose significant burdens on the accounts receivable management industry without any quantitative evidence of consumer harm in those areas, and often with razor-thin research. Moreover, many solutions lack empirical data to support their approach. Indeed, ACA's studies indicate that some Bureau proposals will cause enhanced consumer harm by increasing incentives for creditors to file collection suits because aspects of the Proposed Rule stymie their ability to settle debts outside of court.

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[1] Cmt. Dempsey, ACA International, Re. Ex Parte Filing, CFPB-2019-0022-1195 (07/23/2019).

ACA's principal concerns fall into several broad categories:

- **Meaningful communication must not be discouraged through arbitrary limitations on call frequency**. The work of the accounts receivable management industry allows consumers and creditors to settle debts outside of litigation. Therefore, any regulation that interferes with meaningful communication between collectors and consumers will increase debt collection litigation.[2] Thus, we are concerned when Regulation F provisions create arbitrary and capricious barriers to communication. Communication barriers include, "call caps" at §1006.21, complicated E-sign[3] consents at §1006.42, vague inconvenient place and time restrictions at §1006.6(b)(1) and (6)(b)(1)-1, and work email address restrictions at 1006.22(f)(3). ACA warns that evidence from states with overreaching regulations proves that if collectors cannot communicate, creditors will litigate.

- **Itemization in the validation notice will be impossible for many, would cost over $ 3 billion to initially implement and will increase litigation.** Approximately three-quarters of the accounts receivable management industry will struggle to comply with the itemization requirement at §1006.34 because they service non-finance debt. Non-finance debts are accounts originated by businesses such as hospitals, doctors, dentists, health clubs, pest control and lawn maintenance services, and telecommunications. Some non-financial creditors also include state governments, local governments and municipalities, utilities, and even the Internal Revenue Service. Many businesses have historically provided sufficient documentation and itemization to prove the existence of a debt in state courts. However, they often do not maintain account data in the fashion contemplated under the rule. We estimate that the cost to change creditor systems to comply with §1006.34 will be in the billions. Moreover, the Bureau has not studied whether creditors can alter their data collection practices, and makes questionable assumptions that creditors can (and will) make alterations without a regulatory directive.

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[2] *See infra*, Chapter One section IV.

[3] Section 104 of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. § 7004.

- **The U.S. economy depends on collected debt**. Debt collection returned $67.6 billion of funds in 2016 to US businesses—that's an average savings of $579 for every American household. Regulations should not incentivize consumers to shirk legal and valid debts at the expense of honest businesses and other consumers seeking affordable credit. Small and medium-sized business owners and their employees will stop providing services in advance of payment if collections become less certain. Rules that could so severely impact the U.S. economy must be tested and substantiated with econometrics and cost-benefit analyses. The Bureau has not yet performed these studies.

- **New rules should not hold the accounts receivable management industry liable for attempting to discern unclear or ambiguous consumer information.** Several Proposed Rule sections require collectors to divine facts by holding collectors liable when they "should know": whether an email is a "work" address (1006.22(f)(3)); if the consumer's name has a suffix (1006.34(c)(2)(ii); the consumer's sleep, work, or school schedule (1006.6(b)(1)); the consumers' legal defenses to the debt (1006.26(b)); that the consumer paid another party (1006.27.(b)); or that the consumer has recently died (1006.42). Historically, under the FDCPA, collectors are permitted to rely on the information provided to them by the creditor, and the standard for holding collectors liable is information for what collectors "have a reason to know," or "absent knowledge to the contrary." Regulations that attempt to increase this standard and ask collection agencies to be mind readers as to the consumer's private life will drive creditors and collectors towards litigation instead of meaningful communication.

- **To have a functioning credit-based economy in the United States, consumers have some responsibility to pay their debts and to participate in the discussions about how to pay them.** Consumers benefit when they take part in the process of resolving debt. Through open communications, they can obtain the best results by working out payment plans, fee waivers, identify other parties responsible for paying the debt, or even defer payments if they are facing a hardship or are truly unable to afford to repay the debt. If a consumer objects to contact by a certain method, they have a plethora of rights to do so. If they have questions about payment history, credits, or insurance payments, they should ask for more detail.

As CFPB Deputy Director Brian Johnson recently noted in remarks,

> Contrary to common mythology, consumer credit—the process of lending money to consumers—increases opportunity and wealth in the economy. A consumer borrows money today and spends more in the present, with the intent on paying back the loan in the future. Put differently, rather than save over a period of time and forgo the benefits of a particular product, consumer credit changes the timing of the purchase. Yet, government regulators often ignore the basic purpose behind consumer use of credit. They can fail to recognize that market transactions are a positive-sum game. And they can also ignore the economic reality undergirding the pricing and types of services offered by businesses."[4]

The ability to collect on unpaid debt is an important part of this process, and the work of collection agencies has proven to keep the price of credit more affordable for consumers.

- **Clear and Plain Language Communication is Best for Consumers and Industry.** Despite the offensive rhetoric of certain interest groups, most accounts receivable management industry professionals are fantastic people, representing a diverse segment of the United States.[5] As part of their work, they want to help consumers find a solution to their financial problems. But fear of plaintiff's litigation and the "overshadowing" doctrine force collection agencies to use stiff and confusing statutory language that consumers deem intimidating. Rule 1006.34 seeks to rationalize the policy behind the overshadowing doctrine and clarify significant ambiguities in the FDCPA by providing a single model form and a safe harbor. But some form language can be better, and the form ought to allow flexibility for modifications necessitated by state law or other legal requirements.

- **The CFPB's Complaint Database Data Paints an Inaccurate Portrait of the Accounts Receivable Management industry.** Throughout the

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[4] Johnson, Brian, *Toward a 21st century approach to consumer protection*, (Nov. 15, 2018), available at https://www.consumerfinance.gov/about-us/newsroom/toward-21st-century-approach-consumer-protection/

[5] ACA, SMALL BUSINESS IN THE COLLECTIONS INDUSTRY IN 2019, (ACA International White Paper April 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-wp-smallbusiness-2019-002.pdf

comment, the Bureau refers to complaint data about the accounts receivable management industry to justify new interventions. However, the Bureau's complaint data is flawed. The most troubling aspects of the complaint database are: (1) the Bureau's broad definition of a complaint, (2) the Bureau's failure to verify the accuracy of the complaints it receives, and 3) that the number of complaints versus the number of contacts are not standardized. Notably, debt collection complaints account for only 0.005% of all consumer contacts made in a given year by the accounts receivable management industry.

ABOUT ACA INTERNATIONAL

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 2,500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to a recent survey, 44 percent of ACA member organizations (831 companies) have fewer than nine employees. About 85 percent of members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

> In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the price and reduce the supply of lending to all consumers, especially higher-risk borrowers.[6]

In short, consumer harm can result in several ways when unpaid debt is not addressed, and ACA members work to help consumers understand their financial situation and what can be done to address it and improve it.

The debt collection market is extremely varied in the types of debts being collected and the nature and size of the accounts receivable management industry encompasses a broad scope. Although the credit and collections industry comprises a relatively small space in the entire consumer financial services arena, the client base serviced by industry members is highly diverse, from large corporations to local Main Street service providers — all of whom have a vested interest in customer retention, particularly in the case of small business creditors. From medical debt to student loan debt, mortgage debt to credit card debt, unpaid check to unpaid government fees, or a single bill from a local business, the differences incident to each type of debt require a thoughtful and nuanced regulatory approach.

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[6] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, MERCATUS WORKING PAPER, MERCATUS CTR AT GEORGE MASON UNIV., at 47 (Sep. 2015), *available at* https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf.

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Chapter One- Overview and Studies

I. INTRODUCTION

Congress enacted the FDCPA in 1977 to protect consumers from abusive, threatening, and unfair collection practices. At the time, abuses that needed to be curbed included intimidation by individuals claiming to be part of the debt collection profession, threats of imprisonment, publication of debtor lists in local newspapers, repeated harassment, the placement of hundreds of telephone calls to consumers (often at work or in the middle of the night), as well as blatant misrepresentations to consumers regarding their debt and the creditor's legal recourses.

The most outrageous actions referenced above are extreme exceptions. In today's world with a severely outdated FDCPA, rarely does a case involve actual damages or serious harm to a consumer. Egregious violations are increasingly rare, and ACA has worked with the Bureau to identify bad actors and has applauded its enforcement actions against them.[7]

During the passage of the FDCPA in Congress, ACA was active in those discussions, ultimately supporting it and testifying before Congress on the matter. Although the legislative history of the FDCPA included a call for it to be revisited and modernized as appropriate, the law has not been significantly updated or modernized since that time more than 40 years ago. As a result, where regulatory uncertainty exists within the statute, the judicial arm, charged with interpreting and applying the FDCPA, has rendered a legal patchwork of federal and state case law that is highly inconsistent among jurisdictions.

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[7] ACA International, *CFPB Alleges Large Credit Repair Companies Violated Consumer Laws* (May 2, 2019), available at https://www.acainternational.org/news/cfpb-alleges-large-credit-repair-companies-violated-consumer-laws.

A. Significant Ambiguities in the FDCPA cause Unnecessary Litigation.

In its discussion of the proposed rule, the Bureau recognizes that the nearly 12,000 annual plaintiff litigation filings under the FDCPA, as well as the threat of FDCPA filings, imposes significant costs for the accounts receivable management industry (84 FR at 23370). Most notably, given the mechanical language and requirements under the FDCPA, self-described "consumer protection" attorneys have generated unnecessary litigation based on technical, inconsequential, non-abusive violations.[8] Many consumer attorneys throughout the country coordinate with their clients to call collectors with the intent of eliciting a response that will form the basis of an FDCPA suit. These bait calls or trap calls are no different than acts of entrapment that plague well-intended collectors.

These attorneys burden collection agencies (which as noted are often small businesses)[9] with demands for tens of thousands of dollars to resolve claims arising from hyper-technical violations of the law. Moreover, they and their clients openly invoke the FDCPA as a pretext for avoiding the repayment of lawful debt. Some attorneys even use the FDCPA to drive their bankruptcy law practices. Many go so far as to search public court databases for newly filed collection actions to recruit new clients. Most importantly, these attorneys thrive on the mere threat of litigation, knowing that most agencies will pay $5,000 to settle a frivolous case instead of spending $50,000 to successfully defend one.

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[8] *See, e.g.*, *Anenkova*, 201 F.Supp.3d at 636-39 (granting summary judgment against plaintiff who sued a debt collector because a barcode was visible on the envelope); *McShann v. v. Northland Grp., Inc.*, Case No. 15-00314-CV-W-GAF, 2015 WL 8097650 (W.D. Mo. Dec. 1, 2015) (granting a motion to dismiss where a plaintiff sued because a demand letter with a "window" displayed the plaintiff's name, address, and account number); *Simmons v. Med-I-Claims*, No. 06-1155, 2007 WL 486879, at *9 (C.D. Ill. Feb. 9, 2007) (granting summary judgment where plaintiff sued because the return address listed in the envelope was listed for "Med-I-Claims" instead of "Med-I-Claims Services Inc."); *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1466 (C.D. Ca. 1991) (rejecting plaintiff's argument that debt collector violated FDCPA by including in an envelope language like "PERSONAL & CONFIDENTIAL" and "Forwarding and Address Correction Requested.").

[9] ACA, SMALL BUSINESS IN THE COLLECTIONS INDUSTRY IN 2019 (ACA International White Paper April 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-wp-smallbusiness-2019-002.pdf.

Notably, the FDCPA does not require consumers to show that a debt collector's misconduct was intentional. *See, e.g, Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct to be entitled to damages."); *Beuter v. Canyon State Prof 'l Servs., Inc.*, 261 F. App'x 14, 15 (9th Cir. 2007) (holding that the FDCPA imposes strict liability on debt collectors and that they "are liable for even unintentional violations of the FDCPA"). Likewise, the FDCPA incentivizes consumers and their attorneys to diligently monitor the accounts receivable management industry's behavior by allowing the recovery of "any actual damage," statutory damages up to $1,000, as well as the consumers' attorney's fees and costs. 15 U.S.C. § 1692k. The CFPB should be studying the volume of legitimate v. non-legitimate lawsuits and working with Congress to resolve whether this strict liability is appropriate.

ACA International impresses upon the Bureau that each proposed regulation must be scrutinized with an eye toward whether it will invite new and creative theories for plaintiffs' attorneys to exploit.

Accordingly, ACA's comments will not merely address the Bureau's proposed rules from a compliance and consumer protection standpoint, but with an eye toward curtailing the dubious litigation that may ensue from their promulgation.

B. Courts have developed FDCPA "Policy" without the Benefit of Regulatory Tools

Courts have created their own unintended consequences with their interpretations of the FDCPA over the last 40 years of litigation. Judicial constructs like the least sophisticated consumer are nowhere in the FDCPA text.[10] Likewise, courts made up the doctrine of "overshadowing," which is now being used to attack anything that deviates from mechanical statutory language and that might be considered "congenial."[11] And, even when agencies utilize the FDCPA's statutory language,

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[10] *See Lait v. Medical Data Systems, Inc.*, No. 18-12255, 2018 WL 5881522, at *1-2 (11th Cir. Nov. 9, 2018) (noting the decisions of different courts on whether to apply the least sophisticated debtor standard in different provisions of the FDCPA).

[11] *See, e.g.*, *Gruber v. Creditors' Prot. Servs., Inc.*, 742 F.3d 271 (7th Cir. 2014) (affirming dismissal of the claim that the statement immediately preceding the § 1692g(a) disclosure that "[w]e believe you want to pay your just debt" overshadowed and was otherwise inconsistent with the verification disclosure because the statement does not contradict any of the required disclosure and instead is merely "a congenial introduction to the verification notice and is best characterized as 'puffing'.")

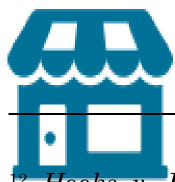
such as by including in their letters the validation notice language found in Section 1692g(a, they get penalized by courts. Indeed, courts have muddied the waters about how to describe "in writing" dispute requirements in *g notices (*despite the fact that the required language is spelled out in the FDCPA) and whether a collector can encourage a telephone call to dispute or ask questions.[12] These and other judicial rewrites to the FDCPA have effectively promulgated rules and regulations with no notice, no opportunity to comment, and no coherent public policy to balance the costs and benefits of the rulings.

ACA welcomes all clarity, safe harbors that allow collectors to use plain language, and interpretations where ambiguity has created differences between courts and circuits.

Where the Bureau has added new and additional regulatory requirements, however, ACA challenges the factual assumptions, rationale, and cost-benefit studies (or lack thereof) that underlie the proposals.

C. Regulatory Overreach in Regulation F Particularly Harms Small Businesses

Finally, ACA International urges the Bureau to be mindful of the cumulative effect of these proposed regulations. Viewed in isolation, a single proposed rule may seem



[12] *Hooks v. Forman Holt Eliades & Ravin L.L.C.*, 717 F.3d 282 (2d Cir. 2013) (holding that a verification notice violated the FDCPA by stating that the consumer must dispute the debt in writing); *Riggs v. Prober & Raphael*, 681 F.3d 1097 (9th Cir. 2012) (stating that "[w]e have previously held that a collection letter, called a 'validation notice' or 'Dunning letter,' violates § 1692g(a)(3) of the FDCPA 'insofar as it state[s] that [the consumer's] disputes must be made in writing.'") *compared to Caprio v. Healthcare Revenue Recovery Group*, L.L.C., 709 F.3d 142 (3d Cir. 2013) (letter containing the § 1692g verification notice was deceptive in that it urged the consumer to telephone the debt collector if the consumer felt he did not owe the amount claimed by the collector, when telephoning would not entitle the consumer to the verification of the debt if the consumer disputed the debt in writing. "More is required than the mere inclusion of the statutory debt validation notice in the debt collection letter—the required notice must also be conveyed effectively to the debtor. . . . More importantly for present purposes, the notice must not be overshadowed or contradicted by accompanying messages from the debt collector.")

reasonable and suggested with the best of intentions. However, there is a collective "speed bump" effect to these proposed regulations when taken together. ACA International maintains that there are already plenty of speed bumps on the debt collection road and plenty of protections for consumers. More speed bumps and overly complex compliance burdens will harm small businesses. These impossible speed bumps will also decrease meaningful consumer communication, which will drive creditors to litigation and ultimately harm the ability of consumers to access credit and services.

1. Small Business Recommendations went Unaddressed

Despite some significant improvements to its original outline, the CFPB's proposal continues to ignore some critical feedback provided from Small Entity Representatives ("SERs") during the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process. This is particularly worrisome, as the majority of the accounts receivable management industry is comprised of small businesses.

One prime example that SBREFA comments were ignored is the itemization requirement in the model validation form at § 1006.34(c). Small business creditors were not invited to be part of the SBREFA process; but the Bureau's proposal assumes that such creditors will be able to provide additional documentation and information for itemization in the model validation notice despite the proposal ostensibly not sweeping in first parties.[13] As we outline extensively later in the comment, this ultimately harms both the accounts receivable management industry and small business creditors, who will not be able to easily comply with these proposed requirements. As noted throughout our comments, it is particularly problematic for small businesses collecting medical debt.

We disagree with the Bureau's decision to not provide a substantive analysis as described in footnote 58, where it states that creditors are not affected by the proposal:

> Certain proposals under consideration in the Small Business Review Panel Outline and discussed in the Small Business Review Panel Report are not included in this proposed rule and are not discussed in part V. For

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[13] See, ACA SBREFA Panel Rep. at 18.

> example, because this proposed rule would apply only to FDCPA-covered debt collectors, the Bureau does not include a discussion of proposals under consideration that would have imposed information transfer requirements on first-party creditors who generally are not FDCPA-covered debt collectors.

The new itemization requirement clearly imposes extra burdens on all creditors (not just those that collect their own debt). Nevertheless, the Bureau conducted no analysis of how the new itemization requirements would impact the small businesses who depend upon the accounts receivable management industry to ensure their customers pay the creditors' bills.

Another example of feedback ignored in the SBREFA process includes requiring differentiation between work and personal emails.[14] Footnote 361 of the proposal notes that SBREFA comments, "were similar to ANPRM comments submitted by several industry members, who noted that debt collectors may not be able to determine accurately whether an email address is provided by an employer because, among other things, the domain name may not signify that it is a work email or the consumer may consolidate multiple email accounts." As outlined in greater detail in our specific comments on this matter,[15] there is still not a vendor that can easily make this differentiation between work and personal emails. Thus, it would make it unduly burdensome for smaller members of the industry to be able to use email in a way that they can guarantee compliance with the proposed requirements for work emails.

This is particularly problematic since the Bureau acknowledges in its proposal that collection agencies who use email may have a competitive advantage:

> Debt collectors who use electronic communication may also benefit to the extent that some consumers are more likely to engage with debt collectors electronically than by telephone call or letter. During the SBREFA process, several small entity representatives said that

[14] *See* NPRM at 187-189.

[15] *See*, *infra* Ch. 2, Section II.F.

> communication by email or text message was preferred by some consumers and would be a more effective way to engage with them about their debts."[16]

It seems that the Bureau is acknowledging that there is a competitive advantage for agencies that can use email, who mostly are the largest at this point. Despite this recognition, the Bureau is ignoring critical SBREFA feedback about the limitations of smaller agencies to be able to differentiate between work and personal emails.

In other CFPB proposals such as the Home Mortgage Disclosure Act rule, the Bureau acknowledged that smaller entities would need to rely on vendors to come into compliance with complex new regulations, and has since requested more information from financial services providers about some of the burdens financial service providers are facing.[17] This is comparable to having a new system in place to differentiate work and personal emails, and should serve as a lesson learned about weighing the *cost versus benefits* of overly complicated new requirements. During discussions about HMDA, previously, the Small Business Administration Office of Advocacy found creating new computer systems to be unduly burdensome for small businesses.[18] In its letter to the Bureau on this, SBA Office of Advocacy stated:

> At Advocacy's roundtables, the participants stated that it will be costly to develop a computer system to collect the information that is required. According to the participants, it will be far more costly than the Home Mortgage Disclosure Act (HMDA) rulemaking. In HMDA, small entities added to an existing system. To comply with the requirements of section 1071, small entities will need to build an entirely new system. Advocacy believes

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[16] NPRM at 412.

[17] Home Mortgage Disclosure (Regulation C), 84 Fed. Reg. 20972 (proposed May 13, 2019) (to be codified at 12 C.F.R. pt. 1003).

[18] *See, e.g.*, Office of Advocacy Comment on the CFPB's Request for Information Regarding the Small Business Lending Market (Sep. 14, 2017), available at https://www.sba.gov/advocacy/9-14-2017-advocacy-submits-comments-cfpbs-request-information-regarding-small-business.

> that the implementation of section 1071 of the Dodd-Frank Act will be costly for small financial institutions.

Similarly, having a compliance system in place that can ensure that all emails are not used as work emails would be extremely burdensome, require extensive training (and yet to be created software), and arguably may still even be impossible since there is no way to read a consumer's mind in how they are using a particular email address.

II. COMMENTS ON CONSUMER FOCUS GROUP STUDIES

A. Consumer Impressions don't Equate to Violations.

The Bureau's *Fors Marsh Cognitive Interview* research confirms that consumer perception of debt collection as "threatening"[19] is often because collection agencies feel they must use the formal statutory language required under the FDCPA to avoid plaintiffs' lawsuits. In truth, collectors themselves are relatable. Over 70 percent of debt collection professionals are women; racial and ethnic minority groups account for 40 percent of the total collections workforce.[20] Industry employees spend more than 520,000 hours per year in volunteer activities.[21] Bureau efforts that allow collectors to empathize early and engage in problem solving with consumers should benefit both consumers and industry.[22]

Overall, however, ACA is skeptical about the reliability of the *Fors Marsh* studies for any purpose other than copy-testing. Focus groups are not the best method to

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[19] FORS MARSH GRP., *Debt Collection Validation Notice Research: Summary of Focus Groups, Cognitive Interviews, and User Experience Testing* (February 2016), at 8, available at https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-summary-report.pdf.

[20] *Diversity in the Collections Industry: An Overview of the Collections Workforce*, at 2 (January 2016), available at https://www.acainternational.org/assets/research-statistics/aca-wp-diversity.pdf.

[21] ACA International Fact Sheet (January 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-fact-sheet.pdf.

[22] ACA therefore supports proposed provision § 1006.34(d)(3)(i).

test nationwide experience with debt collection, in general.[23] And to the extent the CFPB is relying on the focus groups to identify problematic collection issues, "focus groups are not useful when the researcher needs to assess the magnitude of a problem."[24]

Further, this study, in particular, has serious deficits that make it wholly unreliable. The *Fors Marsh* study makes no effort to justify or explain the number of focus groups or their composition.[25] For instance, the study does not describe the efforts to recruit or select participants, does not justify the location of the focus groups, does not describe the participants' socioeconomic backgrounds, and generally does not describe why the researchers chose to format the groups in the way they did.[26] The study also does not describe whether the researchers believed the composition of the focus groups was sufficient to reach the "point of saturation." "Saturation" is critical for ensuring that the depth and breadth of the participants' responses adequately capture perceptions on debt collection.[27]

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[23] *See, e.g.*, R.A. Krueger & M.A. Casey, *Participants in a Focus Group. Focus Groups: A practical guide for applied research* (5th ed. 2014), https://www.sagepub.com/sites/default/files/upm-binaries/24056_Chapter4.pdf ("Keep in mind that the intent of focus groups is not to infer but to understand, not to generalize but to determine the range, and not to make statements about the population but to provide insights about how people in the groups perceive a situation."); Martha Ann Carey, *International Encyclopedia of the Social & Behavioral Sciences* 277 (2d ed. 2015) ("A major concern for data quality is the potential for a 'group think,' the phenomenon of participants being carried along by the group interaction and agreeing with the overall discussion."); David Morgan, *Qualitative Research Methods: Focus groups as qualitative research* 12 (1997) ("Once participants sense that there is a distinct agenda for the discussion and that the moderator is there to enforce that agenda, then they are likely to acquiesce in all but the most extreme circumstances.").

[24] *International Encyclopedia of the Social & Behavioral Sciences*, supra note 24 at 274. Krueger RA. Focus groups. A practical guide for applied research. 2nd ed. Thousand Oaks, CA: Sage Publications, Inc; 1994.

[25] Benedicte Carlsen & Claire Glenton, *What about N? A methodological study of sample-size reporting in focus group studies*, BMC Medical Research Methodolog, at 2 (2011), https://bmcmedresmethodol.biomedcentral.com/articles/10.1186/1471-2288-11-26 ("[T]he number of focus groups depends on the complexity of the research question and the composition of the groups.")

[26] *What about N?*, supra note 26, at 8 ("[R]esearchers should always provide correct and detailed information about the methods used[.]"); *Focus Groups as Qualitative Research*, supra note 24, at 12 ("[I]nadequate recruitment efforts are the single most common source of problems in focus group research projects.").

[27] *What about N?*, supra note 26, at 5-7.

Instead, ACA presents an alternative study based on measurable historical facts from a sample of millions. This study concludes that legitimate disputes about debt collection comprise less than ½ percent of all collected consumer accounts.

1. The Fors Marsh Study lacks a Robust Sample Set and Data Clarity

While the CFPB touts its consumer experience survey data as the "first comprehensive and nationally representative data,"[28] its overall sample of individuals with experience with the accounts receivable management industry is remarkably small. Of the 2,132 survey respondents, only 682 individuals (32%) report being contacted by the accounts receivable management industry. Despite this, the CFPB continually couches its findings in relation to all American consumers with debt collection experience.[29]

Rather than report its findings with any degree of statistical certainty, the CFPB describes the survey report as a "descriptive" exercise to "highlight patterns that may be of policy interest" and "to sketch, from consumers' perspectives, the broad experience of debt collection." The CFPB further cautions that this descriptive sketch "does not present standard errors or statements about the statistical significance of the differences" across groups.[30]

The presentation of data lacks clarity and lends itself to overestimating the prevalence of certain findings. By focusing almost entirely on percentages throughout the report, coupled with a near-total absence of raw numbers or sample sizes for individual questions, the CFPB offers only limited context for interpreting responses or situating them within the larger sample. For example, the CFPB reports that "three in-four consumers report that debt collectors did not honor a request to cease contact." A more accurate description of this finding would note

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[28] CONSUMER FINANCIAL PROTECTION BUREAU, *Consumer Experiences with Debt Collection: Findings From the CFPB's Survey on Consumer Views on Debt*, Jan. 12, 2017, [hereinafter *Consumer Experiences*] available at https://www.consumerfinance.gov/data-research/research-reports/consumer-experiences-debt-collection-findings-cfpbs-survey-consumer-views-debt/

[29] *See,* ACA, AN OVERVIEW OF THE ANALYTICAL FLAWS AND METHODOLOGICAL SHORTCOMINGS OF THE CFPB'S SURVEY OF CONSUMER EXPERIENCES WITH DEBT COLLECTION, 2, 6 (ACA International White Paper February 2017), [hereinafter ACA] available at https://www.acainternational.org/assets/research-statistics/wp-cfpbsurvey.pdf.

[30] *Id.* at 2 (citing *Consumer Experiences*, supra note 13).

that 75% of consumers who reported continued contact after a request to cease communication are a subset of the 42% who requested contact to cease; this 42% is itself a subset of the 32% of the total sample that have been contacted about a debt in collection. Thus, the "three-in-four consumers" actually represents roughly 215 of the 2,132 consumers surveyed, or only 10% overall.

Furthermore, the report addresses consumers who ask debt collectors to stop contact. Despite the FDCPA requiring consumers to submit a request to stop contact in writing, the CFPB reported findings for the 87% of respondents who "said they made the request by phone or in person only." Thus, about 28 people of a 2,132 person sample of consumers with debts on their credit histories reported having submitted a cease and desist request in the form required by the FDCPA yet still had contacts continue.[31] This is 1.3 percent. Even 1.3 percent is likely overestimated when one considers the impact of priming and memory on self-reported surveys.

2. Consumer Survey Evidence is Unreliable

Decades of consumer learning and memory research demonstrates that consumer memory and self-reported experience is inherently unreliable. As multiple researchers have concluded, consumer recall of past experience is subject to distortion and can be guided by marketing communications, researcher feedback, and priming:

> Learning from self-generated experience with a product or service is not a simple process of discovering objective truth. It is, to a greater extent, open to influence, and the consumer's confidence in the objectivity of such learning can be illusory.[32]

The multiple instances where the CFPB found that consumers misinterpreted or were confused by the survey questions suggests that the survey itself might be a flawed instrument, a point that ACA International stressed to the CFPB before the

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[31] ACA, supra note 30, at 2.

[32] Hoch, Stephen J. and John Deighton, *Managing What Consumers Learn from Experience*, JOURNAL OF MARKETING, 53 (April 1989), *quoted by* Braun, Kathryn, *Postexperience Advertising Effects on Consumer Memory*, JOURNAL OF CONSUMER RESEARCH 25 (March 1999).

survey was approved and sent to consumers.[33] Specifically, footnote 24 states that "the survey did not specifically define disputes" and that "consumers' perspectives on whether they had disputed a debt may differ from the definition of dispute used by a given creditor or collector or what may constitute disputes pursuant to the FCRA and FDCPA." It is quite problematic that a survey purporting to evaluate consumer experiences with the accounts receivable management industry fails to present questions that accurately represent the terms by which that industry is regulated.

The report also found the consumers with more than one debt in collection were more likely to be contacted multiple times per week. The CFPB found that these same consumers were also more likely to report that they felt they were being contacted too often, yet also observed that a "consumer who is contacted about multiple debts is likely to experience a higher overall frequency of calls, and this may make the consumer more likely to perceive any number of calls from any one collector as 'too often.'" Perhaps in the future the CFPB, and readers of its report, would be better served by Bureau efforts to disentangle the relationship between the number of debts in collection relative to the number of calls received by a consumer.

3. Legitimate Disputes Comprise Less than ½ Percent of All Accounts

The Fors Marsh study relies on the memories of persons contacted by the accounts receivable management industry to assess facts that ACA members can readily track in their files. In fact, ACA conducted a macro analysis of its members' dispute data and determined that only 0.15% of disputed accounts have a basis in fact. These legitimate disputes comprise less than 4.5% of all disputes submitted. And of those legitimate disputes, 69% were valid because the borrower paid the debt in full prior to the collection agency making its initial contact. This is a time-lag problem, not a compliance issue.

					"Legitimate" Disputes

[33] ACA, supra note 30, at 4, 27, 36, fns.32 & 34 (discussing key "caveats" that recognize that some questions might have confused consumers).

	Total Accts.	Total Disputes	Duplicative Dispute	Validated Acct. or Duplicative Dispute	Error/No media	Acct. Paid in Full	TOTAL
Total	2,263,845.	77,124	15,463	74,487	1,049	2,343	3,392
OF Total Disputes		3.41%	20.05%	96.58%	1.36%	3.04%	4.40%
OF Total Accts.	.	3.41%	0.683%	99.850%	0.046%	0.103%	0.150%
Of "Legit." Disputes					30.9%	69.1%	100.0%

* Duplicative disputes are defined somewhat consistent with NPRM §1006.38(a)(1) as: a dispute submitted by the consumer in writing that is substantially the same as a dispute previously submitted by the consumer in writing for which debt collectors already has satisfied the requirements of paragraph (d)(2)(i). Many collection agencies record and respond to disputes outside the validation period for customer service purposes.

Conclusion

In fact, from a 2018 and 2019 sample set of over 2.2 million accounts, ACA determined that the data supporting collections on those accounts is accurate over 99.85 percent of the time.

This study provides three key takeaways:

- **The numbers cited in the Fors-Marsh study that indicate malfeasance by accounts receivable management industry are dramatically inflated when compared to actual data.**

- **Concerns about consumers not exercising their right to dispute debts are unfounded, as invalid accounts are very rare.**

- **Duplicate disputes comprise over 20 percent of all disputes.**

B. Calling Data Research

The research referencing "calling data"[34] does not provide the public and researchers enough source material for adequate inspection and analysis. Specific failures with respect to the research provided include:

- No clear reference or citation for the data set used
- No sample size is provided
- No methodology is described
- No algorithms are provided for the simulation research
- No assumptions are provided, nor the rationale behind the assumptions

Therefore, it is not possible to contextualize the results of the simulations or to understand the real-world data they are based on.

The NPRM expands upon the details of the "calling data" findings for nearly ten pages,[35] outlining their justification for proposed call caps. However, within those ten pages there is almost a total absence of data and technical detail necessary to support their claims. As the rationale for call caps derives almost entirely on the simulation research and data from one collection agency, there should be clear documentation of the research, sample, methodology, and easy access to a final report.

The Bureau should not be given credit for providing the public the opportunity to comment upon the "calling data" study, and the call-caps rule that is based on the study, in light of this deficit in transparency.

III. DATA FROM STATE REGULATION ADVISES EXTREME RULEMAKING CAUTION

The Bureau must carefully balance new collections requirements with market incentives. For creditors, the alternative to debt collection is litigation. For many reasons, consumers who have breached credit contracts are much better off communicating privately with debt collectors than being sued by creditors in state or local courts:

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[34] *See* NPRM at 370.

[35] NPRM at 370 – 379

- Consumers must often pay attorneys' fees and costs of collections litigations,
- Consumers may lose chances to settle debt for less than face value, and
- When a lawsuit is filed in state or county court, the lawsuit filing, and defaulted debt becomes a matter of public record with all the attendant reputational harm.

Too much regulatory burden or frivolous plaintiffs' class action risk, however, negates the advantages of debt collection and will drive more creditors to elect litigation sooner or more frequently, particularly for certain riskier classes of debt.

Creditors prefer out-of-court resolution through debt collection because it usually is faster, predictable, is private, avoids attorney fees, and typically maintains the goodwill of the consumer. But where regulatory hurdles increase capital costs, on-going burdens, or regulatory risk, creditors and collection agencies may choose to file collections actions where notice pleading rules and medical information privacy rules are clear and a 100 percent recovery is more likely.

A. The 2015 New York DFS Debt Collection Rules Increased Collection Litigation by 93%

Following the enactment of new debt collection regulations in 2015, in New York State, collections lawsuit filings rose 32% in 2018 and 61% in 2017 from pre-2015 levels.[36] ACA believes that this is an overall bad outcome for consumers, and advises the Bureau to avoid tipping the trend toward litigation at a national level.

The New York Department of Financial Services issued regulations that took effect on March 3, 2015, except for certain provisions relating to itemization of the debt to be provided in initial disclosures and relating to substantiation of consumer debts, which were effective Aug. 3, 2015. The New York DFS rules are similar in many respects to those proposed by the Bureau.

1. Itemization on Validation Notices

The DFS' regulations require that the validation notice or "g notice" contain a written notification that includes: (1) disclosure that debt collectors are prohibited

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[36] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019 (crediting New Economy Project, a consumer advocacy group).

from engaging in abusive, deceptive and unfair debt collection; (2) notice of the types of income that may not be taken to satisfy a debt; and (3) itemization similar to that proposed by the Bureau, i.e. detailed account-level information, including the name of the original creditor and an itemization of the amount of the debt. That itemization must include the debt due as of charge-off, total amount of interest accrued since charge-off, total amount of noninterest fees or charges accrued since charge-off and total amount of payments made since charge-off.[37]

2. Disclosures About Debts for Which the Statutes of Limitations May be Expired

The DFS rules also require certain disclosures about statutes of limitations if the debt collector "knows or has reason to know" that the statute of limitations has expired. This section also mandates that collection firms maintain "reasonable procedures" for determining whether the statute of limitations has expired.

3. Increased Substantiation of Consumer Debts

If a consumer disputes a debt, collection firms may treat the dispute as a request for substantiation or must provide instructions as to how to make a written request for substantiation of the debt. Collection firms must provide substantiation within 60 days of receiving a consumer's request and must cease collection efforts during that time.

DFS defined documentation required for substantiation as including either a copy of a judgment against the consumer or: (1) the signed contract or some other document provided to the alleged consumer while the account was active demonstrating that the debt was incurred by the consumer; (2) the charge-off account statement (or equivalent document) issued by the original creditor; (3) a description of the complete chain of title, including the date of each assignment, sale and transfer; and (4) records reflecting any prior settlement agreement reached under the regulations. Collection firms must retain all evidence of the request, including all documents provided in response, until the debt is discharged, sold or transferred.[38]

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[37] 23 NYCRR § 1.2(b)(2).

[38] 23 NYCRR § 1.4

4. Debt Payment Procedures

If an agreement to a debt payment schedule or settlement is reached, the collection firm must provide written confirmation of the agreement and notice of exempt income. The collection firm must also provide a quarterly accounting statement while the consumer is making scheduled payments.

5. Communication through Email Restricted

After mailing the initial required disclosures, debt collectors may communicate with a consumer through email upon receipt of consumer consent, provided the email account is not owned or provided by the consumer's employer.

B. Over-Regulation of Communications Drives Creditors to Litigation

In New York City courts, account collection filings in year 2017 rose 61% from 2016 levels. In 2018, account collection filings rose another 32% from 2017 levels.[39] Prior to the New York DFS rules, lawsuit filings to collect debts had declined for nearly a decade due to tougher court requirements imposed on collectors.[40]

ACA members explain the reasons for this:

- Creditors did not want to invest the money to update systems in order to provide the data required to meet the itemization requirements (Rule 1); lawsuit filings shift the document preparation burden to attorneys;
- The new substantiation requirements (Rule 3) were as burdensome as litigation document preparation, so debt collection and non-litigation based communications lost an advantage.
- Collectors who formerly used email in New York stopped because the risk was too high.

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[39] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019.

[40] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019.

- Collectors who adopted email strategies across the U.S. did not adopt them in New York.

- Most debt collection agencies give consumers a discount on the debt. In contrast, the added cost of litigation discourages creditors from agreeing to the amount of discounts offered by a collection agency. In addition, creditors know they usually win judgments for the full amount further dissuading them from offering debt reductions or payment plans as favorable as accepted by collection agencies. As the conveniences of non-litigation based debt collection decline, the recovery advantage of litigation will prevail.

IV. THE CFPB'S RELIANCE ON THE COMPLAINT DATA LACKS RIGOR

In its White Paper, ACA has outlined why the CFPB's complaint data is flawed.[41] For the reasons below, fully described in ACA's White Paper, , the CFPB should not be relying on its complaint data as an accurate portrayal of the industry when formulating rules.

- Debt collection complaints account for only 0.005% of all consumer contacts made in a given year by the accounts receivable management industry.
- 84% of debt collection complaints are closed "with explanation."
- The Bureau's broad definition of a complaint sweeps in mere inquiries or unhappiness that a debt is owed.
- The Bureau fails to verify the accuracy of the complaints it receives before including the complaint in its counts.
- The Bureau does not differentiate between contacts vs. complaints.
- Many complaints address issues that are not fundamentally about the collection firm. For example, a consumer may submit a complaint that his or her insurance company should have paid a medical bill or that the debt was a result of identity theft.

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[41] ACA, A Review of Debt Collection Complaints Submitted to the Bureau of Consumer Financial Protection's Complaint Database in the First Half of 2018, 2-7 (ACA International White Paper November 2018), available at https://www.acainternational.org/assets/research-statistics/2018complaintsreviewquarteroneandtwo.pdf?viawrapper.

Chapter Two- Comments by Section

I. COMMENTS ON §1006.2- DEFINITIONS

ACA is pleased that the Bureau has proposed to include regulatory definitions in its notice of proposed rulemaking. Many of the proposed definitions incorporate statutory definitions from the FDCPA. However, the Bureau has proposed some new definitions, including an "attempt to communicate" and a "limited-content message." In addition, the Bureau has proposed to amend the definition of a "communication" subject to the FDCPA's purview by defining a "communication" to exclude a "limited-content message." ACA finds that many of these proposed definitions will resolve ambiguity. But, additional clarifications surrounding these proposed definitions may avoid additional interpretation problems down the road.

A. The Bureau's Definitions Should Add More Certainty and Clarity

Oftentimes unnecessary litigation results from strict and technical interpretations of various FDCPA provisions. For example, the FDCPA prohibits a collection firm from "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." 15 U.S.C. § 1692f(8). A strict interpretation of this language would prohibit the "debtor's address, postage, or other postal marks such as 'overnight mail' from being placed on the outside of an envelope." *McShann v. Northland Grp., Inc.*, Case No. 15-00314-CV-W-GAF, 2015 WL 8097650, at *2 (W.D. Mo. Dec. 1, 2015).

As courts have noted, such construction would "yield absurd or unjust results." *Anenkova v. Van Ru Credit Corp.*, 201 F.Supp.3d 631, 635-36 (E.D. Pa. 2016).

Accordingly, courts have held—although not always consistently—that the FDCPA does not proscribe benign language from being visible on an envelope so long as that information does not reveal that the person is a debtor.[42]

Therefore, ACA recommends that the Bureau define "language or symbol" to exclude bar or QR codes, postal markings, addresses, and other elements to aid for efficient use of the mails:

§1006.2(_). *Language or symbol* for purposes of interpreting 15 U.S.C. § 1692f(8) does not include bar or QR codes, postal markings, addresses, and other elements to aid efficient use of the mails.

B. Relevant Portions of Regulation F §1006.2

The Bureau has proposed in Regulation F Section 1006.2 to establish new regulatory definitions:

> **§ 1006.2 Other Prohibited Practices.** For purposes of this part, the following definitions apply:
>
> (e) *Consumer* means any natural person, whether living or deceased, obligated or allegedly obligated to pay any debt. For purposes of §§ 1006.6 and 1006.14(h), the term *consumer* includes the persons described in § 1006.6(a).
>
> (f) *Consumer financial product or service debt* means any debt related to any consumer financial product or service, as that term is defined in section 1002(5) of the Dodd-Frank Act (12 U.S.C. 5481(5)).

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[42] *See, e.g.*, *Anenkova*, 201 F.Supp.3d at 636-39 (granting summary judgment against plaintiff who sued a debt collector because a barcode was visible on the envelope); *McShann v. v. Northland Grp., Inc.*, Case No. 15-00314-CV-W-GAF, 2015 WL 8097650 (W.D. Mo. Dec. 1, 2015) (granting a motion to dismiss where a plaintiff sued because a demand letter with a "window" displayed the plaintiff's name, address, and account number); *Simmons v. Med-I-Claims*, No. 06-1155, 2007 WL 486879, at *9 (C.D. Ill. Feb. 9, 2007) (granting summary judgment where plaintiff sued because the return address listed in the envelope was listed for "Med-I-Claims" instead of "Med-I-Claims Services Inc."); *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1466 (C.D. Ca. 1991) (rejecting plaintiff's argument that debt collector violated FDCPA by including in an envelope language like "PERSONAL & CONFIDENTIAL" and "Forwarding and Address Correction Requested.").

C. ACA's Detailed Comments on §1006.2 Definitions

The Bureau has requested comments on whether additional clarification is needed for any of the proposed definitions and on whether additional definitions would be helpful. ACA believes that the Bureau could fine tune its definitions for the terms "attempt to communicate," "communication," "debt collector," and "limited-content message" so as to avoid subsequent interpretation problems as debt collector continues in their practice of collecting delinquent debt.

D. The definition of "Attempt to Communicate" and "Communicate"

The Bureau has proposed to include, in § 1006.2(b), a new term, "attempt to communicate:"

> (b) *Attempt to communicate* means any act to initiate a communication or other contact with any person through any medium, including by soliciting a response from such person. An attempt to communicate includes providing a limited-content message, as defined in paragraph (j) of this section.

Further, the Bureau has proposed to include, in § 1006.2(d), the term, "communicate:"

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

1. These definitions may touch websites and other public displays of contact information

ACA is concerned that these definitions may invite litigation over passive displays of contact information such as website pages, building signs, printed and electronic directories such as phonebooks, or other printed contact information on mediums that have not yet been invented, but serve a similar general-public informational or

marketing purpose. Not only will this chill useful means by which consumers can get information about accounts, it conflicts with controlling law.

The Supreme Court in *Heintz v. Jenkins* relied on a dictionary definition to determine that an attempt to collect a debt involves an element of personal solicitation or legal proceedings:

> [T]he Act defines the "debt collector[s]" to whom it applies as including those who "regularly collec[t] or attemp[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another." § 1692a(6). In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e.g., Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings").[43]

The Bureau should also consider clarifying that a portal or website hosted by the collection firm and voluntarily sought out by a consumer is not included within the definition of "communication." To include website visits and other posted media as "communication" would invite a morass of problems. When a consumer initiates a call or email to the collection firm, debt collectors can easily track such communication in their own records; however, if a consumer passively visits an agency's website, the agency would have difficulty tracking such information. ACA believes the Bureau should take this opportunity to enhance the clarity of the definition of "communication" so as to avoid any interpretation problems down the road.

2. Regulation F "Communication" Should be Connected to Debt Collection

Further, the Bureau should edit proposed § 1006.2(b) to clarify that an "attempt to communicate" and "communicate" is connected to information concerning a debt. As currently worded, an "attempt to communicate" is any act to initiate a "communication," which is defined in § 1006.2(d) as the conveying of information

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[43] *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995).

regarding a debt directly or indirectly to any person through any medium, ***or*** other contact with any person through any medium. But not all contact with any person should be converted to a covered act under Regulation F.

Collection agencies must communicate *about* a consumer's account for a variety of administrative and customer-service reasons that are not in connection with the collection of a debt. For example, a collector contacting a consumer's financial institution to set up a consumer's requested payment arrangement is "contact with any person through any medium" but is administrative in nature and would adhere to the consumer's instruction to make payment or validate account ownership. As another example, a consumer may make a complaint to an original creditor about collections activity. To resolve the issue, the creditor may need to reach out to a debt buyer, or debt buyer's agency to make sure the consumer gets the assistance that they need. More research and contacts might be needed if the debt was sold downstream. This type of communication should not be a covered "communication" under Regulation F. But under the current wording of the definition of "attempt to communicate" it could fall within the terminology of "contact with any person through any medium."

Finally, many schools, charities, and financial services innovators are developing loan and debt forgiveness and pay-off programs. Any over-broad inclusion of communications about a debt that are not made for the purpose of collecting money risks bringing these financial innovators into the crosshairs of the plaintiffs' bar.

3. *Collectors are unsure whether disconnected and wrong numbers are "Attempts to Communicate"*

The Bureau's proposed commentary indicates that an attempt to communicate includes, but is not limited to, placing a telephone call to a person, regardless of whether someone from the collection firm speaks to any person at the called number. The Bureau should further clarify whether a telephone call placed to a consumer that is either disconnected or does not go through, would also be included as an "attempt to communicate." In addition, the Bureau should clarify whether reassigned numbers are to be included as an "attempt to communicate." Phone number reassignment is when a number that has been deactivated or disconnected is then later reassigned to another person. Collectors may unintentionally call reassigned numbers, but these companies already take steps to avoid wasted time and resources associated with calling reassigned phone numbers because those phone numbers do not reach their consumers. Therefore, consumers do not need the

FDCPA to regulate these unintended phone calls because collectors are already trying to minimize them.

E. Inclusion of "whether living or deceased" in the definition of "consumer" is not necessary to address the Bureau's concerns.

The inclusion of "whether living or deceased" in the definition of consumer upends established case law. Since the enactment of the FDCPA, the definition of "consumer" has been widely litigated in federal courts and is, after forty years, well-settled law. The Bureau's proposal to amend the definition to include "whether living or deceased" would effectively un-root that settled case law.

1. There is no evidence that supports including deceased persons in the definition of consumer

The Bureau's rationale for this change is unsupported. The Bureau says in support of this change: "debt collectors may be uncertain, when collecting on a deceased consumer's debt, how to comply with the FDCPA provisions that refer to the debt collector's obligations to a consumer."[44] But, the Bureau has no evidence that collectors actually face this uncertainty. The Bureau does not provide or cite any specific examples where any collectors are confused or concerned in the collection of deceased debts. Secondly, any concerns the Bureau vaguely references are addressed by the Bureau's proposed changes in §1006.34(a)(1) and 1006.6.

The Bureau also mentions that the collection on debts from estates presents many of the same consumer-protection concerns as collecting debts from living consumers. There is no evidence that non-consumers who handle an estate, probate, trust, or affairs of a deceased consumer have concerns about being harassed or sued for debts that they are not responsible for—not from the Bureau's complaint database, or not from any consumer advocate.

In fact, collection activity against deceased consumers represents a very small percentage. An ACA-member agency specializing in this type of debt collection approximates that deceased collections make up a microscopic 0.6% of all collections in the industry, based on available data. A small number of agencies specialize in

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[4444] NPRM at 53.

decedent debt; none of these ACA-member agree with the Bureau's concerns. The Bureau fails to cite to any complaints or concerns from its surveys, data, or even consumer advocates that representatives of deceased consumer's estates are being harassed, or that their relatives or neighbors are being harassed on a regular, constant enough basis to justify adding this burden to the collection industry.

2. The amendment imposes new uncertainty

The Bureau's proposal to modify the definition of consumer to include "deceased" individuals, would effectively create a new class of potential FDCPA plaintiffs, with no regulatory or judicial guidance about such things as: statute of limitations, a "discovery" rule for deceased plaintiffs, and the competing powers of authorized representatives and designated trustees.

F. The "Limited-Content Message" is an Essential Modernization of the FDCPA

ACA applauds the Bureau's proposed new term as it believes that the proposed limited-content message provides a uniform interpretation of the FDCPA that alleviates the need for collectors to decide between different circuit court opinions.

The Bureau has proposed to include, in § 1006.2(j), a new term, "limited-content message."

> (j) *Limited-content message* means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.
>
> (1) *Required content*. A limited-content message is a message for a consumer that includes all of the following: (i) The consumer's name; (ii) A request that the consumer reply to the message; (iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; (iv) A telephone number that the consumer can use to reply to the debt collector, and (v) If applicable, the disclosure required by § 1006.6(e).

> (2) *Optional content*. In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following: (i) A salutation; (ii) The date and time of the message; (iii) A generic statement that the message relates to an account; and (iv) Suggested dates and times for the consumer to reply to the message.

1. *When it comes to leaving messages, the FDCPA lacks clarity and is in desperate need of interpretation.*

The FDCPA was drafted before voicemail existed and is ambiguous about how one can simultaneously comply with its provisions when leaving a voice message. As currently defined in the FDCPA, a communication "means the conveying of information regarding a debt directly or indirectly to any person through any medium."[45] The FDCPA is clear in Section 805(b) that a debt collector may not communicate with a person other than the consumer in connection with the collection of any debt, with certain exceptions. Yet, in Section 807(11) the FDCPA requires that a debt collector identify itself as a debt collector, inform the consumer that the debt collector is attempting to collect a debt, and that any information obtained will be used for that purpose. Since the passage of the FDCPA there has been uncertainty surrounding the intersection of these two provisions in the FDCPA because if a debt collector leaves such disclosures on a voicemail or other message system, they risk violating the prohibition against revealing information about a debt owed by a consumer to a third party. This has led to some debt collectors deciding not to leave messages at all and instead hanging up when reaching a voicemail.

In the NPRM, the CFPB has identified that consumers are frustrated when a collector calls and doesn't leave a voicemail. The CFPB's proposed definition of a limited content message attempts to resolve both sides of this equation. It provides a method whereby debt collectors may leave a message for a consumer and not risk violating the statute, which would reduce the number of calls a debt collector would need to make to reach the consumer and resolve the outstanding debt.

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[45] 15 U.S.C. § 1692b(2)

There currently is a split among circuits about how collectors should leave recorded or live messages.[46] Additionally, as noted in the NPRM, the FTC and the U.S. Government Accountability Office have previously identified the need to clarify a debt collectors' ability to leave voicemail messages for consumers.[47] Moreover, the CFPB noted that the SBREFA process demonstrated overwhelming support from small business representatives for a rule that clarified a debt collector's ability to leave a message for a consumer.[48]Reasonable minds differ on how to interpret the FDCPA. This area is ripe for agency rulemaking under the *Chevron* factors.[49]

2. The "Limited Content Message" Resolves Ambiguity in the FDCPA Text

Like any administrative agency, the CFPB must act within the scope of authority Congress delegated to it by statute. A court may ignore a regulation promulgated through notice and comment if it does not earn deference.[50] Issues surrounding judicial deference to agency interpretations of statutes enacted by Congress are guided by the *Chevron* doctrine.

Under the *Chevron* analysis, first set forth by the Supreme Court in 1984, courts review agency rules by looking at the rule in two distinct steps. First, a reviewing court must determine whether the meaning of the statute addressing the precise issue before the court is clear. If the statutory text is clear, that is the end of the matter; the court and the agency must give effect to the unambiguously expressed intent of Congress.[51] Only when the statute is silent or unclear on the issue can a court move on to step two.

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[46] *Compare Foti v. NCO Fin'l Sys's, Inc.*, 424 F.Supp.2d 643 (S.D.N.Y. 2006) (holding that a pre-recorded message stating "calling . . . regarding a personal business matter" was a "communication" under the FDCPA) *with Zortman v. J.C. Christensen & Associates, Inc.*, 870 F.Supp.2d 694 (D. Minn. 2012) (holding that voicemail stating "[t]his is a call from a debt collector" was not a third-party communication violating the FDCPA).

[47] *See* NPRM, at 61; *see id.* at 61, fns. 176 & 177.

[48] *See id.* at 67, fn. 179.

[49] *See* Infra Section IV.B.

[50] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[51] *Id.* at 843 n.9 (*Chevron* instructs courts at step one to employ all of the traditional tools of statutory interpretation first).

Further, the CFPB's rulemaking must comply with the Administrative Procedure Act, which requires a reviewing court to set aside agency action under certain conditions, including when agency rulemaking is arbitrary or capricious.[52] When applying the arbitrary and capricious standard, courts generally focus on: (1) whether the rulemaking record supports the factual conclusions upon which the rule is based; (2) the rationality or reasonableness of the policy conclusions underlying the rule, and (3) the extent to which the agency has adequately articulated the basis for its conclusions."[53] Reviewing courts' interpretations of the terms "arbitrary and capricious" have changed over time.[54]

Any rulemaking the CFPB engages in to implement a new rule or modify an existing rule faces two primary statutory requirements. First, the rule must conform to the authority set forth in the Consumer Financial Protection Act ("CFPA"). Second, there must be a "concise general statement of [the amendment's] basis and purpose," reflecting rational and reasonable policy conclusions in the rulemaking record to support the change and thus avoid being overturned as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[55] An agency's interpretation is most likely to receive deference when "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.[56]

The principal evidence that the FDCPA is silent on the content of live or recorded messages is the present dichotomy caused by competing circuit court opinions.

3. The Foti versus Zortman conundrum proves the need for agency interpretation

The split among circuits regarding how collectors should leave messages is premised upon two separate lines of court cases and are generally referred to as *Foti* and *Zortman*.

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[52] 5 U.S.C. § 706(2)(A).

[53] Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 164, 425 (5th ed. 2012).

[54] *Id*. at 426.

[55] 5 U.S.C. § 553(c); 5 U.S.C. § 706(2)(A).

[56] *New York v. EPA*, 413 F.3d 3, 23 (D.C. Cir. 2005) (citing *Chevron*, 437 U.S. at 865).

In *Foti*, the debt collector left the following message:

> Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back 1-866-701-1275. Once again please call back, toll-free, 1-866-701-1275, this is not a solicitation.[57]

Courts following the *Foti* analysis hold that these types of messages are in fact a communication as defined by the FDCPA and that they must include the disclosures that the caller is attempting to collect a debt, which only increases the likelihood that a third party hearing the message would receive information that the message relates to debt collection in violation of the FDCPA.

In *Zortman*, the debt collector left the following message:

> We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866-319-8619.[58]

The *Zortman* court found that the voice message was not a communication under the FDCPA and therefore did not constitute a third-party disclosure or require mini-miranda disclosures under the FDCPA.

The *Zortman* approach also has received some approval by the FTC. In a settlement with GC Services, the FTC enjoined GC Services from leaving messages that disclosed that GC Services is a debt collector only if the message also contained the consumer's first or last name.[59] Thus, a *Zortman* message, which does not contain the consumer's first or last name, but indicates that the call is from a debt collector is consistent with the FTC's approach.

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[57] *Foti*, 424 F.Supp.2d at 648 (S.D.N.Y. 2006).

[58] *Zortman*, 870 F.Supp.2d at 696.

[59] *U.S. v. GC Services Limited Partnership*, Civ. Action No. 17-461, Stipulated Order for Permanent Injunction and Civil Penalty Judgment, at pp. 6-7 (S.D. Tex. March 2, 2017),.

However, the Eleventh Circuit has pushed back on the *Zortman* approach. In *Hart v. Credit Control, LLC*, 871 F.3d 1255 (11th Cir. 2017), the debt collector left a message which stated:

> This is Credit Control calling with a message. This call is from a debt collector. Please call us at 866-784-1160. Thank you.[60]

The Eleventh Circuit found this message was in fact a communication under the FDCPA which is contrary to the holding in *Zortman*.

4. The Limited Content Message Definition Reconciles Conflicting Approaches

As the Supreme Court has explained in *Chevron* when the statute is silent or ambiguous with respect to a specific issue, the court considers whether the agency's interpretation reflects a permissible and reasoned construction of the statute.[61]

The CFPB, seeking to reconcile these contradictory approaches, has presented a method, the limited-content message, whereby debt collectors can leave a message for a consumer and not risk violating the intersecting FDCPA prohibitions found in §805(b) and §807(11). The proposed commentary in the NPRM provides two examples of a limited-content message:

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

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[60] *Hart*, 871 F.3d at 1256.

[61] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842–43 (1984). The Supreme Court most recently reiterated *Chevron* in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 1, 9 (2016). *See also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 164, at 453 (5th ed. 2012) (stating that "if the statutory meaning on the precise issue before the court is not clear, or if the statute is silent on that issue, the court is required to defer to the agency's interpretation of the statute if that interpretation is 'permissible.'").

A comparison of the proposed examples of a limited-content message against the messages at issue in *Foti*, Zortman, and *Hart* demonstrates that the CFPB has proposed a rule that is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the [CFPA]," and therefore not likely to be overturned as arbitrary and capricious.[62]

Indeed, the NPRM sets forth the inconsistency in which courts have interpreted the intersecting prohibitions of the FDCPA, and thus supports the conclusion that providing a clear method whereby a collector may leave a consumer a message free from risk of liability is necessary. The CFPB has therefore sufficiently articulated the three factors courts focus on when applying the arbitrary and capricious standard: (1) the rulemaking record supports the factual conclusion upon which the limited-content message is based; (2) the limited-content message is based upon reasonable policy conclusions that clarity is necessary; and (3) the agency has adequately articulated the basis for proposing the limited content message.[63]

G. Additional Comments about the Limited Content Message

1. Limited Content Messages Should Allow Electronic Contacts

The current definition required the limited content message to leave a telephone number for a response. We suggest that an email address, text message number, or other (yet unknown) type of communication method should also be available. Particularly when the limited-content message is delivered in writing, it makes sense that a consumer would be able to click a link in that message in order to respond.

Official Commentary should state an example such as:

> This is Robin Smith calling for Sam Jones. Sam, please contact me at 1-800-555-1212 or by email. My address is RobinS@ABCfirm.com.

Communications via e-mail should be included because consumers have expressed that they can be convenient because the individual may determine the best time, for

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[62] *Motor Vehicle Mfrs. Ass'n, Inc.*, 463 U.S. 29 at 42-43.

[63] LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 164, 425 (5th ed. 2012).

their own personal schedule, to review and respond to any received e-mail communication. We recommend that the limited-content message would include a name of a real person whom the consumer could contact to reply to the collector, a telephone number or electronic contact, and a disclosure explaining how the consumer could opt-out of receiving such messages. As such, by allowing a collection firm to deliver a limited-content message via e-mail, collectors would be allowed to provide consumers with the information they need, in writing, so that they could contact the collector to communicate about their outstanding debt. And, such information would be provided in a convenient medium that the consumer himself could control.

2. Is there liability for inadvertent incomplete messages?

ACA applauds the Bureau's efforts to provide a method for the accounts receivable management industry to reach consumers that would avoid violations of FDCPA sections 805(b) and 807(11). Yet, ACA urges the Bureau to consider how certain issues, such as telephone disconnection, carrier issues, hang-ups, or other technology issues that prohibit a collector from leaving all elements of the Bureau's proposed limited content message will affect a collector's attempt to leave a limited-content message. Therefore, ACA urges the Bureau to clarify in Official Commentary that an inadvertently incomplete limited-content message will qualify as a limited-content message. Providing such clarification will avoid interpretation issues.

3. Provide clarification regarding consumer's name

ACA further urges the Bureau to clarify the name requirement in a limited-content message. As currently proposed, a limited-content message is a message for a consumer that includes "the consumer's name," in addition to other content. Neither in the proposed regulation or the proposed commentary is "the consumer's name" clarified. Does this mean a consumer's first name, last name, both first and last name? Again, ACA urges that providing as much clarification at the outset will help to potentially avoid subsequent interpretation problems.

4. More clarity is also needed surrounding the term "natural persons"

Under the proposal it states that a consumer should be directed to reply to, "the name or names of one or more natural persons," whom the consumer can contact to reply to the collector. The proposal clarifies that an alias can be used. However, that

leaves some industry practices unclear. Currently some agencies use systems such as using a certain alias to refer to a certain letter used. It is not entirely clear if it is permissible if a name used, not directly linked to a natural person is permissible. Footnote 181 notes that, "Proposed § 1006.18(f) would clarify that an accounts receivable management industry employee does not violate § 1006.18 by using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the employer can readily identify any employee who is using an assumed name. See the section-by-section analysis of proposed § 1006.18(f)."[64] ACA urges the Bureau to clarify whether an exact alias has to be linked to one natural person, or if it can be used in other ways to direct callers to the person who can be most helpful in responding. ACA suggests that the Bureau allow some flexibility in this area that accounts for employee turnover, efficiency, and the ability to connect a consumer to someone that can help them during all regular work hours, in which one certain employee may not always be working.

5. Cost Concerns about Text Messages are Outdated

Organizations who dislike the clarity that the Bureau's proposal provides—which will reduce spurious litigation opportunities—raise issues concerning the cost to consumers if limited content messages are allowed in text messages. This concern is outdated. With the widespread availability of unlimited call and text plans, the number of consumers who continue to pay for individual text massages is certainly a small segment of the marketplace. As virtually all postpaid plans include unlimited texting, as well as some prepaid plans, based on 2018 market data our estimate is that 87% of consumers have unlimited texting. This finding is consistent with other market research on the availability of unlimited texts. However, these figures likely overestimate the number of consumers who pay for individual texts as calling and texting are generally inexpensive for service providers and unlimited calling and texting is often extended as an incentive even for prepaid and low-cost plans.

6. Additional clarity is also needed about direct drop voicemail programs.

Ringless voicemail has become a widely used tool in the industry for connecting with consumers and has been found to be effective because it enables consumers to

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[64] NPRM at 67.

respond when they want to, at a time that is most convenient for them. Many agencies use this technology.[65] ACA urges the Bureau to clarify in official commentary that ringless voicemail can be used to deliver a Limited Content Message.

H. "Debt Collector" Ambiguities Can be Better Addressed

There has been much litigation since the inception of the FDCPA regarding the exemptions from the statutory regime. In particular, servicers of both current and delinquent debt require better clarity. The Bureau's Proposed Rule provides:

> (g)(2) The term debt collector excludes:
>
> (vi) Any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity: (A) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (B) Concerns a debt that such person originated; (C) Concerns a debt that was not in default at the time such person obtained the debt; or (D) Concerns a debt that such person obtained as a secured party in a commercial credit transaction involving the creditor; and (vii) A private entity, to the extent such private entity is operating a bad check enforcement program that complies with section 818 of the Act.

Given that the Bureau has raised the issue of the statutory definition of a "debt collector" in its notice of proposed rulemaking, the Bureau should clarify that the FDCPA and Regulation F don't apply to affiliates, servicers and subsidiaries collecting on originating creditor debt. Further, the rule might address how these firms might alert plaintiff attorneys that they are collecting on behalf of first-party creditors, and not in a third-party capacity.

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[65] ACCOUNTS RECOVERY.NET, DIGITAL COMMUNICATION SURVEY, https://www.accountsrecovery.net/wp-content/uploads/2019/07/Digital-Communication-Survey-Final-Low-Res.pdf

Second, the Bureau should clearly define non-consumer debt and pre-default servicing work that is not covered by the FDCPA.

Third, the Bureau should resolve the question of whether a person can sometimes be a debt collector and sometimes not be a debt collector in instances where the defendant obtains a mix of loans, some of which are in default and some of which are not in default, all unbeknownst to the defendant (as often happens in mortgage servicing).[66]

Fourth, the Bureau should clarify in its proposed definition of "person" that the debt covered by the FDCPA is debt only a natural person can incur as set forth in § 803(3) and (5).

Finally, the Bureau's enforcement division has advanced the theory that creditors and debt buyers can be liable under the FDCPA for the FDCPA violations of the agencies the creditors/buyers hire to collect on accounts. Yet the Bureau has not established the standards of conduct or when such liability will apply for owners of charged-off accounts. The D.C. Court of Appeals in *PHH Corporation v. Consumer Financial Protection Bureau*, 881 F.3d 75, 83 (2018) affirmed the panel's unanimous holding that the Bureau cannot employ new statutory interpretations retroactively. Thus, debt buyers presently have a complete defense to creative FDCPA interpretations about vicarious liability until such time as the Bureau engages in prospective rulemaking.

The Bureau's proposed definitions should avoid subsequent interpretation problems; and failing to clarify now the identified murky issues would unfortunately result in costly litigation that the Bureau is likely to lose.

II. COMMENTS ON §1006.6 – COMMUNICATIONS IN CONNECTION WITH DEBT COLLECTION

ACA appreciates the Bureau using this rulemaking as an opportunity to bring clarity to the accounts receivable management industry's obligations in communicating with consumers, particularly with respect to communications over email and text. Enabling electronic communication regarding debt, or to acquire

[66] *See, e.g., Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 537 (7th Cir. 2003); *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355, 362 (6th Cir. 2012).

location information, further balances the need for the accounts receivable management industry to connect with the consumer, and the consumer's ability to have some control over the timing and volume of communications he or she receives.

That said, if the Bureau's goal is to encourage more of the accounts receivable management industry to communicate electronically, the rule must be easier to understand and follow. ACA recommends further clarity in certain provisions, as discussed in more detail below, to better guide ACA's membership toward FDCPA compliance in using email.

A. §1006.6(a) and Proposed Comments 6(a): The Definition of Consumer

With proposed §1006.6(a)(4) and proposed comments 6(a)(4), the Bureau seeks to clarify that Regulation F's provisions regarding communications with a consumer about a debt include communications with an administrator or executor of a deceased consumer's estate. Proposed comments 6(a)(4)-1 specifies that the terms executor and administrator include the personal representative of the deceased's estate:

> *1. Personal representative.* Section 1006.6(a)(4) provides that, for purposes of § 1006.6, the term consumer includes the executor or administrator of the consumer's estate, if the consumer is deceased. The terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's assets extrajudicially.

But as the Bureau notes, many states have implemented procedures for resolving estates that are more efficient and less costly than probate, and under these procedures, "an individual with the authority to pay the decedent's debts out of the

assets may lack the particular title of executor or administrator under State law." NPRM at 73.

Indeed, the Bureau vastly understates the complexities of state laws that allow families to avoid probate. In California, for example, you can make a living trust to avoid probate for virtually any asset. At death, the successor trustee will be able to transfer it to the trust beneficiaries without probate court proceedings. In this situation, there would not be a "personal representative," but rather a "trustee." The Bureau should avoid proscribing specific language unless it has done the exhausting task of including every state's possible terminology in its definitions or comments.

Accordingly, to facilitate better compliance with Regulation F, ACA believes that a more efficient approach would be to incorporate the relevant state's law and terminology in §1006.6(a)(4) so that it would read as follows:

> §1006.6(a). *Definition*. For purposes of this section, the term consumer includes:
>
> (4) The executor, administrator, or person authorized under state or other applicable law to represent the consumer's estate or property securing a debt, if the consumer is deceased.

Including reference to state or applicable (local, tribal, or foreign) laws concerning estates in the regulatory text, rather than in the comment, ensures clarity at the outset as to whom the debt collector may speak with regarding decedent debt, and eliminates the potential for confusion if the individual who is responsible for the finances of the decedent does not have the title of executor or administrator.

Moreover, if a state uses precise terminology to identify the person authorized under state law to represent the consumer's estate or a particular secured asset, the collector may use the term appropriate to the decedent's situation. This avoids confusing consumers and avoids unwarranted liability for collectors.

B. §1006.6(b)(1) and Proposed Comments (6)(b)(1)-1: Ascertaining Inconvenience to the Consumer

1. *The CFPB Should Clarify the "Should Know" Standard Since a Collection Firm must base it upon Limited Information from a Consumer about a Time or Place being Inconvenient*

The Bureau requested comments on whether to require the accounts receivable management industry to ask at the outset of a debt collection communication whether the time or place is convenient to the consumer, and what effect consumer-initiated communications should have on the times and places the debt collector knows or should know are inconvenient to the consumer. There are practical and legal reasons why a "should know" standard is unnecessary—and even unfair to collectors.

<u>Practical Rationale for Clarifying the *Should-Know* Standard</u>

First, ACA members, who have collectively listened to billions of phone calls with consumers, have no doubt whatsoever that consumers are perfectly able to say that the call's time and place is inconvenient, if indeed the call is inconvenient. With today's call-blocking technology and ringer-silencing, consumers control when a call interferes with their school, work, or sleep.

Second, requiring the accounts receivable management industry to add to their opening disclosures a question about whether the time and place for the call is convenient makes a long introduction even longer:

> 1- the collector must determine a right party contact by verifying name and other pieces of information;
>
> 2- the collector must provide the mini-Miranda;
>
> 3- —we assume, because the rule doesn't specify the order—the agency must request whether the call is convenient.

By the time the agency gets to the real purpose for the call, the consumer has already listened and responded to a full minute of *pro forma* information that does not advance the important communication that must take place in order to resolve

the debt. It's a waste of time for both collector and consumer. It will annoy consumers, as well.

Third, the yes/no question will not always provide adequate information such that the debt collector should know when a more convenient time and place of the communication should occur. A yes/no response is vague because the question is compound. It will be difficult for the collector to determine whether the time or place is inconvenient at the moment, or in perpetuity. Moreover, a response that the call is inconvenient is difficult to record and operationalize. For example, if a consumer simply responds "no" to whether the call is convenient, the collector has no further detail as to why – time of day, location, or a particular situation?

Further inquiries as to when a convenient time to call may generate vague, noncommittal responses—particularly in the situation when the call is, in fact, inconvenient.

If the consumer hangs up, it only becomes more complex. To avoid a regulatory violation, the collector must assume that no time is convenient for the consumer. This, in turn, may lead to the debt collector simply resorting to litigation or garnishment to collect the debt if it cannot establish any meaningful communication with the consumer.

ACA's concerns are heightened by the idealistic scenarios posed in the Proposed Rule examples. Proposed comment 6(b)(1)-1 is intended to provide additional clarity to when the debt collector should know that a time or place is inconvenient for the consumer. Example (i) illustrates the best-case scenario of a consumer providing an exact window of time during which debt collection calls are inconvenient. That level of specificity is the rare exception rather than the norm. More often, consumers state that they can't talk at that moment, and when prompted about when a good time might be, provide a vague response such as "later" or "tomorrow," or may just hang up. The debt collector should not be required to intuit future inconvenience from a single, vague interaction.

This difficulty also applies to designations by the consumer that certain places are inconvenient. Example (iii)'s scenario where a consumer asks a collector to not contact the consumer at school illustrates the difficulty in implementing this request. Without further information on what days and times the consumer is at school, a collector cannot possibly input adequate information into its systems to ensure further contact does not happen while the consumer is at school. Given the

risk that, if the collector attempts to call the consumer again and the consumer is at a night class, a court could find that the collector should have known the consumer was "at school" and that the call was inconvenient.

Legal Rationale for Rejecting the *Should-Know* Standard

Principally, there is a risk that a court might find that a broadly-applied "should know" standard departs from the express language of the FDCPA, which provides a safe harbor under 805(a)(1) for the demarcated daylight hours in "the absence of knowledge of circumstances to the contrary." The FDCPA provides that collectors "shall" presume it is convenient to call after 8 o'clock a.m. and before 9 o'clock p.m., local time at the consumer's location unless the collector has knowledge to the contrary. ("In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location.")

Any person "should know" that calling at 3:00 a.m. is inconvenient, as is calling a person at church or the grocery store and having them paged. This "should know" standard is coupled with a societal norm.

Holding the accounts receivable management industry to a "should know" standard by requiring them to make assumptions beyond societal norms, however, runs contrary to the established principle that the burden of proving something should reside with the party who has the relevant information. "[F]airness dictates that a litigant ought not have the burden of proof with respect to facts particularly within the knowledge of the opposing party." *Adobe Systems v. Christenson*, 809 F. 3d 1071, 1079 (9th Cir. 2015); *see also Evankavitch v. Green Tree Servicing* LLC, 793. F. 3d 355, 365 (3rd Cir. 2015) (general rule of statutory construction, "that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue," *citing Dixon v. United States*, 548 U.S. 1, 9, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)); *National Communications Ass'n Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2nd Cir. 2001) ("[A]ll else being equal, the burden [of proof] is better placed on the party with easier access to relevant information."); 2 McCormick on Evid. § 337 (7th Ed.)("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.")

The consumer, not the debt collector, has the best information on whether a time or place is inconvenient to her for a collection call, or whether certain contact information is appropriate to use for debt collection communications. Unless the consumer expressly supplies this information to the original creditor or shares it with the collector, the collector cannot be expected to “know or should know” about the inconvenience or impropriety of the communication if it is based on highly-personal circumstances.

Negative Ramifications of the Should-Know Standard

Of course, in the wake of vague convenience descriptions, the collector may simply cease calls altogether. This result is not good for the consumer, who misses the opportunity to speak to the collector and resolve the debt. And it risks litigation, wage garnishments, negative credit reporting and other consequences that could have been avoided had the debt collector been able to initiate contact. These actions arguably bring far more inconvenience to the consumer than a phone call.

ACA’s Recommendation Concerning Inconvenient Call Times

Accordingly, ACA recommends clarifying that the debt collector need only assume that the exact time when a consumer designated the call to be inconvenient is inconvenient for future calls, absent additional specificity from the consumer. Using the current examples in proposed comment 6(b)(1)-1, ACA accepts that the collection firm knows or should know that the consumer in example (i) should not be contacted between 3:00 p.m. and 5:00 p.m. However, ACA would request that example (iii) be clarified to state that, unless the consumer provides further information as to when the consumer attends school, the collection firm only knows or should know that, at that particular time and day, the consumer is at school and should not be contacted. Collectors should not be expected to make assumptions about when the consumer is at work or at school, as some consumer advocates have suggested.

Similarly, the collector should be able to rely upon the consumer affirmatively contacting the collection firm as indicia that the time is permissible for future contact unless the consumer expresses otherwise. Proposed 6(b)(1)-1 permits the debt collector to only contact a consumer once at a time that the consumer had previously designated as inconvenient, but during which the consumer had subsequently initiated contact with the debt collector. Again, operationalizing this restriction will prove difficult for collectors and will expand the potential for error.

Taking example 6(b)(1)-1(ii), the collector should not be assumed to know that 4:30 p.m. is only convenient for one call. Just as the consumer had the ability to initially state when calls were inconvenient, the consumer can inform the collector that 4:30 is only convenient for that day, or has become a convenient time.

2. *Time and Inconvenience Restrictions Should Not Apply to Electronic Communications*

ACA has serious concerns regarding proposed comment 6(b)(1)(i)-1, which states that debt collectors may not communicate via text message or email at times it knows to be inconvenient to the consumer, and that the inconvenient time is determined from the time the communication is sent, not received.

Electronic communications do not present the same potential for disturbance as a phone call. One of the benefits of electronic communications, email in particular, is the consumer's increased control over when those communications are reviewed and addressed,[67] because the consumer has greater flexibility in when he or she reads an electronic communication, it is not reasonable to assume that when a consumer expresses that a particular time is inconvenient for a phone call, the consumer is also saying that the same time would be inconvenient to receive an email or text message. No studies or research underlies the Bureau's assumption that consumers would make that connection.

Proposed comment 6(e), by requiring collectors to include an opt-out notice for electronic communications, already accounts for consumer preference as to electronic communications. Consequently, there is no need for the debt collector to extrapolate an inconvenience designation for phone calls to electronic communications – between choosing when to view those communications, or being able to opt-out of receiving them at all, the consumer has plenty of control over his or her receipt of electronic debt communications.

Again, Regulation F should balance the consumer's right to be free from harassing communications with providing enough opportunity for the collector to

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[67] *See* True Accord, *Debt Collection The new frontier in financial services digitization* (stating that "[c]ustomers prefer the pleasant and flexible experience and thus respond more often"), available at: www.trueaccord.com/resources/downloads.

communicate with the consumer to address the debt and avoid litigation and garnishment.

The Bureau ought to clarify that a consumer's designation of a time or place for a call as inconvenient should not apply to electronic communications by revising proposed comment 6(b)(1)(i)-1. It should state that a consumer informing a collector over the phone that a call has occurred at an inconvenient time or place applies to phone calls only and not electronic communications for purposes of whether the collector knows or should know that an electronic communication is inconvenient.

3. Collectors should be permitted to send email outside the presumptive time limits

Send-time restrictions on email do not pass a cost/benefit analysis. First, collectors will need to reprogram email systems to comport with the requirement that communications be made between 8 a.m. and 9 p.m. as specified in proposed comment 6(b)(1)(i); i.e., whether an electronic communication is made during permissible hours is determined by the time the communication is sent, not received.

Second, it is much more cost-effective for collectors to send large batches of email at night due to greater bandwidth, reduced system traffic, and other technological and operational considerations. Technological glitches may prevent emails from going out at a particular time even if the collector did try to comport with the timing restrictions. As explained above, the chance of harassment or inconvenience is greatly diminished with email, as consumers maintain control over when emails are viewed.

Most importantly, consumers have complete control over whether and when they receive emails. In addition, many emails concerning collections are sent automatically upon the occurrence of an event: processed payment, returned payment, response to an email question. Some of these messages benefit consumers more if they are sent concurrently with the event—as it gives them the time to respond and fix potential problems.

Finally, the commercial marketplace, in general, does not restrict timing on email contacts like it does with telephone. News, advertising, billing, and shipment notifications get sent all hours of the day. The fact that a collector could not respond to consumer correspondence outside a 13-hour period is aberrant and more likely to

cause inconvenience and frustration because it differs so much from commercial norms.

Accordingly, ACA requests that the Bureau amend proposed comment 6(b)(1)(i)-2 in the final rule to reflect that electronic mail communications are not subject to the restriction set forth in §1006.6(b)(1).

4. *The Accounts Receivable Management Industry should be permitted to rely on the consumer's address of record only for calculating timing of calls, absent information to the contrary*

ACA appreciates the safe harbor afforded by the 8 a.m. to 9 p.m. window in proposed §1006.6(b)(1)(i), but feels strongly that, given the portability of mobile phone numbers and the operational burden of cross referencing area codes with physical addresses to ascertain possible locations, collectors should be permitted to rely on the consumer's address of record in agency files for determining permissible calling hours. Mobile phone area codes are increasingly unreliable as an indicator of where a consumer resides, as many people retain the same phone number throughout physical moves.[68] An address on file is a more reliable indicator of the consumer's location than a mobile area code.

If a collector is forced to cross reference a physical address with a mobile phone area code, setting aside the additional operational costs that would entail, the end result would be more contacts in the middle of the day, when consumers are typically at work and more difficult to reach. Because the collector cannot readily reach the consumer, the consumer may sustain more inconvenience – lawsuits and garnishments – than if the collector had been able to reach the consumer to discuss and resolve the debt.

C. §1006.6(b)(2)(i): Clarifications Concerning the Length of Time an Attorney Has to Respond to a Debt Collector

The FDCPA prohibits debt collectors from directly contacting debtors regarding the collection of a debt in cases where the debt collector knows that the consumer is

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[68] *See* Robin Huebner, *With Cellphones, Area Codes More About Identity Than Geography*, THE BISMARCK TRIBUNE (Mar. 2, 2017) available at: https://bismarcktribune.com/news/state-and-regional/with-cellphones-area-codes-more-about-identity-than-geography/article_822e86fa-240f-53c4-8aa8-bba685414825.html.

represented by an attorney; however, the FDCPA allows the collector to engage with the consumer directly if the attorney fails to respond in a reasonable amount of time.[69] The FDCPA does not define the term "reasonable time," and only a few cases even address this exception, though none provide a clear holding.[70] The Bureau should take this opportunity to clarify with certainty the length of time an attorney has to respond to a communication from the debt collector before the debt collector may resume collections with an attorney-represented debtor. Various states have clarified this for their residents; however, it would greatly assist the industry if this was clarified uniformly nationwide.[71]

D. §1006.6(b)(3) and Proposed Comment (6)(b)(3)-1: Prohibitions Concerning the Consumer's Place of Employment

1. *Clarity Is Needed Around When the Accounts Receivable Management Industry Has Reason to Know That an Employer Prohibits the Consumer from Receiving Debt Communications*

ACA requests clarification about when the accounts receivable management industry is presumed to know that a consumer's employer prohibits debt collection calls at work. It is unreasonable to assume that collectors can and should cross-reference their files to look at the employers for various consumers and implement a

[69] 15 U.S.C. § 1692c(a)(2).

[70] *See e.g., Phillips v. Amana Collection Svcs.*, 1992WL227839, at *6 (W.D.N.Y. 1992) (disregarding defendant's contention that failure to respond within two-weeks was unreasonable, but failing to identify what would constitute an unreasonable amount of time). In Blum v. Fisher and Fisher, the court found that it was a material question of fact as to whether a delay of more than 30-days constituted a failure by the attorney to respond within a reasonable time. 961 F.Supp. 1218, 1228 (N.D. Ill. 1997); *see also Phillips v. Amana Collection Servs.*, No. 89–C–1152S, 1992 WL 227839, at *6 (W.D.N.Y. Aug.25, 1992) (holding that a debtor's failure to respond within two weeks to a debt collection letter did not warrant direct communication under the FDCPA).

[71] *See, e.g.* F.S.A. § 559.72(18) (no person can "communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt…unless the debtor's attorney fails to respond within 30 days to a communication from the person"); N.D. Admin. Code § 13-04-02-09(5) (prohibiting a debt collector from communicating with a debtor "whenever it appears that the debtor is represented by an attorney…unless the attorney has failed to respond to a communication within thirty days"); S.C. § 37-5-108(5)(b)(ii) (prohibiting creditors from communicating with a debtor represented by counsel unless the attorney fails to communicate within 10 days).

firm-wide restriction on calling any consumers employed at that particular company.

Further, ACA requests clarification on the Proposed Rule's applicability to communications with consumers on their mobile phones or personal devices that 1) the consumer may have obtained through their place of employment, but still use for personal business, and/or 2) the consumer has with them and looks at during work hours.

Again, ACA believes that the best way to avoid communicating with a consumer who is not permitted to receive debt communications at work is to have the consumer affirmatively provide that information. The modern workplace operates such that when a consumer is working depends more upon the habits of the consumer rather than particular set hours or days. While many consumers still maintain a work schedule that conforms to a Monday through Friday, 8 a.m. to 5 p.m. schedule, many others do not due to increased ability to telework, shifts, and international commerce. Consequently, a consumer may be at home, but working, or may be working on a weekend or in the evening.

E. §1006.6(c)(1) and Proposed Comments 6(c)(1)-1: Notification Regarding Refusal to Pay or Cease Communications

1. *The Proposed Rule Should Allow Additional Time for Processing a Notification for Purposes of Determining When the Notice Goes into Effect*

System updates often take time to implement, ACA therefore proposes a mailbox rule for §1006.6(c)(1). This subsection provides that a debt collector must cease communications or attempts to communicate with a consumer once the consumer has notified the collector of refusal to pay the debt or that the consumer wants the collector to stop communications. The Bureau's proposed comment 6(c)(1)-1 helps to clarify that the collector is deemed to have received notice upon receipt of the electronic or written communication from the consumer. But that receipt requires opening, reading, and input into a system of record. Even in the best of situations, these cannot happen instantaneously. The Bureau's §1006.6(c)(1) should take account of realistic processing limitations.

ACA believes that it is reasonable to assume notification has been made upon receipt by the collector of the notice. However, particularly for notices made by mail, it will take a few days to ensure that the notice is recorded and entered into the

collector's account management systems. Accordingly, ACA proposes that comment 6(c)(1)-1 be amended to reflect that the collector is deemed to have notice three days after receipt of the notice.

Note that if the Bureau insists that collection agencies procure E-sign consent before providing written validation notices electronically, it follows that agencies can refuse to give E-sign consent for receiving written cease and desist notices and notices of disputes electronically.

F. The Bona Fide Error Defense is only marginally referenced in § 1006.6(d)(1)

Even though the FDCPA is a strict liability statute, debt collectors may assert a "bona fide error" defense, generally, to avoid liability if they can establish that the collector (1) violated the FDCPA unintentionally; (2) the violation resulted from a bona fide error; and (3) the collector maintained procedures reasonably adapted to avoid the violation.

The NPRM refers to this generally available defense only on a limited basis to the extent a debt collector can show it unintentionally violated the third-party disclosure prohibition in proposed § 1006.6(d)(1) and, by extension, FDCPA section 805(b), as a result of a bona fide error resulting from a communication by email or text message. The Bureau should clarify that its rule does not otherwise impact the general availability of this affirmative defense. It should further clarify that the defense is available, particularly with regard to the call frequency requirements imposed by proposed §1006.6(d)(1)(i) and (ii); and proposed §1006.6(d)(2) as failure to track call attempts and communications could occur despite the debt collector maintaining reasonable procedures to avoid such errors. It should also clarify the availability of this defense in other contexts as well, including but not limited to the behavior addressed in proposed §1006.30 where bona fide error may result in a collector selling, transferring or placing for collection a debt that has been paid or settled, discharged in bankruptcy, or an identity theft report, as defined in section 603(q)(4) of the Fair Credit Reporting Act (15 U.S.C. 1681a(q)(4)), was filed with respect to the debt.

The Bureau should further clarify that, by extension, meeting of the bona fide error defense criteria should mitigate alleged Dodd-Frank UDAAP violations for those sections of the rule where that additional layer is proposed under proposed § 1006.14(b)(1)(ii) and 1006.30(b)(i).

G. §1006.6(d)(3) and Proposed Comments – Reasonable Procedures for Email and Text Message Communications to Avoid Communications with Third Parties

As stated above, ACA appreciates the Bureau's acknowledgement that consumers prefer to use modern forms of communication, and welcomes the clarity around the use of emails and text messages to communicate with them. As discussed, approximately 15% of ACA's membership surveyed in 2017 communicated through email. The relatively low percentage of email use is primarily due to concerns about liability. However, according to one debt collection firm that specializes in electronic collections, "Email response rates in the debt collection process are better than the industry average for any email communication," finding that up to 68% of consumers will open an email, ultimately leading to 55% clicking the link provided, and over 32% initiating payment.[72] Email significantly expands the potential for the debt to get resolved prior to initiating more drastic means of collection and credit reporting. Consequently, ACA proposes modifications below to encourage the use of electronic communications in collections.

1. The Bureau Should Clarify the Term "Recently" as Used in Proposed §1006.6(d)(3)(i)

Proposed §1006.6(d)(3)(i) provides that a debt collector maintains procedures reasonably adapted to avoid a bona fide error in sending an email or text message resulting in an impermissible third-party disclosure if the debt collector:

> 1) communicated with the consumer using an email or phone number that the consumer "recently" used to contact the debt collector, and 2) communicated with the consumer using a non-work email or non-work phone number obtained from the original creditor or prior debt collector through which the consumer was "recently" communicated with using those means, and the consumer did not subsequently request that the original creditor or prior debt collector not use those means for debt communications.

Without further clarification as to what "recently" means in each context, collectors will be hesitant to use such means for communication. Further, its practically useless that collectors are only safe if they use an email that the consumer

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[72] True Accord, *Debt Collection The new frontier in financial services digitization,* available at www.trueaccord.com/resources/downloads.

addressed to the "debt collector." The "non-work" email restriction places barriers unsupported by evidence of need; is misguided considering that Gmail, Facebook, and msn email accounts are obviously monitored; and adds so much cost and risk to the use of email that only a few firms will make the investment. It also ignores consumer preferences, who may have purposefully provided a work email.

2. *The Accounts Receivable Management Industry Should Be Permitted to Use Any Email Address or Phone Number That the Consumer Has Provided to Contact the Consumer*

As discussed more fully below in comments regarding proposed §1006.22(f), it is unreasonable to presume a collection firm should know that a particular email address or phone number is a work email or phone number, especially where the consumer provided that email address and phone number to the original creditor. The baseline assumption should be that, if a consumer has provided this information in assuming the financial obligation underlying the debt, the consumer knew or should have known that the information may be used to collect the debt, and the collector may use this information unless the consumer has said not to use the contact information provided.

The realities of today's workplace are such that many consumers, particularly those that are self-employed, may use the same email address and mobile phone number for both work and personal matters, and, as the Bureau itself recognizes, the consumer has better information about the risk of third party disclosure with a particular email address or phone number. [73]

The consumer retains control of communication methods even without the "non-work" email restriction. The consumer may ensure that the collector does not use a non-preferred address or phone number for further communications through opting out of communications using the email address or phone number after receiving the notice in proposed §1006.6(d)(3)(i)(B)(1), or through opting out of further electronic communications per proposed §1006.6(e). Moreover, the consumer can effectively prevent use of a work email or phone number for debt communications by simply

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[73] NPRM at 100. Similarly, the consumer will have better information about whether his or her employer permits debt communications at work. *See* proposed §1006.6(b)(3).

not providing that information to the original creditor.[74] To that point, it is problematic that the Bureau presumes to know the consumers' personal business. Perhaps he or she would prefer to deal with financial matters at work, rather than at home (particularly if marital problems are at issue). Contact information on credit applications is obviously provided so the consumer can be contacted about the account. Interfering in that basic understanding will cause more harm than good.

3. *The Time Periods Set Forth in Proposed §1006.6(d)(3)(i)(B)(1) Require Further Clarification*

Proposed §1006.6(d)(3)(i)(B)(1) has practical implementation problems that will make compliance often impossible. ACA is concerned that, given the current lack of specificity around what constitutes a "reasonable" period to opt out of further communications with the contact information in a notice pursuant to proposed §1006.6(d)(3)(i)(B)(1), permitting communications using that information 30 days after notification occurred does not provide enough time for an adequate safe harbor. While ACA appreciates the ability to request an opt-out decision during an oral provision of the notice, as permitted by proposed comment 6(d)(3)(i)(B)(1)-2, many of these notices will occur through the mail, as that will provide less risk of calling a consumer at an inconvenient time or at work. Given the time needed for the notification to reach the consumer, the "reasonable" opt-out period, and the time it may take for the consumer to provide the opt-out notice, the collector may risk communicating with the consumer prior to receipt of the opt-out notice.

A bright-line rule that allows for communication up to 45 days after the opt-out period ends ensures that written requests sent to the collector within the 30-day validation period will be received, read, and input in time to comply with the rule. Allowing more time will diminish the collectors risk in both violating proposed §1006.6(d)(3)(i)(B)(1), and in potential overshadowing. Accordingly, ACA requests that the Bureau define a bright-line "reasonable" opt-out period, and that it set the time for communications to begin by the end of the opt-out period to allow for collectors to update systems, and to ensure impermissible communications do not occur.

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[74] ACA recognizes that this may entail requiring original creditors to clearly and conspicuously disclose that contact information may be used to communicate regarding payment.

H. Proposed §1006.6(e) – Opt-out For Electronic Communications

1. The Bureau Should Clarify How to Differentiate Between an Opt-Out for Electronic Communications and a Cease Communication Request Under §1006.6(c)(1)(ii)

Because both proposed §1006.6(e) and §1006.6(c)(1)(ii) permit the consumer to electronically notify the collector to cease communications in some form, ACA requests that the Bureau clarify in proposed comment 6(e)-1 that, absent actual knowledge to the contrary, any response to an opt-out notice contained in an email or text message communication pursuant to §1006.6(d)(3)(i)(B)(1) should be deemed a medium-specific opt-out rather than a request to cease communication entirely.

Such interpretation is reasonable and consistent with ordinary marketplace behavior, as consumers are accustomed to opting out of a particular mode of communication because the consumer prefers to be contacted by phone or letter, or there is a risk of third-party disclosure unbeknownst to the collector. Requiring collectors to assume an opt-out of communications means all communications, unless expressly stated, would considerably inhibit the collector's ability to communicate with the consumer and proactively resolve the debt without the expense and burden of litigation.

2. Represented Party Contacts -§1006.6(b)(2)

The Bureau should allow collectors to comply with the FDCPA and §1006.6(b)(2) – prohibition on communications with a consumer who is known to be represented by an attorney – so long as the collector also complies with any related state law. Some states have statutory or common law regimes that specify when it is appropriate for an attorney or collector to contact directly a "represented party" when the purported attorney has ghosted. For example, Florida, Michigan, New Hampshire, and South Carolina have specific timeframes in which an entity may resume communications (*e.g.* after 10 or 30 days of unresponsiveness).

The Bureau ought to provide agencies a safe harbor for complying with relevant state law concerning represented party doctrines.

3. 1006.6(d)(1) -Limited Content Messages

Proposed 1006.6(d)(1) prohibits communicating with a third party about a debt and the accompanying comment provides that leaving a limited content message with a third party does not violate this provision, unless additional information is given that would imply the existence of a debt. ACA members suggest that it would be useful to have additional clarification about impermissible content—particularly in the event of a live conversation. This might include a few examples of a limited content message that cross the line.

III. COMMENTS ON §1006.10 - ACQUISITION OF LOCATION INFORMATION

The Bureau highlights a few issues raised by the Proposed Rule with respect to acquisition of location information (FDCPA Section 804). First, the Bureau notes that there may continue to be some ambiguity around how to determine when the accounts receivable management industry has acquired enough information about a consumer's whereabouts such that the purpose of the contact has been satisfied, and states that it will continue to monitor this issue to identify areas that pose a risk of consumer harm or require clarification. Second, the Bureau notes that proposed 1006.10(c) would clarify that a debt collector making contact to acquire a consumer's location information will be held to the same limitations on frequency of contact imposed by proposed 1006.14(b).

Finally, the Bureau notes that it has proposed two comments designed to clarify acquisition of location information where decedent debt is involved. Proposed comment 10(a)-1 clarifies that location information includes information about a person authorized to act on behalf of a deceased person obligated or allegedly obligated to pay a debt. Proposed comment 10(b)(2)-1 seeks to clarify that the accounts receivable management industry will not run afoul of proposed section 1006.10(b)(2), and improperly communicate with a third party about a debt, by stating that collector is seeking to identify and locate a person who is "authorized to act on behalf of the deceased consumer's estate." As is acknowledged in the Proposed Rule, this permitted language is a departure from the sanctioned language in the Federal Trade Commission's Policy Statement on Decedent Debt,

which allows a debt collector to state it is looking for someone, "with the authority to pay any outstanding bills of the decedent out of the decedent's estate."[75]

A. Acquisition of Location Information Generally

ACA supports the Bureau continuing to look at how much information the accounts receivable management industry needs to collect before the purpose of acquiring information about a consumer's location has been met and offering guidance in that regard. As in all areas, ACA welcomes increased clarity to better accommodate compliance and avoid unnecessary litigation and enforcement. As discussed in Section One, above, concerning the studies reported thus far, the Bureau lacks sufficient or reliable data to support a rulemaking on this topic.[76]

ACA's comments below regarding the lack of empirical support for the proposed limitations on frequency of contact apply equally to §1006.10(c) regarding the acquisition of location information.

B. Locating an Individual Who Can Resolve Decedent Debt

For a number of reasons, ACA encourages the Bureau to follow the FTC Policy Statement on Decedent Debt in proposing language the accounts receivable management industry may use to find the appropriate party to resolve a deceased consumer's debt, rather than the language currently proposed in comment 10(b)(2)-1. The Bureau proposes that the accounts receivable management industry only be able to reference a person who is "authorized to act on behalf of the deceased consumer's estate." This approach proposes a vague question that will not be helpful for grieving families, and the rationale does not justify the trouble it will cause. The Bureau should avoid proscribing specific language unless it has done the exhausting task of including every state's possible terminology in its definitions or comments.

1. Collectors must be specific to be clear and understood

Consumers who are asked about someone who can generally act on behalf of the decedent's estate may not understand that the collector is asking for someone who

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[75] Federal Trade Commission's Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts, 76 FR 44915, 44918-23 (July 27, 2011) (hereinafter "FTC Statement on Decedent Debt")

[76] *See supra*, section II.A.; *see also supra*, section II.B.

is responsible for resolving the finances of the estate. Further, some debts may require locating a very specific person, such as the trustee for secured property.

As discussed above, state laws vary considerably in their mechanisms to avoid probate.[77] For example, a relative of the deceased may be the estate's executor for most purposes and therefore have "authority to act on behalf of the deceased consumer's estate." But this person may not have authority over certain assets, trusts, or accounts. If the accounts receivable management industry then communicates further with the relative about the decedent's debt, such communication would potentially violate Section 804(2) of the FDCPA, as this person may not be a spouse, parent or guardian.[78] Specifying that the collector is looking for someone with authority to pay the deceased consumer's bills related to a particular asset or debt better ensures that the collector obtains information for the right individual, and better prevents improper communications.

Not permitting the accounts receivable management industry to specifically ask for the location of someone who has authority to pay any outstanding bills of the estate risks that collectors will not find the proper individual to address the decedent's debts as quickly or at all, resulting in both the collector and the estate expending additional resources.

2. There is no reason to set stricter communication limits

The Bureau's rationale for setting stricter limits on the language a collector can use elevates the technical definition of debt under FDCPA section 803(5) over the common-sense understanding that nearly all consumers will have unpaid bills at the time of their death.[79] The purpose underlying § 804(2) is to protect the privacy

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[77] *See supra* at sec. COMMENTS ON §1006.6 – COMMUNICATIONS IN CONNECTION WITH DEBT COLLECTION §1006.6(a) and Proposed Comments 6(a): The Definition of Consumer

[78] *Mathis v. Omnium Worldwide*, No. CIV.04-1614 AA, 2006 WL 1582301, at *4 (D. Or. June 4, 2006) (noting that the daughter of the deceased debtor could bring an FDCPA claim but holding that no FDCPA violation occurred); *cf. Todd v. Collecto, Inc.*, 731 F.3d 734, 737-38 (7th Cir. 2013) (finding that § 1692b protects the consumer from third parties finding out from the debt collects about the consumer's debt).

[79] *See* FTC Statement on Decedent Debt at 44921, fn. 56 (stating that "[n]early all individuals leave some outstanding bills at the time they die, even if they are not delinquent on those bills. Thus, a reference in the location communication to the decedent's 'outstanding bills' is not likely to imply that the decedent was delinquent at the time of death.").

interests of the consumer, and deceased consumers do not have the same level of privacy concerns as when they are alive.[80] The FTC properly recognized that allowing the collection firm to specifically request location information for someone with authority to pay outstanding bills of the estate, rather than to vaguely reference someone with authority to act on behalf of the estate, "balances the legitimate needs of the collector with the privacy interests of the decedent."[81]

Many people do not know what to do with a loved-one's financial affairs after their death. Wrapping up a decedent's affairs is a burden that most people would like to do as quickly and easily as possible. Collectors' communications with surviving relatives ought to be as simple, clear, and straightforward as possible. The Bureau's suggestion here adds a layer of bureaucratic vagueness that doesn't promote any real consumer protection purpose and will create more problems for a class of persons who just crave clarity.

IV. COMMENTS ON §1006.14(b)(2) – CALL FREQUENCY LIMITATIONS

Rule §1006.14(b)(2) creates a new regulatory violation and private right of action if FDCPA-covered debt collectors exceed newly-established telephone call frequency limits:

> [A] debt collector violates paragraphs (b)(1)(i) and (ii) of this section, as applicable, by placing a telephone call to a particular person in connection with the collection of a particular debt either:
> (i) More than seven times within seven consecutive days; or
> (ii) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. The date of the telephone conversation is the first day of the seven-consecutive-day period.

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[80] *See* FTC Statement on Decedent Debt at 44920 (Jul. 27, 2011) (taking into consideration, to grant debt collectors leeway to identify the person authorized to pay a decedent's debt, that "the deceased generally have a reduced privacy interest as compared to the privacy rights during life").

[81] Id.

A. Positive Aspects of §1006.14(b)

ACA appreciates the safe-harbor provision of Section 1006.14(b)(4) earned from compliance with Section 1006.14(b)(2). Per the rule, a debt collector that complies with the frequency limits would not be in violation of the FDCPA's prohibition against engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt…."

ACA also agrees that the limitations should be measured on a per-account, rather than a per-consumer, basis. A sufficient number of consumers have multiple debts, sometimes within the same agency. FDCPA compliance (and often internal software used by the accounts receivable management industry) requires that those accounts be collected and tracked separately. Some accounts are worked by different collection agents. Changing this practice to look at it on a per consumer basis would require extensive new training, costs, reprograming and other burdens that have not been justified by any cost benefit analysis.

B. Proposed §1006.14(b) Exceeds the FDCPA's Authority

This Proposed Rule exceeds the FDCPA's proscription against harassment, annoyance, or abuse by crossing into what some would consider merely persistent. Courts have time and again held that the number of calls placed in one day or throughout the week alone—no matter how frequent—cannot constitute a §806(5) violation absent "intent" because there are a number of reasons why such calls could be made, most of which are not intended to intimidate, pressure, or force the consumer.[82]

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[82] *See Hinderstein v. Advanced Call Ctr. Technologies*, Case No. CV 15–10017–DTB, 2017 WL 751420, at *5 (C.D. Ca. 2017 Feb. 27, 2017) (holding that debt collector's "conduct did not constitute harassment, oppression, or abuse in violation of the FDCPA" where collector placed forty-nine calls in an eighteen-day period); *Valle v. Nat'l Recovery Agency*, No. 8:10–cv–2775–T–23MAP, 2012 WL 1831156, at *2 (M.D. Fla. May 18, 2012) (finding that placing twenty-two calls in one month does not alone constitute harassing conduct); *Tucker v. CBI Grp., Inc.*, 710 F.Supp.2d 1301, 1305–06 (M.D. Fla. 2010) (granting summary judgment in favor of collector who made fifty-seven collection calls in one month (and sometimes up to seven calls in one day) because "Plaintiff has not demonstrated that CBE engaged in oppressive conduct such as repeatedly making calls after it was asked to cease"); *Waite v. Fin. Recover Serv's, Inc.*, No. 8:09–cv–02336–T–33AEP, 2010 WL 5209350, at *5 (M.D. Fla. Dec. 16, 2010) (finding that, despite the call log showing that defendant placed up to twenty-nine calls in one month and up to four calls in one day, nothing in the record demonstrated that the calls

As discussed in Chapter 2, Section I.F.2. at 42-43, the CFPB must act within the scope of authority Congress delegated to it by statute. If the statutory text is clear, that is the end of the matter; the court and the agency must give effect to the unambiguously expressed intent of Congress.[83]

1. FDCPA forbids calls with an "intent" to annoy, harass, or abuse

There is no way to escape the observation that §1006.14(b) departs from the clear statutory text of the FDCPA, which requires "intent" to annoy, harass, or abuse. An agency's statutory interpretation can be overridden by a court's application of a canon of statutory construction.[84] Multiple courts across many circuits have held that the number of calls—standing alone—do not indicate an FDCPA violation. Federal courts have looked at the frequency and pattern of calls to infer an intent to "annoy, abuse, or harass" a consumer and routinely find that calls far exceeding seven per week are permitted under the FDCPA.[85]

It is exceedingly likely that a court reviewing this rule would determine that the agency failed to meet the requirements of Chevron step one because it removes Congress' clear expression that intent is an element of a §806(5) violation.

2. §1006.14(b) bans clearly legal conduct

Depending on the type of debt and the specific situation, a debt collector could easily exhaust the "7/7" frequency limit without ever dialing a current, valid telephone number that actually reaches the consumer. Many consumers have more than one telephone number in their collection file. Some of these numbers are stale or no

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were intended to be abusive or harassing); *Arteaga v. Asset Acceptance, LLC*, No. CV-F-09-1860 LJO GSA, 2010 WL 3310259, at *5 (C.D. Cal. Aug.23 2010) (stating that daily or nearly daily phone calls alone fail to raise an issue of fact for a jury to determine whether an FDCPA violation occurred); *Saltzman v. I.C. Sys., Inc.*, No. 09–10096, 2009 WL 3190359, at *7 (E.D. Mich. Sept. 30, 2009) (quoting and supporting case law that states that "a debt collector does not necessarily engage in harassment by placing one or two unanswered calls a day in an unsuccessful effort to reach the consumer, if this effort is unaccompanied by any oppressive conduct such as threatening messages.").

[83] *Id.* at 843 n.9 (*Chevron* instructs courts at step one to employ all of the traditional tools of statutory interpretation first).

[84] *Id.*; *see also PHH Corp. v. CFPB*, 839 F.3d 1, 44 (D.C. 2016).

[85] *See* footnote 82, *supra*.

longer used by the consumer. Some consumers may have multiple numbers assigned to them for multiple purposes. Often a debt collector does not know which telephone number is a "good" number, particularly early in the collection process. A significant amount of third-party debt collection files fit this profile. If it were easy to reach the consumer, the original creditor would not have needed to hire a collection agency.

The Bureau lacks the statutory authority to limit calls to blocked or obsolete numbers. Calling such numbers cannot by their very nature "harass, annoy, or abuse" the consumer.

C. The Call Frequency Limits are Not Supported by Substantial Evidence

Limiting contact between consumers and collectors turns "early out" debt into "bad debt" and increases the potential for litigation. Nearly 1/3 of collection contacts resolve the debt within 90 days. Once an account ages past 90 days, it is more likely to be considered for legal collections. As discussed in Chapter One, Section III at 29, collection lawsuits are the least desirable outcome for the consumer. Under the APA and the Chevron doctrine, the Bureau's rulemaking here must consider in a reasoned fashion the risk and likelihood that limiting constructive communications to resolve debts will increase litigation[86]—a result that causes harms the FDCPA meant to prevent and is therefore manifestly contrary to the statute.[87]

1. Frequency limits increase the cost and length of time to resolve debts

The Bureau must consider the economic effects of a proposed rule.[88] Some ACA members have noted that this Proposed Rule will decrease direct contact between consumers and collection firms, which will cause an increase in alternative contacts (letters, texts, emails, etc.), and ultimately increase costs and the length of time it

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[86] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 164, at 449 (5th ed. 2012); *See* AMERICAN BAR ASS'N, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 34 (2d ed. 2013).

[87] *Chevron*, 467 U.S. at 844 ("A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute.")

[88] *See* Exec. Order 12,866 § 3(f), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (stating that agencies must consider economic effects of proposed rule); *see also* LUBBERS, *supra* note 86, at 223, 476.

takes to resolve a debt. Professionals in the field and common sense predict increased costs to the industry and reduced effectiveness in reaching consumers due to the call limits. Moreover, the Bureau's own Calling Data study predicted the same impacts.[89] ACA submits that the study likely underestimates the impact significantly—but since the study did not provide any disclosure of the method or underlying data, ACA cannot fully comment in this regard.

2. Frequency Limits fail to consider FCC actions

Another failure is that the frequency limit rules do not consider the impacts of smart-phone technology and recent Federal Communications Commission (FCC) call-blocking rulings, both of which have increased blocked calls from legitimate financial service providers.[90] A coalition representing banks, credit unions, mortgage lenders, the accounts receivable management industry and other financial services providers have outlined concerns extensively to the FCC and the CFPB that their calls are be ing blocked as a result of recent Federal Trade Commission and FCC efforts to target illegal actors.[91]

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[89] *See generally* CONSUMER FINANCIAL PROTECTION BUREAU, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS (July 2016), available at https://www.consumerfinance.gov/documents/755/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf; *see also* NPRM, at 370 (noting that "the proposed frequency limits could affect when and if [debt collectors] establish communication with consumers).

[90] *See In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, FCC 19-51, Declaratory Ruling and Third Further Notice of Proposed Rulemaking, (Federal Communications Commission Jun. 7, 2019), available at: https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf; *see also* Anne Cullen, *Major Carriers Tell FCC They Need Flexibility in Robocall Fight*, LAW 360 (Jul. 29, 2019) (detailing how major phone service providers are asking the FCC for more flexibility to intercept fraudulent calls), available at: https://www.law360.com/consumerprotection/articles/1182480/major-carriers-tell-fcc-they-need-flexibility-in-robocall-fight?nl_pk=64af9aeb-8f99-4301-a268-0199a7490f37&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection&read_more=1&attachments=true.

[91] *See, e.g.*, Ex Parte Communications, available at:

https://www.regulations.gov/document?D=CFPB-2019-0022-0048
https://ecfsapi.fcc.gov/file/1072587443209/7-24-19%20Joint%20Trades%20Letter%20to%20FCC%20on%20Third%20Further%20Notice%20of%20Proposed%20Rulemaking_final.pdf
https://www.fcc.gov/ecfs/filing/10601130041343

Call blocking is happening, yet the Bureau's analysis does not address its impacts.

ACA International commissioned a member survey on the impact of the Bureau's proposed rules. ACA members were asked to indicate whether their calls were being blocked or potentially mislabeled. The majority of respondents indicated that they were experiencing call-blocking (62%) or having their calls mislabeled (64%) (see Figures 1 and 2). Additionally, 53% of respondents reported that they were seeing a decrease in right-party contacts (Figure 3).

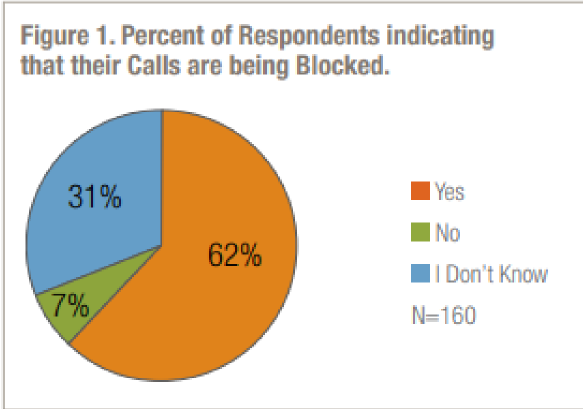
Figure 1. Percent of Respondents indicating that their Calls are being Blocked.

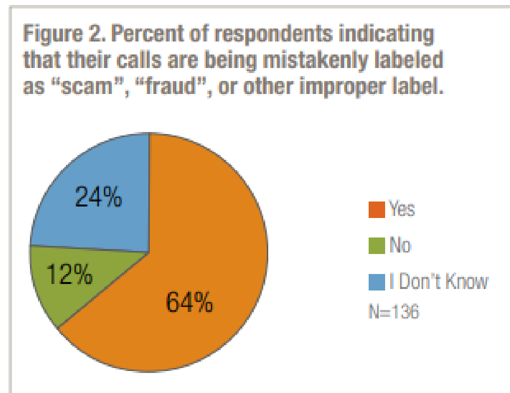
Figure 2. Percent of respondents indicating that their calls are being mistakenly labeled as "scam", "fraud", or other improper label.

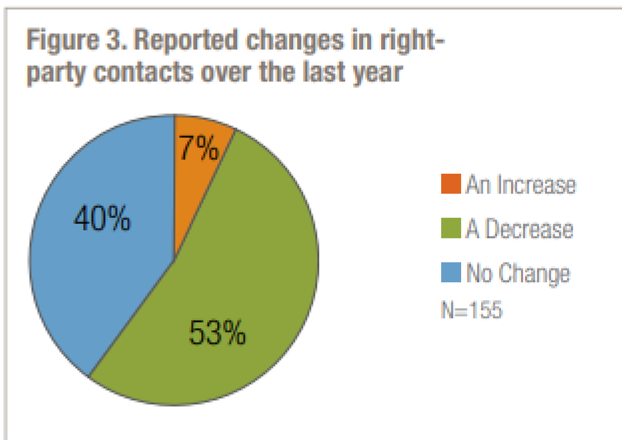
Figure 3. Reported changes in right-party contacts over the last year

These concerns mirror some of the consumer harms discussed in this comment that can result when a live call cannot be completed and a conversation cannot take place. Without first addressing these new issues in the marketplace, it is extremely problematic to compound the already increased difficulty to reach a consumer on a live call, by instituting an arbitrary cap on the frequency of calls.

ACA suggests that the Bureau collaborate with the FCC to do additional research that includes the most recent trends for call completion in the financial services industry before moving forward with a frequency limitation regulation. Using research that does not account for parallel efforts happening at different federal agencies and new trends in the marketplace for call blocking and labeling paints an inaccurate picture of any impact the proposed frequency limits will have on the marketplace.

The fact that the Bureau has not thus far coordinated with the FCC underscores that there is no accurate empirical evidence put forth by the Bureau to show any benefits of a new frequency limitation that would outweigh costs and disruptions in the marketplace.

The failure to consider in a rulemaking the impact of other important regulations with the market has caused several courts to overturn agency rulemakings.[92] Indeed, agency actions that fail to consider the impact of other regulations are arbitrary and capricious because that agency "entirely failed to consider an important aspect of the problem[.]"[93]

3. The Prospect of "Unlimited Email and Text Messages" is a Chimera

The call-frequency limitation has been justified by the thought that the Bureau is now widening the doors to unlimited email and text messaging use. That is nonsense. Less than 15% of collectors use email now. It will be new to most, and it is expensive to implement, particularly for small businesses in the accounts receivable management industry.

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[92] *See, e.g. Michigan v. EPA*, 135 S. Ct. 2699, 2706-07 (2015) ((finding in Chevron step two that "under the standard set out in Chevron…EPA strayed far beyond [the] bounds when it read §7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.").

[93] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Digital collection software needs to integrate with existing systems and strategies. Not every collector has the right setup, or the budget to switch technology. Implementing fully-functional software that operates with legacy systems and meets security requirements can be daunting. Deployments consume financial and human capital, tying up resources that small businesses may need elsewhere. Tasking a strategist and compliance officer to rebuild agent workflows from scratch for a digital debt collection solution may not be an option. In addition, this assumes that existing call center workforces can be trained to execute a digital strategy.

The cost for an email collections system is high, and may exceed $80,000 in some cases. Since most accounts receivable management agencies are small (roughly 98 percent are small businesses as defined by the Small Business Administration), the estimated cost to small businesses just to invest in the technology (not training, lawyers, or compliance personnel) to create an email collections campaign is in the millions. Thus, the Bureau should not stifle certain modes of communication with consumers based on a hunch rather than known facts.

4. The One-Week Cooling Off Period is Impractical

Finally, the proposed "cooling off period" limitation ignores the day-to-day realities of debt collection. When a consumer and debt collector connect, they often need to follow up with one another. Sometimes the call is not convenient for the consumer to take at a particular time or place. The consumer might also need to speak with a spouse before committing to a payment plan, or might need to review records that are not handy. One large provider notes that this could prevent them from giving routine customer service and correcting errors or missed information following the calls. If a payment does not go through or the information provided is not correct, a consumer cannot be notified. Under the proposed cooling off limitation, such a call cannot be made.

One might argue that a debt collector could satisfy the "cooling off period" simply by obtaining consent to call back. The difficulty is the exception contained in Section 1006.14(3)(ii) does not define what constitutes "prior consent given directly to the debt collector." Obvious questions arise:

- Is a warning or disclosure required?
- What language effectively conveys consent?

- May consent be revoked? If so, how?

- Is consent implied when a follow-up call is made to complete or service a transaction agreed to by the customer?

These are not merely hypothetical queries. The issue of whether a consumer has given "prior express consent" under the Telephone Consumer Protection Act (TCPA), despite the guidance by the FCC,[94] has festered in the federal court system for nearly the last decade as many plaintiff attorneys continue to challenge whether "prior express consent" exists, and some courts continue to entertain those arguments.[95] ACA has serious concerns that without further guidance its members will litigate the meaning of "consent" for years to come.

For these reasons, the frequency limitations proposed by the Bureau are neither supported by substantial evidence nor do they reflect a reasoned construction of a statute requiring intent. This is fatal to a party's argument that it is entitled to *Chevron* deference. Thus, ACA urges the Bureau to heavily weigh these critical factors before attempting to impose unauthorized and nebulous restrictions on communications between debt collectors and consumers.

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[94] *See* In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (Tcpa) Rules, 28 F.C.C. Rcd. 6574, 6589 (2013) ("addressing section 227(b) prohibitions in 2008, the Commission clarified that autodialed debt collection calls by third-party debt collectors to wireless telephone numbers would be treated as having been made with the called party's express consent, if the called party had provided the creditor with the wireless number during the transaction that resulted in the debt. At the same time, we stressed that the 'creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third-party collector on behalf of that creditor are treated as if the creditor itself placed the call.").

[95] *See, e.g.*, *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013) (refusing to follow the FCC's regulations interpreting "prior express consent" and denying defendant's motion that borrower gave "prior express consent" to be called), *rev'd in part*, 768 F.3d 1110 (11th Cir. 2014) (holding that borrower did give "prior express consent").

D. §1006.14(b) introduces new ambiguity to a regularly-occurring situation

The Proposed Rule's use of the terms "placed" and "not connected" in the provision excluding certain calls from the cap need clarification in the text of the rule, as they are otherwise likely to invite litigation as to their meaning. For example, the proposed terms do not clarify whether a call is "placed" or "not connected" under the following circumstances:

- A call that never makes it to a consumer because it is blocked by the consumer's telephone or by a call-blocking application;

- A call that is routed to the consumer's voice mailbox, but the voice mailbox is full and no message can be left.

E. An Aggressive Call Cap Requires Better Evidence than Shown to Support its Implementation

The proposal at §1006.14(b) to limit telephone calls to consumers is half-baked. There is no reason that seven calls are better than ten, or that ten are better than fifteen. There is no data that supports why a collector must wait one week after making a contact to call again. This is the essence of arbitrary.

The Bureau's explanation that some consumers may have multiple debts, thus may receive two or more calls per day, does not satisfy the APA and *Chevron* requirements here. The solution to stopping calls to discuss a legitimate contractual obligation is to answer the call and make a payment arrangement or exercise a statutory right to cease and desist. The current statutory regime provides for both alternatives.

The Bureau cannot show why avoiding a conversation about resolving a debt benefits a consumer. Nor can it show the benefits to society of creditors bearing more charged-off debt, consumers avoiding debt resolution, or increases in collection litigations. Therefore, this rule cannot stand.

V. COMMENTS ON §1006.14(h)- PROHIBITED COMMUNICATION MEDIA

The proposed §1006.14(h) allows consumers to opt-out of communication media:

> (h) Prohibited communication media. (1) In general. In connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. For purposes of this paragraph, the term “consumer” has the meaning given to it in § 1006.6(a).
>
> (2) Exceptions. Notwithstanding the prohibition in paragraph (h)(1) of this section:
>
> (i) If a consumer opts out in writing of receiving electronic communications from a debt collector, a debt collector may reply once to confirm the consumer’s request to opt out, provided that the reply contains no information other than a statement confirming the consumer’s request; or
>
> (ii) If a consumer initiates contact with a debt collector using an address or a telephone number that the consumer previously requested the debt collector not use, the debt collector may respond once to that consumer-initiated communication.

This Proposed Rule expands the scope of the FDCPA beyond its statutory text and beyond its application in federal courts. It will most certainly reduce the amount of debt that collectors are able to retrieve for creditors, and will likely increase litigation. There does not appear to be any cost-benefit analysis in support of its proposal.

In addition, the Proposed Rule is unclear as to whether a consumer must opt out in writing. Subsection (h)(1) does not mention a writing requirement, yet Subsection (h)(2)(i) does. The Bureau should clearly prescribe the methods for opting out and include a reasonable time that allows collection firms to receive proper notice of a desire to opt-out. While ACA does not have one specific approach that it believes is the only way a consumer can opt-out, we think the CFPB needs to put more

parameters around what it considers to be reasonable. There needs to be enough flexibility so that both parties can have a free flow of communication about the desire to opt-out, but narrow enough that opportunistic plaintiffs' law firms cannot take advantage of a specific opt-out avenue.

One possibility for creating more clarity in this area is to promote the ability of businesses and consumers to enter into a contract, which stipulates the method for revoking consent. Furthermore, we suggest that the Bureau clarifies that there is a safe harbor for up to seven days to allow systems to update.

Additionally, the Bureau should adopt an approach that provides flexibility and recognizes that digital communications may fall short of what is expected even with the clarification provided by the bright-line safe harbors within the rule. For example, the Bureau could eliminate (or elevate) call frequency limitations if the consumer opts out of email or text communications. It could also raise such thresholds based on the age of the debt involved. This would benefit the holder of the receivable as such debts lose value over time because as debts age the likelihood of payment decreases. It would also benefit consumers to the extent heightened collections activity by a debt collector may signal impending judicial collections or other serious consequences.

The exception contained in Subsection (h)(2)(ii) takes the "fair" out of the FDCPA. Communication should always be a two-way street. Yet the Proposed Rule allows a consumer to use a certain communication medium at will while prohibiting collection firms from using that same medium. A consumer may send mixed signals to collection firms by communicating from a medium that the consumer has barred collection firms from using. If the consumer contacts an agency using a medium that they requested should not be used, this should be counted as a waiver. We support allowing one additional communication using that medium from the debt collection agency to allow for clarification. However, we urge the Bureau to be cautious that the plaintiffs' bar is likely to abuse this by setting lawsuit traps as we have seen in similar TCPA litigation.[96] Accordingly, the CFPB should ensure that

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[96] *Epps v. Earth Fare, Inc.,* No. 16-08221, 2017 WL 1424637 (C.D.Cal. Feb. 27, 2017). The U.S. District Court for the Central District of California found, as a matter of law, that the plaintiff's alleged revocation of consent to receive text messages from the defendant was not ―reasonable. Despite being prompted to text ―STOP‖ if she wished to revoke her consent, the plaintiff responded instead with long sentences such as ―I would appreciate [it] if we discontinue any further texts‖ or

the final rule has specific parameters to address making opt out requests to automated systems.

VI. COMMENTS ON §1006.18(g)- MEANINGFUL ATTORNEY INVOLVEMENT

The Bureau at proposed §1006.18(g) established a "safe harbor" that sets a bar for "meaningful attorney involvement" in debt collection litigation submissions:

> (g) Safe harbor for meaningful attorney involvement in debt collection litigation submissions. A debt collector that is a law firm or who is an attorney complies with § 1006.18 when submitting a pleading, written motion, or other paper submitted to the court during debt collection litigation if an attorney personally:
>
> (1) Drafts or reviews the pleading, written motion, or other paper; and
>
> (2) Reviews information supporting such pleading, written motion, or other paper and determines, to the best of the attorney's knowledge, information, and belief, that, as applicable:
>
> > (A) The claims, defenses, and other legal contentions are warranted by existing law;
> >
> > (B) The factual contentions have evidentiary support; and
> >
> > (C) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

There is no specific test under the law for what constitutes "meaningful involvement." Indeed, this judicially crafted violation was initially created when collection agencies sent letters on attorney letterhead when the attorney had not reviewed the letter or the account. This has now morphed to whether attorneys who

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—Thank you but I would like the text messages to stop can we make this happen.‖ Noting that this was one of several similar suits filed by the same plaintiff, the defendant moved to dismiss and argued that her responses had been deliberately designed to frustrate its automated system for recognizing revocations of consent.

send letters on their own letterhead are somehow misrepresenting their involvement and whether pleadings filed with a court somehow misrepresent the attorney's involvement. Collection litigation varies significantly. Some matters involve lawsuits over a single large debt, which may raise complicated questions. Some are for small claims with simple issues filed ten or more at a time.

Regardless, case law instructs that a spectrum of attorney involvement is sufficient under the FDCPA. For example, an attorney has sufficient involvement in the process if one reviews the file of the consumer to whom the letter was sent and/or exercises some "professional judgment as to the delinquency and validity of any individual debt" before the letter is issued.[97] Other recent courts have held that meaningful attorney involvement is shown when attorneys design systems for non-attorneys to run. Various states have issued ethical opinions that an attorney who designs a system for non-attorneys to send letters and supervises the non-attorneys does not misrepresent that a collection letter came from the attorney.[98] For certain, meaningful involvement is determined based on the individual facts and totality of the circumstances in each case.[99]

The standards set forth in 1006.18(g) are both too wooden and too old-fashioned to be workable.

A. 1006.18(g)'s requirements are old-fashioned

Rule 1006.18(g) references the review of information. Some CFPB enforcement cases make it an issue when the attorney reviews electronic information in the form of spreadsheets in order to verify assertions. This is off-base. Collection attorneys are professionals who use tools of their trade. These experienced legal specialists in the area of debt collection use software, algorithms, and standard testing to employ professional judgment as to the delinquency and validity of individual debts. They arrive at judgments using data and sample set reviews without reviewing each and every loan contract—particularly where the underlying contracts are identical.

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[97] *See, e.g. CFPB v. Frederick J. Hanna & Assoc., P.C.*, 114 F.Supp. 3d 1342, 1363 (N.D. Ga. 2015); Avila v. Rubin, 84 F.3d 222,229 (7th Cir. 1996); *Lesher v. Law Offices of Mitchell N. Kay, P.C.*, 650 F.3d 993, 999 (3d Cir. 2011).

[98] L.A. County Bar Assoc., Prof'l Responsibility and Ethics Comm., Op. No. 522, at 4-6 (June 15, 2009).

[99] *See Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 304 (2d Cir. 2003).

Proposed Rule 1006.18(g) could be interpreted to wrongly rest on the assumption that an attorney must review an individual document in order to trust the validity, enforceability, or ownership of a debt. In fact, digital asset management software systems like DebtNext® and Beam® remove paper and documents entirely from the process. For example, there is little need for sales or placement contracts when the asset management system records when an account is "beamed" from one agency to another. Images of underlying loan contracts are digitally matched with account numbers. Using Optical Character Recognition, values on statements and other documents can be populated as necessary.

And that's just now. Soon, crypto-technology will replace chains of title. Digital handshakes will prevent any data degradation.

While the rest of the world seeks to add automation and digitalization to improve efficiency and the customer experience, rule 1006.184(g) would move collection attorneys back to the 1990s, increase the need for manual and imperfect reviews, and drive up costs for creditors. ACA suggests that the CFPB add commentary for Rule 1006.18(g) noting that the information reviewed may be electronic, in summary form, and does not have to be the original paper documents.

B. Proposed Rule 1006.18(g) Invades the Attorney-Client Relationship

The client's task is to direct attorney involvement, this rule supplants that relationship. Collection attorneys have relationships with creditors that span years. Armed with an in-depth understanding of client practices and their contracts, as well as the nuances of their files and data, these attorneys can rely on their experience and professional judgment to assure themselves with summary material that facts underlying legal filings are well-supported by evidence that the client provides.

Moreover, litigation attorneys often delegate the review of information to supervised staff. For example, personal injury attorneys delegate the intake of clients and review of medical records to paralegals or nurses. Some bankruptcy attorneys similarly rely on paralegals to conduct client intakes. And the state bars and other entities that licensed and regulate attorneys have set standards for attorneys and the ability to delegate to their staff. To add a requirement that attorneys personally review information will not increase the accuracy of legal filings or change outcomes for consumers.

Moreover, in defending a violation of rule 1006.18(g), collection attorneys will probably need to disclose protected and confidential attorney-client privileged information or attorney-work-product. This is unfair and antithetical to the American system of justice. Moreover, it could create discipline problems for the attorney, malpractice claims against the attorney, or require the attorney to disclose information that may provide a basis for creating liability against their client. Since attorneys are prohibited from disclosing client secrets, the likely outcome would be attorneys falling on their swords because they cannot disclose the information that would be required to defend a 1006.18(g) claim.

In every state, attorneys already have an ethical obligation to ensure their filings in court are meritorious. They risk disbarment and *sua sponte* or Rule 11 (or state equivalent) sanctions if facts in pleadings are false. The Bureau's Proposed Rule is unnecessary in its current form. The Bureau is seeking feedback on whether the safe harbor proposed for meaningful attorney involvement in debt collection litigation submissions has sufficient clarity for consumers, attorneys, and law firms. ACA does not believe it does.

VII. COMMENT ON §1006.22 –UNFAIR OR UNCONSCIONABLE MEANS

ACA has no comments on sections §1006.22(a)-(e), as they substantially mirror the FDCPA text. ACA also generally supports the exception contained in subsection (f)(4), in that it allows a debt collector to contact a consumer privately using a social media platform (i.e., Facebook Messenger, LinkedIn, Instagram, etc.), so long as the message is not publicly viewable. However, a collection firm has no control over whether a recipient's social media account is accessible to multiple people. As a result, the exception, which prohibits a communication to any "person other than the persons described in § 1006.6(d)(1)(i) through (vi)" should be expanded so that a communication does not offend the FDCPA if it is not "publicly viewable." It should further clarify that its intent is to limit communications if the social media account is set to have communications viewed by others and the communication is viewable by others through the social media platform.

ACA does not oppose the rule proposed in Subsection (f)(4), though it is not aware of any instance in which this kind of debt collection practice has been employed regularly. The Proposed Rule is akin to Section 806(3) of the FDCPA, which

prohibits the publication of debtor lists, and seems to serve the same legitimate consumer protection goals.

A. Consumers' email communication preferences should be honored without further permissions required

The Bureau's proposals to treat as an "unfair" practice email communications to a work email address raise significant objections from ACA members. Many collection firms that presently use email believe that if this rule takes effect it will disrupt their business. There is simply no way to comply perfectly with the "should know" provisions. And asking consumers via another communication method (e.g. U.S. mail or telephone) for permission to use their work email address is confusing, unwanted, and cumbersome to consumers.

Proposed §1006.22(f)(3) provides:

> Restrictions on the use of certain media.
>
> A debt collector must not: (3) Communicate or attempt 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 from that email address.

Several aspects of this proposal are troubling: (1) it exceeds the commands of the FDCPA, which allow contacts at work until the collection firm acquires a reason to know that contacts are prohibited by the employer; (2) there is no currently existing work email address "scrub" to enable compliance with this provision; (3) development of a work email scrub will cost the industry millions of dollars, if it is even possible to create; (4) there is no evidence that collection emails at work are a problem for consumers that justify such a cost; and (5) when consumers voluntarily provide their email address on credit applications they reasonably expect to be contacted at that preferred address, proposed §1006.22(f)(3) interferes with consumer expectations and preference with no prior notice and without regard for consumer convenience.

1. *§1006.22(f)(3) exceeds he commands of the FDCPA, which allows contacts at work until the consumer expresses otherwise*

The FDCPA §805 only prohibits "communication" to the consumer's place of employment if the debt collector "knows or has reason to know" that the consumer's employer prohibits the consumer from receiving such communication. Congress formulated the "knows or reason to know" standard. And it tied the standard to whether the employer prohibits such communications. Moreover, §805 is not limited to only telephone calls, it would capture other forms of communication as well, including e-mail.

Banning all email communications at a consumer's place of employment absent express permission given to the collector conflicts with the plain text of the FDCPA and could welcome a host of problems including years of litigation. The Bureau should also consider clarifying that creditors can contract with consumers to receive emails on their chosen account, which is passed on to collectors and supersedes the "know or has reason to know" standard or whether it was recently used.

2. *The "Should Know" standard will require new technology, will cost Millions of Dollars and Cannot Be Perfect*

As noted previously, there currently is no database of "work" emails from which collectors can divine which email addresses are work and which are home. And what of the emails that consumers use for both work and home purposes? Will the Bureau create a safe harbor list of permissible domains? How often must the database be updated? Will it be publicly available? What are the privacy implications of a national database of consumer email domains?

The development, testing, and inevitable failure of this trial-by-error system will cost hundreds of millions of dollars. The use of emails by collection agencies is already low, as discussed in Chapter 2, Section IV, *supra*. The threat of litigation for failing to identify a work email address will chill expansion of this communication method.

3. *§1006.22(f)(3) Lacks Evidence of a Reasonable Need*

In order to justify this unfounded mandate, the Bureau must have some sort of data indicating that collections emails to work addresses are an actual problem. It does not. The CFPB consumer complaint database does not even have an issue category

for "work emails". Searches of complaints about debt collection that cross reference the terms "work" and "email" show hardly any complaints about consumers receiving emails from a collection firm at work email addresses. The few collection agencies that use emails in their collections rarely hear complaints about an agent emailing somebody at work. It is simply not a problem.

The Bureau assumes with no evidence that work emails pose the risk of third-party interception. Again, no consumer complaint data back up this assumption.

In contrast, "free" message services—like Gmail, Yahoo, and Facebook— are monitored routinely for commercial purposes. Employment-related email systems are likely *more* private—at least from algorithms and content-related advertising. The Bureau should trust and honor consumer preference, not make baseless assumptions that will cost small businesses their livelihood and chill the use of this valuable technology.

4. §1006.22(f)(3) is Paternalistic and Misguided

Finally, when consumers voluntarily provide their email address on credit applications they reasonably expect to be contacted at that preferred address. Proposed §1006.22(f)(3) interferes with consumer expectations and preference with no prior notice and without regard for consumer convenience. A consumer very well may have a good reason for choosing to use their work email, which cannot be known to a creditor or a third-party collector.

It is wrong to presume that one knows the bounds of a consumer's privacy better than the consumer herself. Consider, for example, that more than one-half of U.S. adults between 18 and 55 have cohabited at some point in their lives, and this percentage has increased steadily over the last two decades.[100] Cohabitation is currently the most common first co-residential union among young adults. While spouses might be "consumers" under the FDCPA, boyfriends/girlfriends remain third parties.

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[100] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Centers for Disease Control and Prevention National Center for Health Statistics, *A Demographic, Attitudinal, and Behavioral Profile of Cohabiting Adults in the United States* (2011–2015), available at: https://www.cdc.gov/nchs/data/nhsr/nhsr111.pdf.

As an example for co-habiting people, contacts by a collection firm at home by mail, email, or telephone could arguably result in a third-party disclosure more easily than an email sent to a work address. When a borrower provides the creditor a work email address, all subsequent contacts should honor that preference.

B. §1006.22(f)(3) Will Chill Email Communications

Abundant evidence supports the benefits of increased email use in debt collection communications. Consumers prefer email. Borrowers in all age groups, 18-24, 25-34 and 35-44, indicate that email is one of the most desired and effective method of communication.[101]

In a study by Katabat Digital Collections platform worldwide, collection firms deploying its digital collections platform saw a 33% increase in customer satisfaction measured by net promoter score. Email reduces telephone calls and costs to agencies. In that same study, digital self-service and reduced outbound calls cut telephone-related charges 7%.

These results make intuitive sense. Email is more likely to be read than U.S. mail, which means consumers are more likely to be informed of their rights. Email is passive and non-intrusive. Email is less likely to be opened by someone other than the addressee. Email moves with consumers when they change residences, thus avoiding "location" calls that increase third-party contacts. Email is superior to regular U.S. mail in many respects.

But by requiring collectors to create and adopt a new filtering system to avoid sending communications to specific domains, the Bureau will chill the expanded use of email. In some agencies, email collections in New York State have shrunk as a collection method since the 2015 DFS rules required collectors to refrain from sending emails to work email accounts. There is no reason to think that a national rule will have a different impact.

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[101] NATIONAL COUNCIL OF HIGHER EDUCATION LOAN RESOURCES (NCHER), STUDENT LOAN ONLINE SURVEY RESULTS (February 12, 2016), available at https://cdn.ymaws.com/www.ncher.us/resource/resmgr/NCHER_Poll/01_NCHER_Survey_Insights.pdf

VIII. COMMENTS ON §1006.26- TIME-BARRED CLAIMS

Whether a debt is time-barred is not always a simple question, and sometimes requires an analysis that goes far beyond any duty that Congress has imposed on the accounts receivable management industry under the FDCPA. Thus, ACA is very concerned about potential negative consequences if the Bureau's proposed section 1006.26 is not carefully considered. Strict liability is inappropriate when non-lawyers are required to make complex legal assessments. Moreover, the Proposed Rule is overbroad to the extent that it seeks to cover bankruptcy proofs of claim and thus conflicts with the Supreme Court's holding in *Midland Funding, L.L.C. v. Johnson*, ___ U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).[102]

The Bureau's Proposal

The Bureau has proposed in Regulation F section 26 to establish a new regulatory violation when a collection firm brings or threatens to bring a legal action to collect a debt that the debt collector "knows or should know" is beyond the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt:

> § 1006.26 Collection of time-barred debts.
>
> (a) Definitions. For purposes of this section:
>
> (1) Statute of limitations means the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt.
>
> (2) Time-barred debt means a debt for which the applicable statute of limitations has expired.
>
> (b) Suits and threats of suit prohibited. A debt collector must not bring or threaten to bring a legal action against

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[102] In a 5-3 decision, the majority concluded that a debt buyer filing a Chapter 13 bankruptcy proof of claim that on its face indicated that the limitations period had run was not false, deceptive or misleading where the consumer was represented by counsel and protected by a bankruptcy trustee who is obligated to object to a time-barred claim. Alabama's law, like the law of many States, provides that a creditor has the right to payment of a debt even after the limitations period has expired.

> a consumer to collect a debt that the debt collector knows or should know is a time-barred debt.

A. Time-Bars are Complicated Legal Questions

Whether a debt is time-barred is not a simple question that can always be easily answered. The National Consumer Law Center publishes an entire chapter on the topic in its Collections Actions text, [103] and says, "The determination of the statute of limitations that applies to the collection of a consumer transaction may be a complicated legal question."[104] Indeed, the statute of limitations is an issue that is often contested and litigated. And particularly in the mortgage arena, time-bars can turn on complex questions around trusts and estates, when a loan is accelerated, and which party had standing to sue at what time.[105] Moreover, information that may not be immediately available to a collection firm (e.g., incapacity, choice of law, incarceration) may toll the statute of limitations, and a debt that at first blush may be time barred, is actually not time barred.

Determining whether a debt is time-barred involves at least these basic questions:

- What law applies? Does the type of debt or creditor control which law applies?[106] Does the applicable agreement provide a choice of law? Is the statute of limitations a procedural or substantive right in the jurisdiction? Does the law of the place where the consumer entered into the agreement govern, or does the law of the forum where a lawsuit would be brought? [107]

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[103] NATIONAL CONSUMER LAW CENTER, COLLECTION ACTIONS § 3.6 (4th ed. 2017), updated at www.nclc.org/library.

[104] NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION § 7.2.12.3.2, updated at www.nclc.org/library.

[105] *See, e.g., Deutsche Bank Nat. Tr. Co. Americas v. Bernal*, 59 N.Y.S.3d 267, 271 (N.Y. Sup. Ct. 2017) (Plaintiff argued that the debt at issue was not accelerated by the filing of the 2009 action because Aurora, the prior plaintiff, did not have standing to bring that action).

[106] In general, collections actions are governed by state statutes of limitations, but federal law can determine the limitations, such as for debts owed to the United States, and sometimes for debts emanating from cell phone and long-distance charges. But see Castro v. Collecto, Inc., 634 F.3d 779 (5th Cir. 2011) (cell phone collection suits were timely because state statute of limitations applied, not shorter FCC statute of limitations).

[107] *See Portfolio Recovery Assoc. v. King*, 14 N.Y.3d 410 (N.Y. App. Div. 2010) (finding that Discover Card's action against New York consumer accrued in Delaware, even though consumer had never

- Under the governing law, what is the applicable statute of limitations? There is more than one available answer in some jurisdictions. For example, Illinois has different limitations periods for "written" and "unwritten" agreements (and "written" and "unwritten" don't necessarily mean what they sound like — an "unwritten" agreement can mean a written agreement that isn't exhibited to the complaint in an action for collection.)[108]

- Has the statute of limitations been tolled? Has it been reset?[109] Does it apply to all obligors?

Even in a simple case, there are often questions over which reasonable minds can differ in good faith, hence the not-infrequent litigation over the statute of limitations.[110]

While a non-lawyer may be able to reach an informed view about whether a debt is time-barred, that view may be mistaken in the absence of a more sophisticated legal

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lived in Delaware, because Discover was a Delaware corporation and suffered its economic injury in Delaware when the credit card was not paid). *But see Conway v. Porfolio Recovery Assocs.*, Civil No: 3:13-cv-007-GFVT, 2017 WL 3908682 (E.D. Ky. Sept. 5, 2017) (rejecting claim that Kentucky borrowing statute applied because the payments were to be sent to Virginia and Virginia's three-year statute of limitations applied; instead applying Kentucky's five-year period because that is where the nonpayment breached the credit card agreement).

[108] *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S. Dist. LEXIS 48722, at *6–8 (N.D. Ill. June 23, 2008).

[109] Federal law may toll state statutes of limitations when the defendant is on active duty in the military and during the pendency of a bankruptcy proceeding. *See also Panico v. Portfolio Recovery Assoc.*, 2016 WL 4820628 (D.N.J. Sept. 14, 2016) (plain language of Delaware's statute of limitations and related tolling provision made timely debt buyer's N.J. collection suit against N.J. consumer on credit card agreement made in Delaware adopting Delaware law; Delaware statute of limitations never commenced, as N.J. consumer never traveled to Delaware, tolling running statute of limitations).

[110] *See, e.g.*, *Avery v. First Resolution Mgmt. Corp.*, 568 F.3d 1018 (9th Cir. 2009) (Ninth Circuit considered collection suit filed in Oregon against Oregon consumer, based on contract that prescribed New Hampshire as setting relevant period of limitations; New Hampshire had shorter period of limitations, which under Oregon's choice-of-law rules would apply, but Ninth Circuit applied New Hampshire's tolling rule for when defendants are out of state; since New Hampshire law had tolled statute of limitations, Oregon law reverted to its own (longer) statute of limitations).

analysis — and as the Supreme Court recently reminded all debt collectors, a mistaken view of the law is not an excuse and may result in significant civil liability. [111] To impose that risk of liability on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the FDCPA.

Congress recognized the effects upon interstate commerce of debt-collection practices in the FDCPA, and stated explicitly in it that one of its purposes was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[112] Congress did not intend to weave a regulatory web so tangled that it snares legitimate, compliant, law-abiding actors along with the abusive actors at whose conduct the statutes are aimed.

B. Legal Analysis can be done only by Lawyers

Section 26 risks holding laymen to the same standard as lawyers. The Bureau should take care to clarify that the "know or should know" standard must be tied to the specific understanding and analysis of the consumers' account at the time of the alleged violation.

Nor is it reasonable to expect a lawyer to conduct a choice of law analysis on all accounts prior to all collection's communications.

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[111] *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 527–36 (2010) ("Our law is no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law. . . . Congress . . . did not confine liability under the FDCPA to 'willful' violations, a term more often understood in the civil context to excuse mistakes of law."). *Cf. Pescatrice v. Robert J. Orovitz, P.A.*, No. 07-60653-CIV, 2007 WL 3034929 (S.D. Fla. Oct. 17, 2007) (finding applicable statute of limitations rule unsettled; excusing resulting FDCPA violation as bona fide error of law); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268 (M.D. Fla. 2008) (credit card agreement that specified that Delaware law applied to substantive matters, including statute of limitations, controlled time frame within which debt collector may initiate collection action; although debt collector was wrong in its choice of applicable statute of limitations, his procedures were "reasonably adapted" to prevent legal error and established bona fide error defense pursuant to § 1692k(c)).

[112] 15 U.S.C. § 1692(e) (purposes).

C. The Bureau Should Propose Safe-Harbor Language

To reach the Bureau's aim of preventing consumer confusion about time-barred debt, the Bureau should develop a plain and clear statement about the possibility of a lawsuit and that the consumer may have certain legal defenses, such as the statute of limitations. This model disclosure would be appropriate when a collector uses a legal collections strategy. This safe-harbor statement would ensure that the collector adequately warns the consumer about the consequences of nonpayment and it allows the collector and consumer to engage in legitimate communications about resolving the account. Thus, because the Bureau standardized the language, there would be no risk that collectors were giving legal advice or wrong advice.

D. The Supreme Court Permits Time-barred Proofs of Claims

ACA also urges the Bureau to consider refining Section 26's language to clarify that claims in bankruptcy courts are not under its purview. The Supreme Court in *Midland Funding v. Johnson*[113] held that filing a proof of claim that on its face indicates that the limitations period has run does not fall within the scope of an FDCPA violation. The Court points out that when collectors file proofs of stale claims in bankruptcy it benefits consumers because those debts are discharged and removed from credit reports.[114]

Specifically, Section 26's current wording "legal action" might be interpreted to include bankruptcy proofs of claim. This provision does not apply to the filing of proofs of claim, which the Supreme Court has ruled is outside the scope of the FDCPA in the *Midland Funding v. Johnson* case. We request more clarity to ensure that the rule is not read so broadly.

IX. COMMENTS ON §1006.30- CREDIT INFORMATION FURNISHING

Requiring debt collectors to communicate with a consumer prior to furnishing information to credit reporting agencies regarding the consumer's debt is an

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[113] 137 S. Ct. 1407, 1411 (2017).

[114] 137 S. Ct. 1407, 1414 (2017) ("[D]ischarge means that the debt (even if unenforceable) will not remain on a credit report potentially affecting an individual's ability to borrow money, buy a home, and perhaps secure employment").

impermissible regulatory act. The FDCPA is not meant to govern credit reporting in this manner, and the Fair Credit Reporting Act (FCRA), which sets forth many requirements, does not require this. In fact, the FCRA only requires one notice of negative credit reporting from the person that extended the credit. After a consumer receives the notice once, it is sufficient for all subsequent owners or servicers of the account. Second, this regulation will disrupt the market without a well-studied cost-benefit analysis to support its potential impact.

The Bureau has proposed in Regulation F Section 1006.30(a) to establish a new regulatory requirement for collection firms to provide notice to the consumer about credit reporting prior to furnishing information to a credit reporting agency about the debt:

> §1006.30(a) Other Prohibited Practices
>
> *Communication prior to furnishing information.* A debt collector must not furnish to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)), information regarding a debt before communicating with the consumer about the debt.

Although adding a notice to the initial communication may appear to be of little consequence, this is not the case in many instances. While it is quite common for a collection agency to communicate in some fashion with a consumer prior to credit reporting, there are many times that this is not done. For instance, a collection firm may not have viable contact information for a consumer, and a notice prior to credit reporting would be impossible. Additionally, the balance of the debt may dictate that a collection firm cannot expend the resources to send a writing to the consumer until the consumer initiates communication with the debt collector.

As proposed, the regulation would require that a collection firm expend resources to communicate with the consumer prior to credit reporting when the balance might not justify the expense. It makes business sense where consumers have become difficult to reach and delinquent dollar amounts are low on a per-account basis, but significant to a creditor when added up across all consumers. These small dollar accounts may each be insignificant, but when combined, they are significant to a creditor. If these accounts cannot be managed in a cost-effective way, these debts will not be collected, and the original creditors will stop granting credit for these smaller debts.

A. The FCRA Expressly Allows Furnishing after a Negative Reporting Notice is provided

Primarily, §1006.30(a) cannot stand as written because an agency by regulation cannot overturn an Act of Congress.[115] The FCRA's statutory text expressly allows "subsequent submissions" of negative information furnishing so long as the consumer received at least one written notice of negative information furnishing.[116] The Bureau is certainly welcome to clarify what that notice should say—as the states of California and Utah have opted.[117] But §1006.30(a) turns the FCRA's permissive paragraph on its face.

B. Requiring the Accounts Receivable Management Industry to Communicate with a Consumer Prior to Furnishing Information Regarding a Debt to Credit Reporting Agencies Will Significantly Affect Business

ACA urges the Bureau to reconsider its proposed requirement that a collection firm must "communicate" with a consumer prior to furnishing information regarding a debt to credit reporting agencies from a practical and policy perspective, as well. First the Bureau has not sufficiently established that "passive" debt collection is a widespread problem. As shown in ACA's summary of dispute data in Chapter 1, Section II, *supra*, less than ½ of one percent of studied accounts had a problem that made the account invalid. Being surprised by an unpaid bill on one's credit report may be annoying or upsetting. However, the annoyance is not at credit reporting, but rather at having unpaid bills that are now affecting the consumer's credit report.

When the information is accurate, the furnishing is legal. This is not an issue that the Bureau should be concerned with and try to address. And, a consumer could find the debt by simply checking one's credit report on www.freeannualcreditreport.com and then paying it.

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[115] *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 164 (5th ed. 2012) (stating that if Congress directly addressed the question at issue, courts must "give effect to the unambiguously expressed intent of Congress.") (citation omitted).

[116] 15 U.S.C. § 1681s-2(a)(7)(A)(ii).

[117] *See infra* text accompanying notes 121 & 122.

Federal law already protects consumers seeking to buy a home, car, or other major purchase requiring credit from inaccurate or surprise reporting. Financial education by schools and the Bureau is an effective remedy to the annoyance described in the NPRM's commentary—and it will not carry the risk of unintended consequences concomitant with a ban on credit information furnishing

1. Passive Debt Collection is not a Widespread Practice

Most collection agencies wait a period of time after sending a written validation, in case there is a valid dispute that could be corrected, before furnishing credit information. But that practice is not always sensible. When a renter moves without filing with the U.S. Postal Service a forwarding address, it is silly to send a paper validation notice as the rule suggests is required prior to furnishing information about the debt to the national credit reporting agencies. The expense of skip-tracing is not justified for debts under $50 or $100.

Accurately reporting unpaid bills on a credit report and waiting for the borrower to contact the creditor or agency is a rational and economically feasible means of ensuring that consumers do not skip-out on their last month of services or simply forget to tie up loose ends. As a benefit to the consumer, it also prevents costly and disruptive location calls.

Keep in mind that utilities and telecommunications are often provided by local governments. Consumers who do not pay their final bills and face no repercussions will increase prices or taxes for citizens who meet their obligations.

2. §1006.30 risks a shift in consumer behavior and economic incentives

Proposed §1006.30 requires a fulsome cost-benefit analysis to support its enactment. Significant economic issues are raised by §1006.30 and the Bureau did not perform a study to know whether the perceived benefits are real.

Furnishing credit information prior to communication is usually done because communication through mail or telephone with these consumers is shown already to be impossible. The accurate reporting of consumer credit information, in a manner that complies with the FCRA, is both legal and a way to alert consumers about unpaid accounts.

Costs considered to evaluate the cost to benefit ratio should include: 1) the write-off of a substantial portion of the accounts that would have been collected by indirect

communication; and 2) how this rule would encourage some additional consumers to not provide forwarding contact information in order to avoid debt obligations altogether.

Consumers and businesses that extend credit will bear the cost of these "free riders" who choose to not pay, which leads to market failure.[118] Because the private market is profit-driven, it produces only those goods for which it can hope to earn a profit. That is, it will not produce public goods. When a private market fails to produce a good at the level society wants, or doesn't produce it at all, economists call this a market failure. When an entire segment of credit risks non-payment, this will inevitably shift incentives.

The business segments that are most likely to see an incentive shift when small-amount debts cannot be efficiently collected is housing rental, telecommunications, and utilities. Most likely, people who would be granted credit for rent, telephone, and utilities will need to provide larger payments or security deposits. Prices will increase to defray the costs of lost collections. If people cannot make the deposits or afford the price increases, they will be denied services. Denial of housing rental, telecom, and utilities services may lead to unintended, and perhaps even dangerous, consequences, such as homelessness.[119]

Further, lack of credit information furnishing prevents other creditors from having reliable credit information when making determinations about lending or housing rentals. Proposed 1006.30 might cause a shift in consumer behavior, credit granting behavior, and economic incentives to lend, merely to prevent consumer annoyance. This is particularly unwarranted when Congress provided for this issue in the Fair and Accurate Credit Transaction Act (FACTA) years ago by making sure that consumers could get a free copy of their credit report.

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[118] *See* FEDERAL RESERVE BANK OF ST. LOUIS, *Public Goods*, THE ECONOMIC LOWDOWN PODCAST SERIES, Episode 17, available at: https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-17-public-goods.

[119] *See* Chris Glynn & Alexander Casey, *Homelessness Rises Faster Where Rent Exceeds a Third of Income* (Dec. 11, 2018) ("This research demonstrates that the homeless population climbs faster when rent affordability – the share of income people spend on rent – crosses certain thresholds. In many areas beyond those thresholds, even modest rent increases can push thousands more Americans into homelessness.") available at https://www.zillow.com/research/homelessness-rent-affordability-22247/

C. Accurate Credit Reporting Benefits Everyone

The Bureau's Proposed Rule will interfere with the accurate reporting of credit information. The credit reporting infrastructure is an ecosystem that depends on voluntary participation by a critical mass. Rule §1006.30(a) will damage the section of that ecosystem that reports on the subsets of debts most affected by this rule: housing rental, telecommunication, and utility debt.

As previously discussed, debt furnishing on small and non-finance debt meets a niche need for certain creditors. Many consumer debts are small and sent to third party collections specifically because the original creditor had a tough time finding the consumer to collect the outstanding bill. The telecom, utility, and apartment rental industries, in particular, have this problem.

To the extent that the Bureau does not heed ACA's warning that §1006.30(a) is not permissible and will cause more harm than good, we have further suggestions to limit its potential damage.

D. The Bureau Should Clarify What is Sufficient to Establish "Communication" and Whose Burden It Is to Establish That the Communication Occurred

The Bureau's suggestion in its commentary on what constitutes a "communication" between the consumer and the debt collector should be the language used in the regulation. Specifically, the Bureau seems to suggest that a communication under § 1006.30(a) only occurs if a validation notice has been sent.[120] To the extent the Bureau intends to narrow the definition of communication to only where a validation notice is sent, ACA respectfully disagrees with such a stringent approach.

As stated above, debt collectors furnish credit information prior to establishing contact with the debtor because communication through mail or telephone with the debtor has already proved impossible. ACA appreciates the Bureau's desire to provide consumers with an opportunity (or better stated, one last opportunity) to

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[120] *See* NPRM at 391 (stating that "[d]ebt collectors who furnish information to CRAs but provide validation notices to consumers only after they have been in contact with consumers would need to change their practices and would face increased costs as a result of the proposal.").

resolve their debts prior to debt collectors furnishing the information to credit reporting agencies. But, to better balance the needs between (1) collecting debt and (2) providing consumers opportunities to resolve their debt disputes, ACA proposes that the Bureau do one of two things: either adopt a pre-notice requirement similar to Utah's and California's, or include an "attempt to communicate" with the debtor as a manner for debt collectors to satisfy the proposed pre-notice requirement under § 1006.30(a).

1. A Safe Harbor is Necessary when Negative Notice is Provided

The Bureau should include model language as a safe harbor for the accounts receivable management industry that provides the required notice set forth in this Rule. California and Utah already have similar safe harbor notice requirements in place.[121] In both California and Utah, creditors are only allowed to submit a negative credit report to a credit reporting agency if the creditor notifies the consumer.[122] Both states provide in their statutory language the notice that should be provided to the consumer that would satisfy the notification requirement. Once notification is provided, no additional notification to the consumer is required for a creditor to furnish additional information to a credit reporting agency.

ACA recommends that the Bureau adopt the approach of both California and Utah, which provides the safe harbor language contained in the notification to the consumer:

> "…you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations."

2. "Attempts to Communicate" should be Sufficient

Alternatively, the Bureau could add the newly defined term "attempt to communicate" into this section in place of the term "communicate" such that leaving

[121] *See* Cal.Civ.Code § 1785.26; *see also* U.C.A. § 70C-7-107.

[122] Cal.Civ.Code § 1785.26(b); U.C.A. § 70C-7-107(2); *see also* 15 U.S.C. § 1681s-2(a)(7).

a limited-content message for a consumer would be sufficient for accounts receivable management industry to begin furnishing information to a credit reporting agency.

The Bureau stated in its proposed regulation that the goal of this newly-added section is to avoid "passive" collections and to avoid consumers facing pressure to pay debts that they otherwise would dispute, including debts that they do not owe, in an effort to remove the debts from their consumer reports and more quickly obtain a desired product or service (i.e. a mortgage, or job). Leaving a limited-content message could help avoid the "passive" collection identified by the Bureau in that the consumer would, at a minimum, receive a message from the accounts receivable management industry requesting a call, and it would empower the consumer to respond and make attempts at resolving the debt. It also avoids the consumer pressure identified by the Bureau in that the consumer would at least be provided with contact information for the accounts receivable management industry, likely before they were seeking a new job or mortgage or other product or service, and again it would be up to the consumer to respond and make attempts to resolve the debt, or notify the accounts receivable management industry that the debt is one that they do not owe.

E. The Bureau Should Exempt Debt Collectors that Furnish Information to Special Credit Reporting Agencies.

The CFPB's proposed pre-notification requirement in § 1006.30(a) will have unintended consequences for check verification consumer reporting agencies (CRAs) that provide check verification services to retailers for the purpose of preventing fraud. If § 1006.30(a) were adopted, it would undermine the effectiveness of check verification services, result in increased fraud in check and check conversion transactions, and harm consumers, retailers, banks, and providers of check verification services. This section should therefore be narrowed to exempt check verification CRAs from its pre-notification requirement.

Some debt collectors collect checking account debt. Companies that work with these types of debt collectors issue check acceptance advisories, which indicate potential fraud, to its retailer customers. In doing so, these companies are considered nationwide specialty reporting agencies providing check verification services under the FCRA. These companies provide a service referred to as a premium check warranty to its retailer customers. Through this service, the check acceptance advisories are warranted such that if a retailer were to accept a payment in reliance on an advisory that later returns unpaid, the company that issued the advisory

would assume that loss. The main concern with the CFPB's proposed pre-notification requirement is that the effectiveness of the check acceptance reporting model hinges on the immediacy with which a nationwide specialty reporting agency is able to receive and transmit current check transaction data which indicates the likelihood of fraud. Stated another way, the check acceptance advisory model only works when the CRAs alert data is current and can outpace fraud. This could not be accomplished were the pre-notification requirement to issue because the debt collector would not be able to quickly report bad check data to check acceptance advisory companies, therefore exposing consumers, retailers, banks, and check advisory companies to increased financial loss. It would also result in greater insecurity in using and accepting checks as a form of payment.

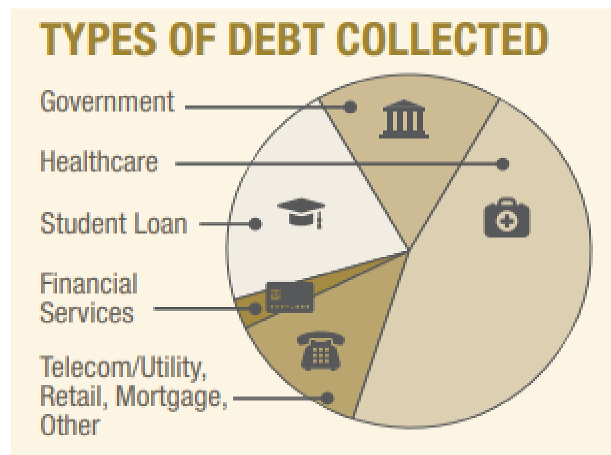
Another complicating factor is that debt collectors working to collect checking account debt have a severe impediment to communicating with the consumer. Placement records for paper checks typically contain full debtor contact information. However, the vast majority of debts collected in this area are for checks that were converted into electronic funds transfer items (EFTs) which do not contain debtor contact information. It can take several months to locate debtor contact information and for almost half of those EFT transactions, debtor contact information cannot be located.

Check verification CRAs rely on timely reports from the debt collectors on the status of the debts so that companies are protected against fraud and so that a consumer is not wrongfully denied a service in the near future when their account has sufficient funds. Timely and accurate reporting is therefore of the essence—both to protect companies from fraudulent checks and to protect consumers from adverse actions based on outdated information. Even more, through the check verification process, consumers can timely be alerted that someone may have stolen their identity. This check acceptance advisory system has been a mainstay in the United States for over fifty years.

Accordingly, ACA recommends that the Bureau exempt debt collectors who report to check verification CRAs from any requirement the Bureau adopts under § 1006.30(a). This exemption would avoid any unintended consequences of undermining the important fraud prevention function served by check verification CRAs.

X. COMMENTS ON §1006.34(c)- ITEMIZATION IN VALIDATION NOTICES

ACA's main concern with the proposed standard notice is that the new itemization requirements are unworkable, particularly for small agencies and for several types of debt, particularly medical debt, merchant and service debt. While well-intentioned and meant to be flexible, the Bureau's one-size fits all approach to itemization creates unnecessarily burdensome requirements for certain types of debt, without first properly studying the impact they will have.



In fact, a large part of the accounts receivable management industry works to collect debt owed to medical providers governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[123] rules or small and mid-sized company debt. According to ACA figures, financial services firms are the most consistent in their billing practices, but they make up only about 10% of total debt collections activities. Health care related debt (from hospitals and non-hospitals) is the leading debt category collected by debt collection professionals, accounting for nearly 47% of all debt collected in the industry, followed by student loan debt, which makes up 21% of all debt collected. Government-related debt makes up 16% of all debt collected, while credit card, retail, telecom, utility, mortgage, and other debt each make up less than 10% all of debt collected.[124]

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[123] 42 U.S.C. § 1320d-2 et seq., including the Security Rule, Privacy Rule, and Transaction and Code Set Standards promulgated by the Department of Health and Human Services.

[124] *Cf.* CONSUMER FINANCIAL PROTECTION BUREAU, MARKET SNAPSHOT: THIRD-PARTY DEBT COLLECTIONS TRADELINE REPORTING 5 (July 2019) (stating that "[m]edical debt accounted for 58 percent of total third-party collections tradelines in Q2 2018" and "[m]ore than three out of four (78 percent) total third-party debt collections tradelines were for medical, telecommunications, or utilities debt in Q2 2018"), available at: https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.

The new "itemization" components are too tough to implement for small creditors and collectors. Most collection firms are small businesses themselves. A full 85 percent of ACA members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees. Nearly half of ACA members have client creditors that are either totally or at least 50 percent small businesses.

The itemization burden proposed in §1006.34(c) is unwarranted and dangerous. As discussed in Section One, the Bureau's studies do not support its need.[125] The negative impact of overly burdensome rules in New York also highlight why the proposed requirements for itemization will not benefit consumers.[126] The itemization requirement in §1006.34(c) runs the very real risk of pushing creditors and service providers to file collections lawsuits against consumers earlier and in greater volume. As discussed in Chapter 1, Section III, for many of the same reasons, account collection lawsuit filings are increasing year over year in the state of New York.

A. The Bureau's Proposal for Section 1006.34(c)(1)

The Bureau's increased information requirements in 1006.34(c)(1) are based on focus group copy testing, which found that participants suggested that the inclusion of additional information about the debt amount (e.g., fees, penalties) contributed to their overall sense of trust.[127]

The focus group's only use should be to judge the readability of the forms placed before it. The total set of people upon whom the Bureau based its conclusions was 682 individuals. This is not a statistically valid sample size for the purpose of assessing tens of millions of debt collection contacts annually. Nor is the focus group method able to be the sole basis for drawing conclusions that will impose a $1 billion implementation cost.

Nevertheless, to address sentiments of a portion of the 682 individuals, the Bureau proposes to require the following information in validation notices:

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[125] *See supra*, section II.A at 13.

[126] *See supra*, section III.A. at 30.

[127] *Id.*

§ 1006.34(c) Validation information.

(1) Debt collector communication disclosure. The statement required by §1006.18(e).

(2) Information about the debt. Except as provided in paragraph (c)(5) of this section:

(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) The current amount of the debt.

The changes that the Bureau proposes are not based on a sufficient study and determination of need. The Bureau's proposal did not include an analysis of costs and an estimation of benefits to consumers or industry by increasing the amount of information that must, by law, be provided in an initial communication to consumers. Notably and in most cases, consumers have already received the same account information directly from the creditor.

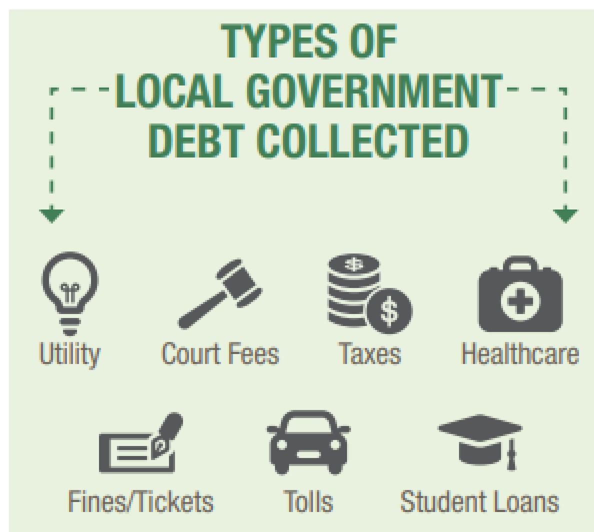
B. Itemization Requirements would Cost over $ 4 billion to Implement

The cost in agency and creditor system changes to implement this rule will exceed $1 billion dollars. ACA members fear that they will not be able to program their

systems to accommodate the variety of "itemization dates" that are appropriate for every different creditor. ACA urges the Bureau to rethink its definition in 1006.34(c)(2)(v), (vii), (viii), (x), which add requirements that the initial written communication with consumers contain an itemization of the debt.

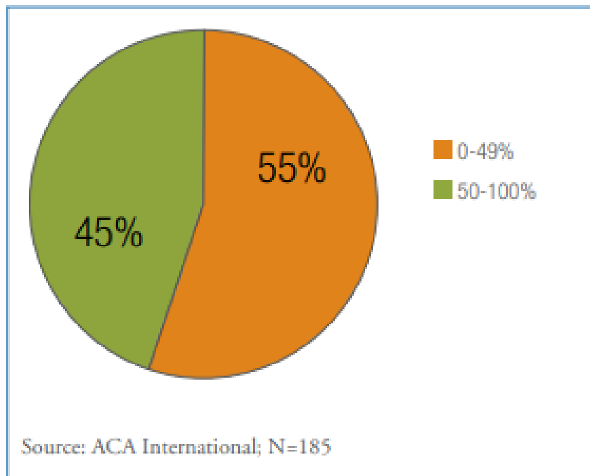
Collectors will need to make software adaptations to comply with 1006.34(c)(2) that match the unique billing/accounting habits of creditors and merchants. Each and every creditor, regardless of debt type, has different billing statement habits. Most collectors have multiple creditor clients. The itemization requirement—in its attempt to be flexible—also increases the number of permutations that agency computer systems must accommodate. This would be prohibitively expensive, requiring new programming for every new client on-boarded. These costs could result in some small businesses with small portfolios of accounts being denied collection services.

Small business creditors will be challenged to provide collectors digitized information to perform the mail merge necessary to fulfill the rule's requirements. Consider, for example, the local government debt that would be included under the Proposed Rule. This includes parking tickets, taxes, tolls, court fees, and public utilities.



This Proposed Rule would require changes to each of these public record-keeping systems and may implicate the Unfunded Mandates Reform Act of 1995.[128]

Figure 3. Percentage of Member Responses to the Question "What percentage of your business serves small business clients?"



Over 45% of ACA members indicated that between 50%-100% of their customers are small business clients.

There is significant expense to small business to make them save and send copies of invoices if there is not a legitimate consumer need to understand more about the basis for a debt. Many creditors only send collectors invoices upon request. A significant majority of small businesses (e.g., plumbers, lawn care, pest control, or heating/cooling repair companies) never send a monthly bill. Many others still rely on excel spreadsheets and hand-written invoices made via notebooks and carbon copy.

The Bureau's itemization requirements would cost well over $1 billion dollars in expense for providers and collectors. Implementation expenses fall into four categories: professional analysis fees, system reprogramming, ongoing error correction, and increased litigation and legal fees.

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[128] P.L. 104-4; 109 Stat. 48 et seq.; and 2 U.S.C. §§602, 632, 653, 658-658(g), 1501-1504, 1511-1516, 1531-1538, 1551-1556, and 1571.

1. $600 million in one-time professional fees

ACA estimates that hospitals and other health care providers will need to conduct significant legal analysis to understand what billing information they can legally share with collection agencies to comply with Rule 1006.34(c) as proposed. HIPAA requires that each "covered entity" develop and implement policies and procedures appropriate for its own organization, reflecting the entity's business practices and workforce. There are about 6,000 non-federal hospitals in the United States. In addition, there were over 827,000 doctors in patient care in 2015.[129] If only half of these providers hire counsel to develop revised billing procedures, and each only spent $2,000 on legal advice, the total cost of the advisory services exceeds $600 million.

2. Over $30 million in one-time system reprogramming for agencies.

Also, collection systems would require reprogramming.[130] Reprogramming would require new fields, which creditors would need to mirror in their own software and data. Every collector and creditor in the U.S. would need to program systems to accommodate every difference in "itemization date" and connected information.

ACA polled its members to estimate the cost of changing computer systems to accommodate the Proposed Rule. They advised that many computer systems will not currently accommodate additional data fields, which would require a complete replacement or major programming revision.

Agencies that have the capacity to reprogram systems, and who have done so before, estimate based on prior experience that the necessary changes will require a minimum of 3 weeks of programming time before the altered system could be tested. Another 2-3 weeks of testing and fixing are required after the initial programming. The process will require a senior programmer at approximately $65

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[129] John Elflein, *Active Doctors of Medicine in Patient Care in the U.S. from 1975 to 2015*, STATISTA (Sep. 27, 2018), available at https://www.statista.com/statistics/186226/active-doctors-of-medicine-in-patient-care-in-the-us-since-1975/

[130] CFPB, Study of third-party debt collection operations, (May 2016). Available at: https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf ("Changes to collection management systems may be required in response to changes in the law or client requirements.")

per hour and a system administrator at $40 per hour. Each new field will require about 10 hours of programming time and 4 hours of admin time. Thus, the estimated cost to make these changes are $7,290 per agency in one-time programming costs.

About 15 percent of the approximately 4,100 collection agencies have proprietary collection management systems (615). ACA estimates that a simple reprogramming to add nine new fields and adjust the associated mail merge would cost each agency about $7,290 per service in either consultant or FTE expense. Thus, technical implementation of these requirements will cost an estimated $4,483,350 in one-time reprogramming fees.

3. Unknown $ billions annually in uncompensated medical care

Finally, each year, hospitals provide tens of billions of dollars in uncompensated care. In 2016, this amount totaled $38.3 billion; in 2015, hospitals provided $35.7 billion in uncompensated care.[131] The average profit margin across hospitals in a study by the Congressional Budget Office was 6.0 percent in 2011; with about 27 percent of hospitals showing "negative profit margins (in other words, they lost money) in that year."[132] A key feature of the hospital industry that affects margins is that nearly 60 percent of hospitals are nonprofit organizations and about 20 percent are publicly owned.

The Bureau's Proposed Rule 1006.34(c) runs the risk of increasing the amount of uncompensated care that hospitals must provide by making it harder for hospitals to employ professional debt collection services to collect on validly owed debt. The added burdens would apply equally to public and charitable hospitals as they would to for-profit hospitals. Ultimately, the cost of unpaid bills for medical services is born by patients and society and could be in the billions of dollars.

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[131] American Hospital Association, *Uncompensated Hospital Care Cost Fact Sheet*, at 3 (December 2017) (citing Health Forum, AHA Annual Survey Data, 1990-2016), available at: https://www.aha.org/system/files/2018-01/2017-uncompensated-care-factsheet.pdf.

[132] TAMARA HAYFORD ET AL., CONGRESSIONAL BUDGET OFFICE, PROJECTING HOSPITAL'S PROFIT MARGINS UNDER SEVERAL ILLUSTRATIVE SCENARIOS 1 (Working Paper 2016-04), available at: https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/51919-Hospital-Margins_WP.pdf.

Debt collection for many small and local companies is a method of last resort; but it is a method that keeps their businesses afloat. For example, one ACA member serves a handful of long-time clients who are chiropractors and dentists. These providers place fewer than 25 accounts per year. The itemization requirement that imposes the new burden of showing interest and prior payments could pose such a data collection hurdle on small businesses that they might forgo collecting on bad debt entirely.

4. Costs to creditors will amount to over $ 3 billion.

Creditors will also need to reprogram systems. Unlike collection agencies, creditors do not use a limited selection of collection management software. Their systems vary by the thousands. Approximately 10,000 creditors furnish data to national credit reporting agencies.[133] This represents a fraction of the creditors in the U.S. Also, about half of all hospitals and medical care providers equals 416,500 potential creditors. Even if just these firms reprogrammed systems to comply with the itemization requirements, the cost is $3,036,285,000.

As an aside- if creditors must pay the reprogramming costs to comply with 1006.34(c), this sunk cost works as a disincentive to change collectors if the creditor is not satisfied with the service and compliance of its collector. One of the principal drivers of collector compliance is establishing and maintaining a good reputation for customer service in the community of creditors. The Bureau should not be watering down creditors' purchasing power by creating a situation where creditors have sunk costs with collectors and reduced leverage to demand better service.

5. On-going implementation and error-correction costs will continue.

Further, by adding new data fields, the Bureau is increasing the recurring cost to collectors of error correction and on-boarding. Continued changes after the one-time fees will cost an estimated $1460 per creditor. This cost will be incurred because each client/creditor will use different itemization dates, descriptions, and letter templates. Collectors can expect to spend additional programming time for every new client, estimated at 20 hours of programming time and 2 hours of system

[133] CFPB, Credit Reporting Whitepaper (2012) at 3. https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf

administration time for a total of $1460. Multiplied by each issuing creditor, the total on-going cost of the new rule is over $ 6.5 billion.

In addition, those collecting medical debt expect that Proposed Rule 1006.34(c) will create tens of millions of dollars of new plaintiff lawsuits per year because the rule requires what is often impossible, as detailed above.

C. An Itemization Requirement would risk violating other federal law.

ACA appreciates the Bureau's intent to make consumers more aware of the exact nature of their debt with the goal of reducing confusion and therefore the frequency of disputes. But the proposed itemization requirement under § 1006.34(c) is unwise because (1) it runs counter to other laws like HIPAA, (2) it is unnecessary given already-existing disclosure requirements surrounding medical debt, (3) it risks exposing sensitive medical information to unwanted parties, (4) it may in some circumstances be impossible to enforce, and (5) it is unduly burdensome for small businesses. ACA therefore proposes that the Bureau instead allow debt collectors to disclose the multiple names of original creditors to further the Bureau's intent to better inform consumers about their debt.

1. Section 1006.34(c) asks for more information than HIPAA allows.

ACA members are concerned that the proposed itemization requirement will conflict with other laws and regulations, particularly those related to health-information privacy.

Under HIPAA, medical debt collectors are permitted to share personal health information (PHI) to achieve payment, but only that which is necessary to collect payments. 45 C.F.R. §§ 164.502(b); 164.514(d). Violators of these rules are subject to serious penalties. State attorneys general may bring civil actions to obtain damages on behalf of state residents and may seek to enjoin further HIPAA violations. 42 U.S.C. § 1320d-5(d).[134] Moreover, persons who knowingly obtain or disclose PHI may be subject to fines up to $250,000 and up to ten years imprisonment where the wrongful conduct involves the intent to sell, transfer, or use identifiable health

[134] Health Information Technology for Clinical and Economic Health (HITECH) Act.

information for commercial advantage, personal gain or malicious harm. 42 U.S.C. § 1320d-6(b).

Because the Bureau lacks the authority to order HIPAA-covered entities to provide detailed medical billing information to collectors, and because the Bureau lacks the power to exempt HIPAA-covered entities from HIPAA rules, ACA is concerned that some medical providers, faced with potential liability for violating HIPAA, will refuse to provide the information required to comply with proposed § 1006.34(c); thus forcing collectors to decide between complying with § 1006.34(c) or filing collection lawsuits against consumers where debt collectors can rely upon notice pleading.

2. *Section 1006.34(c) risks exposing sensitive medical information to unwanted parties.*

Unauthorized disclosure of PHI could also result if medical debt must be itemized in validation letters. As the Bureau found, consumers perceive that debt collection notices are inadvertently sent to family members in 16% of reported cases. Consumers may perceive this because medical collections communications are addressed to the "responsible party" for billing, who may not be the patient. PHI is delicate, and therefore should be confidential wherever possible, even from spouses, children, and parents as contemplated under HIPAA's provisions.[135]

The FDCPA's structure further jeopardizes the confidentiality of PHI: the FDCPA requires validation notices to be the initial communication or be sent within five days of the initial communication. Such notice may be mailed using information from care providers and before a collection agency has determined whether the address information provided by the care provider is correct or obsolete, further increasing the risk of third-party disclosure of PHI.

The dissonance between HIPAA and the FDCPA is additionally illustrated by the fact that, whereas the FDCPA expects collectors may communicate with the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator, HIPAA forbids communication without express written permission. Using the figures from the Proposed Rule, third party disclosure of patient

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[135] The HITECH Act addresses the fact that "incidental" disclosure is expected. But the proposed 1006.34(c) itemization requirements would cause more than "incidental" disclosure to happen.

information will likely happen to at least 16% of consumers. That is unacceptable to both consumers and collectors. Considering that debt collection is "commercial," criminal HIPAA penalties may, and likely would, attach to illegal PHI disclosures.[136] Care providers and collectors therefore have reasonable concerns that criminal or civil penalties could attach if PHI is included in validation notices that third parties open.

3. Section 1006.34(c) is unnecessary to inform consumers as to the nature of the debt being collected.

The Bureau has not clearly articulated why itemization must occur in the initial communication or validation notice rather than through subsequent communications. The Bureau's proposal presumes that providing information that is more detailed initially addresses concerns about reader trust and the potential for mistakes. There is, however, no proof of this. In fact, for nearly half of all collected debt, consumers receive multiple pieces of mail before collection even begins.[137]

For example, under the IRS rule known as 501(r), nonprofit hospitals, to maintain their tax-exempt status, must send three letters in the first 120 days after a health service, which includes itemized information and a simple summary of their financial assistance policies. Nonprofit hospitals comprise 48% of the hospital market. Although doctors and clinics are not required to follow 501(r), many will if they are affiliated primarily with nonprofit hospitals.

Also, health insurance companies are required to mail to "responsible persons" an Explanation of Benefits, which provide details about coverage, payments, and copays. Insurance companies have customer service departments to resolve consumers' disputes or questions about coverage or denials. Thus, consumers have ample opportunity to seek more information about charges prior to collection activity.

Finally, ACA members engaged in medical debt collection observe that very few people ask for extensive detail about charges, even though they can easily do so if they do not recognize a charge on their bills. Assuming that consumers want detailed information about their debts, therefore, puts an unjustified burden on

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[136] *See* 42 U.S.C. 1320d-6.

[137] Recall that 47% of collected amounts are medical.

medical care providers, collection agencies, and, as stated earlier, creates a situation of violating HIPAA when it is unnecessary to do so.

4. *In some cases, compliance with 1006.34(c) will be impossible.*

ACA is not only concerned that HIPAA rules may make it impossible for medical debt collectors to comply with the Bureau's proposed itemization requirement, ACA also knows it may be impossible to abide by this itemization requirement given the nature of medical debt, as multiple bills from multiple providers from a single hospital visit are common.

For example, suppose a woman undergoes a caesarian section surgery, and as a result, she incurs a facility charge from the hospital, a surgeon charge from her OBGYN, an anesthesiologist charge, probably a pediatrician charge and, if there were complications, there could be more.

These bills all derive from the same general service. Sometimes they are billed individually, and sometimes, depending on affiliations with the hospital, it is all billed under the hospital. For individual statements, compiling the separate sources will require substantial expense, and in some instances, hospitals do not have the technology or capability to itemize these separate charges. Not surprisingly, neither debt collectors nor hospitals do this now. Moreover, many doctor offices use "family billing" when a primary insured party is the "responsible party" for payment. Account statements may therefore reflect payments due for multiple patients with multiple procedures. Predictably, questions will arise if amounts remain due about which individual the overdue amount should be allocated to. There simply is no way to identify an itemization date or itemized amounts, absent arbitrary allocations. Practically, it does not seem like much of a problem, but with the plaintiff's bar waiting to use this new regulation as a profit center, such dichotomy between the Bureau's proposal and the industry's practices could result in incessant litigation and unwarranted expenses.

5. *Section 1006.34(c) brings undue hardship to small businesses.*

ACA is also concerned about the impact the Bureau's proposed itemization requirement under § 1006.34(c) will have on small businesses. Specifically, the expenses associated with implementing this requirement will likely result in small businesses with low account volumes being denied collection services. Furthermore, raising barriers for essential service providers—like hospitals, pest control

companies, or car mechanics—to collect past due accounts has serious consequences for society—e.g. uncompensated care in 2015 already represented 4.2% of annual hospital expenses;[138] also, ACA debt collectors in 2016 returned a net of $67.6 billion in collected accounts to the U.S. economy, representing $579 in savings on average per U.S. household.[139]

In sum, collectors that work with non-singular debt obligations like medical debt or credit sales of multiple items (e.g. several pieces of living room furniture) believe that compliance with the itemization requirement on the validation notice is impractical, expensive, and duplicative of multiple pieces of mail that consumers already receive prior to commencement of third-party collections.

6. *The Bureau has better options than Section 1006.34(c) to provide consumers with adequate information about their debt.*

A less costly and less burdensome alternative to achieve the same objective without the negative unintended consequences is to provide collectors a safe harbor so they can list multiple names of original creditors, if doing so aids consumers in understanding the character and source of the debt.

The collective experience of ACA member debt buyers and collectors is that the most significant source of consumer perception that the debt collected is incorrect-- and therefore disputed -- is because the consumer does not recognize the name of the creditor.[140] Simply put, if the Bureau will allow collectors to describe the current

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[138] *See* American Hospital Association, *Uncompensated Hospital Care Cost Fact Sheet*, at 3 (December 2017) (citing Health Forum, AHA Annual Survey Data, 1990-2016), available at https://www.aha.org/system/files/2018-01/2017-uncompensated-care-factsheet.pdf.

[139] Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies in 2016, at 2 (2017), prepared for ACA International, available at https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf

[140] Consumer Financial Protection Bureau, Market Snapshot: Third-Party Debt Collections Tradeline reporting 5-6 (July 2019), available at: https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.

and past creditors in understandable terms, consumer uncertainties and disputes will decrease.

For example, some medical providers (and financial service companies) have corporate names with multiple providers falling under the same umbrella.[141] While consumers know the name of their doctors, they may not know the name of their doctor's hospital or clinician group. Unfortunately, collectors would deviate from the FDCPA by providing all relevant names to trigger the consumer's memory, thereby creating fertile ground for vexatious litigation when collectors choose to do so.

Accordingly, the Bureau should consider providing debt collectors a safe harbor for those collectors who list the actual name of the facility where the services were rendered (for instance anesthesiologist office, facility for lab work, ER services name, etc.) or who list the name of the clinic, chiropractor, dentist office, pharmacy, etc. whose staff gave services, and which would trigger the patient's memory and achieve the same goals as itemization.

D. Other Negative Consequences of Section 1006.34(c)

Raising barriers for essential service providers—like hospitals, pest control companies, or car mechanics—to collect past due accounts has serious consequences to society. According to the American Hospital Association, uncompensated care in 2015 represented 4.2% of annual hospital expenses.[142] Section 1006.34(c) adds the burden to itemize debt beyond what is required in the FDCPA, with little overall value to society.

The Bureau's Proposed Rule would create a new regulatory violation for a collector's failure to accurately list itemization information. Where itemization becomes too

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[141] For example, Tenet Healthcare Corp. owns and operates hospitals under local names, such as St. Mary's Medical Center. In such cases, providing strictly the name of the original creditor may confuse the least sophisticated consumer who is not aware of corporate ownership structures.

[142] *See* American Hospital Association, *Uncompensated Hospital Care Cost Fact Sheet*, at 3 (December 2017) (citing Health Forum, AHA Annual Survey Data, 1990-2016), available at: https://www.aha.org/system/files/2018-01/2017-uncompensated-care-factsheet.pdf.

difficult, collectors are more likely to file collections lawsuits that rely upon notice pleading and discovery—rather than risk plaintiff suits and regulatory risk.[143]

A validation notice for debt collection ought to be easier and less expensive than filing a lawsuit, because the market will always opt for the cheaper and less risky alternative to collect on defaults. As written now, section 1006.34(c) is very likely to increase medical debt collection litigation, as well as increase litigation for other types of debts where itemization is onerous and impractical.

XI. COMMENTS ON §1006.34(C)(3)- FORM VALIDATION NOTICE.

ACA supports the Bureau's current proposal at section 1006.34 and Form B–3 in Appendix B to create a uniform validation notice. The Bureau must ensure that its form will withstand judicial scrutiny—and be prepared to support its model form in litigation as amicus, if necessary. It should also expressly state how it aligns with the statutory text to create a safe harbor from litigation. Beware of those who complain about a standard validation form, as a model form will reduce opportunities for plaintiff lawyers to profit from frivolous FDCPA litigation.

A. The Bureau's Proposal for Section 1006.34

The Bureau has proposed in Regulation F section 34 to create a standard form for the validation of debts as prescribed under the FDCPA Section 809 (15 U.S.C. 1692g), a form known colloquially as the "*g notice*" or "validation notice".[144] ACA applauds the Bureau for recognizing that a single national standard is necessary to resolve the many inconsistent holdings across federal district and circuit courts regarding the contents and emphasis of disclosures on the *g notice*.

The Bureau's proposed model validation notice is a single page and is written in plain English. Further, the model validation notice was crafted after focus group copy testing, which found that the focus group understood and trusted sample validation forms that were written in "plain language" rather than those that used

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[143] *See supra*, section COMMENTS ON §1006.34(c)- ITEMIZATION IN VALIDATION NOTICES.

[144] *See* NPRM, at 474 Proposed §1006.34(d)(2) ("*Safe harbor*. A debt collector who uses Model Form B–3 in appendix B of this part complies with the requirements of paragraphs (a)(1)(i) and (d)(1) of this section.")

"statutory language" from the FDCPA.[145] ACA noted earlier in this comment that focus groups are not the best method to test nationwide experience with debt collection. The research indicates; however, that while focus groups may not be the best method for testing nationwide experience with debt collection, focus groups do provide insight about how people in groups perceive a situation.[146] Thus, for this limited purpose, a focus group's conclusion about understanding certain language in a form has weight.

1. *The CFPB's model form must meet Chevron Step One by addressing ambiguity in the FDCPA*

Decades of inconsistent rulings, circuit splits, and court-created doctrines like "overshadowing" evidence the ambiguous construction of FDCPA § 809.[147] It is imperative that the Bureau's model form directly address these ambiguities.[148] ACA recommends that the Bureau's model form rest firmly and squarely on interpretations of the FDCPA that have given rise to the most litigation concerning validation notices. Also, ACA recommends that all validation notices must state the CFPB's official communication about consumer rights and complaint resolution. Thus, the Bureau's use of plain language will have a clearer nexus to the Plain Writing Act of 2010, 5 U.S.C. 301 (Sec. 3).

An "interpretation-focused" approach will have several outcomes: (1) bolster the Bureau's arguments in favor of Chevron deference; (2) therefore, increase adoption by collection agencies; and (3) limit expensive litigation for consumers, creditors, and collectors.

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[145] FORS MARSH GRP., *supra* note 19, at 8.

[146] *See, supra*, note 25.

[147] *See, e.g.*, *Caceres v. McCalla Raymer, L.L.C.*, 755 F.3d 1299, 1304, fn.5 (11th Cir. 2014) (recommending that debt collectors include the substance of § 1692g(c) (failure to dispute validity) in their validation notice).

[148] *See supra*, section IV.B., (Under the *Chevron* analysis, first set forth by the Supreme Court in 1984, courts review agency rules by looking at the rule in two distinct steps. First, a reviewing court must determine whether the meaning of the statute addressing the precise issue before the court is clear. If the statutory text is clear, that is the end of the matter; the court and the agency must give effect to the unambiguously expressed intent of Congress.)

2. Ambiguities to be Addressed

Disclosing interest/Not disclosing interest.

The section-by-section analysis for section 1006.34(c) correctly notes that the phrase "the amount of the debt" is ambiguous; it does not specify which debt amount is being referred to, even though the debt amount may change over time. Courts differ in how interest accrual is supposed to be disclosed.[149] For the suggested balance due on the account language, ACA suggests that a dynamic balance disclosure should be added when the account balance is dynamic, not static.

ACA specifically suggests the following language:

"As of the date of this letter, the balance due on the account is <current>. Because interest, fees, and/or other charges may change the total owed from day to day, the amount due on the day you pay may be greater. If you pay the amount shown above, an adjustment may be necessary after we receive your payment, in which event you may be informed of any other amount due."

Addressee for Decedent Debt.

Please specify whether a collection firm complies with the statute and Regulation F by sending the validation notice addressed to the deceased consumer, so long as it is eventually received by the deceased person's personal representative or estate administrator. Or, must the debt collector send a new *g notice* to the name and address of the decedent's personal representative/estate administrator and provide that person a new 30-day validation period? If collection had begun when the

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[149] *See, e.g.*, *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 876 (7th Cir. 2000) (holding that amount of debt disclosed must include interest at the time the disclosure occurs even though consumer may ultimately pay more at the time of payment because of accrued interest); *Avila v. Riexinger & Associates, LLC*, 817 F.3d 72 (2d Cir. 2016) (holding that the accounts receivable management industry will not be subject to liability under Section 1692(e) for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date).

consumer was alive, is a new *g notice* and validation period required for the estate's representative upon the death of the consumer?

Dispute Prompt Checkboxes

In its current form, the check box is problematic. The options "This is not my debt" and "The amount is wrong" are not useful because the only appropriate response for the collector is to send validation information. We suggest combining these.

By far, the most common reason for a valid dispute is that the debt was paid in full to someone else. This should be the first option. This option should also request the recipient of the payment and the date, which will allow the collection agency to expediently research the dispute. While not necessary to resolve the issue, consumers should be encouraged to attach proof of payment in order to hasten the process and prevent additional contacts.

Thus, ACA recommends reducing the options for Dispute Prompts to the below:

☐ I paid this debt in full to ____________________ on [date]__________. (attach copy of proof of payment, if available). ☐ I do not recognize the creditor's name, or ☐ I dispute that this debt is mine, or ☐ I dispute the amount, or ☐ I request validation of the debt for any other reason. (check any that apply) ☐ Other (please describe on reverse or attach additional information).

Disputes should contain evidence.

Disputes are handled most quickly if supporting evidence is provided- payment receipts, bank account statements, etc. The Bureau's rules should clarify that it is not overshadowing to encourage behaviors that lead to quick resolution of legitimate disputes. The ambiguity in the many cases concerning overshadowing should be resolved by the Bureau.

Form Design Must Consider Mailing Practices

Some of the content on the model form is positioned incorrectly to accommodate a tri-fold letter and glassine windows in envelopes. Below are various specifications of

standard #10 window envelopes. As presently designed, none of these standard envelopes will work with the model form.

Style: #10 Commercial Size: 4-1/8 x 9-1/2 Window size: 1-1/8 x 4-1/2 Window position: 7/8 Left x 1/2 Bottom	Style: #10 Commercial Right Window Size: 4-1/8 x 9-1/2 Window size: 1-1/8 x 4-1/2 Window position: 4-1/8 Left x 1/2 Bottom	Style: #10 Commercial Fast Forward Size: 4-1/8 x 9-1/2 Window size: 1-1/8 x 4-1/2 Window position: 7/8 Left x 11/16 Bottom This window is slightly higher to be out of the clear zone for the post office.

The cost to migrate to a letter that does not conform to standard folds and window locations will prevent many small businesses from using the model form.

Note also that if the coupon or tear-off is more than 3-1/2 to 3 3/4 inches wide, the standard glassine window return envelope would not be usable and either a custom printed or configured glassine envelope would be needed.

Comments on proposed § 1006.34(c)(2)- Current practices for determining the end of the validation period.

Consumer-specific information on *g notices* are populated by mail merge, usually derived from spreadsheets of information about the debt. It is a relatively simple task to add five days from a letter's print date and another thirty to calculate the end of the validation period. The Bureau should specify whether a validation period end-date on weekend or holiday when the collection agency is closed should be adjusted to the next business day. The Bureau should also specify that it is not a violation to provide a longer time than 35 days—in the event a collector prefers to be especially cautious.

Comments on proposed § 1006.34(c)(2): Method of Delivery.

A five-day delivery rule should apply to all types of written communications whether printed or electronic. First, it is easier to implement when programming

systems and training employees. Second, it allows for consumers who do not check their emails regularly to take full advantage of the 30-day validation period.

Oral disclosures given live to the consumer should not have a delivery rule. The delivery rule is designed to account for unknown and uncontrollable factors while a message is in transit between the sender and recipient. As implied in proposed section 1006.6, there would be no such impediments when a disclosure is given orally directly to the consumer.

Comments on proposed § 1006.34(c)(1), which provides that the § 1006.18(e) disclosure is validation information.

So long as use of the Bureau's model form receives Chevron deference and collectors will not be held to have violated the FDCPA by departing from explicit statutory language, ACA supports this requirement. But if the Bureau's Legal Division has any doubt about whether the proposed language will receive deference, the Bureau should not box in collectors by making the mini-Miranda statement an express regulatory requirement with only one kind of safe harbor language, lest collectors meet 1006.34(c)(1) but somehow fail to meet one court's view of FDCPA § 809.

3. The Bureau's Determination of Form Contents must be Detailed and Reasoned

An agency's interpretation is entitled to deference when "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[150] To aid the Bureau in considering matters related to the form in a detailed and reasoned fashion, ACA provides herein comments on several aspects of the form and delivery of the validation notice.

B. Comments on proposed § 1006.34(c)(2): Complete Name Requirement

ACA is very concerned that the "complete name" requirement will lead to unnecessary technical litigation. First, its necessity seems overblown. There isn't a

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[150] *New York v. EPA,* 413 F.3d 3, 23 (D.C. Cir. 2005) (quoting *Chevron,* 467 U.S. at 865).

parent alive who has a Jr., II or III who hasn't been confused for their child at some point in time. The solution to this circumstance is a phone call, not litigation.

In addition, consumers bear some responsibility for this confusion. Creditors provide collectors the names given on applications. Nobody requires Jr.'s, II's or III's to consistently use these numbers in their names on loan applications or at dentist offices. If these persons are later confused, it is by their own doing.

Finally, by creating a regulatory violation for failing to get a consumer's legal name correct, the Bureau is inviting loan fraud by encouraging people to misspell, truncate, or otherwise alter their names.

1. Proposed comments 34(c)(2)(iii)–1

The provision requiring the merchant brand for credit cards as part of the itemization information would better serve consumers and reduce compliance costs if it were drafted to include broader categories than merchant brand names and was optional, rather than mandatory. ACA agrees that consumers would appreciate knowing that their account arose from a store brand card (e.g. Gap or Conoco). That information is usually available to collectors and can be added to validation notices. In addition, consumers might also benefit when collectors could state other applicable trade names when only using a finance company name to identify the creditor might be confusing. This is often the case with hospitals, physician groups, utilities, and retail product loans or auto loans.

2. § 1006.34(d)(3)(i)- telephone number

§ 1006.34(d)(3)(i) would permit a debt collector to include the debt collector's telephone contact information on the validation notice. ACA supports this provision. The best possible outcome for a consumer with a valid debt is for her to communicate with a collector within the first 30 days of collection to arrange to resolve the debt. In doing so, the consumer will avoid further contacts, may avoid credit reporting that the debt is in collections, and may be able to settle the debt for less than face value.

C. "Clear and Conspicuous" Requirement in 1006.34(b)(1) is Not Suited to a Conversation

A "clear and conspicuous" requirement is unnecessary, inconsistent with the purpose of debt collection, and will have undesirable consequences. The "clear and conspicuous" standard in Regulation E –from which the Bureau seeks to borrow for Regulation F—is a disclosure provision designed for situations where parties are meant to interact once and then go about their business with a single preauthorization establishing their future relationship. Initiating a debt collection communication does not have the same characteristics—the best possible outcome for the consumer is a productive two-way conversation where the debt is disputed, forgiven, paid, or resolved in the first 30 days. If a phone agent is not speaking clearly or there is static on the line, the consumer should simply ask the phone agent to repeat herself or provide the information more loudly or slowly. The purpose of debt collection is to enable a two-party communication so that parties can arrive at a mutual agreement to resolve a debt before credit reporting or litigation becomes a potential option.

Another negative consequence of adding the "clear and conspicuous" requirement for oral or electronic validation of debt disclosures is that the Bureau is giving plaintiffs' attorneys one more arrow in their quiver with which they can extract value from the U.S. credit system, health care providers, and merchants.

D. Conclusion

There is not a pressing need for validation notices to contain detail beyond what the FDCPA expressly requires. Most debt is valid.[151] ACA members process and collect upon millions of consumer accounts daily and only a small portion— less than one-half of one percent —of these debts lack a contractual basis or are miscalculated. For those small number of debts, the current validation process offers consumers the chance to dispute the debt. Indeed, a vast majority of ACA members accept verbal disputes and disputes outside the first 30 days.

Collections professionals have many disincentives that prevent them from collecting accounts that aren't truly owed, including personal morality, state regulatory oversight, reputation with creditors, threat of plaintiffs' suits, and federal oversight.

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[151] *See supra* at 19.

The Bureau lacks reliable information supporting a need for more detail in validation notices.

Finally, the Bureau's Proposed Rules will not impact "zombie" debt or phony accounts because the agents that deal in such accounts are rogues and will have no regard for these rules in any event. Itemization requirements will burden legitimate collectors without impacting the behavior of those who work outside the law.

One must not forget that the debts at issue in FDCPA communications arose because the consumer received money, goods, or services for which they did not pay according to contract terms. If collections are not successful, the cost of non-payment is borne by the creditor, merchant, or health care provider—as well as the U.S. Treasury when these debts are written off against taxable income. These rules should not impede collection of legitimate debt, and they should not be designed to line the pockets of plaintiff attorneys.

XII. COMMENTS ON 1006.38 – DISPUTES AND REQUESTS FOR ORIGINAL CREDITOR INFORMATION

ACA appreciates the Bureau's willingness to tackle the costly problem of duplicative disputes under 15 U.S.C. § 1692g(b), and it encourages the Bureau to provide additional clarity on the issue of overshadowing.

A. Duplicative Disputes

As the Bureau acknowledged,[152] duplicative disputes are a nagging problem for the accounts receivable management industry. Duplicative requests are costly in time and money, especially if there is no electronic mail address for the consumer. In those cases, responses must be sent by U.S. mail with the attendant cost of postage. For 20,000 duplicative disputes, a collection firm spends at least $40,000 in duplicative paper, print-jobs, and postage alone—not counting: (1) employee time spent in investigating, reinvestigating, and resolving the request prior to continuing with collections; and (2) the burden on compliance staff to resolve these duplicative requests, leaving compliance staff, as the Bureau acknowledged, with "fewer resources to investigate and respond to non-repeat disputes."[153]

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[152] *See* NPRM at 291-92.

[153] *Id.* at 292.

Indeed, many consumers submit duplicative disputes hoping to fabricate an FDCPA claim where an agency fails to reply to one of the requests. This is particularly troublesome and needlessly expensive to deal with given that, as shown above, from 2018 to 2019, a sample of over 2.2 million accounts determined that the data supporting collections on those accounts is accurate over 99.85 percent of the time.[154]

ACA agrees that the Bureau should define "duplicative dispute" as a dispute which is substantially similar to a prior dispute raised by the consumer and, if possible, adopt specific criteria for determining whether a dispute is duplicative. ACA requests that the Bureau consider amending 1006.38(d)(2)(ii) to include calling the consumer to notify them that their dispute is deemed duplicative and referring them to the response to the earlier dispute. This will save paper and postage.

In addition, the Bureau should clarify that consumers are not entitled to the protections of 15 U.S.C. § 1692g(b) after the 30-day validation period has ended. While it should already be clear that liability cannot arise for the failure to respond to an untimely dispute, that has not stopped many consumers from asserting claims or filing lawsuits alleging this very wrong.

With regard to responding to a request for the identity of the name and address of the original creditor, ACA International notes that a slew of lawsuits have been filed by consumers alleging that the FDCPA is violated when the initial communication does not identify the *original* creditor.[155] This dubious position is belied by the plain text of 15 U.S.C. § 1692g(b), which allows a consumer to request the name and address of the original creditor if it is not mentioned in the initial communication.

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[154] *Supra*, at 28; *see also* NPRM at 291 (noting that industry commenters have stated that ten to twenty percent of consumer disputes reiterate, without providing new information, earlier disputes accounts receivable management industry have already responded, and that repeat medical debt disputes may be as high as fifty to sixty percent of all disputes).

[155] *See, e.g.*, *Johnson v. Fay Servicing, LLC*, No. 1:17-CV-02513-CC-JCF, 2018 WL 5262078, at *15 (N.D. Ga. July 2, 2018), report and recommendation adopted, No. 1:17-CV-2513-CC-JCF, 2018 WL 5262049 (N.D. Ga. Sept. 19, 2018); *De Amaral v. Goldsmith & Hull*, No. 12-CV-03580-WHO, 2014 WL 572268, at *6 (N.D. Cal. Feb. 11, 2014); *Hammett v. AllianceOne Receivables Mgmt., Inc.*, No. CIV.A. 11-3172, 2011 WL 3819848, at *4 (E.D. Pa. Aug. 30, 2011); *Brenker v. Creditors Interchange, Inc.*, No. 03 CIV.6500 LTS DFE, 2004 WL 594502, at *3 (S.D.N.Y. Mar. 25, 2004).

Accordingly, ACA International requests that, in addition to providing the accounts receivable management industry with permissible responses for duplicative requests, the rule clarify that: (1) A debt collector has no legal obligation to respond to a duplicative dispute; and (2) A debt collector has no legal obligation to respond to a dispute made outside the 30-day validation period; and (3) The name and address of the original creditor need not be provided in the initial communication.

B. Overshadowing

As to overshadowing, it would be duplicative for the Bureau to implement the prohibition against overshadowing under 15 U.S.C. § 1692g(b) by implementing a rule that "generally restates the statute, with only minor changes for style and clarity."[156] Instead, the Bureau should provide meaningful guidance.

There is little uniformity among federal courts in defining the term "overshadowing," the Bureau should provide an interpretation that solves this issue.

In 2019, nearly every initial communication sent by the accounts receivable management industry contains language expressly advising a consumer of the right to dispute the debt and to request the name and address of the original creditor. Nevertheless, overshadowing claims are some of the most common, if not the most common, FDCPA violations alleged under 15 U.S.C. § 1692g(b) in federal court lawsuits.[157] The reasons are not hard to fathom, given the hyper-aggressive approach of consumer protection attorneys to find fault in every letter sent. The quandary was explained well by the Seventh Circuit Court of Appeals in *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997):

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[156] *See* NPRM at 287-88.

[157] *See, e.g.*, *Lerner v. Forster*, 240 F.Supp.2d 233 (E.D.N.Y. 2003) (noting that "[w]hether a certain debt collection letter violates § 1692 requires a fact specific analysis") (holding that "a validation notice contained in a collection letter is not overshadowed simply because another section of the letter discusses alternative payment plans."); *Orenbuch v. Computer Credit, Inc.*, No. 01 Civ.9338 JSM, 2002 WL 1918222 (S.D.N.Y. Aug. 19, 2002) (holding that the accounts receivable management industry did not overshadow its first notice notifying debtor that debt collector was contracted to collect on the debt through its second notice notifying debtor that debt collector was returning the account to the hospital); *Sturdevant v. Thomas E. Jolas, P.C.*, 942 F.Supp. 426, 429-30 (W.D. Wis. 1996) (holding that debt collector's letter demanding payment in full or arrangement of payments within ten days of receipt of the letter, sent twenty-one days after sending the initial validation notice, did not overshadow the initial letter because the expiration of the second letter would be past the thirty days plaintiff is granted to dispute the debt).

> Judges too often tell defendants what the defendants cannot do without indicating what they can do, thus engendering legal uncertainty that foments further litigation. The plaintiff's lawyer takes the extreme, indeed the absurd, position—one that he acknowledged to us at argument, with a certain lawyerly relish, creates an anomaly in the statutory design—that the debt collector cannot in any way, shape, or form allude to his right to bring a lawsuit within thirty days. That enforced silence would be fine if the statute forbade suing so soon. But it does not. The debt collector is perfectly free to sue within thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor. In effect the plaintiff is arguing that if the debt collector wants to sue within the first thirty days he must do so without advance warning. How this compelled surprise could be thought either required by the statute, however imaginatively elaborated with the aid of the concept of "overshadowing," or helpful to the statute's intended beneficiaries, eludes us.
>
> The plaintiff's argument is in one sense overimaginative, and in another unimaginative—unimaginative in failing to see that it is possible to devise a form of words that will inform the debtor of the risk of his being sued without detracting from the statement of his statutory rights.

Id. (citation omitted). The Seventh Circuit went so far as to draft an FDCPA compliant letter for "[d]ebt collectors who want to avoid suits by disgruntled debtors":

> Dear Mr. Bartlett:
>
> I have been retained by Micard Services to collect from you the entire balance, which as of September 25, 1995, was $1,656.90, that you owe Micard Services on your MasterCard Account No. 5414701617068749.

> If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Micard $316 against the balance that you owe (unless you've paid it since your last statement) or call Micard at 1–800–221–5920 ext. 6130 and work out arrangements for payment with it. If you do neither of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over.
>
> Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid. If you do dispute it—by notifying me in writing to that effect—I will, as required by the law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor (Micard Services), I will furnish you with that information too.
>
> The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.
>
> Sincerely,
>
> John A. Heibl

The entire economy, including consumers, the accounts receivable management industry, and creditors, will benefit if the Bureau follows in the Seventh Circuit Court's footsteps. More than a mere definition of overshadowing is needed because such a definition could still be manipulated by the plaintiff's lawyer who takes the

"extreme, indeed absurd, position . . . with lawyerly relish." It would be far more helpful for the Bureau to establish a form letter similar to the one crafted by the Seventh Circuit in *Bartlett*, with a safe harbor for debt collectors who use them.

For those reasons, the Bureau should not only restate the prohibition against overshadowing, it should also define it.

XIII. COMMENTS ON § 1006.42 - PROVIDING REQUIRED DISCLOSURES ELECTRONICALLY

One of the primary goals of proposed Regulation F is to promote and leverage modern communication technologies to the benefit of both consumers and industry. Consumers increasingly prefer modern electronic communications—like emails and text messages—to mail and phone calls.[158] And these modern technologies are more cost-effective and efficient for communicating critical information from a collection firm to consumers. Yet, the Bureau's proposal to overlay detailed and onerous E-SIGN consent requirements on a collection firm's electronic communications with consumers will make it infeasible for collectors to use electronic methods. And it will pose insurmountable barriers for consumers who wish to communicate "in writing" with collectors using modern technology.

Accordingly, ACA urges the Bureau to reconsider and reverse its determination that the E-SIGN Act applies to the FDCPA's mandatory Written Notices when provided to consumers electronically. To the extent that the Bureau believes that such electronic disclosures must fall within the E-SIGN Act, ACA requests that the Bureau create an exemption from the E-SIGN Act's requirements that ensures consumers will receive the mandatory disclosures in the electronic formats they prefer without overburdening the industry.

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[158] NATIONAL COUNCIL OF HIGHER EDUCATION LOAN RESOURCES (NCHER), STUDENT LOAN ONLINE SURVEY RESULTS (February 12, 2016), available at https://cdn.ymaws.com/www.ncher.us/resource/resmgr/NCHER_Poll/01_NCHER_Survey_Insights.pdf.

A. The Bureau Proposes to Allow Electronic Disclosures but Mandate E-SIGN Act Consent

The FDCPA requires three disclosures be provided to consumers in writing: 1) a validation notice sent after an initial communication; 2) the original-creditor disclosure; and 3) the validation-information disclosure (collectively "Written Disclosures").[159] In addition—though not noted in the NPRM—the FDCPA requires consumers to provide "in writing" 4) written disputes; and 5) cease and desist notices.

The Bureau interprets the FDCPA's writing requirement to permit these disclosures to be provided through the mail or electronically—such as through an email or text message. Proposed § 1006.42(a)(1) would require a debt collector who provides such required disclosures in writing or electronically to do so: (1) in a manner that is *reasonably expected* to provide actual notice to the consumer, and (2) in a form that the consumer may keep and access later. A debt collector who receives actual notice that the disclosure was not in fact delivered to a consumer does not satisfy § 1006.42(a)(1).

ACA believes proposed § 1006.42(a)(1)'s delivery standard provides much needed clarity to the accounts receivable management industry on the use of modern technologies to provide Written Disclosures and that the proposed regulation strikes an appropriate balance between consumer protection and industry burden.

The rule, however, is overly proscriptive and places process over results. The directions for sending FDCPA notices to consumers inserts roadblocks that will prevent collection firms—particularly small businesses—from adopting electronic communications.

ACA has several recommendations to improve proposed § 1006.42(a). First and foremost, state that any Written Disclosures actually accessed by the consumer are presumed compliant.

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[159] *See* § 1006.34(a)(1)(i)(B); § 1006.38(c);§ 1006.38(d)(2).

(a) Providing required disclosures. (1) In general. A debt collector who provides disclosures required by this part in writing or electronically complies with this subsection when the consumer receives notice in a form that the consumer may keep and access later. In all instances, a debt collector who provides disclosures required by this part in writing or electronically must do so in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later.

Because the goal of § 1006.42(a)(1) is to provide reasonable assurances that a consumer received Written Disclosures, any delivery method that exceeds this goal by providing actual, confirmed notice should be acceptable and encouraged.

B. The Bureau Should Reconsider and Reverse its View that the E-SIGN Act Applies to the FDCPA's Written Notices.

ACA requests that the Bureau reassess and retract its position that Written Disclosures provided electronically must satisfy the E-SIGN Act. Neither the E-SIGN Act's text nor its purpose clearly supports application of the Act's consent requirements to the FDCPA's Written Disclosures. Moreover, applying the E-SIGN Act will hinder, not encourage, the accounts receivable management industry's' electronic communications with consumers.

The E-SIGN Act is a consent statute meant to grease the wheels of electronic commerce. Used here, however, the proposed regulation will stifle the Bureau's aim of keeping consumers better informed through modern communication technologies. At a minimum, the Bureau should create a commonsense exemption from E-SIGN's consent protocol that is appropriately tailored to meet § 1006.42(a)(1)'s requirement that electronic disclosures be provided in a manner that is *reasonably expected* to provide actual notice to the consumer.

1. The Bureau's Position on E-SIGN

According to the Bureau, unless a collection firm receives a consumer's "informed, affirmative consent"—under E-SIGN Act section 101(c)'s detailed consent protocol—before delivering disclosures electronically, the delivery is invalid. The Bureau proposes that a debt collector may satisfy this requirement in two ways: by obtaining E-SIGN consent directly from a consumer (§ 1006.42(b)(1)) or by relying on consent the consumer provided to the creditor or a prior debt collector (§

1006.42(c)). While the Bureau states that it does not propose to interpret a consumer's prior consent to a creditor as an affirmative consent to receive electronic disclosures from a debt collector, § 1006.42(c)'s proposed "exemption" from the E-SIGN Act for electronic disclosures made in reliance on consumer's consent to a creditor has the same effect.

The Bureau did not address how a consumer should acquire E-SIGN consent from a debt collector if the consumer sends a dispute or cease and desist notice electronically.[160]

By choosing to not give E-SIGN consent, a consumer can force a debt collector to use a more expensive method of sending the notice, even if she is perfectly able to read and keep the electronic notice provided. Thus, the Proposed Rule in this regard has the practical effect of dissuading the use of modern technologies to provide Written Disclosures, which leads back to the less preferred paper route.

2. *The E-SIGN Act's Language and History Do Not Compel the Bureau's Conclusion that Electronic Disclosures under the FDCPA Require E-SIGN Consent.*

The Bureau's interpretation of the E-SIGN Act is overbroad. According to the Bureau, because the Written Disclosures must be provided in writing, a collection firm must comply with the E-SIGN Act's consumer consent requirements when providing such disclosures electronically. But the E-SIGN Act is limited to "transactions." Proposed §1006.42(c) rests on the mischaracterization of the five FDCPA written notices as "transactions" that are mutually entered into by both parties.

The E-SIGN Act only requires consumers' consent to the use of electronic records when the parties are engaging in a "transaction":

> Consent is required when "a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or

[160] *See*, 15 U.S.C. 7001(b)(2) ("This subchapter does not— (2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.")

> foreign commerce be provided or made available to a consumer in writing."[161]

The E-SIGN defines a "transaction" with a focus on an actual exchange of consideration between the parties:

> The term "transaction" means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, *including any of the following types of conduct*--
>
> (A) *the sale, lease, exchange, licensing, or other disposition of* (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and
> (B) *the sale, lease, exchange, or other disposition of* any interest in real property, or any combination thereof.[162]

While the exchange that resulted in the initial credit obligation is likely a "transaction," a totally different party's notice or disclosure to the consumer after the transaction has been consummated should not by itself qualify as an additional "transaction" subject to E-SIGN consent.

A validation notice, for example, is not a "*sale, lease, exchange, or other disposition of*" any goods, services, or property between a consumer and a collection firm". A validation notice is part of an effort to provide information to a consumer to confirm and satisfy a consumer's already-existing obligation incurred in a prior transaction. Unlike the transactions described in the E-SIGN Act term's definition, the FDCPA's Written Disclosures do not seek a consumer's assent to any new contractual relationship. Thus, these notices and disclosures do not constitute the type of "transactions" for which a party would need to get a consumer's consent to do business electronically pursuant to the E-SIGN Act.

The E-SIGN Act's legislative history also supports the conclusion that the Act's consent requirements should not be extended to the FDCPA's Written Disclosures. The aim of the E-SIGN Act is to promote electronic transactions and

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[161] 15 U.S.C. § 7001(c)(1)(a).

[162] 15 U.S.C.A. § 7006(13) (emphasis added).

communications—not discourage them. Specifically, Congress enacted the Act "to promote electronic commerce by providing a consistent national framework for electronic signatures and transactions."[163] Congress recognized that "[t]he growing use and global reach of the Internet can reduce paperwork and ease the burdens of conducting commercial transactions."[164] "The legislation is narrowly drawn so as to remove barriers to the use and acceptance of electronic signatures and records *without establishing a regulatory framework that would hinder the growth of electronic commerce*."[165]

In short, the E-SIGN Act was created out of "the need for the Federal government and States to promote and not hinder this new market."[166] Thus, the E-SIGN Act focuses on facilitating and regulating *additional* electronic transactions and not unnecessarily burdening existing relationships. Further, nowhere does the E-SIGN Act reference the FDCPA or debt collection, and ACA is not aware of any debt collection references in the Act's legislative history. Simply put, there is no indication that Congress was contemplating mandatory Written Disclosures under the FDCPA when it enacted the E-SIGN Act; instead, it was attempting to ensure that the developing electronic economy would not be hampered. And that is exactly what the Bureau risks with its over burdensome proposal.

Critically, the plain language of the E-SIGN Act's consent requirements demonstrates they are a bad fit for the FDCPA's Written Disclosures. As industry commenters to the Bureau's ANPRM and small entity representatives who participated in the SBREFA process made clear "the process for obtaining E-SIGN Act consent is particularly cumbersome in the debt collection context, where consumers and a collection firm typically lack a pre-existing relationship."[167]

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[163] S. Rep. No. 106-131, at 1 (1999); *see also* H.R. Rep. No. 106-341, pt. 1, at 5 (1999) ("The bill adds greater legal certainty and predictability to electronic commerce by according the same legal effect, validity, and enforceability to electronic signatures and records as are accorded written signatures and records.").

[164] S. REP. 106-131, 1

[165] H.R. Rep. No. 106-341, pt. 1, at 5 (1999) (emphasis added).

[166] S. REP. 106-131, 5.

[167] NPRM at 315.

As further proof that the E-SIGN Act is a bad fit, the statute allows companies to impose fees on consumers and terminate agreements if the consumer withdraws his or her consent to electronic disclosures, including "termination of the parties' relationship[] or fees in the event of such withdrawal."[168] Surely the Bureau does not want to incentivize the accounts receivable management industry to punish consumers for refusing to accept electronic disclosures. The potential material harm to consumers of such consequences or fees—even if most debt collectors did not require them—would outweigh any marginal benefits of E-SIGN consent.

Further, by applying the E-SIGN Act to the FDCPA, the Bureau is essentially creating a private right of action to enforce the E-SIGN Act where none exists or was intended. It is beyond dispute that "[t]he E-Sign Act contains no rights-creating language and manifests no intent to create a private right or remedy, but rather establishes that contracts and signatures cannot be denied legal effect merely because they are in electronic form."[169] Thus, the Bureau need not and should not inject E-SIGN requirements and liability into the FDCPA.

The Bureau recognizes that "debt collectors and consumers may benefit from greater flexibility as to electronic disclosures."[170] Yet, many in the accounts receivable management industry do not send electronic notices to consumers because they fear violating the FDCPA. This fear was recently borne out in *Lavallee v. Med-1 Solutions, LLC*, where the Seventh Circuit concluded that a debt collector's secure email did not contain the § 1692g(a) disclosures because the debtor had to follow the hyperlinks in order to access the information.[171] The court stated that "[a]t best, the emails provided a digital pathway to access the required information. And we've already rejected the argument that a communication 'contains' the mandated disclosures when it merely provides a means to access them."[172]

The salient point is that the court, did not rest its decision on a lack of consent for an electronic communication. Indeed, the court declined to address the CFPB's

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[168] 15 U.S.C. § 7001(c)(1)(B)(i).

[169] *Levy-Tatum v. Navient Sols.*, Inc., 183 F. Supp. 3d 701, 708 (E.D. Pa. 2016).

[170] NPRM at 314.

[171] *Id.*

[172] *Id.* at 1056.

argument that the E-SIGN Act should apply.[173] At this point, the Bureau retains the leeway to reconsider its legal analysis and determine that, in fact, the E-SIGN Act does not cover FDCPA Written Disclosures.

C. The E-SIGN Act Would Impose Substantial, Unnecessary Burdens in the Context of Debt Collection.

The Bureau expressly recognizes that "[t]he process for obtaining consumer consent under the E-SIGN Act may impose a substantial burden on electronic commerce in the unique context of debt collection."[174] Yet, the two options the Bureau proposes for allowing a collection firm to provide electronic Written Disclosures require either direct or indirect E-SIGN consent. The Bureau should not impose the severe burden on consumer-preferred electronic communications.

Most collection firms do not currently acquire E-SIGN consent from consumers, and it would be onerous for collectors to obtain such consent. Largely due to the current legal uncertainty surrounding electronic communications, the majority of interactions between collectors and consumers continue to occur by telephone and postal mail. Neither method is well-suited to obtaining E-SIGN Act consent, where—as the Bureau recognizes—the required disclosure may exceed 1,000 words.

The accounts receivable management industry wants to communicate with consumers as economically and efficiently as possible. Thus, a collection firm will usually prefer to communicate by telephone call rather than by mail because the transaction costs are lower. Likewise, if capital costs were not an issue, a collection firm will usually prefer to communicate by email rather than by telephone, since email is not only inexpensive but does not require a live representative to be available at the precise moment when a consumer is available to communicate.[175]

Imposing E-SIGN consent requirements will make a collection firm less likely to use email and texts for their Written Disclosures to consumers, which will drive up the cost of collection—a cost that will ultimately be borne by each American consumer.

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[173] *Id.*

[174] NPRM at 315.

[175] *Id.* at 126.

The more efficiently the credit-and-collection industry can operate, the more it can recover for unpaid creditors and governmental clients, and the lower those creditors and governments can keep costs, interest rates, and taxes.

Accordingly, for the reasons described above, ACA does not believe the E-SIGN Act does or should apply to electronic disclosures under the FDCPA. ACA implores the Bureau to establish that email and text messages can be "written notice" within 15 U.S.C. § 1692g(a)'s meaning, and that the statute applies to emails and texts in the same way that it applies to postal email without the additional confines imposed by the E-Sign Act. Without clear and *practical* answers on how a debt collector can comply with the requirement that it send the consumer a written notice using emails or texts, debt collectors will be less likely to use email for their initial communication with a consumer, which will drive up the cost of collection – a cost that will ultimately be borne by the consuming public. Therefore, ACA encourages the Bureau to reconsider and revise its interpretation.

D. Even if the E-SIGN Act Applies, the Bureau Should Provide an E-Sign Act Exemption for the FDCPA's Written Notices.

The E-SIGN Act grants federal regulatory agencies the authority to "exempt without condition a specified category or type of record from the requirements relating to consent in section [101(c)] if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers."[176] The Bureau proposes to utilize this procedure in §1006.42(c) to allow a collection firm to make electronic disclosures based on creditor's or prior collector's E-SIGN consent. The Bureau should adopt the recent FCC E-SIGN exemption approach and expand the exemption in §1006.42(c) so it covers communications to validated electronic addresses.

1. Consent procedures are expensive

An exemption conditioned on prior consent would create enormous upfront expense to implement. The cost to change contracts to include a written E-SIGN consent

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[176] 15 U.S.C. § 7004(d)(1).

provision is estimated at $300 million.[177] Creditor software would require reprogramming to insert the new field to capture the permission, an estimated $100 million cost. Collection software will require reprogramming, which is estimated at $12 million.

The Bureau thus should adopt an E-SIGN Act exemption that actually eliminates the substantial burden on creditors and the accounts receivable management industry while also appropriately mitigating the risk to consumers associated with electronic collection disclosures.

2. Consent Procedures are Confusing

The requirements for consent under the E-SIGN Act as set forth by the Bureau in the proposed regulations are so onerous, let alone confusing for the consumer, that the likelihood of consent would be remote—even though more and more consumers indicate that electronic communication is their preferred method of communication. Similarly, the cost-benefit analysis of delivering electronic disclosures in compliance with the E-SIGN Act, as contemplated under §§ 1006.42(b)(1) and (c), would certainly discourage the accounts receivable management industry from going down that path.

3. The Deterrent Effect of Consent Procedures is Observed

For instance, ACA surveyed members that used email to communicate with consumers in the state of New York at any point in the period 2010 through the present. When the New York Department of Financial Services issued its rules requiring consumer E-SIGN consent to receive electronic g-notices, a significant majority of ACA's members stopped using emails to communicate with consumers residing in New York. Relatedly, one attorney-advisor to multiple collection agencies (who has helped agencies develop email collections programs) has reported that, while his clients use email to communicate with consumers in many states throughout the country, they continue to use postal mail and telephone calls in New York. This is because the 2015 New York DFS rules are too onerous and failure to abide by them perfectly risks litigation.

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[177] *See* Kate Berry, *BCFP no more: Kraninger scraps plan to rebrand CFPB*, AMERICAN BANKER (Dec. 19, 2008) ("An internal agency memo had said the cost to the financial services industry could be roughly $300 million if the name change went forward.")

As proposed, §§ 1006.42(b)(1) and (c) would have the same deterrent effect on electronic communication—but on a nationwide level. Thus, proposed § 1006.42(c) is not necessary and insufficient to eliminate the burdens of E-SIGN consent on industry. Because the burden on the accounts receivable management industry would be severe, the Bureau may fashion any exemption to the consent requirement that would eliminate the burden so long as the exemption will not increase the material risk of harm to consumers. Here, the Bureau can do just that without indirectly mandating E-SIGN consent under § 1006.42(c). In other words, E-SIGN consent is not necessary to ensure compliance with § 1006.42(a)(1)'s reasonable expectation of notice standard. Instead, the regulations should allow a collection firm to send Written Disclosure electronically to any email address or phone number where a collection firm has reasonable assurances that the email or number presently belongs to and is being used by the consumer.

Specifically, ACA proposes that a collection firm should be allowed to deliver in electronic format the FDCPA's mandatory written disclosures to verified email address or phone numbers, which are similar to those that satisfy the same parameters recently adopted by the Federal Communications Commission in its E-SIGN exemption:

> (1) an email address or phone number that the consumer has provided or confirmed to the creditor, debt collector, or another for purposes of receiving communication concerning the account; or
>
> (2) an email address or phone number that the consumer has used to communicate with the debt collector concerning the account.[178]

Indeed, the Bureau supports a similar exemption elsewhere in its Proposed Rule.[179] Where a disclosure is sent to a verified email address or phone number, logic and commonsense dictate a consumer's actual receipt of the notice can be presumed. If no verified email address or phone number is available for a particular consumer, then a debt collector must deliver Written Disclosures via paper copies to that consumer.

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[178] *See*, In the Matter of Nat'l Cable & Telecommunications Ass'n & Am. Cable Ass'n, 32 F.C.C. Rcd. 5269 (2017).

[179] § 1006.6(d)(3)(i)(A) and § 1006.6(d)(3)(i)(C).

ACA appreciates that phone numbers—especially wireless numbers—are frequently reassigned. ACA, therefore, proposes that where the debt collector sends a mandatory disclosure to an email address or phone number that it received from a creditor, the consumer must have provided the phone number or used it within the last 180 days. Such a limitation mitigates the risk that a disclosure will be provided to an unintended third party. The same risk is not present for emails because email addresses are generally unique to a particular consumer and are not reassigned. As a further safeguard, ACA proposes that any electronic disclosure include a clear and conspicuous option for a consumer to opt-out of future electronic disclosures and to continue to receive paper notices.[180]

ACA's proposal is consistent with an E-SIGN Act exemption that the FCC recently granted to cable operators to distribute their "annual notices via e-mail to a verified e-mail address that includes a mechanism for customers to opt out of e-mail delivery and continue to receive paper notices."[181] There, the Commission found that "[t]he benefits of permitting e-mail delivery include the positive environmental aspects of saving substantial amounts of paper annually, increased efficiency and enabling customers to more readily access accurate information regarding their service options."[182] Like cable subscribers, consumers would receive the same benefits from receiving debt collection notices electronically. Relying on substantially the same verification requirements ACA proposes above, the Commission concluded that "[b]y requiring the use of a verified email address, we will ensure that the annual notices have a high probability of being successfully delivered electronically to an email address that the customer actually uses, so that the written information is actually provided to the customer." The Commission found that such benefits were more than sufficient to satisfy the E-SIGN Act's exemption standard, agreeing that "it would not be workable for cable operators to attempt to receive permission from each individual customer prior to initiating electronic delivery for this particular notice."[183]

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[180] Should the Bureau adopt such an opt-out requirement, debt collectors would value clarification from the Bureau on what constitutes a clear and conspicuous disclosure.

[181] In the Matter of Nat'l Cable & Telecommunications Ass'n & Am. Cable Ass'n, 32 F.C.C. Rcd. 5269 (2017).

[182] *Id.*

[183] Id. at n.40.

ACA's proposed safeguards would not materially increase the risk that consumers would not receive, identify, open, read, or understand the disclosures, and would not materially increase the likelihood of an unintended third-party disclosure. Significantly, the proposed safeguards would also ensure that a collection firm satisfies §1006.42(a)(1)'s requirement that collection firms that provide required disclosures in writing or electronically do so in a manner that is *reasonably expected* to provide actual notice to the consumer. The Bureau is not proposing to impose an actual receipt standard under §1006.42(a)(1) and should not indirectly do so by mandating E-SIGN consent under §1006.42(c). Therefore, should the Bureau determine that the E-SIGN Act applies to the FDCPA's mandatory written disclosures, ACA urges the Bureau to adopt ACA's proposed exemption, as follows:

> (d) Exemption from the E-Sign Act for certain messages. Messages, including those under FDCPA § 1692g, to the following are exempt without condition from the requirements relating to section 101(c) of the E-SIGN Act, pursuant to 15 U.S.C. § 7004(d)(1): (1) an email address that the consumer has provided or confirmed to the creditor, debt collector, or another for purposes of receiving communication concerning the account; or (2) an email address that the consumer has used to communicate with the debt collector or creditor concerning the account; or (3) a wireless or virtual telephone number that the consumer has provided or confirmed to the creditor, debt collector, or another for purposes of receiving communication concerning the account within the last 180 days; or (4) a wireless or virtual phone number that the consumer has used to communicate with a creditor or the debt collector concerning the account within the last 180 days.

E. ACA Urges the Bureau to Allow Required Disclosures both in the Body of an Electronic Communication and in a Hyperlink without Onerous Limitations

ACA agrees with the Bureau that providing a disclosure in the body of an email likely poses no more risk of third-party reception than delivery by mail. Therefore, collection firms should be able to discuss debts in the body of emails. ACA, however, would urge the Bureau to clarify that a collector can also include mandatory written disclosures in the body of a text message where feasible.

While ACA urges the Bureau also to allow the accounts receivable management industry to include required disclosures in a hyperlink in an email or text message, the limitation and requirements that the Bureau seeks to impose on hyperlinked

disclosures will make them infeasible to collectors. Specifically, proposed §1006.42(d) requiring notice and opportunity to opt out of hyperlinked disclosures suffers from the same infirmity as the Bureau's proposal to require direct or indirect E-SIGN consent for the email or text message containing the hyperlinked disclosures. The accounts receivable management industry will not be able to effectively satisfy §1006.42(d)'s requirement that a consumer receive notice from the accounts receivable management industry or creditor regarding the hyperlinked disclosure before receiving the actual disclosure. ACA, therefore, urges the Bureau to allow a collector to send hyperlinked disclosures to any email address or phone number for a consumer that is "verified" pursuant to ACA's proposed E-SIGN exemption.

F. ACA Urges Expansion of § 1006.42(e)'s Proposed Safe harbors

ACA applauds the Bureau's proposal to create safe harbors for satisfying §1006.42(a)(1)'s notice and retention requirements but encourages the Bureau to expand the safe harbors.

First, ACA urges the Bureau to extend the mailing safe harbor to include post office boxes in addition to residential addresses. In many rural areas, consumers cannot receive mail at their residences and must utilize a post office box. These consumers, and collection firms, should not be disadvantaged because of this limitation.

Second, any validation notice in the body of an email that is an initial communication with a consumer should qualify for the safe harbor as long as the email is sent to an email address that is "verified" pursuant to ACA's proposed E-SIGN exemption.[184]

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[184] The verification procedures described in proposed § 1006.6(d)(3) are unnecessarily onerous and will not encourage or allow most in the accounts receivable management industry to avail themselves of the safe harbor.

G. The Bureau Must Urge the FCC to Provide Clarity on the Definition of What is Considered an Autodialer for Text Messaging to be a Viable Option

Congress provided the CFPB, not the FCC, with rulemaking and supervisory authority over the accounts receivable management industry. Yet the FCC is making policy decisions impacting debt collection without consulting with or working closely with the Bureau. The FCC's refusal to clarify onerous interpretations under the TCPA, will have a direct impact on whether debt collection agencies can develop compliance programs for sending text messages.

The FCC's refusal to act is despite the fact that the D.C. Circuit recently struck down the FCC's 2015 Order and remanded key questions to it including asking it to define what is considered an autodialer.[185] ACA has outlined the FCC's need to act extensively in coordination with many other financial services industry participants.[186]ACA urges the Bureau to work more collaboratively with the FCC to ensure that the many industries under the CFPB's jurisdiction seeking answers from the FCC, are provided with them. This is the only way that the industry will be able to fully assess its compliance abilities and risks for sending text messages.

XIV. COMMENTS ON §1006.100- RECORD RETENTION

Calculating the time frame for record retention requirements is not as easy as it may seem. ACA strongly encourages the Bureau to consider the interplay of the proposed three-year record retention requirement with other laws or legal requirements imposed on the accounts receivable management industry. In addition, ACA urges the Bureau to narrow the proposed record retention requirements to communications or attempted communications with a consumer as opposed to any person. Narrowing the record retention requirement in this manner is in line with the purpose of the FDCPA.

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[185] Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018).

[186] *See e.g.*, ACA International Continues Fight for Clarity Under TCPA by Joining Petition to FCC (May 4, 2018), *available* at https://www.acainternational.org/news/aca-international-continues-fight-for-clarity-under-tcpa-by-joining-petition-to-fcc.

Finally, ACA urges the Bureau to consider that its record retention requirements may implicitly require a collector to retain call recordings and that for smaller agencies this would be a disproportional cost. To counter this disparity, the Bureau should provide some safeguard measures for smaller agencies in the accounts receivable management industry that would exempt them from retaining call recordings if the cost exceeds a specified proportional sum of their annual net worth.

The Bureau has proposed in Regulation F Section 1006.100 to establish a new regulatory requirement for the accounts receivable management industry to maintain records that demonstrate they are in compliance with the requirements contained within the Regulation:

> § 1006.26 Record Retention. A debt collector must retain evidence of compliance with this part 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.

As drafted, the Bureau's proposed record retention requirements are too broad and should be narrowed. In addition, the Bureau should take this opportunity to further clarify the proposed end dates, including the terms "communicate" and "attempt to communicate." The Bureau should consider tiered or proportionality requirements that would apply to smaller agencies.

A. The Bureau Should Narrow This Requirement to a Collector's Last Communication or Attempted Communication with a Consumer

The Bureau should narrow the proposed record retention requirements to communications or attempted communications "with a consumer" as currently defined in §803(3).[187] The purpose of the FDCPA is to protect consumers from

[187] Any natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. § 1692a(3).

abusive, deceptive, and unfair debt collection practices by debt collectors.[188] With that purpose in mind, it seems that maintaining records that demonstrate a collector's compliance with the FDCPA should be limited to consumers as opposed to any person.

"Any person" under the FDCPA could mean credit reporting agencies, of course. But record retention requirements for the FCRA would be covered by its own statute of limitations rules.

Collector systems are able to currently record the date of last communication with a consumer. Employing an "any person" approach could be expensive, unpredictable, and arbitrary.

1. Communication or Attempted Communication Definition Should Be Clarified

ACA has previously discussed definitions contained in proposed Section 1006.2, which includes definitions for the terms "communication" and "attempted communication." ACA urges the Bureau to clarify the definitions of these terms to better enable the accounts receivable management industry to calculate the start and end dates of the proposed retention requirements.

2. The Bureau's Proposal, In Effect, Requires That Accounts Receivable Management Industry Retain All Call Recordings

Smaller agencies would likely be detrimentally and disproportionately impacted by the proposed record retention requirement. As noted by the Small Business Review Panel, the costs of record retention, particularly for retention of recorded telephone calls, is likely to cause high costs for smaller accounts receivable management industry participants. As noted in the SBREFA report, some smaller accounts receivable management industry participants retain certain information, such as recorded phone calls, for a short amount of time, such as a year, because storing additional data could be cost-prohibitive. In addition, at least one accounts receivable management industry participant reported that the record retention requirement may result in it ceasing to record calls in order to eliminate high recordkeeping costs.

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[188] 15 U.S.C. § 1692.

In the proposed comments to Section 1006.100, the Bureau states that the proposed record retention requirements do not impose a requirement on any accounts receivable management industry to record telephone calls. However, if a collector does record telephone calls, they must retain those recordings "if the recordings are evidence of compliance." It is very difficult to imagine an instance where a recorded telephone call would not be "evidence of compliance." The FDCPA imposes a number of requirements on the accounts receivable management industry, for example, the prohibition of engaging in any conduct that is harassing, oppressive, or abusive in connection with the collection of a debt. It is clear that any recorded telephone call would demonstrate a debt collector's compliance with this prohibition.

For many smaller accounts receivable management industry participants, the answer will likely be to cease recording calls so as to avoid high recordkeeping costs. Ultimately, this could negatively impact consumers as it would impose increased difficulty in monitoring internal compliance.

The Bureau should perhaps impose a tiered requirement specific to call recordings that takes into account the higher proportional costs of maintaining recorded calls for small accounts receivable management industry participants.

XV. COMMENTS ON §1006.104 – RELATION TO STATE LAWS

Overall, ACA generally agrees with the approach the Bureau has taken with § 1006.104 and proposed comment 104-1. In particular, ACA appreciates the further clarification afforded by proposed comment 104-1 by specifying that disclosures describing additional protections under State law do not contradict the requirements of the FDCPA or the corresponding provisions of Regulation F.

Many states require disclosures regarding time-barred debt, and ACA understands that the Bureau may also ultimately require a disclosure about time-barred debt pending additional testing. ACA would request that the Bureau make efforts to ensure that any required disclosure on time-barred debt be uniform across jurisdictions. In the Debt Collection Quantitative Disclosure Testing notice the Bureau published on February 2, 2019, the Bureau provided several sample validation notices that included proposed disclosures about time-barred debt.

Overall, the required disclosures are becoming very long and risk providing too much irrelevant information to consumers.

XVI. COMMENTS ON §1006.108 and PROPOSED APPENDIX A

With proposed § 1006.108 and Proposed Appendix A the Bureau seemingly will allow States to supplant the FDCPA and Regulation F with stricter and inconsistent state laws. This approach violates the FDCPA.

While the FDCPA generally allows States to enforce their own debt collection laws, the Bureau has spent years developing Regulation F in an effort to provide a uniform approach to debt collection that appropriately balances consumer protection with industry burdens, and the Bureau should not through the FDCPA's exemption process invite States to disrupt this balance. For the credit-and-collection industry to best comply with the FDCPA, the Act must be consistently and predictably applied.

Patchwork state collection laws serving in place of the Act and Regulation F would hinder this effort, hurting both consumers and industry. The Bureau apparently recognizes this risk, but the lone statement in Appendix A that State law following an exemption will constitute the requirements of Federal law "except to the extent such State law imposes requirements not imposed by the Act" does not resolve the ambiguity around the scope of a state law exemption created by the rest of proposed § 1006.108 and Appendix A. Accordingly, ACA asks the Bureau to clarify that only state laws with "requirements substantially similar to" the FDCPA and Regulation F can replace the federal collection regime.

A. State Exemption from the FDCPA and the Bureau's Proposal

FDCPA section 817 provides that the Bureau shall by regulation exempt from the requirements of the Act "any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to *requirements substantially similar* to those imposed by [the FDCPA], and that there is adequate provision for enforcement."[189] Current

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[189] 15 U.S.C. § 1692o (emphasis added).

Regulation F implements section 817, setting forth procedures and criteria that enable states to apply to the Bureau for exemption of debt collection practices within the applying state.[190] However, while section 817 requires that the applying state's requirements be "*substantially similar*," proposed Regulation F seemingly takes a more liberal approach, exempting not only those state laws that are "substantially similar" but also those that "provide greater protection for consumers" than the FDCPA.[191] Through §1006.108 and Appendix A, the Bureau proposes to substantially retain these exemption procedures and criteria with certain clarifications.

Proposed §1006.108(a) and Appendix A would contradict the express intent of Congress. Whereas, existing § 1006.4(a)(1)(i) requires that defined terms and rules of construction must be "the same" as the FDCPA, the Bureau proposes to interpret section 817's substantial similarity standard to also apply to defined terms and rules of construction—and further interprets that standard to "permit[] variation from FDCPA defined terms and rules of construction, as long as the State law definitions and rules of construction are substantially similar to *or more protective of consumers than the FDCPA*." The Bureau, accordingly, proposes that Appendix A use the phrase "substantially similar" rather than "the same." Additionally, the Bureau proposes to retain in Appendix A the limitation that "[a]fter an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part."[192]

Under the new rules, to be eligible for an exemption, the debt collection practices within an applying state would need to be subject to requirements that are substantially similar to, or provide greater protection for consumers than, the provisions *of the proposed Regulation F* corresponding to FDCPA sections 803 through 812. The Bureau further proposes to clarify in Appendix A that section 817's "substantially similar" standard applies to the Bureau's consideration of all aspects of the State law for which the exemption is sought, including defined terms and rules of construction.

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[190] 12 C.F.R. §§ 1006.1 through 1006.8.

[191] 12 C.F.R. § 1006.2.

[192] *See* 12 C.F.R. § 1006.6(d).

B. The Bureau Should Clarify that State Laws that Impose Additional or Different Requirements Cannot Replace the FDCPA or Regulation F

Congress passed the FDCPA not only to eliminate abusive debt collection practices by debt collectors but also to ensure that those accounts receivable management industry participants who refrain from using abusive debt collection practices are not competitively disadvantaged and to promote consistent State action.[193] As the Bureau recognizes, regulation of debt collection imposes costs on the accounts receivable management industry, which—when passed on to creditors—can ultimately reduce consumers' access to credit. It is with these purposes and considerations in mind that the Bureau has undertaken years of industry and consumer outreach, testing, and research to develop the scope and substance of proposed Regulation F. The Bureau's Proposed Rule seeks to maintain an appropriate balance between protecting consumers and not unnecessarily burdening the collection industry, as such overregulation can negatively impact credit markets and consumers. (e.g. New York's 2015 regulations).

The Bureau's protocol for enabling states to obtain an exemption from the FDCPA and Regulation F, however, risks upsetting this balance by seemingly allowing different, more stringent state law to displace Federal law. Such a regime is not supported by the FDCPA's plain language and is inconsistent with the Act's purpose and, therefore, may not be entitled to deference from courts. ACA requests the Bureau clarify that states only may receive an exemption from the FDCPA and Regulation F for laws that are "substantially similar" to Federal law, and not those that impose added or different obligations.

ACA is concerned that the Bureau's proposed state exemption protocol departs from FDCPA section 817's clear statutory language so that courts may not give the Bureau's rule *Chevron* deference.[194]

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[193] 15 U.S.C. § 1692(e).

[194] See, Chapter 2, Section I.F.2. at 42, *supra* ("First, a reviewing court must determine whether the meaning of the statute addressing the precise issue before the court is clear. If the statute is clear, that is the end of the inquiry, and the court and the agency must give effect to Congress's unambiguously expressed intent.)

2. *The Bureau's Approach to State Exemption is Broader than that Plainly Allowed by Section 817 and, therefore, may not be entitled to deference.*

Section 817 directs the Bureau to develop regulations to exempt from the FDCPA's requirements "any class of debt collection practices within any State if the Bureau determines" such practices are subject to State law "*requirements substantially similar* to those imposed by [the FDCPA], and that there is adequate provision for enforcement."[195] Although the Act does not define "substantially similar" requirements, State debt collection laws that require additional or different obligations or timing—or that apply to additional or different actors—do not fit the plain meaning of the phrase. Yet, the Bureau's regulations appear to sweep in such dissimilar State laws. While existing Regulation F recognizes that the Bureau must establish procedures and criteria for exemption "as provided in section 817," the rules provide that the State laws may be exempt if they "are substantially similar to, *or provide greater protection for consumers than*, those imposed under sections 803 through 812 of the Act," thereby grafting on a much broader and unsupported standard.[196] With the proposed § 1006.108 and Appendix A, the Bureau seeks to maintain this same criteria and allow stricter State laws to provide the basis for an exemption.

The Bureau's interpretation of section 817's substantial similarity standard to include State laws that "provide greater protection for consumers than" Federal law is premised on FDCPA section 816. That section does not address State exemptions but instead describes the Act's preemptive scope, providing that the FDCPA preempts only "inconsistent" State laws and "only to the extent of the inconsistency."[197] Section 816 expressly clarifies that "a State law is not inconsistent with [the FDCPA] if the protection such law affords any consumer is greater than the protection provided by this subchapter." No such language appears in section 817. Unlike section 816, section 817 does not speak in terms of whether the State law is consistent or inconsistent with Federal law but rather whether the State law is "substantially similar" to Federal law.

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[195] 15 U.S.C. § 1692o (emphasis added)

[196] 12 C.F.R. §§ 1006.2; 1006.3; 1006.4

[197] 15 U.S.C. § 1692n.

Moreover, whether a State law can stand in addition to a Federal law is a different issue than whether State law and State enforcement should completely displace Federal law and the Bureau's enforcement thereof. It thus makes sense that Congress would use different language to describe preemption limits than to provide criteria for State exemption and that the different language used would not be coextensive. State laws that are "substantially similar" to the FDCPA and Regulation F are those that reflect the same balance between consumer protections and industry obligations as Federal laws, and not those that impose any infinite range of stricter consumer protection.

Had Congress intended section 816's preemption test to be the same as section 817's exemption test, it would have used the same language. But it did not, and the Bureau should not disregard the sections' clear differences by grafting section 816's preemption test onto section 817. By doing so, the Bureau would risk a reviewing court invalidating its proposed exemption procedures and criteria.

3. Allowing Inconsistent State Laws to Replace the FDCPA and Regulation F Is Not in Line with the FDCPA's Purpose or the Bureau's Rulemaking Authority.

The FDCPA is not a one-sided statute. While the Act is intended to protect consumers, it is also focused on ensuring that those in the accounts receivable management industry who avoid abusive collection practices are not competitively disadvantaged.[198] To accomplish this balancing, the FDCPA—and the Bureau—should "promote consistent State action to protect consumers against debt collection abuses."[199] Thus, it is the role of the FDCPA and the Bureau to define what is and is not a covered debt collection abuse, and not the role of individual States to do so.

To that end, ACA opposes the Bureau's proposal to "permit[] variation from FDCPA defined terms and rules of construction, as long as the State law definitions and rules of construction are substantially similar to *or more protective of consumers than the FDCPA*." As described above, the plain language of section 817's substantial similarity standard does not encompass State laws that are more stringent than the FDCPA. Further, allowing States to redefine the FDCPA's

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[198] 15 U.S.C. § 1692(e).

[199] *Id.*

defined terms threatens to disturb proposed Regulation F's updated collection regime. For instance, under the Bureau's proposed construction a State could redefine new terms like "communication" to include—as opposed to exclude—a "limited-content message." Or the State could redefine "debt collector" to include first-party creditor, greatly broadening the scope of the FDCPA beyond Congress's intentions.

In prescribing a rule under consumer financial laws, the Bureau must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule[.]"[200] Adopting proposed § 1006.108 and Appendix A to allow stricter and different State law to supplant the relevant Federal law—and thereby disregard the years spent formulating balanced rules under proposed Regulation F—would not result in a balancing of the benefits and costs and would not carry out the purposes of the FDCPA.[201] By allowing States with *"more protective*" debt collection laws to define the scope of FDCPA, the Bureau risks disregarding the extensive efforts it has undertaken to reshape the FDCPA for modern technology and its attendant challenges and opportunities.

ACA accordingly urges the Bureau to remove from § 1006.108 and Appendix A any exemption for State laws that provide greater protection for consumers than Federal law and, instead require that to qualify for the exemption the State law must be the same as or "substantially similar to" the FDCPA and Regulation F. Such a clarification is consistent with existing § 1006.6(d) and the language in Appendix A that "[a]fter an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part." In other words, State law is not "substantially similar to" Federal law where it imposes stricter, different, or additional debt collection requirements and such inconsistent State law does not displace the FDCPA and Regulation F. Leaving the proposed § 1006.108 and Appendix A as written will lead to uncertainty to the detriment of consumers and industry.

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[200] 12 U.S.C. § 5512(b)(2)(A)(i).

[201] 12 U.S.C. § 5512(b)(1) ("The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.").

CONCLUSION

ACA appreciates the opportunity to provide comments on the NPRM to implement the FDCPA. If you have any questions concerning our letter, please contact Leah Dempsey at the contact information below.

Sincerely,

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