## September 19, 2019

### ATTORNEY GENERAL RAOUL URGES CFPB TO PUT CONSUMERS BEFORE DEBT COLLECTORS

**Chicago** — Attorney General Kwame Raoul, as part of a bipartisan coalition of 28 attorneys general, filed comments with the Consumer Financial Protection Bureau (CFPB) urging the agency to revise its proposed debt collection rule and place the interests of consumers above those of debt collectors.

"Despite the prominence of its mission to protect consumers in its name, the Consumer Financial Protection Bureau has continued to introduce policies that prioritize the interests of businesses and debt collection agencies – at the expense of the consumers it is supposed to protect," Raoul said. "In the absence of true consumer protection by the CFPB, I will continue to stand with my counterparts across the country to put our residents and families first."

In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) after finding "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors… [that] contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." Importantly, Congress noted that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." Despite decades of public and private enforcement of the FDCPA, widespread deception and abuse have continued in the $11.5 billion debt collection industry.

Raoul and the coalition commend certain aspects of the CFPB's proposed rule. For instance, they note in their comments that the rule, proposed in May 2019, would prohibit so-called "passive debt collection" — a particularly coercive practice in which debt collectors report debts to credit reporting agencies before even attempting to collect on them. The proposed rule also expressly acknowledges that it does not preempt state laws that are more protective of consumers than the FDCPA.

Raoul and the coalition argue that the proposed rule falls short by allowing debt collectors to:

- Place up to seven calls per week for each debt a consumer has. According to the CFPB's own research, almost 75 percent of consumers with one debt in collection have multiple debts in collection, meaning a consumer with five debts in collection could receive up to 35 calls per week.
- Send a virtually unlimited number of electronic communications, including direct messages on social media platforms, without consumers' consent. Because electronic communications, such as texts and emails, are essentially cost free for debt collectors, these companies would have no incentive to minimize these communications.
- Infringe upon a consumer's right to privacy. When contacting consumers, debt collectors could speak with any third party who happens to answer the consumer's phone (such as a roommate) and leave what the CFPB refers to as a "limited content message." While this message will purportedly not convey information regarding a debt, the CFPB ignores the likelihood that people will become familiar with the generic and formulaic language and recognize these messages for what they are.
- Take advantage of consumers who fundamentally do not understand their rights or obligations when it comes to time-barred or "zombie" debts, as the CFPB's own surveys attest. First, the proposed rule will allow debt collectors to collect debts even if they cannot file suit due to the expiration of a statute of limitations. In fact, in some jurisdictions, by paying any portion of the debt a consumer restarts the statute of limitations, essentially giving the collector back the right to sue. Second, the proposed rule would water down consumer protections because it would only allow a debt collector to sue or threaten to sue if they "know or should know" that the applicable statute of limitations has

expired; whereas, the current "strict liability" standard means collectors violate the law if they sue on expired debt. Whether they knew or had reason to know is irrelevant.

- More easily file baseless lawsuits on a massive scale. The proposed rule would specifically erode the FDCPA's requirement that attorneys be meaningfully involved with debt collection litigation, which would overwhelm state courts with lawsuits that are based on form complaints.

Finally, a glaring omission of the proposed rule is that it does not cover first-party creditors. In the comments, Raoul and the coalition of attorneys general argue that there is no reason to treat those who originated a defaulted loan differently from third-party debt collectors. The CFPB has the statutory authority to extend the protections against unfair, deceptive, and abusive practices to all debt collectors, yet declined to do so.

Joining Raoul in submitting the letter are the attorneys general of California, Colorado, Connecticut, Delaware, Idaho, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia.

September 18, 2019

**VIA ELECTRONIC SUBMISSION**

Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

**Re: Proposed Rule Concerning Debt Collection Practices (Regulation F) (Docket No. CFPB-2019-0022)**

Dear Director Kraninger:

On behalf of the 28 undersigned State Attorneys General (the "States"), we write in response to the Consumer Financial Protection Bureau's (the "CFPB") request for comments on its proposed debt collection rule (the "Proposed Rule").[1] We appreciate the opportunity to comment on the Proposed Rule, which will impact the estimated 49 million American consumers who are contacted each year by a debt collector.[2] While the Proposed Rule is laudable in certain respects, on each of the most significant issues affecting consumers in the Proposed Rule, the CFPB elevates the interests of the debt collection industry over consumers. We urge the CFPB to reconsider the Proposed Rule, as discussed below.

## Introduction

Lawful debt collection plays a legitimate and important role in our national economy, as a lender's ability to recover a loan if a borrower defaults increases the availability and affordability of credit. At the same time, the importance of debt collection does not give debt collectors carte blanche to collect unpaid debts in whatever manner they wish.

Complaints about debt collection are consistently among the top categories of consumer complaints to most of our offices.[3] Our offices devote significant resources to enforcement actions against unscrupulous debt collectors. Despite these efforts, however, our experience suggests that deception and abuse are widespread in the $11.5 billion dollar debt collection industry.[4]

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[1] *See Debt Collection Practices (Regulation F)*, 84 Fed. Reg. 23,274 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

[2] *See id.* at 23,373 n.617, 23,389 n.701.

[3] *See* F.T.C., *Consumer Sentinel Network Data Book 2018*, Feb. 2019, at 22-73, *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2018/consumer_sentinel_network_data_book_2018_0.pdf; Nat'l Consumer L. Ctr., *Debt Collection in the States*, 2019, *available at* https://www.nclc.org/images/pdf/debt_collection/fact-sheets/fact-sheet-debt-collection-complaints-in-states.pdf. All websites cited in this letter were last visited on September 17, 2019.

[4] *See* Proposed Rule at 23,276. Credit card and other financial services debts account for most of the debt collection industry's revenue. *See* C.F.P.B., *Fair Debt Collection Practices Act: BCFP Annual Report 2019*, Mar. 2019, at 9-10, *available at*

The Proposed Rule, issued pursuant to the CFPB's rulemaking authority under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the "FDCPA"), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 11-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), is commendable in certain respects. We are pleased that the Proposed Rule's frequency limitation treats unanswered calls the same way as answered calls, recognizing that unanswered calls can and do cause stress, anxiety, and even panic. We also welcome the Proposed Rule's prohibition on so-called "passive debt collection," whereby debt collectors report debts to credit reporting agencies before even attempting to collect the debt. We also appreciate the CFPB's acknowledgement that its Proposed Rule would not preempt state laws that are more protective of consumers than the Proposed Rule.[5]

But on the most critical issues, the Proposed Rule falls far short. For example, while we appreciate the CFPB's desire to place a bright-line limit on the number of times debt collectors can call consumers, applying this limitation per debt instead of per consumer results in what we – and the majority of consumers – regard as an unacceptably high volume of phone calls. Similarly misguided is the Proposed Rule's approach to electronic communications. Despite repeatedly acknowledging that electronic communications such as texts and emails are essentially costless for debt collectors, the Proposed Rule places no meaningful restrictions on the number of electronic communications debt collectors can send, and even goes so far as to authorize debt collectors to contact consumers through social media. For most consumers, the Proposed Rule will result in more phone calls, a barrage of emails and texts, and even social media contacts.

More broadly, the Proposed Rule disregards the CFPB's statutory mandate to protect consumers from an industry with a well-documented history of misconduct. While the issues addressed by the Proposed Rule are undoubtedly complex and require balancing of interests, the CFPB is not writing on a blank slate. In 1977, Congress enacted the FDCPA based on its findings that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors" and, importantly, that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[6] In 2010, Dodd-Frank authorized the newly-created CFPB to implement and enforce the FDCPA, among other laws, "for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[7] On issue after issue, the Proposed Rule places the interests of debt collectors over the interests of consumers, upending the careful balance Congress created

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https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf (the "2019 FDCPA Report").

[5] *See* Proposed Rule § 1006.104 ("Neither the Act nor the corresponding provisions of this part annul, alter, affect, or exempt any person subject to the provisions of the Act or the corresponding provisions of this part from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the Act or the corresponding provisions of this part, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with the Act or the corresponding provisions of this part if the protection such law affords any consumer is greater than the protection provided by the Act or the corresponding provisions of this part.").

[6] *See* 15 U.S.C. §§ 1692(a), (b).

[7] 12 U.S.C. § 5511(a).

in the FDCPA and Dodd-Frank between lawful debt collection and consumer protection and privacy.

## I. States' Objections to the Proposed Rule

### A. The Proposed Rule's Call Frequency Limit Would Not Meaningfully Reduce Calls for the Majority of Consumers

The FDCPA prohibits a debt collector from "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[8] Court decisions interpreting this provision have been inconsistent, and we believe both debt collectors and consumers would benefit from a bright-line rule. Unfortunately the Proposed Rule's frequency limit does not adequately serve the interests and rights of consumers.

The Proposed Rule would prohibit debt collectors from placing a telephone call to a consumer (1) more than seven times within seven days or (2) within a period of seven consecutive days after the debt collector has a conversation with the consumer.[9] With the exception of student loans, this frequency limit applies per debt, not per consumer.[10] Violating the frequency limit would constitute a per se violation of the FDCPA and the CFPA, while complying with the frequency limit would provide a safe harbor from liability under those same statutes.[11]

We believe applying the frequency limit on a per debt basis renders any benefits to consumers illusory, and for reasons the Proposed Rule itself acknowledges. First, according to the CFPB's research, "almost 75 percent of consumers with at least one debt in collection have multiple debts in collection."[12] Thus, a consumer with five debts in collection could receive up to 35 calls per week (in addition to virtually unlimited emails and text messages, described below). Further, it is not uncommon for a single medical appointment to result in bills from multiple different providers, each of which could end up in collections if the patient is unable to pay. Thus, the Proposed Rule increases the likelihood that a single medical emergency would result in dozens of consumer contacts, which the CFPB has recognized has a deleterious effect on consumer well-being. Such a result should be unacceptable, as both the CFPB and the Federal Trade Commission have taken the position in enforcement proceedings that debt collectors violate the FDCPA when they place multiple telephone calls to debtors per day or week for extended periods of time.[13]

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[8] 15 U.S.C. § 1692d(5).

[9] *See* Proposed Rule at 23,310. The proposed frequency limit would apply to calls to "any person," not only the consumer who was a party to the transaction creating the debt. *See id.* at 23,311.

[10] *See id.* at 23,313.

[11] *See id.* at 23,311.

[12] *See id.* at 23,312 & n.300; s*ee also* C.F.P.B., *Consumer Experiences with Debt Collection*, Jan. 2017, at 13, table 1, *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (noting that "57 percent of consumers with at least one debt in collection reported having between two and four debts in collection").

[13] *See, e.g.*, Compl., ¶ 63, *F.T.C. and C.F.P.B. v. Green Tree Servicing LLC*, Case No. 15-cv-2064 (D. M.N.) (alleging that debt collector violated the FDCPA when it "(i) called consumers between seven and twenty times per day, every day, week after week; (ii) called consumers again despite having

Second, the CFPB recognizes that debt collectors take advantage of consumers' multiple debts: "Debt collectors who are aware that many consumers have multiple debts in collections and that these consumers are already receiving telephone calls from other debt collectors may be placing additional calls with intent to annoy, abuse, or harass those consumers."[14] The Proposed Rule affords no protection to these consumers with multiple debts.

Several States and cities have implemented telephone call frequency limits to protect consumers from harassment, oppression, and abuse. For example, regulations issued by the Massachusetts Attorney General and New York City prohibit debt collectors from contacting consumers more than twice per week.[15]

The States recommend that the CFPB prohibit debt collectors from placing a telephone call: (1) more than three times within seven days (regardless of how many debts a collector is trying to recover), or (2) within a period of seven consecutive days after the debt collector has a conversation with the consumer.

### B. The CFPB Must Place Meaningful Limitations on Debt Collectors' Use of Electronic Communications

The States recognize that regulation of collection activity must necessarily evolve along with changing technology and consumer habits. While we welcome the CFPB's attempt to establish clarity regarding methods of communication that did not exist when the FDCPA was passed, the States believe that the Proposed Rule prioritizes the interests of the debt collection industry at the expense of the protection of consumers from abusive practices that the FDCPA was designed to curb. Most importantly, the Proposed Rule's failure to prescribe specific limits on electronic communications means that consumers will be inundated with a flurry of electronic communications, resulting in confusion and possibly unwanted data and messaging fees. To prevent these harms, the States believe that debt collectors should have to obtain affirmative consent from consumers before using any method of communication other than mail or phone. Additionally, the States are deeply concerned with the CFPB's proposal to allow collectors to send validation notices to consumers electronically without prior consent and without compliance with the E-SIGN Act. Finally, the States believe that use of social media in collection activity is inappropriate and should be banned.

#### 1. The Proposed Rule Should Require Affirmative Consent for Any Electronic Contact

Consistent with the purpose of the FDCPA, the CFPB should require affirmative consumer consent before allowing any communication method other than phone or mail. The Proposed Rule's authorization for electronic communications without consumer consent is likely to increase the collection industry's use of such communications methods, which will increase the burden of such communications on the consumer.

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already spoken to the consumers earlier that day; (iii) called consumers again as soon as a call is terminated; and (iv) left multiple voicemail messages for consumers in the same day"); Compl., ¶ 22, *F.T.C. and Illinois v. K.I.P., LLC*, Case No. 15-cv-02985 (N.D. Ill.) (alleging that debt collector violated the FDCPA when it "call[ed] consumers multiple times per day or night").

[14] *See* Proposed Rule at 23,312.

[15] *See* 940 Mass. Code Regs. 7.04(1)(f); N.Y.C.R.R., tit. 6, § 5-77(b)(1)(iv).

As an initial matter, the CFPB appears to assume reliable electronic access is the norm for debt-laden consumers, and cites a cell phone industry study for the proposition that 90 percent of Americans have unlimited texting plans.[16] Even taking such data at face value, the populations who do not have unlimited texting plans are also most likely to have debts in collection.[17] Moreover, recent data shows that significant gaps in connectivity still exist among rural, low-income, and elderly populations, all of which are more likely to be debtors.[18] For example, more than 25 percent of low-income households lack home broadband.[19] In fact, many low-income households are able to connect to the internet only via a smartphone pre-paid data plan, meaning that unconsented-to electronic communications from debt collectors consume a scarce resource and may even violate the statutory prohibition on collection communications which cost consumers money.[20] Moreover, many rural areas continue to lack infrastructure for broadband access.[21] The lack of affordable, consistent digital access for the populations most likely to have debts in collection will essentially shift many of the costs of collections onto consumers, contrary to the intent of the FDCPA. Consumers are in the best position to evaluate whether they would incur such costs or whether the efficiency and ease of such electronic communications are worth the costs. The CFPB should therefore require that electronic communications be prohibited unless and until the consumer affirmatively opts in.

An affirmative consent requirement would also solve another significant problem with the Proposed Rule: the lack of guidance on appropriate methods of obtaining a consumer's contact information for purposes of delivering an electronic communication. The Proposed Rule's only mention of this is in the context of a safe harbor from liability in the event of a prohibited third-party disclosure.[22] In reality, however, the Proposed Rule allows debt collectors to obtain consumers' electronic contact information by any means it chooses to pursue (regardless of accuracy), provided the collector is willing to forego the protection of a bona fide error defense. Allowing such discretion in identifying consumers' contact information poses a significant risk of third-party disclosure and compromises consumer privacy, which was a central feature of the FDCPA.

In fact, the Proposed Rule's opt-out requirements are also even less protective of consumers than opt-out requirements of other consumer protection laws related to communication. Proposed 1006.6(e) would require "a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or

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[16] *See* Proposed Rule at 23,305 n.255.

[17] As the Proposed Rule observes, consumers with one or more debts in collection "tend to have lower incomes, be under age 62, and be non-white." *See id.* at 23,388 n.693.

[18] Pew Research Center, *Internet/Broadband Fact Sheet*, June 12, 2019, *available at* https://www.pewinternet.org/fact-sheet/internet-broadband/.

[19] *Id*.

[20] Pew Research Center, *Mobile Fact Sheet*, June 12, 2019, *available at* https://www.pewinternet.org/fact-sheet/mobile/.

[21] Andrew Perrin, Pew Research Center, *Digital Gap Between Rural and Non-Rural America Persists*, May 31, 2019, *available at* https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/.

[22] *See* Proposed Rule at 23,400.

attempts to communicate by the debt collector to that address or telephone number."[23] The Telephone Consumer Protection Act, by contrast, allows consumers to "revoke consent in any manner that clearly expresses a desire not to receive further messages."[24] Further, the CAN-SPAM Act requires e-mail marketers to provide a reply e-mail or internet-based means by which an opt-out may be sent by the consumer.[25] As drafted, the Proposed Rule's opt-out provision leaves it up to the debt collector to decide on the means by which the opt-out is communicated to consumers, with the potential for the collector to select a burdensome method of opting out. If, for example, a debt collector only accepted opt-out requests submitted in writing and sent by U.S. mail, not only would opting out require consumers to incur costs (in the form of stamps and paper), it would also require access to a computer and printer, which, as noted above, many consumers do not have. Any opt-out rule should allow consumers to opt-out by any reasonable means, including replying to the email or text message. As one circuit court recognized, such a rule would incentivize collectors to "mak[e] available clearly-defined and easy-to-use opt-out methods."[26] The CFPB should require that the opt-out notice be placed prominently in the body of the communication, where a consumer could see it without having to scroll down.[27]

### 2. The CFPB's Proposed Limits on Phone Contacts Should Apply to All Methods of Contact

As discussed elsewhere in this comment, the States welcome the CFPB's recognition that debt collector phone calls should be subject to bright line limits. The States believe, however, that any limitations should apply to *all* forms of communication, whatever the medium. The lack of a specific limitation on electronic communications is likely to drastically accelerate a trend that has already begun, with 36 percent of collectors reporting that they already use e-mail to contact consumers.[28] As a large collection industry trade organization recent stated in a federal amicus brief, "a debt collector 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.[29]

Coupled with an explicit limitation on phone calls, the CFPB's explicit authorization of written electronic communications without an equivalent bright line limitation is likely to drive a

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[23] *See id.* at 23,401.

[24] *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7691, 7996 ¶ 63 (June 18, 2015), *set aside in part by ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[25] *See* 15 U.S.C. § 7704(a)(3)(A), 47 U.S.C. § 227(b)(2)(E).

[26] *ACA Int'l v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

[27] Of course, requiring affirmative consent would alleviate any deficiency in the current opt-out provision by rendering it unnecessary, provided that consent can be revoked by any reasonable means.

[28] Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016* , Nov. 2017, at 5, *available at* https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf?viawrapper.

[29] Brief of ACA Int'l as Amicus Curiae in Support of Appellant and Reversal, *Lavallee v. Med-1 Solutions*, ___ F.3d. ____, (No. 17-3244), 2018 WL 841892, at *6.

dramatic increase in electronic communications with debtors.[30] The CFPB's own data shows that repeated or frequent phone calls make up the majority of consumer complaints about collector communication tactics, and suggests that these contacts themselves negatively affect consumer financial well-being.[31] The CFPB's data is consistent with the experience of States in handling consumer complaints, a large volume of which involve frequent contacts made by collectors. As the CFPB recognizes, electronic communication methods are easily automated and "essentially costless."[32] Such a shift would be a deeply problematic sea change in the collection industry, one that is likely to erode the protections the FDCPA was intended to provide.

In proposing the rule, the CFPB apparently assumes that electronic communications are less intrusive than phone calls. Like phone calls, however, many smartphone users receive a notification when they receive a text or an email, and have to interrupt what they are doing to determine whether the text or email needs immediate attention.[33] Further, the CFPB's stated reasoning for not imposing a limit – the lack of evidence that communications methods other than phone calls are used to harass consumers – is likely due to the fact that such contacts by such methods are not specifically contemplated under current law.[34]

Making all methods of contacting debtors subject to the same specific limitations would provide needed clarity to the law, benefitting consumers and debt collectors alike. Indeed, the CFPB recognized the benefits of a bright line limitation in its comments about the phone call limitation.[35] Although texts and emails would be limited by the FDCPA's general prohibition on intentional abuse and harassment, this prohibition has been difficult to apply, spawning a significant amount of litigation as well as conflicting court decisions.[36] To avoid such an

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[30] Debt collectors are also likely to increase use of electronic communications due to a recent decision by the Federal Communications Commission permitting telephone companies to offer their customers call-blocking services by default. *See In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, F.C.C. 19-51, ¶¶ 31-32 (June 7, 2019). Notably, in rejecting an opt-in system – in which consumers would have to contact their telephone service provider and request call blocking – the FCC made the general point that inertia makes opt-in systems of limited use to consumers. *See id.* at ¶ 28 & n.64 ("Many economic studies have demonstrated that inertial decision making by consumers can diminish the consumer benefits from new service offerings and retail competition.").

[31] *See 2019 FDCPA Report* at 17; C.F.P.B., *Financial Well-Being in America*, Sept. 26, 2017, at 55-56, *available at* https://files.consumerfinance.gov/f/documents/201709_cfpb_financial-well-being-in-America.pdf.

[32] Proposed Rule at 23,305

[33] *Meadows v. Franklin Collection Serv., Inc.*, 414 F. App'x 230, 234 (11th Cir. 2011) (recognizing that plaintiff had to stop what she was doing to see who was calling).

[34] National Association of Retail Collection Attorneys, *Comment Letter on Advanced Notice of Proposed Rulemaking for Rules Implementing the Fair Debt Collection Practices Act* at 30 (February 28, 2014).

[35] *See* Proposed Rule at 23,305.

[36] *Compare Fleming v. Associated Credit Servs., Inc.*, 342 F. Supp. 3d 563, 581 (D.N.J. 2018) (15 or 16 calls over a three month period could support 1692d violation), *with Carman v. CBE Grp., Inc.*, 782 F. Supp. 2d 1223, 1229 (D. Kan. 2011) (149 calls over two months was insufficient to demonstrate intent to harass).

outcome, the CFPB should take this opportunity to provide a bright line limit on all forms of communication.

### 3. The CFPB Should Not Authorize Electronic Delivery of the Validation Notice Without E-SIGN Compliance

The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.* (the "E-SIGN Act"), establishes criteria for an electronic record to satisfy a statutory requirement that a communication or disclosure be made in writing.[37] Most importantly, the E-SIGN Act requires the consumer to "affirmatively consent[]" to receiving such communications electronically.[38] The Proposed Rule would exempt certain communications from "the E-SIGN Act's consent process," including the validation notice required by the FDCPA.[39]

The validation notice required by the FDCPA is a "significant feature" of the FDCPA, consistent with Congress' remedial purpose.[40] The validation notice is intended to "provide the consumer with notice of how and when the debt was originally incurred or other sufficient notice from which the consumer could sufficiently dispute the payment obligation."[41] Congress "added the validation of debts provision specifically to ensure that debt collectors gave consumers adequate information concerning their legal rights."[42] There is no "doubt that Congress intended the validation notice provision to protect consumers throughout the entire lifecycle of a debt."[43] Moreover, providing the validation notice to consumers was not thought to significantly increase the burdens or costs associated with collection, since debt collectors were expected to have ready access to this information.[44]

The CFPB's proposal to allow debt collectors to deliver critical validation information about consumers' debt electronically is likely to diminish the utility of one of the most significant consumer tools in the FDCPA. Electronic delivery of the validation notice would result in significant cost savings for debt collectors and is therefore likely to come into widespread use if the Proposed Rule goes into effect. The States therefore urge the CFPB to reconsider this aspect of the Proposed Rule, and require full compliance with the E-SIGN Act. Full compliance with the E-SIGN Act is particularly appropriate in light of the collection industry's acknowledgement that E-SIGN compliance is not burdensome and "would work well for electronic delivery of validation notices."[45]

The electronic delivery of the validation notice is likely to significantly decrease the utility of the notice for consumers. First, as discussed above, many low-income consumers lack

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[37] *See* 15 U.S.C. § 7001(c).

[38] *See id.* § 7001(c)(1).

[39] See Proposed Rule at 23,361.

[40] *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1080 (9th Cir. 2016).

[41] *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 786 (6th Cir. 2014).

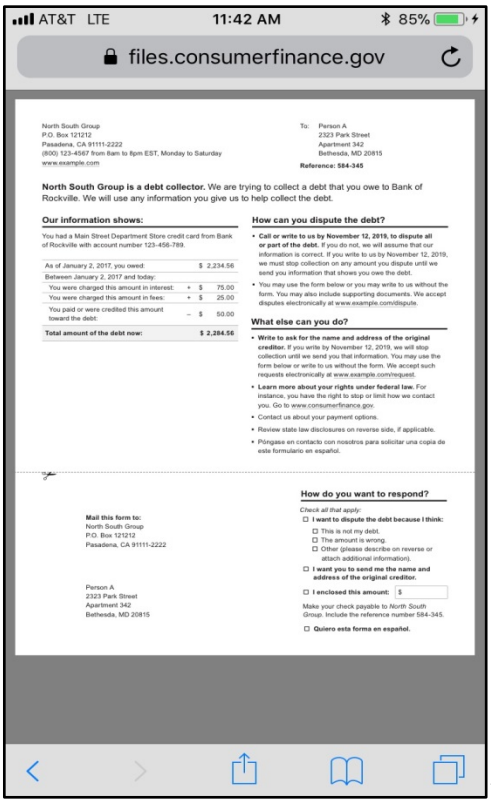
[42] *Hernandez*, 829 F.3d at 1080.

[43] *Id*.

[44] *Haddad*, 758 F.3d at 786.

[45] ACA International, *Comment Letter on Advanced Notice of Proposed Rulemaking for Rules Implementing the Fair Debt Collection Practices Act* at 15 (February 28, 2014).

regular access to the internet, and many more have access only via pre-paid data plans. Although the Proposed Rule is correct to require that the validation notice be "accessible" regardless of the size of the consumer's screen, the notice may be difficult to comprehend and process on a small screen even if it is "accessible." For example, the following is the approximate size of the CFPB's model validation notice on the screen of an iPhone 6:



[46]

The text is too small to read unless magnified. Magnification, however, requires the consumer to read one small section of the page at a time, with the likelihood that important information will be overlooked or reviewed out of context. Further, allowing the notice to be delivered via a hyperlink in an email or a text message raises significant concerns about the notice being actually received or viewed by consumers. As one court has recognized, a validation notice that is delivered by a hyperlink – even a secure hyperlink – "is not likely to accomplish receipt of the validation notice" because many consumers do not click links in emails from senders they do not know.[47] Indeed, many consumers will be understandably reluctant to click on a hyperlink sent by a person they do not know.[48] In fact, many state Attorneys Generals advise consumers *not* to

[46] As the Second Circuit has explained, when including screen shots in legal papers, the resolution of a screen shot is slightly lower than the image as it would appear on an iPhone. *See Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 70-71 & nn.1-2.

[47] *Lavallee v. Med-1 Sols., LLC*, No. 115CV01922 - DML/WTL, 2017 WL 4340342, at *4 (S.D. Ind. Sept. 29, 2017), *aff'd* --- F.3d ----, No. 17-3244, 2019 WL 3720875 (7th Cir. Aug. 8, 2019).

[48] *See id*. ("There is no evidence that Ms. Lavallee should have recognized as safe an email from Med-1 Solutions.") (finding that validation notice was not "sent" to consumer when it was sent via email hyperlink). Notably, CFPB filed an amicus brief supporting the debtor in *Lavallee*. On appeal, the Seventh Circuit affirmed the district court's judgment for the debtor, describing the e-mails with hyperlinks as "gateways to an extended process that ends in the relevant message." *Lavallee*, 2019 WL

click on such links because of the risks posed by viruses, malware, or ransomware,[49] and the CFPB acknowledges this risk elsewhere in the Proposed Rule.[50] Widespread adoption of this method of delivery of validation notices may eventually decrease consumers' vigilance against such suspicious links, putting consumers at greater risk for phishing and identity theft scams.

#### 4. The CFPB Should Not Allow Debt Collectors to Contact Consumers Via Social Media

The States agree with the CFPB's ban on using public-facing social media to contact consumers. The States believe, however, that the CFPB should ban any collector-initiated communications via social media, including those that are not public facing. First, as the CFPB recognizes elsewhere in the Proposed Rule, "consumers do not appear accustomed to using such technologies in their financial lives."[51] Second, social media profiles are prone to misidentification and raise significant privacy concerns. Many social media services do not require users to use their real names, increasing the likelihood of debtor misidentification. Further, many social media providers use even the data exchanged through private messaging to show users advertisements and other information, meaning that users could be inundated with unwanted ads or news in addition to communications from debt collectors.[52] Accordingly, the CFPB should not allow debt collectors to use any form of social media – whether public or private-facing –for any communication with consumers.

### C. This Risks Posed by Limited Content Messages Far Outweigh the Benefits

According to the Proposed Rule, one of the reasons debt collectors place so many phone calls to consumers is because they are concerned that leaving a voicemail or a message with a third party may subject them to FDCPA liability.[53] To address this concern, the Proposed Rule introduces what it refers to as "limited-content messages" ("LCMs"). LCMs are messages designed to contain enough information to elicit a response from the consumer but not enough

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3720875, at *5. "The proper analogue is a letter that provides nothing more than the address of a location where the message can be obtained." *Id.*

[49] *See, e.g.*, Office of Minnesota Attorney General Keith Ellison, *Computer Malware and Phishing Schemes, available at* https://www.ag.state.mn.us/Brochures/pubComputerMalwareandPhishingSchemes.pdf; Office of the New Jersey Attorney General, *Consumer Alert: Beware of the Rising Threat of Computer "Ransomware" That Holds Your Data Hostage, available at* https://www.njconsumeraffairs.gov/News/Pages/05102016.aspx ("Never click on links in suspicious emails or pop up advertisements. Even if the source looks legitimate – like an email from your bank - play it safe by opening a new tab to go directly to the website.").

[50] *See* Proposed Rule at 23,291.

[51] *See id.* at 23,300.

[52] *See, e.g.*, Instagram User Agreement, https://help.instagram.com/519522125107875; Snapchat User Agreement, https://www.snap.com/en-US/privacy/privacy-center/; Tumblr User Agreement, https://www.tumblr.com/privacy/en.

[53] *See* Proposed Rule at 23,289-90. Another reason debt collectors place so many phone calls is to harass and annoy consumers to pay: "Some debt collectors may, in fact, place more than seven telephone calls to a person each week precisely because they believe that additional telephone calls may cause sufficient harassment or annoyance to pressure the person to respond or make a payment that the person otherwise would not have made." *Id.* at 23,314.

information to convey to a third party that the messages concern a debt. In our view, LCMs raise significant privacy concerns that far outweigh any benefits they may provide to debt collectors.

The Proposed Rule provides that LCMs must contain certain information and may contain other information, but nothing else. The CFPB has concluded that this limited amount of information does not meet the statutory definition of a communication under the FDCPA – "the conveying of information regarding a debt directly or indirectly to any person through any medium" – because it does not convey "information regarding a debt."[54] The following is the only information permitted in LCMs: a salutation, the consumer's name, a "generic statement that the message relates to an account," a request that the consumer reply to the message, the name and telephone number[55] of a natural person whom the consumer can contact, the date and time of the message, suggested dates and times for the consumer to contact the debt collector, and, if the LCM is transmitted electronically, "a clear and conspicuous statement" informing the consumer how to opt out of future electronic communications (*e.g.*, "Reply STOP to stop texts to this telephone number.").[56]

Because the information permissible in LCMs does not, in the CFPB's view, convey information regarding a debt, the Proposed Rule explicitly excludes LCMs from the definition of communication.[57] Because LCMs would not constitute communications under the FDCPA, they would not be subject to the FDCPA's prohibition on communicating with third parties.[58] LCMs would constitute attempts to communicate, however, and therefore be subject to the FDCPA's prohibition on unfair or unconscionable practices, and harassing or abusive conduct, including the Proposed Rule's frequency cap.[59]

A debt collector could transmit LCMs by leaving the consumer a voicemail, sending the consumer a text message, leaving a message orally with a third party who answers the consumer's telephone number, or sending a private direct message to a consumer via a social

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[54] *See id.* at 23,293.

[55] The telephone number must be expressed numerically and not as a vanity number (*e.g.*, "1-800-PAY-DEBT"). *See id.* at 23,292.

[56] *See id.* §§ 1006.2(j)(1), (2), 1006.6(e), comment 6(e)-1 (p. 23,412). With respect to the opt-out notice, as discussed above the Proposed Rule permits debt collectors to dictate the method by which consumers may opt out of electronic communications, and thus this an opt-out statement sent by text could just as easily provide as follows: "To STOP texts to this telephone number send a request in writing to P.O. Box 1234, Sioux Falls, South Dakota, 57117."

[57] *See id.* §§ 1006.2(b), (d).

[58] *See id.* at 23,290-91. For the same reason, LCMs would not be subject to the FDCPA requirement that a debt collector must "disclose in its initial communication with a consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." *See id.* § 1006.18(e), 23,290-91.

[59] *See id.* at 23,291 ("[C]onsumers may be harassed or otherwise injured not only by communications, but also by attempts to communicate, including when a debt collector conveys limited-content messages."); comment 14(b)(2)-1.i (p. 23,412). While it seems clear from the entirety of the Proposed Rule that LCMs are subject to the frequency limitation, the CFPB should explicitly say so in the final rule.

media platform that permits private direct messaging.[60] The Proposed Rule explicitly disallows transmittal of LCMs by two means: A debt collector could not transmit LCMs by email because the CFPB concluded that the email address could convey information regarding the debt, and consumers may be unlikely to respond to an email containing only a LCM because they may regard it as spam or a security risk.[61] Similarly, a debt collector could not orally convey LCMs directly to the consumer, because the CFPB concluded that a live conversation carried a significant risk that the debt collector would convey more information than permissible (for example, in response to the consumer's questions).[62]

In our view LCMs raise significant privacy concerns in at least three respects.

First, we do not believe the CFPB has sufficiently considered the possibility that, if LCMs are widely adopted by debt collectors, consumers will become familiar with the generic and formulaic nature of LCMs and recognize them for what they are: debt collection communications.[63] It is also not difficult to imagine computer algorithms discerning the true nature of LCMs, and consumers receiving LCMs by, say, direct message on Facebook will soon thereafter see ads for debt relief services. In these instances, LCMs would quite clearly convey information about a debt.

Second, LCMs transmitted orally to third parties are likely to convey impermissible information. The Proposed Rule recognizes that a live conversation with a consumer would likely include information beyond the LCM, and there is no reason to think a live conversation with a consumer's roommate – or any other third party who happens to answer the consumer's phone – would be any different.

Third, LCMs transmitted by social media direct messaging should be prohibited for the same reason the Proposed Rule prohibits the transmission of LCMs by email – namely, because the email address is likely to convey information concerning the debt. Most – if not all – social media platforms only permit registered users to contact other registered users. Thus, if a debt collector wanted to contact a consumer on a social media platform, the debt collector would need

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[60] *See id.* at 23,291 ("The proposal would enable a debt collector to transmit a limited-content message by voicemail, by text message, or orally."); comment 22(f)(4) (p. 23,414) ("If a social media platform enables a debt collector to send a private message to the consumer that is not viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi), however, § 1006.22(f)(4) does not prohibit a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of a debt by sending such a private message to the consumer, including by sending a limited-content message . . . .").

[61] *See id.* at 23,291.

[62] *See id.* at 23,291, comment 6(d)(1)-1 (p. 23,411) ("[I]f, during the course of the interaction with the third party, the debt collector conveys content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information regarding a debt, the message is a communication, as defined in § 1006.2(d), subject to the prohibition on third-party communications in § 1006.6(d)(1).").

[63] The Proposed Rule acknowledges that "some third parties who hear the [LCM] may discover that the caller is a debt collector, either because they have familiarity with the type of generic messages that debt collectors leave or because they do further research, such as by researching the telephone number," *id.* at 23,379, but does not address how this undermines the conclusion that LCMs do not convey information regarding a debt.

a profile. If the profile identifies the debt collector as a debt collector, then it has conveyed information concerning the debt.

In addition to these privacy concerns, we doubt that LCMs will reduce the volume of phone calls debt collectors place. The CFPB bases its Proposed Rule on the assumption that expressly authorizing debt collectors to leave voicemails and send texts and emails will result in fewer calls. But that assumes consumers respond to LCMs, and there is reason to think they will not. The generic and cryptic nature of LCMs may lead some consumers to believe the messages are a scam. Indeed, the CFPB itself has warned consumers that one "warning sign[] of debt collection scams" is withholding of information,[64] and many consumers are likely to ignore or delete LCMs.

For these reasons, we believe any benefits to consumers from LCMs are far outweighed by the significant privacy risks posed by the messages. We urge the CFPB to reconsider this aspect of the Proposed Rule.

### D. Time-Barred Debt

The interests and rights of consumers will not be adequately served by the adoption of the Proposed Rules regarding the collection of time-barred debt.[65] The Proposed Rule would permit debt collectors to continue to collect time-barred debt but would make it a per se violation of the FDCPA for a debt collector to file a lawsuit or threaten a lawsuit if the debt collector "knows or should know" that the statute of limitations has expired.[66] While we commend the CFPB for making lawsuits or threats of lawsuits regarding time-barred debt a focus, the "knows or should know" standard is problematic as the FDCPA in general is a strict liability statute. The CFPB should require a strict liability standard for time-barred debt collection and consider expanding the scope of collection practices this section addresses.

#### 1. A Strict Liability Standard Towards Collecting Time-Barred Debt Should Be Implemented

The Proposed Rule would prohibit a debt collector from suing or threatening to sue on a debt if the debt collector "knows or should know" that the applicable statute of limitations has expired. Traditionally, the FDCPA has been a strict-liability statute, and importing an intent element into it is problematic.[67] Section 1692(e)(2)(A) of the FDCPA forbids the false

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[64] Indeed, the CFPB itself has identified withholding information such as the name of the creditor or the amount owed as a "warning sign[] of debt collection scams." *See* C.F.P.B., *How to Tell the Difference Between a Legitimate Debt Collector and Scammers*, Oct. 17, 2018, *available at* https://www.consumerfinance.gov/about-us/blog/how-tell-difference-between-legitimate-debt-collector-and-scammers/.

[65] *See* Proposed Rule § 1006.26.

[66] *See id.* at 23,329. The Proposed Rule also contemplates the CFPB at some point in the future issuing a disclosure debt collectors would have to make when collecting time-barred debt.

[67] *See* 20 ALR Fed 3d Art, 5 ("The FDCPA is a strict-liability statute that is subject to the affirmative defense of a debt collector's bona fide error"); *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) ("To recover damages under the FDCPA, a consumer does not need to show intentional conduct on the part of the debt collector. The [FDCPA] is a strict liability statute, and the degree of a defendant's culpability may only be considered in computing damages.") (internal citation and quotation marks omitted).

representation of the legal status of any debt without qualifying that standard of whether the debt collector "knew or should know" a debt could be collected legally within a statute of limitations. Federal Circuit and District Courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in court to recover that debt violates §§1692(e) and 1692(f).[68]

The Proposed Rule relies on self-reporting for the proposition that debt collectors do not knowingly sue on time-barred debt.[69] This opens the door for collectors to plead ignorance if they so wish, and completely removes any teeth from the intent standard of "know or should have known." Additionally, the States maintain it will likely be unknown how often debt collectors file suit on time-barred debts because most lawsuits end in default judgments, and complaints filed in those cases are typically form complaints with no statute of limitations information.

The States recommend that the CFPB adopt a strict-liability standard, which would be in line with what the FDCPA intends to accomplish. This will better protect consumers, not only due to the reasons listed above, but also as few consumers alone would have the legal wherewithal to understand how to prove that a debt-collector "knew or should have known" a debt was time-barred. Further, the rate at which debts are bought and sold between collectors with incomplete or inaccurate information will increase the likelihood that a debt collector can claim ignorance in regards to statutes of limitations and pass the new standard.

### 2. Consumers Fundamentally Do Not Understand Their Rights Regarding Time-Barred Debt, Which Heightens the Risk for Abuse

The CFPB commissioned a study and relied upon its findings in support of the Proposed Rule.[70] Consumers of two groups, those with experience in interacting with debt collectors and those with none, were provided a sample notice regarding time-barred debt, and overwhelmingly reported confusion towards entire concepts, not just legal jargon. Consumers consistently reported confusion at what seemed to them to be conflicting and counterintuitive messages.

The States recommend that the CFPB generate more robust and exhaustive explanations of consumer rights in regards to time-barred debt, perhaps with examples of the rule in operation, so the risk of abuse can be lowered. Consumers' current understandings of their rights on this

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[68] *See Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting) ("Every court to have considered the question has held that a debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA."); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (explaining that a debt collector's filing of a time-barred lawsuit to recover a debt violates the FDCPA); *see also Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011) (indicating that threatened or actual litigation to collect on a time-barred debt violates the FDCPA). Courts have also held that seeking to collect debts that are barred by the statute of limitations violates state UDAP laws. *See, e.g.*, *Armbrister v. Pushpin Holdings, LLC*, 896 F. Supp. 2d 746, 756 (N.D. Ill. 2012); *Taylor v. Unifund*, 1999 U.S. Dist. LEXIS 13651 (N.D. Ill. May 3, 1999); *Commonwealth v.* Cole, 709 A.2d 994 (Pa. Commw. Ct. 1998).

[69] *See* Proposed Rule at 23, 329.

[70] *See* Fors Marsh Group, *Debt Collection Validation Notice Research: Summary of Focus Groups, Cognitive Interviews, and User Experience Testing*, Feb. 2016, at 35-40, *available at* https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-summary-report.pdf.

topic, coupled with the new "know or should have known" standard of intent introduced by the CFPB, will compound the misunderstandings and risks consumers already face.

### E. Meaningful Attorney Involvement

According to a recent report by the CFPB, 53% of consumers who said they had been contacted about one or more debts in collection said those contacts included attempts to collect on a debt the consumer did not believe they owed or attempts to collect an amount the consumer believed to be incorrect.[71] This is unsurprising, given that purchasers of debt typically only receive a summary of a creditor's records as part of a debt purchase, often in the form of an Excel spreadsheet with no guarantee of the reliability or accuracy of the information.[72] And, as the Office of the Comptroller of the Currency has recognized, "[e]ach time account information [concerning a debt] changes hands, risk increases that key information will be lost or corrupted, calling into question the legal validity and ownership of the underlying debt."[73]

Based on these incomplete and unreliable records, debt collectors resort to litigation, relying on form complaints that are often a single-page and contain nothing but boilerplate. Debt collectors file these complaints on a massive scale, overwhelming many of our States' courts. Yet, because consumers largely fail to appear in court debt collectors frequently obtain default judgments without ever having to prove the debt. Once armed with a judgment, a debt collector can seek to garnish the debtor's wages, file a lien against a debtors home, or authorize a sheriff to seize the debtor's property.[74]

The FDCPA's requirement that attorneys involved with debt collection litigation be meaningfully involved has been an important check on the ability of debt collectors to inundate consumers with baseless debt collection lawsuits. In an abrupt departure from prior rulemakings, the CFPB has proposed a safe harbor (the "safe harbor") for meaningful attorney review that is at odds with federal and state efforts to curtail unfair and deceptive debt collection litigation. The Proposed Rule's safe harbor would deem a debt collector who establishes compliance with factors laid out in the safe harbor provision not to have engaged in false, deceptive, or misleading representations in filing debt collection litigation. An attorney is meaningfully involved in a debt collection lawsuit if the attorney reviews information supporting such pleadings, written motions, or other documents and determines, to the best of the attorney's knowledge that all legal allegations are warranted and all factual allegations contain evidentiary support. As written, the safe harbor would once again permit debt collection firms to file collection lawsuits

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[71] *See* C.F.P.B., *Consumer Experiences with Debt Collection*, Jan. 2017, *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[72] *See* C.F.P.B., *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*, July 28, 2016, at 8, *available at* https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

[73] O.C.C., OCC Bulletin 2014-37, Aug. 4, 2014, *available at* https://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

[74] *See, e.g.*, Tom Feltner, Julia Barnard, and Lisa Stifler, *Debt Collection Practices in Washington 2012-2016*, Mar. 2019, at 6, *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-washington-debt-by-default-15mar2019.pdf.

without obtaining any substantiation of the debt. We urge the CFPB to condition this safe harbor on reasonable substantiation requirements, or to eliminate it from the final rule in its entirety.

### 1. The Rule Provides Consumers No Real Protections from Abusive Debt Collection Litigation

Federal Rules of Civil Procedure 11(b), the stated basis for the CFPB's meaningful attorney involvement safe harbor, sets forth a standard for determining whether an attorney's conduct is subject to court sanctions. It is the minimum level of review and due diligence an attorney must perform prior to filing litigation. In the context of consumer debt collection litigation, however, this standard fails to offer any real protections for consumers against the proliferation of meritless debt collection lawsuits and potentially abusive use of state debt collection litigation.

The CFPB's proposed safe harbor would require an attorney to "draft or review" pleadings and other filings and "review information supporting such pleadings" to make a determination based on the best of the attorney's "knowledge, information, and belief."[75] Nothing in this provision indicates the level of review required to qualify for the safe harbor, and it appears to condone exactly what the CFPB has sought to prevent in its many enforcement actions to date – the mass-filing of lawsuits with the most minimal attorney review.[76]

A standard based on Rule 11 would effectively permit debt collectors to file litigation without possessing any reliable proof of a debt. As courts have interpreted Rule 11, evidentiary support for a lawsuit is valid if there is some support for a factual allegation, even if the support is weak or inferential.[77] According to rule 11(b)(3) an attorney does not need to separately identify "fact" and "inference," the attorney is only expected to certify that the factual contentions on the paper presented to the court have or will have evidentiary support.[78] An attorney satisfies the burden of rule 11 by confirming that "some evidence" supports their claims,[79] even if that evidentiary support is inferential or circumstantial.[80]

Applying this standard to debt collection litigation will mean that attorneys will need to do no more than perform a perfunctory review of the pleadings and refer to a spreadsheet or database to assess whether the information in the pleadings matches the database. Similarly,

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[75] Proposed Rule § 1006.18(g).

[76] *See, e.g., In re Pressler & Pressler, LLP*, Consent Order (File No. 2016-CFPB-0009) (2016); *C.F.P.B. v. Frederick J. Hanna & Assocs., P.C.*, Stipulated Final Judgment and Order (Civil Action No. 1:14-cv-02211-AT) (N.D. Ga. 2015); *In re Encore Capital Grp., Inc.*, Consent Order (File No. 2015-CFPB-0022) (2015); *In re Portfolio Recovery Assocs., LLC*, Consent Order (File No. 2015-CFPB-0023) (2015).

[77] *See, e.g., Lucas v. Duncan*, 574 F.3d 772, 777 (D.C. Cir. 2009) (holding an attorney does not need to separately identify "fact" and "inference," but is only expected to certify that the factual contentions presented to the court have or will have evidentiary support); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991) (holding that prefiling factual investigation must uncover only "some" information to support the allegations in the complaint)

[78] *Id.*

[79] *MetLife Bank, N.A. v. Badostain*, 2010 WL 5559693, at 3 (D. Idaho Dec. 30, 2010).

[80] *See id*. (explaining direct evidence as supporting the truth of an assertion, such as eyewitnesses or a forensic report).

filing of robosigned affidavits would be entirely permissible under the CFPB's proposed safe harbor so long as the attorney has compared the affidavit with the information from the debt collection firm's database.

Not only will the CFPB meaningful attorney involvement safe harbor enable debt collectors to file suit with the most minimal evidence or no evidence at all, but consumers will struggle to effectively avail themselves of the protections of this proposed rule. Under Rule 11, the burden of proving a violation is on the moving party.[81] Applied to consumer debt collection litigation, this rule would place a heavy burden on a relatively unsophisticated consumer to show that an attorney for a large debt collection law firm has not met the vague standard proposed in the rule. Moreover, courts have emphasized that Rule 11 violations showed be imposed cautiously and only in rare circumstances,[82] suggesting that consumers would rarely succeed in a claim of meaningful attorney involvement.

### 2. The Rule Is Inconsistent with State and Federal Consumer Protections Efforts

The CFPB safe harbor is a severe weakening of the legal standards for meaningful attorney involvement that has grown out of the Bureau's own enforcement work, state enforcement work, and the protections established through the enactment of new state laws.

As an initial matter, the safe harbor is inconsistent with the CFPB's own enforcement actions, which have shown that debt collection law firms routinely filed tens of thousands or even hundreds of thousands of lawsuits against consumers without reviewing evidence of the debt. In 2015, CFPB entered into a consent order with Fredrick J. Hanna & Associates for deceiving consumers by filing lawsuits that were generated automatically and filed without an attorney reviewing whether there was evidence to support the allegations.[83] In this matter, CFPB set forth a standard for meaningful attorney involvement requiring that the law firm possess and review original account level documentation of the debt.[84] The CFPB imposed a similar requirement to obtain and review original account level documentation prior to suing a consumer on debt buyers Encore Group and Portfolio Recovery Associates, LLC in 2015 consent orders. The consent orders against these two debt buyers alleged that a substantial percentage of the lawsuits filed by the companies could not be proven or were false.[85] The CFPB used this same standard for meaningful attorney involvement in 2106 in the Pressler & Pressler matter,[86] and in the Work & Lentz, Inc. consent order in 2017.[87] The CFPB's suit against Forster & Garbus in

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[81] *See, e.g., Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000) (moving party must establish the elements of a Rule 11 violation).

[82] *See Laretz v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994) (courts should use extreme caution in imposing sanctions); *Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 175 (3rd Cir. 1993) (Rule 11 sanctions should be imposed only when the claim is patently unmeritorious or frivolous).

[83] *C.F.P.B. v. Frederick J. Hanna & Assocs., P.C.*, Stipulated Final Judgment and Order (Civil Action No. 1:14-cv-02211-AT) (N.D. Ga. 2015).

[84] *Id.*

[85] *In re Encore Capital Grp., Inc.*, Consent Order (File No. 2015-CFPB-0022) (2015); *In re Portfolio Recovery Assocs., LLC*, Consent Order (File No. 2015-CFPB-0023) (2015).

[86] *In re Pressler & Pressler, LLP*, Consent Order (File No. 2016-CFPB-0009) (2016).

[87] *In re: Works & Lentz, Inc.*, Consent Order (File No. 2017-CFPB-0003) (2017).

May 2019 alleged that this law firm used high-volume litigation tactics to collect debts from consumers without adequately reviewing account files to determine whether consumers actually owed the debts.[88] In all of these actions, the CFPB has consistently taken the position that meaningful attorney involvement requires the law firm to have its attorney review original account level documentation before filing suit against a consumer.

The CFPB's proposed safe harbor for meaningful attorney involvement would also undermine states' efforts to address some of the most harmful practices of debt collection litigation. For example, in Massachusetts, the Attorney General sued that state's largest debt collection law firm, Lustig, Glaser & Wilson, P.C., alleging that the firm had misled consumers by filing thousands of lawsuits without reviewing underlying proof that the consumer owed the debt.[89] In settling this litigation, Massachusetts required the Lustig firm to establish a process to ensure the firm's attorneys obtain and review proof of the debt before filing suit, much like the standard for meaningful attorney involvement set forth in the CFPB's orders against Hanna and the other debt collection law firms.[90]

In the absence of federal action, many of our States have enacted statutory and procedural protections for consumers to limit abusive debt collection litigation practices. New York, for example, requires certain debt collectors to submit supplemental affidavits in support of default judgment motions, including affidavits from the original creditor and each debt buyer sufficient to establish chain of ownership, and affirmations by attorneys that the statute of limitation to sue on the debt has not expired.[91] California,[92] Illinois,[93] Maine,[94] Maryland,[95] Massachusetts,[96] Minnesota,[97] North Carolina,[98] and Wisconsin[99] also impose pleading standards on debt buyers seeking default judgment against borrowers requiring proof of ownership and validity of the debt.

### 3. The Rule Fails to Account for The Significant Disadvantages Consumers Face In Debt Collection Litigation

The CFPB's proposed safe harbor seems to envision that the standard for civil litigation under Rule 11 will translate effectively into the debt collection context. Consumer debt collection litigation, however, bears little resemblance to the traditional dynamics of civil

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[88] Compl., *C.F.P.B. v. Forster & Garbus, LLP*, Case No. 2:19-cv-2928 (E.D.N.Y. 2019).

[89] *Commonwealth v. Lustig, Glaser & Wilson, P.C.*, No. 15-3852 (Mass. Super. Ct. Dec. 21, 2015).

[90] *In re: Lustig, Glaser & Wilson, P.C.*, Consent Order (Civil Action No. 15-3852BLS) (2017).

[91] *See* N.Y.C.R.R. §§ 208.14-a, 210.14-a, 212.14-a, 202.27-a.

[92] *See* Cal. Civ. Code § 1788.60.

[93] *See* Illinois Supreme Court Rules 280-280.4

[94] *See* 32 M.R.S.A. § 11019.

[95] *See* Md. Rule 3-306(d).

[96] *See* Mass. Unif. Small Claims Rule 2(b).

[97] *See* Minn. Stat. § 548.101.

[98] *See* N.C. Gen. Stat. § 58-70-150.

[99] *See* W.S.A. § 425.109.

litigation where opposing sides advocate their positions, test the evidence, and ultimately obtain a decision on the merits of the case. To the contrary, debt collection litigation is immensely one-sided. This is due in large part to the fact that the majority of consumers who have been sued for a debt are unrepresented and unfamiliar with the legal system. Studies of state debt collection cases have found that 90 to almost 99 percent of consumers sued by a debt collector did not have an attorney.[100] Without an attorney, these consumers are left on their own. They must attempt to read and understand the lawsuit despite having no legal training or background. They must gather evidence to support a defense, and then articulate those defenses in writing and potentially orally before a judge – all tasks that are completely foreign to anyone without legal training.[101] In addition to lacking knowledge of the law or the legal process, consumers often struggle with the many practical problems related to rearranging their lives to appear in court, including figuring out the schedule for court dates, arranging time off work, and coordinating transportation to court.[102] Those consumers who do appear and attempt to make a pro se defense are not likely to be successful.[103]

By contrast, most large creditors and debt buyers use debt collection law firms that specialize in filing suit against consumers in state court.[104] These law firms typically engage in non-legal collection activities, such as calling consumers and sending out dunning letters, and have a large number of non-attorney staff who operate the phones, prepare outgoing collection

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[100] *See, e.g.*, Testimony of April Kuehnhoff, National Consumer Law Center, Before the Massachusetts Joint Financial Services Committee In support of S.120/H.2811, An act relative to fairness in debt collection (Sept. 25, 2017), citing data collected by Erika Rickard, Associate Director of Field Research at Harvard Law School's Access to Justice Lab, in September 2017 using the Massachusetts Trial Court Electronic Case Access at http://www.masscourts.org (in four Massachusetts district court small claims sessions, the percentage of consumers sued to collect consumer debts who were represented by attorneys ranged from 0.3% to 1.4% in 2016); Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, ProPublica (May 5, 2016) (99% of defendants sued by New Jersey collection law firm Pressler & Pressler did not have attorneys; 97% of defendants in debt collection cases filed in New Jersey's lower level court in 2013 did not have attorneys; 91% of defendants in Missouri debt collection cases in 2013 did not have attorneys); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 288 (2011) (fewer than 10% of defendants served in debt collection lawsuits were represented by an attorney in Dallas County, Texas);

[101] *See* Chris Albin-Lackey, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, Jan. 20, 2016, *available at* https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor (discussing challenges of unrepresented defendants in debt collection lawsuits); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, March 10, 2014, *available at* https://www.masslegalservices.org/system/files/library/Junk%20Justice_Statitical%20analysis%20of%204400%20lawsuits%20by%20debt%20buyers.pdf; J. David Griener, Dalie Jimenez, and Lois Lupica, *Self-Help, Reimagined*, 92 Ind. L.J. 1119 (2017).

[102] J. David Griener, Dalie Jimenez, and Lois Lupica, *Self-Help, Reimagined*, 92 Ind. L.J. 1119 (2017).

[103] *See* Holland, *Junk Justice*, at 212 ("Defendants who filed a response had better outcomes than those who did not file a response, but the outcomes were poor overall.")

[104] *Id.*

letters, and engage in other collection efforts.[105] The law firms are able to use a largely automated system that combines templates and data from the creditor or debt buyer to generate huge numbers of lawsuits, motions, and other court filings.[106] Once a lawsuit is filed, the professional debt collection law firms use a network of attorneys to appear in courts across the state.[107] A single coverage attorney may handle dozens of lawsuits in a single court session. Cases rarely go to trial,[108] with most consumers defaulting altogether.

The Proposed Rule's optimistic view of consumer litigation is also inconsistent with the CFPB's previous recognition that debt collection litigation exposes consumers to a "higher risk" of harm:

> The Bureau believes that consumers face a higher risk of harm during litigation than during other points in the collection process. Many consumers fail to defend in litigation, making it easier for collectors to obtain judgments against the wrong consumer, for the wrong amount, or where the collector had no legal right to collect. Consumers who do defend may bear significant costs, including the cost of legal counsel or the cost of appearing in court. And consumers against whom judgments are entered may be subject to collection methods, such as garnishment, which are more severe than those they would otherwise encounter during the pre-litigation collection process. Because of the higher risk of consumer harm from claims of indebtedness made without reasonable support in complaints filed in litigation, the Bureau believes that a higher level of support is needed to make claims in litigation than in most initial collection activity.[109]

Notwithstanding these heightened risks, the Proposed Rule treats litigation as essentially another debt collection segment.

#### 4. The Rule Allows Debt Collectors to Obtain Judgments on Debts Without Ever Having Proof

The vast majority of debt collection lawsuits end in a default judgment against the consumer.[110] Consumers may default for a number of reasons, including fear of appearing in

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[105] *See id.*

[106] *Id.*

[107] *Commonwealth v. Lustig, Glaser & Wilson, P.C.*, No. 15-3852 (Mass. Super. Ct. Dec. 21, 2015).

[108] *See* Holland, *Junk Justice*, at 212 ("only 9 (0.4%) of the judgments were the result of a trial.")

[109] *See* C.F.P.B., *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*, July 28, 2016, at 12, *available at* https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

[110] *See* Tom Feltner, Julia Barnard, and Lisa Stifler, *Debt Collection Practices in Washington 2012-2016*, Mar. 2019, *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-washington-debt-by-default-15mar2019.pdf; F.T.C., *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, July 2010, at 7 ("panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most

court, uncertainty about how to defend themselves, difficulty taking time off of work or coordinating transportation, or even lack of notice of the suit altogether. Ultimately, this means that a debt collector rarely has to prove that the amount it is alleging is correct and that the consumer is the one who owes the debt. Without a rule requiring some form of documentation and review prior to filing, the CFPB will be enabling creditors and debt buyers to continue to rely on default judgments as the means to convert unproven debts into enforceable judgments.

By transforming a contractual debt into a state court judgment, debt collectors can wield immense power over consumers, starting with the fact that a judgment on a debt can be enforceable for much longer than the underlying contractual debt. For example, some states allow judgments to be enforceable for up to twenty years, and can be renewed once, making it effectively a life-time of debt for most consumers.[111] Through our enforcement efforts we have seen instances in which debt collectors were able to obtain a judgment and continue collection on that judgment for decades. This is particularly harmful to consumers when the underlying debt may have been time barred. The FTC's report on the debt buying industry reported that many consumers had been sued on time-barred debts.

Not only do judgments harm consumers by extending the time to collect the debt, but often debt collectors apply both pre-judgment and post-judgment interest to the debt. This can cause a debt that was already financially out of reach to continue increasing almost indefinitely. In some states, the rate of post-judgment interest can exceed 10 percent causing the debt to grow faster than the consumer can pay it off leaving the consumer trapped in endless debt payments to the debt collector.[112]

A judgment also gives debt collectors access to a range of powerful collection options. With a judgment a debt collector can obtain payments from consumers involuntarily through garnishment of wages or attachment of a bank account. Even the threat of garnishment or attachment by a debt collector can be enough to pressure a consumer to pay even when they cannot afford it. Similarly, a debt collector can wield significant leverage against a consumer with a judgment by placing a lien on the consumer's property. Often a consumer whose home qualifies as exempt property will end up paying a debt collector for fear of what will happen because of the lien or because they do not understand that they are entitled to the protections for exempt property. In some of the most egregious instances, we have seen debt collectors erroneously place a lien on the wrong consumer's property and worked to help consumers clear their title.

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panelists indicating that the rate in their jurisdictions was close to ninety percent"; collecting studies), *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

[111] *See, e.g.*, Tom Feltner, Julia Barnard, and Lisa Stifler, *Debt Collection Practices in Washington 2012-2016*, Mar. 2019, at 6, *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-washington-debt-by-default-15mar2019.pdf (judgments enforceable for 20 years in Washington state); *see also* General Laws Ch. 260, § 20 (twenty years); Chptr. 8, Art. 2, Sec. 211, New York State Consolidated Laws (twenty years).

[112] In Massachusetts, the interest rate for pre- and post-judgement interest is 12%. *See* M.G.L c. 231 § 6(c)

Finally, consumers who are elderly, disabled, or reliant on government benefits are particularly vulnerable to debt collection litigation and the consequences of enforcing a judgment. CFPB's consumer survey shows that debt collection is one of the top concerns for older consumers, particularly those who are struggling with debt in retirement.[113] Consumers who rely on government benefits, such as social security disability insurance or supplemental security income, report experiencing significant distress when a debt collector threatens to garnish their income. The stress of dealing with debt collectors who wrongly attempt to garnish their government benefits can aggravate existing medical conditions and lead to further health problems.[114]

### F. Application to FDCPA-Covered Debt Collectors Only

The States urge the CFPB to promulgate a rule that applies equally to the collection activities of first-party creditors and third-party debt collectors. Dodd-Frank granted the CFPB with supervisory and UDAP authority over first-party creditors. Under the Consumer Fraud Protection Act ("CFPA") the CFPB has the rulemaking authority to extend the debt collection rules to include first-party creditors. It is natural to extend debt collection rules to ensure that first-party creditors and third-party debt collectors are operating on an equal playing field with protection for all consumers.

The application of the debt collection rules to first-party creditors has garnered bi-partisan support in Congress. H.R. 5434 was introduced in the U.S. House of Representatives in June 2016 and it proposed to amend the FDCPA by broadening the definition of "debt collector" to include first-party creditors.[115] Although the bill did not make it out of the Committee on Financial Services, it did receive bi-partisan support and was sponsored by two Republicans and two Democrats.[116]

Both first-party creditors and third-party debt collectors harm consumers when they engage in unfair, deceptive, and abusive debt collection practices. There is no reason to treat their actions differently. In 2015, 49 States and the CFPB reached a $136 million settlement with Chase Bank USA N.A. and Chase Bankcard Services Inc. over improper debt collection practices the States alleged violated their state consumer fraud statutes. Many of the alleged actions also constituted FDCPA violations such as selling uncollectable accounts to debt buyers, subjecting consumers to collections activity for debts that were not theirs, and inaccurate credit reporting that may have affected consumers' ability to obtain credit. While some have argued that debts held by original creditors or loan servicers are more likely to be valid because they have access to all the records of the debt, the Chase case clearly shows that conclusion is not always accurate. No original creditor, loan servicer, contingency creditor, or debt buyer should be allowed to harm consumers through unfair, deceptive, or abusive debt collection practices.

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[113] C.F.P.B., *A Snapshot of Debt Collection Complaints Submitted by Older Consumers*, Nov. 5, 2014, at 14 -15, *available at* https://files.consumerfinance.gov/f/201411_cfpb_snapshot_debt-collection-complaints-older-americans.pdf

[114] *Id.*

[115] H.R. 5434, 114th Cong. (2d Sess. 2016).

[116] The sponsor of H.R. 5434 was Rep. Mia Love (R, UT), and the co-sponsors included Rep. Keith Ellison (D, MN), Rep. French Hill (R, AR), and Rep. Emanuel Cleaver (D, MO). H.R. 5434, 114th Cong. (2d Sess. 2016), https://www.congress.gov/bill/114th-congress/house-bill/5434/cosponsors.

The States respectfully request that the CFPB amend the proposed rule to include first-party creditors in the debt collection rules. The proposed rule as currently written creates a tiered system of regulation that fails to hold first-party creditors to the same standards as third-party debt collectors and risks harming consumers.

### G. Issues the Proposed Rule Fails to Address

On February 28, 2014, 31 states submitted a comment to the CFPB in response to its 2013 advanced notice of proposed rulemaking (the "2014 Letter").[117] We are disappointed that the Proposed Rule fails to address many of the issues raised in the 2014 Letter. We see no need to restate the entirety of the 2014 Letter, but the following issues warrant further comment.

#### 1. Substantiation of Debt In Collection and Litigation

As discussed above in the context of the Proposed Rule's meaningful attorney involvement safe harbor, the Proposed Rule does not impose any requirements that debt collectors substantiate debt prior to litigation. For the reasons discussed above and in the 2014 Letter, the CFPB should require debt collectors to possess complete and reliable account-level documentation throughout the life of a debt, including litigation and, if applicable, post-judgment enforcement.

#### 2. Transfer of Information Upon Sale or Assignment

To ensure that debt collectors have sufficient documentation necessary to prove ownership of the debt, the CFPB should require creditors and debt collectors to include documentation when debts are sold, assigned, or otherwise transferred. Transfer requirements should also include data security safeguards. Improved quality and quantity of account-level documentation throughout the life of a debt will ensure the integrity of the debt collection system.

#### 3. Debt Payment Allocation

The CFPB should require debt collectors to inform consumers that they have the right to determine how the debt collector allocates payments, a particularly acute problem given how many consumers have multiple debts in collection (as the Proposed Rule acknowledges).[118] More significantly, the CFPB should also establish regulations to ensure that debt collectors are not garnishing funds from a consumer that are in fact exempt from garnishment.

#### 4. Servicemembers

The Proposed Rule also fails to address the challenges faced by servicemembers with debt in collection. As explained in detail in the 2014 Letter, members of the military are subject to potential disciplinary action under the Uniform Code of Military Justice ("UCMJ") for unpaid debts and are thus particularly vulnerable to coercion and abuse by predatory debt collectors seeking to leverage that threat of punishment. Debt collection communications to servicemembers should be regulated to limit the ability of predatory collectors to exploit servicemembers' obligations under the UCMJ to remain in good financial standing. Debt

[117] A copy of the 2014 Letter is enclosed herewith and incorporated herein by reference.

[118] *See* Proposed Rule at 23,312 & n.300 (noting that "almost 75 percent of consumers with at least one debt in collection have multiple debts in collection").

collectors should be prohibited from threatening a servicemember with disclosure of his or her debt to a superior and from contacting superior officers, even for location information.

## Conclusion

We appreciate the CFPB's efforts to bring more clarity to the law surrounding debt collection. Unfortunately, the Proposed Rule fails to offer consumers the meaningful protection they need, and we urge the CFPB to fundamentally reconsider its approach before issuing a final rule.[119]

Respectfully submitted,

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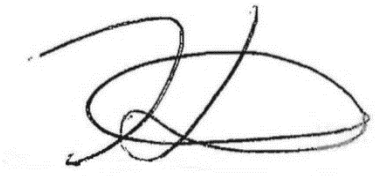

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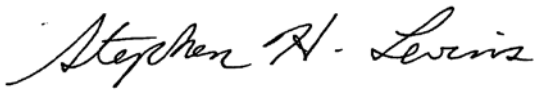

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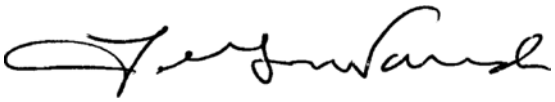
[119] Hawaii joins this letter by its Office of Consumer Protection, an agency which is not part of the Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity purposes, this letter refers to the "States," and this designation, as it pertains to Hawaii, includes the Executive Director of the State of Hawaii's Office of Consumer Protection.



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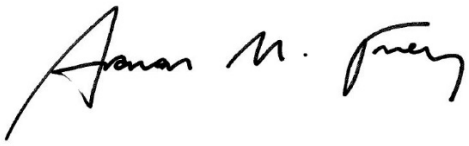

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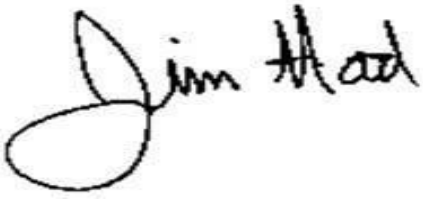

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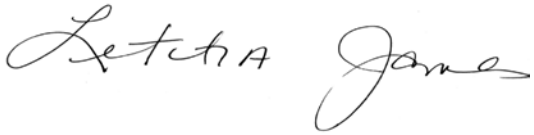

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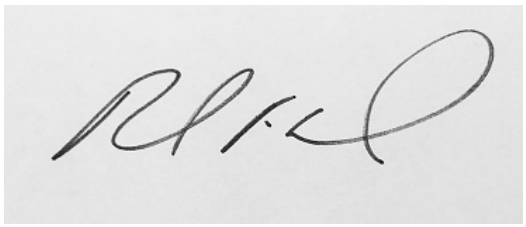

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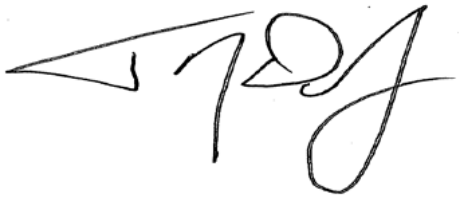

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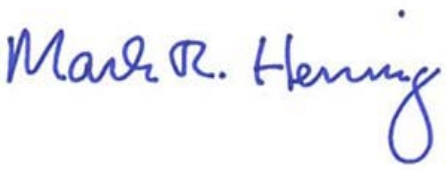

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