Center for Responsible Lending
Leadership Conference on Civil and Human Rights
NAACP
National Fair Housing Alliance
National Coalition for Asian Pacific American Community Development (National CAPACD)
National Urban League
UnidosUS

Comments to the Consumer Financial Protection Bureau
Notice of Proposed Rulemaking
Debt Collection Practices (Regulation F)
12 CFR Part 1006
Docket No. CFPB-2019-0022
RIN 3170-AA41

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1700 G Street NW
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The **Center for Responsible Lending (CRL)** is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 37 years, Self-Help has provided over $7 billion in financing through 146,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 145,000 mostly low-income members through 45 retail credit union locations in North Carolina, California, Florida, Greater Chicago, and Milwaukee.

The **Leadership Conference on Civil and Human Rights** is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Through advocacy and outreach to targeted constituencies, The Leadership Conference works toward the goal of a more open and just society - an America as good as its ideals. The Leadership Conference is a 501(c)(4) organization that engages in legislative advocacy. It was founded in 1950 and has coordinated national lobbying efforts on behalf of every major civil rights law since 1957.

Founded in 1909, the **National Association for the Advancement of Colored People (NAACP)** is our nation's oldest, largest and most widely known grassroots civil rights organization. The principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate racial prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof.

National Coalition for Asian Pacific American Community Development (National CAPACD) is a progressive coalition of local organizations that advocate for and organize in low-income Asian American and Pacific Islander (AAPI) communities and neighborhoods. We strengthen and mobilize our members to build power nationally and further our vision of economic and social justice for all. Our members include more than 100 community-based organizations in 21 states and the Pacific Islands. They implement innovative affordable housing, community development and community organizing strategies to improve the quality of life for low-income AAPI communities.

Founded in 1988 and headquartered in Washington DC, **the National Fair Housing Alliance (NFHA)** is the only national organization dedicated solely to ending discrimination in housing. NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, community development, advocacy and enforcement. Today NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. NFHA recognizes the importance of "home" as a component to the American Dream and hopes to aid in the creation of diverse, barrier free communities across the nation.

The **National Urban League** helps African Americans and others in underserved communities achieve their highest true social parity, economic self-reliance, power, and civil rights. The League promotes economic empowerment through education and job training, housing and community development, workforce development, entrepreneurship, health, and quality of life.

UnidosUS, previously known as NCLR (National Council of La Raza), is the nation's largest Hispanic civil rights and advocacy organization. Through its unique combination of expert research, advocacy, programs, and an Affiliate Network of nearly 300 community-based organizations across the United States and Puerto Rico, UnidosUS simultaneously challenges the social, economic, and political barriers at the national and local levels. For 50 years, UnidosUS has united communities and different groups seeking common ground through collaboration, and that share a desire to make our country stronger.

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I. Introduction and Executive Summary

The undersigned consumer and civil rights organizations appreciate the opportunity to submit comments on the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed rule on debt collection. As organizations dedicated to eliminating abusive financial practices – particularly focused on communities of color and low- to moderate-income consumers – we are deeply concerned about the proposed rule's content and impact. Without significant changes, we believe the rule will perpetuate abusive practices, harm already struggling families, and widen the racial wealth gap. We urge the Bureau to:

- Ban the collection of time-barred debt in and out of court;
- Eliminate any "safe harbor" for collection attorneys who make false, deceptive or misleading representations; and require debt collection attorneys to review original account-level documentation that establishes the amount owed and allows the attorney to make an independent conclusion that they are suing the right person, for the right amount of money, and that their client has the legal right to sue;
- Require that debt collectors provide a Spanish translation on the reverse of every validation notice and provide translated versions of the validation notice to the consumer in a language the consumer can understand if certain circumstances are met;
- Require that debt collectors provide a "Statement of Rights," as the Bureau proposed in Small Business Review Panel Outline, and require collectors to provide a Spanish translation of the Statement of Rights. And, provide translated versions of the validation notice to the consumer in a language the consumer can understand if certain circumstances are met;
- Limit the number of times a debt collector may attempt to call a consumer to three attempts per week per consumer;
- Require debt collectors to obtain consumer consent before contacting consumers via electronic communication methods, including email, text messaging, and private social media messages;
- Allow consumers to opt-out of electronic communication via any method convenient to them;
- Eliminate the proposal to allow "limited content messages," and prohibit their exemption from being considered "communication" under the Fair Debt Collection Practices Act (FDCPA); and
- Improve the model validation notice to eliminate the option to make a payment and require that debt collectors provide a method to dispute a debt electronically in addition to providing the "tear off" option.

In addition, we urge the Bureau to retain these portions of the proposed rule:

- Limit debt collectors to one conversation per week, though the limit should be per consumer, not per debt;

- Clarify that consumers have the right to request that a debt collector stop calling or using another form of communication without stopping all communications;
- Prohibit the sale, transfer, or placement of certain debts, including debts discharged in bankruptcy, already paid, or subject of an identity theft report. And, we urge the Bureau to prohibit the sale of time-barred debts;
- Prohibit the “parking” of debts on credit reports by prohibiting a debt collector from furnishing information to a credit reporting agency about a debt before communicating with a consumer about the debt; and
- Prohibit the use of public social media platforms to communicate with consumers.

II. The Proposed Rule Will Harm Already Struggling Families, Particularly Families of Color.

As the first federal agency with the authority to promulgate regulations under the Fair Debt Collection Practices Act (FDCPA), the CFPB has the opportunity to set strong, clear standards and help reform the worst practices in the marketplace. However, the proposed rule fails to address common and well-documented abusive practices in debt collection and instead authorizes a landscape of continued harassment for already struggling families.

Debt collection practices impact millions of families nationwide. Nationally, 33 percent of adults with credit files had debt in collections in 2016, with a median amount of $1,450.[1] The vast majority of families struggling with debt collection would pay their debts if they could. Families are already in a tough position, often due to circumstances outside their control, such as a medical emergency that saddles them with debt. Families should not also have to contend with harassment and other illegal practices, especially when the collector improperly targets the wrong person for the debt or pursues a debt that is beyond the statute of limitations. Moreover, the CFPB's proposed rule will have a disproportionate impact on families of color.

i. Systemic economic conditions are driving increased debt loads for the average family.

Wage stagnation, as well as already high and rising housing, health care, and education costs have dramatically increased debt loads for the average family.[2] For most of the past generation, pay has lagged farther and farther behind overall productivity.[3] From 1973 to 2013, hourly compensation of a typical worker increased just 9 percent, while productivity increased 74 percent.[4] And, there has been extraordinarily rapid growth of annual wages for the top 1 percent compared to everyone else. Since 1979, the top 1 percent's wages rose 138 percent, while wages of the bottom 90 percent rose just 15 percent.[5] Between 1979 and 2013, the hourly wages of middle-wage workers were stagnant, increasing just 6 percent – or less than

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[1] Ratcliff, C., et. al. (2017). Debt in America: An Interactive Map. *Urban Institute*. Retrieved from https://apps.urban.org/features/debt-interactive-map/. This number underestimates the number of consumers in collection, as 22 million Americans do not have credit files.

[2] Tsosie, C., et. al. (2018, December 10). 2018 American Household Credit Card Debt Study. *NerdWallet*. Retrieved from https://www.nerdwallet.com/blog/average-credit-card-debt-household/; Maldonado, C. (2018, July 24). Price of College Increasing Almost 8 Times Faster Than Wages. *Forbes.* Retrieved from https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages/#3b04b6e766c1.

[3] Mishel, L., et al. (2015). Wage Stagnation in Nine Charts. *Economic Policy Institute*. Retrieved from https://www.epi.org/publication/charting-wage-stagnation/.

[4] *Id.*

[5] *Id.*

0.2 percent per year.[6] In fact, except for the late 1990s, the wages of middle-wage workers were totally flat or in decline over the 1980s through the 2000s. Low-wage workers have fared even worse, with wages falling 5 percent from 1979 to 2013.[7] The hourly wages of high-wage workers increased 41 percent.[8] Additionally, wage stagnation affects even the one-third of workers who have earned a four-year college degree. In 2013, inflation-adjusted hourly wages of young college graduates were lower than they were in the late 1990s.[9]

Furthermore, the recovery from the Great Recession has been uneven. Data show that families of color, Americans born after 1970, and households earning less than $60,000 are the least likely to have recovered the wealth they lost in the financial crisis.[10] In lower-income communities and communities of color across the nation, homeownership has not recovered from the far-reaching damage of the Great Recession. In fact, the Great Recession wiped out 30 years of homeownership gains for African-Americans. It exacerbated the already large racial homeownership gap, with Black homeownership rates falling to levels that predate the passage of the Fair Housing Act more than 50 years ago.[11] The current homeownership rate for Black families is only 40.6 percent, as compared to 73.1 percent for white families.[12]

Asian American and Pacific Islanders (AAPIs) also lag behind the white homeownership rate by almost 15 percentage points, with a homeownership rate of 57.4 percent, while the rate for Pacific Islanders alone is even lower at just over 38 percent in 2015.[13] Although the AAPI community is the fastest growing racial group in the United States, it is also one of the fastest growing poverty populations with more than half of all poor AAPIs living in only 10 Metropolitan Statistical Areas (MSAs), the majority of which are concentrated in the most

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Long, H. (2019, July 24). This Doesn't Look Like the Best Economy Ever: 40% of Americans Say They Still Struggle to Pay Bills. *Washington Post.* Retrieved from https://www.washingtonpost.com/business/economy/this-doesnt-look-like-the-best-economy-ever-40percent-of-americans-say-they-still-struggle-to-pay-bills/2019/07/04/855c382e-99b5-11e9-916d-9c61607d8190_story.html.
[11] Goodman, L., McCargo, A., & Zhu, J. (2018, February 13). A Closer Look at the Fifteen-Year Drop in Black Homeownership. *Urban Institute*. Retrieved from https://www.urban.org/urban-wire/closer-look-fifteen-year-drop-black-homeownership.
[12] U.S. Census Bureau. (2019, July 25). *Quarterly Residential Vacancies and Homeownership, Second Quarter 2019*. Retrieved from https://www.census.gov/housing/hvs/files/currenthvspress.pdf.
[13] National Equity Atlas. (2018). *Homeownership: Percent owner-occupied households by race/ethnicity and ancestry: United States, Asian or Pacific Islander, All people, 2015.* Retrieved from https://nationalequityatlas.org/indicators/Homeownership/By_ancestry:38501/United_States/false/Race~ethnicity:Asian_or_Pacific_Islander/Nativity:All_people/Year(s):2015/.

expensive markets.[14] The majority of the over 2 million AAPIs in poverty live in zip codes with housing costs above the national median for both rental housing and homeownership.[15]

The cost of rental housing has also skyrocketed. According to the National Low Income Housing Coalition, a full-time worker would have to make an hourly wage of $22.96 on average, more than three times the federal minimum wage, to afford to rent a modest two-bedroom apartment or house in the United States.[16]

Finally, wage stagnation and high costs for housing and other life necessities, financial struggles and contending with debt collectors has become a fact of life for many families, as reports from the Federal Reserve, Urban Institute, and the CFPB, among others, bear out.[17] More commonly, people take on debt to finance life's necessities, whether that means attending college to earn a living wage, or seeking medical treatment. As one research report avers: "[D]ebt is a fundamental part of financial lives in the United States,"[18] and "taking on debt has become a critical part of how many individuals achieved social status, such as being a homeowner or a college graduate, as well as how they may obtain material goods and services."[19] This establishes debt as something that has become fundamental to investing in people's future, and in the future of people's families, in addition to its function of supplying necessities for daily living.

ii. The proposed rule will exacerbate the racial wealth gap.

A legacy of racial discrimination in housing, lending, banking, policing, employment, and otherwise, has produced dramatically inequitable outcomes that persist today.[20] Communities

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[14] United States Census Bureau. (2017, June 22). *The Nation's Older Population Is Still Growing, Census Bureau Reports*. (Release Number CB17-100). Retrieved from https://www.census.gov/newsroom/press-releases/2017/cb17-100.html; Ishimatsu, J. & Hasgawa, L. Spotlight on Asian American and Pacific Islander Poverty: A Demographic Profile. *Ford Foundation and the National Council of La Raza.* Retrieved from https://www.frbsf.org/community-development/files/LA_AAPI_Poverty_Overview_JMoon_08-15-13.pdf.

[15] National Coalition for Asian Pacific Americans Community Development (CAPACD). *AAPI Poverty Profiles*. Retrieved from https://www.nationalcapacd.org/aapi-poverty-profiles/; US Census, 5-Year American Community Survey, 2016. 64 percent of AAPIs in poverty live in zip codes where the median rent for rental housing in the zip code is higher than the US national median rent, and for homeownership 65 percent of AAPIs in poverty live in zip codes where the median home value is more expensive than the US national median home value.

[16] Aurand, A.; Cooper A.; Emmanuel, D.; Rafi, I.; & Yentel, D. (2019). Out of Reach 2019. *National Low Income Housing Coalition*. Retrieved from https://reports.nlihc.org/oor/about.

[17] *Id.*; Urban Institute. (2017). *Nine Charts About Wealth Inequality in America*. Retrieved from https://apps.urban.org/features/wealth-inequality-charts/; Consumer Financial Protection Bureau. (2014, November). *A Snapshot of Debt Collection Complaints Submitted by Older Consumers*. Retrieved from https://files.consumerfinance.gov/f/201411_cfpb_snapshot_debt-collection-complaints-older-americans.pdf.

[18] Kalousova, L. & Burgard, S.A. (2013). Debt and Forgone Medical Care. *Journal of Health and Social Behavior 54*(2), 204-220.

[19] Drentea, P. & Lavrakas, P. (2000). Over the limit: the association among health, race and debt. *Social Science and Medicine 50*(4), 517-529.

[20] Baradaran, M. (2017). *The Color of Money: Black Banks and the Racial Wealth Gap*. Boston, MA: Belknap Press; Hannah-Jones, N. (2014, December 9). School Segregation, the Continuing Tragedy of Ferguson. *ProPublica*.

of color, often largely segregated due to the history of redlining and other racially exclusionary housing policies, experience higher rates of poverty, lower wages, and higher cost burdens to pay for basic living expenses. According to a report by Demos, if homeownership rates were the same for whites and people of color, we would see a decrease in the racial wealth gap by 31 percent for African-Americans and 28 percent for Latinos.[21] Debt collection and debt collection litigation are both symptoms of the racial wealth gap and perpetuators of it. Rather than ensuring that consumers are protected from unscrupulous collectors and abusive practices, the proposed rule will only widen existing disparities.

Average family wealth in the United States has increased over the past half century, but it has not increased equally for all groups. For instance, between 1963 and 2015, families close to the bottom of the wealth distribution – those at the tenth percentile – went from having no wealth on average to being approximately $1,000 in debt.[22] Those in the middle more than doubled their wealth, families at the 90th percentile saw their wealth increased fivefold, and those at the 99th percentile saw their wealth grow sevenfold.[23]

Moreover, there is a stark wealth divide across racial groups. The average African-American child is born into a family with 10 times less wealth than the average white child.[24] If current trends continue, it could take as long as 228 years for the average Black family to reach the level of wealth white families own today.[25] For the average Latinx family, matching the wealth of white families could take 84 years.[26] Furthermore, by 2024, median Black and Latinx households are projected to own 60 to 80 percent less wealth than they did in 1983.[27] Additionally, by 2043, the year in which projections show that people of color will make up a majority of the U.S. population, it is projected that the wealth divide between white families and Latinx and Black families could double, on average, from approximately $500,000 in 2013 to over $1 million.[28] Additionally, a significant portion of AAPIs hold less wealth than their white

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Retrieved from https://www.propublica.org/article/ferguson-school-segregation; Kozol, J. (2005). *The Shame of the Nation: The Restoration of Apartheid Schooling in America*. New York: Crown Publishers; Massey, D. & Denton, N. (1993). *American Apartheid: Segregation and the Making of the Underclass.* Boston, MA: Harvard University Press; Rothstein, R. (2017). *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright Publishing Corporation.

[21] Traub, A.; Ruetschlin, C.; Sullivan, L.; Meschede, T.; Dietrich, L.; & Shapiro, T. (2016). The Racial Wealth Gap: Why Policy Matters. *Demos.* Retrieved from https://www.demos.org/research/racial-wealth-gap-why-policy-matters.

[22] Urban Institute. (2017). *Nine Charts About Wealth Inequality in America*. *Urban Institute*. Retrieved from https://apps.urban.org/features/wealth-inequality-charts/.

[23] *Id.*

[24] Ingraham, C. (2019, March 14). A new explanation for the stubborn persistence of the racial wealth gap. *Washington Post*. Retrieved from https://www.washingtonpost.com/us-policy/2019/03/14/new-explanation-stubborn-persistence-racial-wealth-gap/.

[25] Asante-Muhammed, D., Collins, C., Hoxie, J., & Nieves, E. (2016, August). The Ever-Growing Gap: Without Change, African American and Latino Families Won't Match White Wealth for Centuries. *Institute for Policy Studies and Corporation for Enterprise Development.* Retrieved from https://ips-dc.org/report-ever-growing-gap/.

[26] *Id.*

[27] *Id.*

[28] *Id.*

peers, in a context of economic inequality even within the AAPI community: The wealthiest 10 percent of Asian Americans own 168 times more wealth than the poorest Asian Americans, compared to a gap of 121 times seen in corresponding white households.[29]

Moreover, the wealth gap drives higher debt loads for families of color. Black families are twice as likely as white families to lack liquid savings to pay each month's expenses, and their community support networks typically have less wealth, again because historical and systemic discrimination has plagued the entire community. In an emergency, most Black families would not know someone who could lend them $3,000.[30] Thus, without family wealth to fall back on, many Black families are forced to take on increasing debt loads to make ends meet or cover unexpected expenses.

iii. Communities of color are disproportionately impacted by debt and unfair debt collection practices.

Debt collection, collection lawsuits and judgments, and wage garnishments are more common in communities of color, due to systemic and historical discrimination in financial services, housing and employment. Forty-five percent of borrowers living in areas that are predominantly communities of color had debt in collections versus 27 percent of borrowers living in predominantly white areas.[31] In addition, in a 2017 survey, the CFPB found that 44 percent of borrowers of color reported having been contacted about a debt, compared to 29 percent of white respondents.[32] Moreover, even when accounting for differences in income, communities of color are disproportionately impacted by debt collection litigation. One investigation revealed that in three major cities—St. Louis, Chicago, and Newark—the rate of judgments for debt collection lawsuits was twice as high in mostly Black neighborhoods as in mostly white neighborhoods.[33]

Furthermore, studies indicate that a greater percentage of debt buyer cases end in default judgments when the consumers are from communities of color or low- and moderate-income communities. A study of 365 debt buyer cases in New York City found that default judgments

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[29] Weller, C. and Thompson, J. (2016, Dec. 20). *Wealth Inequality Among Asian Americans Greater Than Among Whites*. Center for American Progress. Retrieved from https://www.americanprogress.org/issues/race/reports/2016/12/20/295359/wealth-inequality-among-asian-americans-greater-than-among-whites/.

[30] Noel, N., Pinder, D., Stewart, S., & Wright, J. (2019, August). The economic impact of closing the racial wealth gap. *McKinsey & Company*. Retrieved from https://www.mckinsey.com/industries/public-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap.

[31] Ratcliff et. al., 2017.

[32] Consumer Financial Protection Bureau (2017, January). *Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt. Consumer Financial Protection Bureau*. Retrieved from https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[33] Kiel, P. & Waldman, A. (2015, October 8). The Color of Debt: How Collection Suits Squeeze Black Neighborhoods. *ProPublica*. Retrieved from https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

obtained by debt buyers were disproportionately concentrated among these consumers.[34] Of those cases, 91 percent of people sued and 95 percent of people with default judgments against them lived in low- and moderate-income communities. About half of the people sued by debt buyers (51 percent) and with default judgments entered against them (56 percent) lived in communities that had majority African-American or Latinx populations. Similarly, a study of New York State debt-collection cases found that the ten zip codes with the highest concentrations of default judgments per 1,000 residents were all predominantly (75 percent or more) communities of color.[35] In addition, as discussed in section IV, many default judgment cases are situations in which debt buyers are abusing the court system and prevailing despite the common pattern of suing the wrong person for the wrong amount.

A poll from Americans for Financial Reform (AFR) and the Center for Responsible Lending (CRL) (AFR/CRL poll) reveals that one in five likely voters have been contacted by a debt collector in the past twelve months, including higher numbers in communities of color (see Figure 1).[36] Nearly half of likely Latinx voters have been contacted by a debt collector in the past 12 months (see Figure 1). And, more than one in three (34 percent) of African American voters have been contacted by a debt collector in the past 12 months (see Figure 1).[37]

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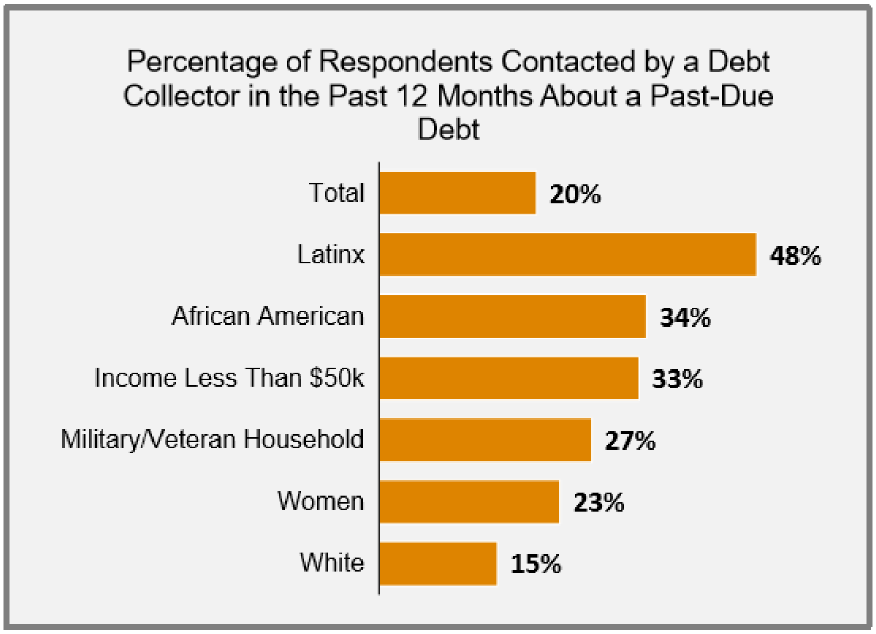
[34] Wilner, C. & Sheftel-Gomes, N. (2010, May). Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower Income New Yorkers. *New Economy Project*. Retrieved from https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf.

[35] Shin, S. & Wilner, C. (2013, June). The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality. *New Economy Project*. Retrieved from http://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf.

[36] Americans for Financial Reform and the Center for Responsible Lending. (2019). "New Poll Reveals Bipartisan Opposition to CFPB Debt Collection Rule." July 15-23, 2019, [Survey report] Durham, NC: Center for Responsible Lending. Retrieved from https://www.responsiblelending.org/research-publication/poll-strong-bipartisan-opposition-among-voters-major-components-proposed-new; Lake Research Partners and Chesapeake Bay Consulting designed and administered this survey that was conducted between July 15-23, 2019 online. The survey reached a total of 1,000 likely November 2020 voters nationwide. Data were weighted slightly by gender, party identification, age, race, education level, household income, 2016 self-reported vote, and region. The margin for error is +/- 3.1% and larger for subgroups.

[37] *Id.*

Figure 1: Voters of Color Disproportionately Contacted by Debt Collectors



Source: Americans for Financial Reform and the Center for Responsible Lending poll conducted by Lake Research Partners and Chesapeake Bay Consulting, 2019.

iv. Student loan debt disproportionately impacts communities of color.

The results of historic and current segregation in higher education, as well as the existing racial wealth gap, makes the burden of student loan debt particularly heavy for African-American and Latinx communities.[38] Families of color are likely to have less income and family wealth to pay for college, are more likely to need to borrow for higher education, and typically have less of a cushion to withstand future financial shocks, thus contributing to a higher likelihood of delinquency and default on student loan debt. Black graduates are more than three times as likely to default on their student loans within four years as white borrowers, and Latinx graduates are more than twice as likely to default as white graduates.[39] Today, nearly half of Black graduates owe more on their undergraduate student loan after four years than they did at graduation, compared to 17 percent of white graduates.[40] Also, the rise in Asian American

[38] Center for Responsible Lending and the National Association for the Advancement of Colored People. (2019, July). *Quicksand: Borrowers of Color and the Student Debt Crisis.* Retrieved from https://www.responsiblelending.org/research-publication/quicksand-borrowers-color-student-debt-crisis.
[39] Scott-Clayton, J. & Li, J. (2016). Black-white disparity in student loan debt more than triples after graduation. *Brookings Institution*. Retrieved from https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/.
[40] Scott-Clayton & Li, 2016.

wealth inequality is correlated with faster rising debt and increased indebtedness in the community, particularly in student loan debt and car purchases.[41]

Even a degree is no shield from racial disparities: Black bachelor's degree holders default at five times the rate of white bachelor's degree graduates, and are more likely to default than white individuals who never finish a degree.[42] In fact, recent research shows that, rather than helping communities of color build wealth, a college education deepens the wealth gap.[43] For example, young African-Americans take on 85 percent more student debt than their white counterparts for their education and that difference in indebtedness increases by almost 7 percent per year after leaving school.[44]

Moreover, women graduate, on average, with $2,700 more in student loan debt than men, and because of the gender pay gap, they earn about 26 percent less, so paying off their debt takes significantly longer.[45] This is especially true for Black women and Latinas, who have the greatest average amount of student loan debt and are paid only 61 cents and 53 cents to the dollar, respectively, compared to white men.[46] Approximately 57 percent of African-American women and 42 percent of Latina women who were repaying student loans reported that they had been unable to meet essential expenses within the past year compared to 34 percent of all women.[47]

As a result of low-income students of color's need to borrow more, compounded by for-profit institutions targeting students of color and issues with student loan servicer abuses, a disproportionate percentage of students of color and the majority of Black students are unable to pay off student debt and may default. This derails their financial and personal lives and subjects them to harsh collection practices that can keep them from achieving the wealth gains

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[41] Weller, C. and Thompson, J. (2016, Dec. 20). *Wealth Inequality Among Asian Americans Greater Than Among Whites*. Center for American Progress. Retrieved from https://www.americanprogress.org/issues/race/reports/2016/12/20/295359/wealth-inequality-among-asian-americans-greater-than-among-whites/.

[42] Scott-Clayton, J. (2018). The looming student loan default crisis is worse than we thought. *Brookings Institution.* Retrieved from https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/.

[43] Hamilton, D., Darity, W., Price, A.E., Sridharan, V., & Tippett, R. (2015). Umbrellas Don't Make it Rain: Why Studying and Working Hard Isn't Enough for Black Americans*. The New School, the Duke Center for Social Equality, and Insight: Center for Community Economic Development*. Retrieved from https://assetfunders.org/resource/umbrellas-dont-make-rain-studying-working-hard-isnt-enough-black-americans/.

[44] Houle, J. & Addo, F. (2018, August 2). Racial Disparities in Student Debt and the Reproduction of the Fragile Black Middle Class. *Sociology of Race & Ethnicity.*

[45] Miller, K. (2017). Deeper in Debt: Women and Student Loans. *American Association of University Women*. Retrieved from https://www.aauw.org/research/deeper-in-debt/; Hill, C. & Corbett, C. (2012). Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation. *American Association of University Women*. Retrieved from https://www.aauw.org/resource/graduating-to-a-pay-gap/.

[46] Vagins, D. The Simple Truth about the Gender Pay Gap. *American Association of University Women*. Retrieved from https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/.

[47] Miller, 2017.

a college education promises. Meanwhile, their debt keeps growing due to unlimited interest accrual with no statute of limitations ending the period in which they can be sued on their student debt, and no relief in bankruptcy. Unless bold, new actions are taken, a generation of low-income students of color will be trapped in debt undertaken in an effort to advance their lives.

v. Debt burdens are linked to negative health outcomes and abusive debt collection practices will only exacerbate poor health, especially for communities of color.

In this difficult economic context – a lack of affordable housing, wage stagnation, high student loan costs, and racial and income wealth gaps – a family that experiences a medical emergency may find that debt collection has a compounding effect, with broad impacts on health and wellbeing. Indeed, a growing body of research linking debt with health outcomes suggests that regardless of the type of debt (including credit card, mortgage, medical, payday loans, student loans), there is a concerning link between debt and stress – despite changes in the economic market over time. One research study posits that "since the beginning of organized study in the health fields, health problems have been linked to poor economic circumstances."[48] If harassing debt collection practices are added into the mix, stress will be further amplified.

All studies that have looked at the impact of debt on health outcomes have shown a link between debt and negative health outcomes, including anxiety, depression, and high blood pressure. One meta-analysis of 65 studies found that "overall results suggest that unsecured debt increase the risk of poor health,"[49] and "the relationship with depression has been studied most frequently and relationships appear to be strong and robust...."[50] Research has further found that debt has substantial impacts on health, family life and job performance, with payday loans being the main source of debt stress.[51]

Furthermore, a study from the Federal Reserve of Atlanta found that severe delinquency was linked with higher mortality.[52] This is significant in the debt collection context, as consumers who are severely delinquent on one or more debts are more likely to be contacted by debt collectors. Another study found "support for credit card debt and medical debt as particular potent predictors of foregone medical care."[53]

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[48] Dunn, L. & Mirzaie, I. (2012). Determinants of Consumer Debt Stress: Differences by Debt Type and Gender. Working Paper. *Ohio State University*. Retrieved from chrr.ohio-state.edu/content/surveys/cfm/doc/DSI-Working-Paper-07-19-12.pdf.

[49] Richardson, T., Elliott, P., & Roberts, R. (2013). The relationship between personal unsecured debt and mental and physical health: A systematic review and meta-analysis. *Clinical Psychology Review 33*(8), 1148-1162.

[50] *Id*.

[51] Dunn & Mirzaie, 2012.

[52] Argys, L.M., Friedson, A.I., & Pitts, M.M. (2016). Killer Debt: The impact of debt on mortality. *Federal Reserve Bank of Atlanta.* Retrieved from https://www.frbatlanta.org/-/media/documents/research/publications/wp/2016/14-killer-debt-the-impact-of-debt-on-mortality-2017-04-10.pdf.

[53] Kalousova & Burgard, 2013.

Racial disparities in debt and debt stress are present as well. Research reveals that when compared to a white population, Black individuals have higher overall debt stress and higher debt loads, which may contribute to disparities between white and Black individuals when it comes to race and health outcomes.[54] One study found being African American was associated with being more likely in debt and "being in debt was associated with higher depressive symptomatology, anxiety and anger…indebtedness is a key component underlying the relationship between socioeconomic position and mental health."[55] Chronic stress introduces a particular health concern, given the presence of a number of health outcomes due in part to stress, such as psychological effects (such as anxiety or depression), reduced immune functions, increased cortisol levels and several others.[56] Research also finds that African Americans are less likely than whites to have additional income resources to draw on if they were to suffer a financial crisis or lose their job.[57] The legacy of racial discrimination in housing, lending, banking, policing, employment is a major driver of this disparity.

A recent study by Sweet et. al (2018)[58] utilized a representative sample of people in Dorchester, MA to learn about the qualitative aspects of debt. In the study, Lisa, an African-American woman who lives in Dorchester, described her experience with debt as one of profound grief for the life she felt was lost as a result of it: "*I was grieving what my life would be like if I didn't have debt…I'll have the breakdown, I'll have the tears, I'll grieve the life I'm hoping I'll one day have, and I'll grieve it because I think it's not going to be possible with all this debt."*

The body of public health research suggests the damaging effects chronic debt stress has on health outcomes. The negative health outcomes support a debt rule that does not cause additional stress due to frequent calls or other harassing collection techniques including permitting unlimited emails, texts, and private social media messages, as is currently being proposed by the Bureau.

III. The Proposed Rule Fails to Protect Families Against Abusive Collection of Time-Barred, "Zombie" Debt.

We suggest that the CFPB amend proposed §1006.26(2)(b), which interprets the FDCPA section 807 to provide that a debt collector must not bring or threaten to bring a legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred

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[54] Ratcliff et. al., 2017; Drentea & Lavrakas, 2000.
[55] Drentea & Lavrakas, 2000.
[56] MacMillan, A. (2014, August 20). 7 Ways Debt Is Bad for Your Health. *Health*. Retrieved from https://www.health.com/stress/7-ways-debt-is-bad-for-your-health; Sweet, E., Nandi, A., Adam, E., & McDade, T. (2013, August). The high price of debt: Household financial debt and its impact on mental and physical health. *Social Science & Medicine 91*, 94-100.
[57] Drentea & Lavrakas, 2000.
[58] Sweet E., DuBois, Z, & Stanley, F. (2018, May 14). Embodied Neoliberalism: Epidemiology and the Lived Experience of Consumer Debt. *International Journal of Health Services 48*(3), 495-511.

debt.[59] Thus, the prohibition would apply only if the debt collector knows or should know that the applicable statute of limitations has expired. This proposal does not go far enough to protect consumers. The Bureau requests comment on whether to adopt a strict liability standard instead.[60] We urge the Bureau to ban any collection of time-barred debt in court by implementing a strict liability standard; and, out of court, including by prohibiting threats of suit and prohibiting the revival of time-barred debt.

i. The Bureau should ban the collection of time-barred debt in court by adopting a strict liability standard, not one that relies on the collector's knowledge at the time of filing.

Proposed §1006.26(2)(b) would prohibit collectors from filing suit, or threatening suit only when the collector knows or should know the debt is time-barred.[61] As courts have held, the collection and threat of collection of time-barred debt in court violate the FDCPA's prohibition on false or misleading representations[62] and the FDCPA's prohibition on unfair practices,[63] or both.[64] As such, they should be banned outright to adequately protect consumers from the obvious harm they cause. Time-barred debt is debt as to which the statute of limitations has expired,[65] the statute of limitations being the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt.[66] Statutes of limitations are typically established by state law, and for debt collection claims, vary depending on the state, and then can vary depending on the type of debt. Under just three states' laws, Wisconsin, Mississippi, and North Carolina, collectors are affirmatively prohibited from any collection attempts, including filing

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[59] Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274, 23403 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006) ("FDCPA section 807 generally prohibits debt collectors from using 'any false, deceptive, or misleading representation or means in connection with the collection of any debt,' and FDCPA section 807(2)(A) specifically prohibits falsely representing 'the character, amount, or legal status of any debt.' The Bureau interprets FDCPA section 807 and 807(2)(A) to prohibit debt collectors from suing or threatening to sue consumers on debts they know or should know are time-barred debts because such suits and threats of suit explicitly or implicitly misrepresent, and may cause consumers to believe, that the debts are legally enforceable.").

[60] Debt Collection Practices, 84 Fed. Reg. at 23329 ("The Bureau specifically requests comment on using a ''knows or should know' standard in proposed § 1006.26(b) and on the merits of using a strict liability standard instead.").

[61] *Id.* at 23403.

[62] 15 U.S.C. § 1692(e).

[63] 15 U.S.C. § 1692(f).

[64] *See*, *e.g.*, *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 683–84 (7th Cir. 2017); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 273 (D. Conn. 2005); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487–89 (M.D. Ala. 1987).

[65] Proposed § 1006.26(a)(2) would likewise define the term time-barred debt to mean a debt for which the applicable statute of limitations has expired. *See* Debt Collection Practices, 84 Fed. Reg. at 23328.

[66] Debt Collection Practices, 84 Fed. Reg. at 23327 ("Proposed § 1006.26(a)(1), in turn, would define the term statute of limitations to mean the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt).

lawsuits, on time-barred debt.[67] In an increasing number of states, debt collectors are prohibited from bringing suit on time-barred debt.[68]

There is strong public policy going back centuries in American jurisprudence supporting the enactment and enforcement of statutes of limitations. As the Supreme Court has held in the past and present, "[s]tatutes of limitations are not simply technicalities. They reflect strong public-policy determinations that it is unjust to fail to put an adversary on notice to defend within a specified period of time. And they promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared ."[69] In this vein, the main reason that states impose statutes of limitations in lawsuits to recover debt rises out of a concern that evidence becomes less reliable as time goes on. Most statutes of limitation relevant to debt collection cases fall in the three-to-six-year range, although in some jurisdictions they may extend to ten years.[70] If the intent of statutes of limitations is to protect consumers, then turning debt into a commodity that can be bought and sold without prohibiting collectors from bringing suit on time-barred debt makes a mockery of the public policy undergirding them. The fact that debt buyers seek to flood the courts with collections cases, totally uninterested in whether or not the case is time-barred, further cheapens the consumer-protective concept of statutes of limitations.[71]

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[67] Wis. Stat. § 893.05 (2019) ("When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy."); Miss. Code Ann. § 15-1-3(1) (2018) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."); N.C. Gen. Stat. § 58-70-115(4) (2018) (declaring unfair practice for a debt buyer to bring suit, arbitrate, or attempt to collect debt the debt buyer "knows, or reasonably should know" the debt is time-barred).

[68] *See*, *e.g.*, Cal. Civ. Code § 1788.56 (West 2018) ("A debt buyer shall not bring suit or initiate an arbitration or other legal proceeding to collect a consumer debt if the applicable statute of limitations on the debt buyer's claim has expired."); Conn. Gen. Stat. § 36a-814(a) (2019); Me. Stat., tit. 32, § 11013(7) (2019) (where debt collector "knows or reasonably should know" the debt is time-barred); Md. Code Ann. Cts. & Jud. Proc. § 5-1202(a) (LexisNexis 2018) ("A creditor or collector may not initiate a consumer debt collection action after the expiration of the statute of limitations applicable to the consumer debt collection action."); N.C. Gen. Stat. § 58-70-115(4) (2018) (unfair practice for debt buyer to file lawsuit or arbitration proceeding on debt the debt buyer "knows, or reasonably should know" the debt is time-barred); Wash. Rev. Code § 19.16.250(23) (2019) (where collector "knows, or reasonably should know" the debt is time-barred); H.B. 996, 86th Reg. Sess., 2019 Tex. Gen. Laws ch. 1055 ("A debt buyer may not, directly or indirectly, commence an action against or initiate arbitration with a consumer to collect a consumer debt after the expiration of the applicable limitations period…"); N.Y. Comp. Codes R. & Regs. tit. 22, §§ 202.27-a(e), 208.14-a(e), 210.14-a(e), 212.14-a(e) (2016) (requiring creditor or debt buyer attorney to file a form signed by the attorney that the case was filed within the applicable statute of limitations).

[69] *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1418-19, (2017) (citing *Bd. of Regents of Univ. of State of N.Y. v. Tomanio,* 446 U.S. 478, 487 (1980); *United States v. Kubrick,* 444 U.S. 111, 117, 100 (1979); *Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 348–349 (1944)).

[70] Md. Code Ann. Cts. & Jud. Proc. § 5-101 (LexisNexis 2018) (three years); N.C. Gen. Stat. § 1-52(1) (2018) (three years); Ind. Code § 34-11-2-9 (2018) (six years); Nev. Rev. Stat. § 11.190(1)(b) (2018) (six years); Ohio Rev. Code Ann. § 2305.06 (2018) (eight years); Iowa Code § 614.1(5)(a) (2018) (ten years); R.I. Gen. Laws § 9-1-13(a) (2018) (ten years).

[71] *See*, *e.g.*, Encore Capital Group, Inc. (2018). *Form 10-K 2018*. Retrieved from SEC EDGAR website https://www.sec.gov/Archives/edgar/data/1084961/000108496118000013/ecpg-20171231x10k.htm ("We generate a significant portion of our revenue by collecting on judgments that are granted by courts in

Enforcement actions brought by the New York Attorney General reveal the widespread practice of debt buyers threatening suit and filing suit on debts that are beyond the statute of limitations. For example, in a 2015 action by the New York Attorney General against national debt buyer, Encore Capital Group, the Attorney General found that "despite the clear requirements of New York law, Encore brought debt collection claims that were untimely under the statutes of limitations where the causes of action accrued. Given that most consumers fail to respond when they are sued by a debt collector, Encore obtained default judgments in its favor based on these time-barred claims."[72] The New York Attorney General brought similar suits against three other large debt buyers, including Portfolio Recovery Associates, and as a result, more than 7,500 judgments have been vacated, worth more than $34 million.[73] The Bureau's own actions against Encore Capital Group and Portfolio Recovery Associates further establish these widespread practices and the consumer harms that stem from suits on time-barred debt.[74]

It is unsurprising that debt buyers are so often suing consumers for debts that are time-barred; a 2013 Federal Trade Commission (FTC) analysis estimated that debt buyers did not receive any documentation for the debt for approximately 94 percent of accounts at the time of purchase.[75] Ultimately, this process leaves debt buyers with murky and often inaccurate information, including whether the debt is time-barred. However, despite this persistent lack of proof, litigation filed by debt buyers is successful in a vast majority of cases,[76] in large part because buyers' claims go unchallenged by consumers in almost 75 percent of all cases.[77] In fact, Encore's 2018 10-K filing confirms that quickly securing judgments on insufficient evidence is at the heart of how they operate, and that requiring more documentation and review of that

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lawsuits filed against consumers. A [...] change in the requirements for filing these cases or obtaining these judgments...could have an adverse effect on our business, financial condition and operating results [....] We may not be able to collect on certain aged accounts because of applicable statutes of limitations.").

[72] Office of the New York Attorney General. (2015, January 9). *Press Release: A.G. Schneiderman Obtains Settlement From Major Debt Buyer Who Filed Thousands Of Time-Barred Debt Collection Actions*. Retrieved from https://ag.ny.gov/press-release/2015/ag-schneiderman-obtains-settlement-major-debt-buyer-who-filed-thousands-time.

[73] Stifler, L. & Becker, C. (2015, April). State, Federal Regulator Actions Highlight Widespread Debt Buyer Abuses. *Center for Responsible Lending.* Retrieved from https://www.responsiblelending.org/research-publication/state-federal-regulator.

[74] Consent Order, *In re Encore Capital Grp.*, 2015–CFPB–0022 (Sept. 9, 2015), http://files.consumerfinance.gov/f/201509_cfpb_consentorder-encore-capital-group.pdf; Consent Order, *In re Portfolio Recovery Assocs.*, LLC, 2015–CFPB– 0023 (Sept. 9, 2015), http://files.consumerfinance.gov/f/201509_cfpb_consentorder-portfolio-recovery-associates-llc.pdf.

[75] Federal Trade Commission. (2013). *The Structure and Practices of the Debt Buying Industry*. Retrieved from https://www.ftc.gov/reports/structure-practices-debt-buying-industry.

[76] Stifler, L. (2017, Winter). Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions. *Harvard Law and Policy Review 11*(1), 91-139.

[77] Consumer Financial Protection Bureau, January 2017.

documentation would damage their business.[78] Encore asserts that when courts require certain account documents at the time of filing including requiring that a copy of the account statements or applications be attached to the pleadings in order to obtain a judgment against consumers and they cannot produce them, "these courts could deny [their] claims, and [their] business, financial condition and operating results may be adversely affected."[79]

Furthermore, this lack of documentation is coupled with the fact that debt is bought and sold multiple times, and the low purchase price "reflects the risk that the buyer is taking that the debt will ultimately be uncollectible." [80] These factors altogether increase the likelihood that collectors suing to obtain the debt have time-barred debt on their hands.

Although most courts will dismiss lawsuits filed on such debt if the consumer presents the statute of limitations as an affirmative defense, the burden should not be on consumers to raise the issue. Consumers are often uncertain about their rights concerning time-barred debt—including the fact that they must raise it as a defense, in fact the CFPB's own consumer testing supports this assertion.[81] Consumers may fail to recognize that the debt is time-barred, and that time-barred debts are unenforceable in court. That said, because consumers often lack the knowledge and the resources at the outset of collections lawsuits to defend themselves, the case will often result in a default judgment and wage garnishments will be levied against them for a claim that was time-barred in the first place. [82] In contrast, debt buyers have ample resources and are best positioned to demand information from debt sellers and evaluate the statute of limitations before they pursue collection on a debt. Thus, they should be obligated to do so.

Consequently, there is good reason for the CFPB's stated concern regarding debt collectors' suits or threats of suit on time-barred debt. Given collectors' perception that increased regulation with respect to ensuring claims are not time-barred is adverse to their operations, it is unlikely that collectors will go out of their way to ensure their claims are legitimate prior to

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[78] Encore Capital Group, Inc. (2018). *Form 10-K 2018*. Retrieved from SEC EDGAR website https://www.sec.gov/Archives/edgar/data/1084961/000108496118000013/ecpg-20171231x10k.htm.
[79] *Id*.
[80] Jiménez, D. (2015, September 19). Dirty Debts Sold Cheap. *Harvard Journal on Legislation 52*, 41-124.
[81] Fors Marsh Group. (2014, August). *Debt Collection Focus Groups*. Retrieved from https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-focus-group-report.pdf; Fors Marsh Group. Debt Collection Cognitive Interviews. *Consumer Financial Protection Bureau.* Retrieved from https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-cognitive-report.pdf; Fors Marsh Group. (2016, February). Debt Collection Validation Notice Research: Summary of Focus Groups, Cognitive Interviews, and User Experience Testing. *Consumer Financial Protection Bureau*. Retrieved from https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-summary-report.pdf; Federal Trade Commission. (2010, July). *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*.
[82] Stifler, L., Feltner, T., & Sajadi, S. (2018). Undue Burden: The Impact of Abusive Debt Collection Practices in Oregon*. Center for Responsible Lending*. Retrieved from https://www.responsiblelending.org/research-publication/undue-burden-impact-abusive-debt-collection-practices-oregon; Federal Trade Commission, 2013; Consumer Financial Protection Bureau, January 2017.

filing suit. The consumer protection harms associated with these practices are clear, while the practice of pursuing time-barred debt serves no legitimate business purpose. Thus, only a strict liability rule that bans the collection of time-barred debt regardless of whether a collector knew or should have known the action was time-barred will sufficiently protect consumers.

However, rather than institute an outright ban on the collection of time-barred debt, the Bureau instead proposes a standard whereby a collector is prohibited from suing or threatening to sue only when the collector knows or should know the debt is time-barred. The CFPB current proposal is, in fact, a big step backwards from previous proposals which simply ban suit on time-barred debt. And, the proposal contravenes a 2018 multi-state enforcement action against Encore and its subsidiary Midland, in which certain procedures with respect to time-barred debt were set forth in the settlement agreement. In general, the agreement rendered Midland responsible for instructing its collections firms for calculating the statute of limitations for each account, and prohibited Midland from filing suit if the statute of limitations had expired.[83]

Moreover, the proposal is out of step with the Supreme Court and multiple lower courts that firmly hold the FDCPA is a strict liability statute,[84] that "makes debt collectors liable for violations that are not knowing or intentional."[85] Further, the narrow bona fide error exception

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[83] Assurance of Voluntary Compliance/Assurance of Discontinuance, *In re Encore Capital Grp., Inc., Midland Funding, LLC, and Midland Credit Mgmt., Inc.*, para. 29 (Dec. 4, 2018), https://www.insidearm.com/news/00044559-encore-enters-6m-settlement-agreement-42-/

[84] *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 584 (2010) ("Congress also did not confine liability under the FDCPA to "willful" violations, a term more often understood in the civil context to excuse mistakes of law."); *Tourgeman v. Collins Fin. Servs., Inc.,* 755 F.3d 1109, 1119 (9th Cir. 2014), as amended on denial of reh'g and reh'g en banc (Oct. 31, 2014) (The FDCPA "comprehensively regulates the conduct of debt collectors," and "is a strict liability statute."); *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."); *Clark v. Capital Credit & Collection Servs., Inc*., 460 F.3d 1162, 1174–77 (9th Cir. 2006) (concluding that the FDCPA holds debt collectors strictly liable); *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 by the debt collector to be entitled to damages."); *Lee v. Kucker & Bruh, LLP*, 958 F. Supp. 2d 524, 528 (S.D.N.Y. 2013) ("It is well established that the FDCPA imposes strict liability on debt collectors. Plaintiff need not prove that the prohibited conduct was intentional."); *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000) ("The strict liability view of the Act is supported by a closer examination of the FDCPA itself. Nowhere in the language of the statute on which this cause of action is based— §§ 1692e, 1692e(2), 1692e(5), 1692e(10), 1692f, and 1692f(1)—is there any mention of an element of knowledge or intent." "Therefore, since the provisions of the Act relied on by the plaintiff impose strict liability on any debt collector that fails to comply with the Act's provisions, knowledge or intent is only a factor in the liability stage of the proceedings and need not be pled to state a prima facie case.").

[85] *Donohue v. Quick Collect, Inc.,* 592 F.3d 1027, 1030 (9th Cir. 2010) (quoting *Reichert v. Nat'l Credit Sys., Inc.,* 531 F.3d 1002, 1005 (9th Cir.2008) ("The FDCPA is a strict liability statute that 'makes debt collectors liable for violations that are not knowing or intentional' "); *see also Lee v. Kucker & Bruh, LLP*, 958 F. Supp. 2d 524, 528 (S.D.N.Y. 2013) ("Requiring a violation of § 1692e to be knowing or intentional would make superfluous a part of the statutory bona fide error defense [. . .] which requires a showing that the violation was not intentional as well as other elements.").

to the strict liability FDCPA is an *affirmative* defense,[86] requiring much more than a lack of knowledge or intent,[87] and does not apply to violations of the FDCPA resulting from a debt collector's incorrect interpretation of the legal requirements of the Act.[88]

The Bureau maintains that its proposed rule around time-barred debt will reduce the practice of collectors suing or threatening to sue on time-barred debt “by eliminating any legal uncertainty about whether such suits or threats of suit are permitted and potentially by strengthening enforcement of the prohibition.”[89] It is our position that the proposal would have the effect of doing neither. Proposed §1006.26(b) is likely to *increase* not decrease litigation costs and make enforcement increasingly difficult because it will be difficult to determine whether a ‘‘know or should have known’’ standard has been met. Replacing the portions of proposed §1006.26(b) about whether a collector knows or should know the debt is time-barred with a strict liability standard will reduce ambiguity and set clear rules of the road for collectors, thus reducing the potential for litigation and strengthening the ability to bring enforcement actions.

We urge the Bureau to adopt a strict liability standard and ban the collection of time-barred debt in court regardless of whether the debt collector knew or should have known that the debt was time-barred.

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[86] *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011) (“The bona fide error defense is an affirmative defense, for which the debt collector has the burden of proof. The defense does not protect a debt collector whose reliance on a creditor's representation is unreasonable. The defense requires the defendant to show that it maintains procedures to avoid errors. We have held that a debt collector failed to meet its burden under the defense when it did not produce evidence of “reasonable preventive procedures” aimed at avoiding the errors.”; *see also Bentley v. Great Lakes Collection Bureau, Inc.,* 6 F.3d 60, 63 (2d Cir. 1993) (“The FDCPA is a strict liability statute and the degree of a defendant's culpability may only be considered in computing damages.”); *see also Crawford v. LVNV Funding, LLC,* 758 F.3d 1254,1259 & n.4 (11th Cir. 2014) (in addressing whether trying to enforce a time-barred debt would be unfair, unconscionable, deceiving, or misleading, court noted that although the FDCPA is generally described as a “strict liability” statute, “a debt collector's knowledge and intent can be relevant–for example, a debt collector can avoid liability if it 'shows by a preponderance of the evidence [in an affirmative defense] that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”') (quoting 15 U.S.C. § 1692k(c)).

[87] *See McCollough,* 637 F.3d at 948 (9th Cir. 2011) (“Although the FDCPA is a strict liability statute, it excepts from liability those debt collectors who satisfy the “narrow” bona fide error defense.” “That defense provides that: A debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”).

[88] *Jerman*, 559 U.S. at 584 (bona fide error defense to civil liability under the FDCPA does not apply to “mistakes of law,” that is, violations of the FDCPA resulting from a debt collector's incorrect interpretation of the its legal requirements).

[89] Debt Collection Practices, 84 Fed. Reg. at 23380 n.646.

ii. The Bureau should ban the collection of time-barred debt out of court, including prohibiting threats of suit and prohibiting the revival of time-barred debt.

As described in the previous subsection, proposed §1006.26(2)(b) would prohibit collectors from threatening to bring suit out of court only when the collector knows or should know the debt is time-barred. But, as courts have held, threats of suit on time-barred debt in court violate the FDCPA prohibitions on false or misleading representations and unfair practices.[90] The Bureau should ban threats of suit on time-barred debt outright to adequately protect consumers from the harms that debt collectors cause through false and misleading claims and unfair practices. But, the Bureau refuses to ban all collection of time-barred debt.

In addition, in its proposed rule, the Bureau states that it is testing disclosures and if such disclosures "might affect consumers' understanding of whether debts can be revived."[91] Among the disclosures the Bureau is considering "include a disclosure that would inform a consumer that, because of the age of the debt, the debt collector cannot sue to recover it[,] [and . . .] where applicable, a disclosure that would inform a consumer that the right to sue on a time-barred debt can be revived in certain circumstances."[92] However, the Bureau should instead prohibit the revival of time-barred debt that occurs when collectors deceptively solicit payment from consumers, or solicit some other acknowledgment of the debt to restart the statute of limitations, as the harms to consumers are evident.

Statutes of limitations are notoriously difficult for consumers to understand, especially in states where revival of the statute of limitations by partial payment or acknowledgment of the debt is legal.[93] In some jurisdictions, consumers may "revive" a debt and restart the statute of

[90] *See* 15 U.S.C. §§ 1692(e) and 1692(f); s*ee also Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 683–84 (7th Cir. 2017) ("[A] debt collector also violates the Act by threatening to sue to collect such a debt."); *see also McMahon v. LVNV Funding, LLC,* 744 F.3d 1010, 1020 (7th Cir. 2014) ("The proposition that a debt collector violates the FDCPA when it misleads an unsophisticated consumer to believe a time-barred debt is legally enforceable, regardless of whether litigation is threatened, is straightforward under the statute. Section 1692e(2)(A) specifically prohibits the false representation of the character or legal status of any debt."); *see also Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011) ("[W]hen the expiration of the statute of limitations does not invalidate a debt, but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action in connection with its debt collection efforts."); *see also Goins v. JBC & Assocs*., P.C., 352 F. Supp. 2d 262, 272 (D. Conn. 2005) ("As the statute of limitations would be a complete defense to any suit, however, the threat to bring suit under such circumstances can at best be described as a "misleading" representation, in violation of § 1692e.").
[91] Debt Collection Practices, 84 Fed. Reg. at 23329 n.646 (May 21, 2019).
[92] *Id*.
[93] Consumer Financial Protection Bureau. (2016). *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*. Retrieved from https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf; Source says that "Consumer protection concerns exist even when a debt collector attempts to collect time-barred debt without suing or threatening suit. Again, this is because few consumers know the statute of limitations applicable to any particular debt or whether the limitations period has run. Consumers may take away from an attempt to collect a

limitations for a previously time-barred debt by making a partial payment or otherwise acknowledging the debt. As the Bureau has already recognized, "most consumers are unaware of the potential legal consequences of making a payment or acknowledging a debt in writing. Indeed, many consumers may find it counterintuitive that making a payment—which they believe out to have positive consequences for them—may actually have negative consequences."[94] In response to these broad concerns, some states have enacted laws stating that partial payments or acknowledgment does not revive the statute of limitations.[95]

One way debt collectors unjustly take advantage of consumers' lack of awareness of the consequences for making payments on, or in acknowledging time-barred debt, is by threatening suit on time-barred debt. Collectors expressly state or imply that they are legally entitled to enforce the debt in court, which induces consumers to pay debts they would otherwise not have paid, and even for debts they do not actually owe, on their mistaken belief that they need to prevent future litigation.

Moreover, in violation of the FDCPA, collectors readily engage in the deceptive collection practice of implying time-barred debt is collectable to solicit payments that could restart the statute of limitations. In its actions against Encore Capital Group and Portfolio Recovery Associates (PRA), the Bureau focused, among other issues, on collection activities related to old debt. The Bureau found that over roughly a two-year period, Encore sent thousands of letters offering a time-limited opportunity to "settle" without revealing that the debt was too old for litigation, when "[i]n truth and in fact, [c]onsumers do not have a legally enforceable obligation to pay [d]ebt that is beyond the applicable statute of limitations."[96] And, over a three-year period, PRA similar letters with "settlement offers" to consumers, likewise failing to disclose the debt was time-barred.[97] In addition to these letters, both debt buyers filed and threatened to file lawsuits on debt that was beyond the statute of limitations.[98]

Given how difficult statutes of limitations laws are for consumers to understand, coupled with the reality that so few consumers will have legal representation, disclosures will be insufficient to protect consumers from the harm that allowing the collection of time-barred debt to prevail will cause. Despite these clear harms, the proposed rule neither prohibits threats of suit outright, nor does it prohibit the revival of time-barred debt, and therefore, the Bureau sanctions collectors' continued abuse of consumers.

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debt the implied claim that the debt is enforceable in court if they do not pay—a claim that is false for time-barred debts."

[94] *Id*.

[95] *See, e.g.*, Conn. Gen. Stat. § 36a-814(b) (2019); Me. Stat., tit. 32, § 11013(8) (2019); Md. Code Ann. Cts. & Jud. Proc. § 5-1202(b) (LexisNexis 2019) H.B. 996, 86th Reg. Sess., 2019 Tex. Gen. Laws ch. 1055; H.B. 1730, 2019 Wash. Sess. Laws ch. 377.

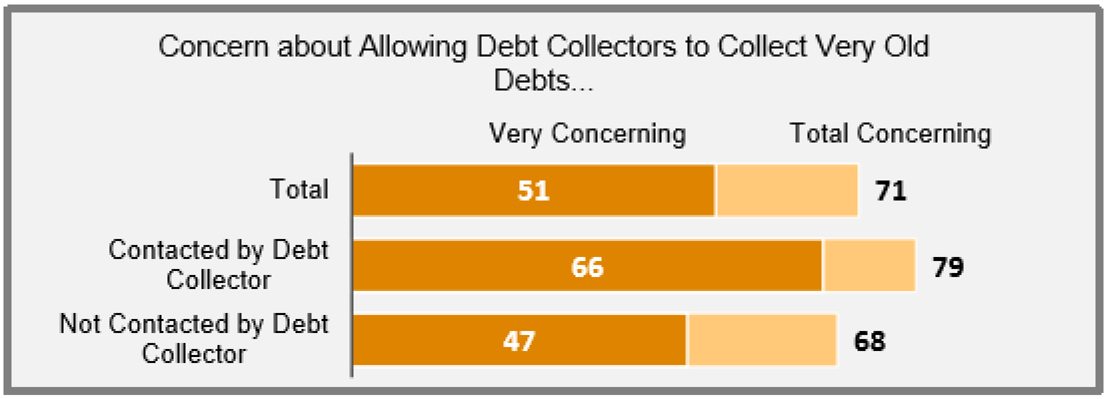
[96] Consent Order, *In re Encore Capital Grp., Inc.*, 2015–CFPB-0022, para. 112-114 (Sept. 9, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf.

[97]Consent Order, *In re Portfolio Recovery Assocs.*, LLC, 2015–CFPB–0023, para. 56 (Sept. 9, 2015), http:// files.consumerfinance.gov/f/201509_cfpb_consentorder-portfolio-recovery-associates-llc.pdf.

[98] Id. at para. 56; Consent Order, *In re Encore Capital Grp., Inc.,* 2015–CFPB-0022, para 112-114.

Finally, it is worth noting that 71 percent of all likely voters are concerned about allowing debt collectors to collect payments to restart the collector's ability to sue on those debts after the time to sue has expired, according to a 2019 poll.[99] Those who have been contacted themselves are more intensely concerned (see Figure 2).[100]

Figure 2: 71% of Likely Voters Concerned about Allowing Debt Collectors to Collect Very Old Debts



Source: Americans for Financial Reform and the Center for Responsible Lending poll conducted by Lake Research Partners and Chesapeake Bay Consulting, 2019.

In light of these reasons, we encourage the Bureau to implement a strict liability standard around the collection and threats of collection of time-barred debt. The Bureau should also prohibit the revival a debt that was formerly time-barred.

IV. The Proposed Rule Creates a Problematic Safe Harbor for Collection Attorneys that Benefits Abusive Debt Collectors to the Detriment of Consumers.

Proposed § 1006.18 prescribes rules with respect to a debt collector's collection of debts, and in general, implements the FDCPA's prohibition of collectors using any false, deceptive, or misleading representations or means in connection with the collection of any debt, and lists sixteen non-exhaustive examples of such prohibited conduct.[101] Proposed section § 1006.18(g) "provides a safe harbor for attorneys and law firms against claims that they violated § 1006.18 due to the lack of meaningful attorney involvement in debt collection litigation materials signed by the attorney and submitted to the court," as long as collections attorneys meet the requirements in proposed § 1006.18(g).[102] However, the requirements that the Bureau proposes do not go far enough to protect consumers, and, in fact will protect debt collection attorneys by providing legal cover for deceptive and unfair practices that harm consumers.

[99] Americans for Financial Reform and the Center for Responsible Lending, 2019.
[100] *Id.*
[101] Debt Collection Practices, 84 Fed. Reg. at 23322.
[102] Debt Collection Practices, 84 Fed. Reg. at 23324.

Given that: debt collectors routinely abuse the court system to collect debts from the wrong person, for the wrong amount, or on time-barred debt or debts not owed; that it is collectors' business model to win by default, most often against unrepresented borrowers; and, that there are grave racial disparities in collections lawsuits as it is, it behooves the Bureau to enact a rule that seeks to curb these abusive practices, not assist in them. We are disappointed to see that the proposed section 1006.18(g) collection attorney "safe harbor" provision does the latter.

We instead propose that collection attorneys be required to review original account-level documentation that establishes the amount owed and encourages the firm's attorneys to independently conclude that they are suing the right person, for the right amount of money, and that their client has the legal right to sue. Providing so-called clarity by creating a weak standard for attorney involvement harms consumers by permitting officers of the court to participate in practices that increase the chance that the wrong people will be sued, sued for the wrong amounts, or sued for time-barred debts or for debts not owed. This permissive standard will further exacerbate racial disparities between white consumers and consumers of color, who are already disproportionately impacted by debt collection cases. Separately, we are disappointed that the Bureau has proposed this safe harbor provision without including it within the S*mall Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (Small Business Review Panel Outline or Outline) as part of the 2016 Small Business Regulatory Enforcement Fairness Act consultation process. We urge the Bureau to eliminate the safe harbor for collection attorneys who make false, deceptive or misleading representations.

Especially as the Small Business Review Panel Outline summarized proposals with respect to conducting documentation reviews at various stages of the debt collection process—acknowledging the grave inaccuracies in debt collection litigation, including before filing suit—it is alarming that this proposal and any alternatives were not previously discussed in the Outline so that the public could meaningfully analyze and respond to the proposal prior to this advanced notice of proposed rulemaking.[103] Such an omission does not effectuate the goal the

[103] Consumer Financial Protection Bureau, 2016; Consumer Financial Protection Bureau. (2016, October). *Final Report of the Small Business Review Panel on CFPB's Debt Collector and Debt Buyer Rulemaking*. Retrieved from https://files.consumerfinance.gov/f/documents/cfpb_debt-collector-debt-buyer_SBREFA-report.pdf. While the initial Small Business Review Panel Outline neither contained references to an attorney "safe harbor," nor sufficiency of Rule 11 requirements, the Final Report explains that "[a] few law firm SERs" raised concerns about proposed documentation, including concerns over obtaining and reviewing specific documentation prior to filing a complaint (i.e., that "they might not be able to review certain documentation, such as an original agreement or application, and that in their view such documentation was not generally necessary to establish the identity of the debtor or the amount owed"). Nonetheless, it appears that the *one and only* recommendation for such an attorney "safe harbor," simply for fulfilling the state version of Rule 11, came from a single law firm panelist, Levy & Associates (stating that "[w]e recommend that the CFPB not prescribe a list of information and documentation that must be obtained and reviewed prior to filing a complaint", and that "[a]lternatively, we recommend that collectors should be able to satisfy the substantiation requirement "safe harbor" prior to filing a complaint by reviewing account notes and sufficient account-level documentation to reasonably ensure that the claim of indebtedness is for the correct amount and that the correct consumer is named in the complaint.").

Bureau stated in the Outline, which was to propose measures that "specify how debt collectors can possess reasonable support for making such collection attempts at different times during the collection process[,]" to "help ensure that consumers are not deceived or treated unfairly[.]"[104] The Bureau's failure to describe proposed 1006.18(g) in the Outline, therefore, by itself, risks harming consumers and the integrity of the Bureau's rulemaking process.

i. The Bureau must eliminate the safe harbor for collection attorneys and propose a strong meaningful attorney involvement rule to reduce grave inaccuracies in collection lawsuits that exacerbate the racial wealth gap.

Many collection firms have successfully weaponized the court system to harass consumers and operate as lawsuit mills filing thousands of collection lawsuits a year, often without proper review of original account documentation. A similar problem occurred in the lead up to the housing crisis in 2008, as many bank employees were signing off on thousands of foreclosures per day without reviewing the details of the cases.[105] This had enormous deleterious consequences for individuals who were losing their homes to foreclosure and for the economy at large.[106] Just as communities of color were disproportionately impacted by the foreclosure crisis,[107] we know that communities of color are disproportionately impacted by debt collection litigation, even when accounting for differences in income. In three major cities—St. Louis, Chicago, and Newark—a ProPublica investigation revealed that the rate of judgments was twice as high in mostly Black neighborhoods as in mostly white neighborhoods.[108] Thus, to the extent the Bureau issues a bad rule that increases lawsuits against the wrong person for the wrong amount, the Bureau risks widening the existing racial wealth gap.

As discussed in the Small Business Review Panel Outline, the Bureau has serious concerns around information integrity in the debt collection process, and it reiterated that the most comment debt collection complaint to the CFPB in recent years concerns collectors suing the wrong consumer for the wrong amount.[109] In fact, the top complaint to the CFPB in 2018 was a

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[104] Consumer Financial Protection Bureau, 2016.
[105] Gutman, M. and Blackburn, B. (2010, Oct. 4). Foreclosure Crisis: 23 States Halt Foreclosure As Officials Review Bank Practices. *ABC News*. Retrieved from https://abcnews.go.com/WN/robo-signers-blamed-foreclosure-mistakes/story?id=11798650.
[106] Gruenstein Bocian, D., Smith, P., & Li, W. (2012, October 24). Collateral Damage: The Spillover Costs of Foreclosures. *Center for Responsible Lending*. Retrieved from http://www.responsiblelending.org/mortgage-lending/research-analysis/collateral-damage.pdf.
[107] Burd-Sharps, S. & Rasch, R. (2015, June). Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations. *Social Science Research Council.* Retrieved from https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/impact-of-the-us-housing-crisis-on-the-racial-wealth-gap-across-generations.pdf; Kochhar, R. & Fry, R. (2014). Wealth inequality has widened along racial, ethnic lines since end of Great Recession. *Pew Research Center*. Retrieved from https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/.
[108] Kiel & Waldman, 2015.
[109] Consumer Financial Protection Bureau, 2016

collector attempting to collect a debt that was not owed.[110] The Outline states that "[t]he Bureau believes that such problems arise in significant part [because] there are often substantial deficiencies in the quality and quantity of information collectors receive at placement or sale of the debt that frequently result in collectors contacting the wrong consumers, for the wrong amount, or for debts that the collector is not entitled to collect."[111]

Previous research has raised concerns about the accuracy and adequacy of the information being shared and maintained in the debt collection and sales process. Many of these problems can be traced to the fact that debts can be bought and sold without the underlying documentation of the original debt.[112]

Moreover, debt collectors self-describe as constituting a volume industry: Kevin Stevenson, CEO of PRA—one of the largest debt buyers in the country—recently remarked that "[i]n the legal collections channel, [PRA has] maintained excellent returns despite processing significantly more volume."[113] And, "[PRA] did not shy away from expensing materially more in court costs in order to address the volumes."[114] Not only are debt collectors a volume industry, but collectors have weaponized state courts to file these suits *en masse* to quickly obtain default judgments that cause significant disruption to struggling consumers' lives. Encore, for example, stated in its 2018 10-K filing that they "generate a significant portion of [their] revenue by collecting on judgments that are granted by courts in lawsuits filed against consumers."[115] In PRA's 2018 10-K, they maintain, "[a]n important component of our collections effort involves our legal recovery operations and the judicial collection of accounts of customers who we believe have the ability, but not the willingness, to resolve their obligations."[116] PRA's and Encore Capital Group's 10-K filings also indicate that legal collections are the most profitable way to collect on these debts due to the involuntary payment authority courts provide and the fact that legal fees are paid only on a contingent basis to contracting debt collection law firms.[117]

These collectors' business model is to win cases quickly by obtaining default judgments, and according to PRA, to win cases against consumers who they perceive as unwilling to defend

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[110] Consumer Financial Protection Bureau. (2018). *Consumer Response Annual Report.* Retrieved from https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf.
[111] Consumer Financial Protection Bureau, 2016.
[112] Halpern, J. (2014). *Bad Paper: Inside the Secret World of Debt Collectors*. New York: Picador.
[113] (2019). PRA Group's (PRAA) CEO Kevin Stevenson on Q2 2019 Results - Earnings Call Transcript. Retrieved from Seeking Alpha website https://seekingalpha.com/article/4283676-pra-groups-praa-ceo-kevin-stevenson-q2-2019-results-earnings-call-transcript?page=2.
[114] *Id*.
[115] Encore Capital Group, Inc. (2018). *Form 10-K 2018*. Retrieved from SEC EDGAR website. https://www.sec.gov/Archives/edgar/data/1084961/000108496118000013/ecpg-20171231x10k.htm.
[116] PRA Group, Inc. (2018). *Form 10-K 2018*. Retrieved from SEC EDGAR website. https://www.sec.gov/Archives/edgar/data/1185348/000118534818000008/praa-20171231x10k.htm
[117] Encore Capital Group, Inc. (2018). *Form 10-K 2018*. Retrieved from SEC EDGAR website https://www.sec.gov/Archives/edgar/data/1084961/000108496118000013/ecpg-20171231x10k.htm.

themselves, and to obtain a court order to force people to pay or have their wages garnished up to a quarter of their paychecks.[118] In fact, in one of the Bureau's enforcement actions, the Bureau found that "[t]he signing attorney generally spent less than a few minutes, sometimes less than 30 seconds, reviewing each summons and complaint before approving the filings and directing that a lawsuit be initiated."[119]

Prior research has also established that many debt collection law firms regularly file lawsuits without ever examining account-level data, but their signatures still appear on documents as a result of "robo-signing," or "the pattern of signing and filing affidavits in state courts against consumers in large volumes without verifying the information printed in them."[120] In fact, enforcement actions have highlighted this "robo-signing" problem in recent years. In December 2018, Attorneys General from 41 states and the District of Columbia announced a settlement with Encore Capital Group and its subsidiaries for "robo-signing" thousands of affidavits without verifying the validity of debts or checking whether the information contained in the complaints was accurate.[121]

Given this context, it is easy to see how lawsuits may be filed against the wrong person, for the wrong amount, or for time-barred debt or debts not owed by the person they are pursuing. For example, a recent research report by the Center for Responsible Lending found that debt buyers secured default judgments in 80 percent of cases filed by one large debt collection law firm in Washington between 2012 and 2016.[122] The same report found that a mere 1.2 percent of defendants were represented by an attorney, and in cases where the outcome was a default judgment in favor of the debt buyer, defendants were represented in just 45 cases, or 0.4 percent of the time.[123] Without being present or represented in court, consumers are not able to demand proof of debt or defend against unwarranted legal actions.

To minimize increasing the racial wealth gap, and to curtail abusive debt collection practices, the CFPB should eliminate any "safe harbor" for collection attorneys who make false, deceptive or misleading representations. The Bureau should also require collection attorneys to review original account-level documentation of alleged indebtedness by instituting a stronger standard than what is being proposed to increase the chance that lawsuits will be filed against the right person, for the right amount, and that the collector has the legal authority to do so. Indeed, if

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[118] *Id*.; ADP Research Institute. (2018). *Garnishment: The Untold Story.* Retrieved from https://www.documentcloud.org/documents/1301187-adp-garnishment-report.html

[119] Consent Order, *In re Pressler & Pressler, LLP*, 2016-CFPB-0009, para. 15 (Apr. 25, 2016), https://files.consumerfinance.gov/f/documents/201604_cfpb_consent-order-pressler-pressler-llp-sheldon-h-pressler-and-gerard-j-felt.pdf.

[120] Office of the Illinois Attorney General. (2018, December 4). *Madigan Announces $6 Million Settlement with Encore Capital to Reform Debt Buyer and Collection Practices.* Retrieved from http://www.illinoisattorneygeneral.gov/pressroom/2018_12/2018124b.html.

[121] *Id*.

[122] Feltner, T., Barnard, J., Stifler, L. (2019). Debt by Default: Debt Collection Practices in Washington 2012-2016. *Center for Responsible Lending.* Retrieved from https://www.responsiblelending.org/research-publication/debt-default-debt-collection-practices-washington-2012-2016.

[123] *Id*.

debt collectors have license to enforce their claims in court, then the attorneys who represent collectors in court should not merely be rubber-stamping legally insufficient claims. Attorneys take oaths to serve as guardians of the law and are held to high standards of ethical conduct in furthering this mission. If the Bureau gives collection attorneys a pass with respect to meaningfully reviewing the sufficiency of the evidence, then it undermines legal professional standards and misses the point of having an attorney involved in the debt collection process at all.

ii. **The proposed safe harbor for so-called meaningful attorney involvement fails to protect consumers from collection attorneys' false or misleading representations.**

The FDCPA, section 807, contains provisions to protect consumers from "false or misleading representations," and section 807(3) specifically prohibits the "false representation or implication that any individual is an attorney or that any communication is from an attorney."[124] However, the FDCPA does not describe the level of involvement that would render such an attorney representation false or misleading.[125] The courts, nonetheless, have reasoned that when attorney communications, including litigation submissions, wrongfully imply that an attorney was "meaningfully involved," that attorney makes a false or misleading representation in violation of the FDCPA.[126] There "is no specific 'standard' for assessing meaningful attorney involvement for complaints [. . .]"; instead, whether the attorney violates the FDCPA for not being meaningfully involved is case-specific.[127] Yet, the proposed safe harbor provision does not protect consumers from "false or misleading representations," as the FDCPA requires. Proposed § 1006.18(g) provides:

> An attorney has been meaningfully involved in the preparation of debt collection litigation submissions if the attorney: (1) Drafts or reviews the pleading, written motion, or other paper; and (2) personally reviews information supporting the submission and determines, to the best of the attorney's knowledge, information, and belief, that, as applicable: The claims, defenses, and other legal contentions are warranted by existing law; the factual contentions have evidentiary support; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.[128]

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[124] 15 U.S.C.A. §§ 1692e(3) and (10) (respectively prohibits the "false representation or implication that any individual is an attorney or that any communication is from an attorney," and the "use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer).
[125] *Id*.
[126] *See CFPB v. Frederick Hanna & Associates, P.C.*, 114 F. 3d 1342, 1368 (N.D. Ga. 2015) (quoting *Tourgeman v. Collins, Financial Servs., Inc.*, 2011 WL 3176453, *9 (S.D. Cal.)) (under the "least sophisticated consumer" standard, courts are concerned that a consumer "could view a lawsuit, signed by an attorney, as an indication that a lawyer had in fact scrutinized the case and determined that it had legal merit." As such, courts apply "the least sophisticated consumer standard to determine whether the routine filing of complaints with a lack of substantive attorney involvement constitutes a misleading or deceptive debt collection practice").
[127] *Id*.
[128] Debt Collection Practices, 84 Fed. Reg. at 23402-03.

The very generalized and vague safe harbor provision stated in the proposed rule only requires that an attorney attest that the factual contentions have "evidentiary support," and provides absolutely no clarity as to what exactly "evidentiary support" entails.[129] Instead, the CFPB should eliminate any "safe harbor" for collection attorneys who make false, deceptive or misleading representations, and should require a more specific standard for meaningful attorney involvement to protect consumers from false or misleading representations.

iii. Federal Rule of Civil Procedure 11 insufficiently guides whether a collection attorney has been meaningfully involved and fails to protect consumers.

The Bureau maintains that "the factors in proposed § 1008.18(g) are similar to some of the nationally recognized standards for attorneys making submissions in civil litigation."[130] And, "[b]ecause most FDCPA claims are considered by Federal courts, and Federal court rules are adopted and apply nationwide, Federal Rule of Civil Procedure 11(b)(2) through (4) as currently adopted may provide an appropriate guide for judging whether a submission to the court has complied with § 1006.18(g)."[131] As such, the Bureau, asserts, "the safe harbor in proposed § 1006.18(g) restates certain provisions of Federal Rule of Civil Procedure Rule 11(b)."[132] In doing so, the proposed safe harbor provision attempts to define "meaningful attorney involvement" in debt collection litigation submissions by merely using a watered-down version of Federal Rule of Civil Procedure, Rule 11,[133] in which an attorney need only certify three of Rule 11's four requirements.[134] However, Federal Rule 11, or its comparable state provision, *already* applies to attorneys, separate and apart from the FDCPA. Simply restating a shortened version of the already applicable Federal Rule 11 serves no useful purpose.

Moreover, as evidenced by several past and current CFPB enforcement actions described in subsection iv, below, Rule 11's generalized requirements have thus far, insufficiently protected consumers from deceptive debt collection practices, or from false or misleading representations. Rather, as the use of litigation to collect debts increases,[135] and the need for enforcement actions continue,[136] so does the necessity for stronger checks and balances in the

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[129] *Id*.
[130] *Id*. at 23324.
[131] *Id*.
[132] *Id*.
[133] Fed. R. Civ. P. 11.
[134] Debt Collection Practices, 84 Fed. Reg. at 23402-03.
[135] *See, e.g.,* Consent Order, *In re Portfolio Recovery Assocs., LLC*, 2015-CFPB-0023 (Sept. 9, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf; Consent Order, *In re Encore Capital Grp., Inc.,* 2015–CFPB-0022, para. 66 (Sept. 9, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf (self-describing as a litigation volume industry).
[136] *See, e.g.,* Complaint, *CFPB v. Forster v. Garbus, LLP*, 2:19-cv-2928, para. 2, (E.D. N.Y. May 17, 2019), https://files.consumerfinance.gov/f/documents/cfpb_forster-garbus_complaint_2019-05.pdf ("Since at least January 2014, Forster & Garbus has relied on nonattorney support staff, automation, and both a cursory and

form of specific requirements for collection attorneys. Again, in light of Rule 11's limited utility, we insist that the Bureau to eliminate any "safe harbor" for collection attorneys who make false, deceptive, or misleading representations.

iv. The Bureau's recent enforcement actions lay the foundation for a stronger meaningful attorney involvement standard than the proposed rule provides.

Although the courts have not provided a single, specific standard, the Bureau has, through the majority of its enforcement actions between 2015 and 2019, promoted several aspects of what might constitute a meaningful attorney involvement rule. These enforcement actions have been brought against a number of collection firms, generally speaking, for contacting consumers and implying that an attorney has reviewed the account for accuracy, even when an attorney has not actually been "meaningfully involved" in the suit.

For instance, in the CFPB's 2016 enforcement action against *Pressler & Pressler, LLP*, the consent order maintains that defendants cannot bring a suit unless a firm attorney has reviewed certain original account-level documentation.[137] The Bureau found that the Pressler & Pressler firm violated the FDCPA's prohibition against a collector using false, deceptive, or misleading representations in collecting debts, when, without reviewing original account-level information, the firm represented that consumers owed the claimed debts even when they had knowledge or reason to believe that the consumers' accounts might contain unreliable data.[138] Moreover, the *Pressler & Pressler* order found that the firm violated FDCPA's prohibition against using unfair and unconscionable practices in debt collection when it "unfairly collected or attempted to collect a debt by in many instances relying exclusively on summary data provided by clients without having reviewed supporting documentation underlying the facts the [f]irm asserts in complaints." [139] The Bureau maintained that "[t]hese practices are likely to cause substantial injury to consumers, for example by imposing costs in defending improperly filed or outright erroneous lawsuits."[140] And, the injuries consumers may face "are not reasonably avoidable by consumers because, among other things, when a consumer is sued, he or she must defend or otherwise respond to the lawsuit, or else face a default judgment."[141]

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deficient review of account files to attempt to collect more than 99,000 debts that consumers allegedly owe to Forster & Garbus's clients.").

[137] Consent Order, *In re Pressler & Pressler, LLP*, 2016-CFPB-0009, para. 37, (Apr. 25, 2016), https://files.consumerfinance.gov/f/documents/201604_cfpb_consent-order-pressler-pressler-llp-sheldon-h-pressler-and-gerard-j-felt.pdf (requiring that defendant collection attorneys review certain original account-level documentation, including a review of the consumer's name, last four digits of the account number associated with the debt at the time of charge-off, the claimed amount (excluding post-charge off payments), and the bill of sale (and "confirmed that it evidences the transfer of ownership of the Debt at the time of Charge-off to each successive owner, including the Debt Buyer on whose behalf Respondents initiate a Collection Suit")).

[138] *Id*. at para. 24.

[139] *Id*. at para. 28.

[140] *Id*. at para 32.

[141] *Id*. at para. 33.

In light of the harms to consumers caused by the collection firm attorneys' lack of review of original account level documentation, the Bureau enjoined the firm's attorneys and any other employee, officer, or agent from filing a collections suit unless one of the firm's attorneys had reviewed certain minimum original account level documentation. The order specified, among many other things, that to file a suit, a firm attorney would be required to review either "a document signed by the [c]onsumer evidencing the opening of the account forming the basis for the [d]ebt; or [o]riginal [a]ccount-[l]evel [d]ocumentation reflecting a purchase, payment, or other actual use by the consumer."[142] Furthermore, the firm attorney was required to confirm that the statute of limitations had not run on the debt. And, a firm attorney had to confirm, "based upon methods or means proven to be historically reliable and accurate [for] the [c]onsumer's correct identity and current address[.]"[143] Requiring that a firm attorney review these documents prior to initiating a lawsuit, according to the Bureau, would ensure that debt-collection litigation activities are not conducted without a reasonable basis. Such review would also protect against the collector using unfair and unconscionable practices in debt collection, which the FDCPA specifically prohibits.[144]

Most recently, on May 17, 2019, the CFPB filed a complaint against *Forster & Garbus*, "to address its practice of filing collection lawsuits against consumers without meaningful attorney involvement"[145] and alleges violations of both the FDCPA and the Consumer Financial Protection Act of 2010 (CFPA).[146] The complaint states that, "using high-volume litigation tactics, Forster & Garbus collects substantial sums of money from consumers who may not actually owe debts or may not owe debts in the amounts claimed in the collection suits."[147] The CFPB's complaint maintains that Forster & Garbus files complaints "on behalf of creditors that have been accused of unlawful debt-collection practices, including alleging that consumers owe amounts that they do not actually owe[.]"[148] However, "Forster & Garbus has filed suits against purported debtors on behalf of those creditors without investigating or verifying the summary information that served as the basis for those lawsuits."[149]

Finally, consent orders from past CFPB actions overwhelmingly mandate that collections firms *possess* "original account level documentation" before filing a lawsuit against a borrower.[150]

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[142] *Id*. at para. 36(d).
[143] *Id*. at para. 37(b).
[144] 15 U.S.C. § 1692f.
[145] Complaint*, CFPB v. Forster v. Garbus, LLP*, Civil action No. 2:19-cv-2928, para. 1, (E.D. N.Y. May 17, 2019).
[146] *Id.* at para. 47-60
[147] *Id*. at para. 3.
[148] *Id*. at para. 37.
[149] *Id*. at para. 39.
[150] *See, e.g.,* Consent Order, *In re New Century Financial Servs., Inc.*, 2016-CFPB-0010, para. 31, (Apr. 25, 2016), https://files.consumerfinance.gov/f/documents/201604_cfpb_consent-order_new-century-financial-services-inc.pdf (requiring Respondent and "all other persons in active concert or participation" with them "from threatening or initiating a Collection Suit" unless in possession of certain original account-level documentation"); Consent Order, *In re Portfolio Recovery Assocs.*, 2015-CFPB-0023, para. 119, (Sept. 9, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf

Though distinct from what must be reviewed, it logically and reasonably follows that what collection attorneys must possess to initiate a suit, they must also review. The Bureau, with some degree of variation amongst the enforcement actions, has stated that this documentation should include:

- an explanation of the amount claimed;
- the consumer's name;
- the last four digits of the account number;
- a record of post charge-off payments; and
- a bill of sale or other document showing transfer of ownership of the debt.[151]

Additionally, we also recommend that required documentation include, but should not be limited to:

- a copy of the original contract between the borrower and the creditor;
- an explanation of any interest, fees (including attorneys' fees), and charges by the original creditor, debt buyer, or any other assignee;
- the amount and date of the last payment before charge-off or default, whichever is earlier; and
- a complete copy of assignment, rather than just a bill of sale, since a bill of sale is merely a generic spreadsheet listing the accounts sold, which does not provide proof of anything because it typically does not mention the debt at issue.

The totality of this original account level information, at a minimum, if required to be provided and reviewed before initiating a lawsuit, would significantly reduce errors in suing the wrong borrower, for the wrong amount. Indeed, several states, including North Carolina, California, New York, Maine, Colorado, and Maryland have passed laws or issued regulations requiring original account level information at the time debt buyers file lawsuits, precisely to improve accuracy in the debt collection litigation process.[152] Again, what is required at the time of filing differs from what must be reviewed, but it follows that what collections attorneys in these state courts must file to begin a suit, they should also be reviewing.

Together, these enforcement actions underscore the need for heightened attorney review of the information prior to filing a collections suit, and undoubtedly provide a higher standard for "meaningful attorney involvement" than what is set forth in proposed section § 1006.18(g). Indeed, in these actions, the Bureau acknowledges that the renowned default judgment mill model that collectors espouse is exacerbated when collections attorneys are not required to meaningfully review the supporting documentation. However, the proposed rule is completely

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(prohibits defendants from "initiating any Debt Collection Lawsuit unless in possession of [certain] Original Account-Level Documentation").

[151] *See, e.g., id*.

[152] *See, e.g.,* Cal. Civ. Code §§ 1788.58, 1788.60 (2018); Colo. Rev. Stat. § 5-16-111(2) (2018); Me. Stat. tit. 32, § 11019 (2018), N.C. Gen. Stat. Ann. §§ 58-70-115(5), 58-70-170, 58-70-155 (2019). *See also*, Md. Code Regs. 3-306 (2018); N.Y. Comp. Codes R. & Regs. tit. 22, §§ 202.27-a, 202.27-b, 208.6(h), 208.14-a, 210.14-a, 210.14-b, 212.14-a, 212.14-b (2016).

silent about the CFPB's prior enforcement actions, and their impact on the meaning of "meaningful attorney involvement." Instead, the safe harbor provision the CFPB now proposes substitutes a generalized, weaker standard for the thorough requirements established through CFPB enforcement precedent, without explanation or even acknowledgement of such a deviation.

The CFPB should not provide a safe harbor to collection attorneys when the attorney has not been meaningfully involved in making sure that the collectors are filing a lawsuit against the right person, for the right amount, for legitimate debts, or that their client has the legal right to sue.

V. The Proposed Rule Does Not Sufficiently Protect Limited-English Proficiency (LEP) Consumers.

Proposed § 1006.34(d)(3)(vi)—limited only to Spanish-speaking consumers—completely lacks meaningful requirements for collectors to convey critical information about alleged debts in the validation notice, as required by the FDCPA,[153] to limited English proficiency (LEP) consumers.[154] In fact, proposed § 1006.34(d)(3)(vi)(B) places the burden on Spanish-speaking consumers to request a Spanish-language translation of their validation notice without any guidance; and, makes it only optional for debt collectors to provide a disclosure to Spanish-speaking consumers stating that consumers can request this Spanish-language validation notice.[155] Moreover, the proposed rule does not address non-Spanish speaking LEP communities at all.[156] We know, for instance, that limited English proficiency among recently emigrated Asian Americans and Pacific Islanders can push this population into poverty and can even lead to housing displacement.[157] This approach is unacceptable.

We strongly urge the Bureau to require that debt collectors include a Spanish translation on the reverse of every validation notice. Under certain circumstances, we also urge that the Bureau mandate non-Spanish language translations of the validation notice. Spanish-speakers, as do all LEP consumers, deserve the right to understand the information collectors send to them. Moreover, as described in Section VIII of this comment below, we urge the Bureau to include a Statement of Rights, which would provide consumers with information to determine whether

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[153] *See* 15 U.S.C. § 1692(g).

[154] Debt Collection Practices, 84 Fed. Reg. at 23351.

[155] *Id*. ("Proposed § 1006.34(d)(3)(vi)(B) would permit debt collectors to provide a statement in Spanish in the consumer response information section that a consumer can use to request a Spanish language validation notice.").

[156] See *id*. for a discussion of proposed § 1006.34(d)(3)(vi); *cf* Small Business Review Panel Outline (proposing a Statement of Rights be included along with the validation notice, and proposes that it be translated for LEP consumers under certain conditions).

[157] National Coalition for Asian Pacific Americans Community Development (National CAPACD) and the Council for Native Hawaiian Advancement (CNHA). (2016, May 11). *Our Neighborhoods: Asian American & Pacific Islander Anti-Displacement Strategies*. Retrieved from https://www.nationalcapacd.org/data-research/neighborhoods-asian-american-pacific-islander-anti-displacement-strategies/.

they owe a debt and to navigate the debt collection process, along with the required validation notice. The Small Business Review Panel Outline recommended a Statement of Rights.[158] Yet, the proposed rule no longer contains this requirement and is, therefore, insufficient in protecting consumers.[159] If it were required by the Bureau as we recommend, we would urge that a Statement of Rights also be provided in a language that the consumer can comprehend.

i. Validation notices contain important information about the debt that LEP consumers deserve to understand.

Under Section 809(a) of the FDCPA, debt collectors must provide consumers with a validation notice when trying to collect a debt.[160] Congress enacted section 809(a) in response to "the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."[161] The validation notice contain critical information about the debt and consumers' rights regarding the debt collection process, but is helpful only to the extent they are comprehensible. As such, English-only debt notices do not adequately protect LEP persons from abusive practices under the FDCPA. For limited English proficiency (LEP) consumers, therefore, it is a paramount and commonsense protection that the validation notice be translated into a language that they can understand.

The LEP population in the United States is large and growing. According to the Census Bureau, this population is made up of approximately 25.6 million people; debt collection poses a significant issue for many LEP communities. For example, McAllen, Texas is 85 percent Latinx[162] with the highest proportion of the population with a debt in collections reported in their credit file, and 32 percent of the working-age population considered to be LEP.[163] The AAPI community comprises 56 ethnic groups and 100 languages; approximately 5.5 million (34%) AAPIs are LEP.[164] Limited English proficiency populations tend to experience poverty at much greater rates. In 2013, about 25 percent of LEP individuals lived in households with an annual income below the official federal poverty line—nearly twice as high as the share of English-

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158 Consumer Financial Protection Bureau, 2016.
159 *Id.* (the Validation Notice states: "Learn more about your right under federal law. For instance, you have the right to stop or limit how we contact you. Go to www.consumerfinance.gov). See also n.37 ("While the Bureau tested a statement of consumer rights disclosure, this proposal would not require debt collectors to provide such a disclosure to consumers. Instead, the Bureau proposes to require certain debt collectors to provide on the validation notice a statement referring consumers to a Bureau-provided website that would describe certain consumer protections in debt collection.").
160 *See* 15 U.S.C. § 1692(g) (stating that within 5 days after the initial communication with the consumer about the collection of any debt, the collector must send the consumer a written notice—barring certain circumstances—that contains information about the amount of the debt, the name of the creditor, how to dispute the debt, and how the consumer can obtain information about the original creditor).
161 S. Rep. No. 95-382, at 4 (1977).
162 Ratcliff et. al., 2017.
163 Dews, F. (2014, September 24). Six Questions about the Limited English Proficient Workforce. *Brookings Institution*. Retrieved from https://www.brookings.edu/blog/brookings-now/2014/09/24/six-questions-about-the-limited-english-proficient-lep-workforce/.
164 5 U.S. Census Bureau, 2012 American Community Survey, 1-Year Estimates, Table S0201.

proficient persons.[165] Therefore, LEP communities are more likely to face challenges with paying for life's necessities without having to take on debt, thus increasing the likelihood they may be in contact with debt collectors. In fact, the LEP community is often the target of deceptive advertising of harmful financial services products marketed in their own languages.[166]

LEP consumers who receive debt collection notices in English are unlikely to understand the status of their accounts. The debt collection process and the legal system through which debt is collected are already complicated and inaccessible to non-English-speaking consumers, and by failing to require translations at this critical first step of understanding what the debt is, to whom it is owed, and whether they actually owe it, the CFPB only sets LEP consumers up for failure. This may result in further financial harm, including negative credit reporting, legal judgments, and wage garnishment. Nonetheless, the CFPB's proposed rule would codify abusive practices with respect to interacting with the LEP community, as debt collectors will not be required to provide them with necessary information about the alleged debt, which will only serve as an additional barrier in a complex legal system.

In 2014, the FTC and CFPB co-hosted a roundtable that highlighted debt collection challenges in LEP communities.[167] The roundtable emphasized language discrimination issues and how the inaccessibility of certain financial products and services to Spanish speakers stresses the need for additional CFPB regulation and enforcement. And, that new CFPB rules could be used to complement state laws that currently protect LEP individuals.[168] It is disappointing to see that the CFPB has significantly walked back the potential protections discussed at the 2014 roundtable, and which were proposed and considered through the Small Business Review Panel Outline.[169] In fact, the Proposal stated two strong alternatives, but proposed §1006.34(e) falls painfully short of both of them.

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[165] Zong, J. & Batalova, J. (2015, July 8). The Limited English Proficient Population in the United States. *Migration Policy Institute.* Retrieved from https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states.

[166] Weiner, Brodsky, Kider PC. (2018, January). *Weiner, Brodsky, Kider PC, FTC Consent Order Requires Spanish Language TILA Disclosures in Spanish Language Advertisements*. Retrieved from https://www.thewbkfirm.com/featured-industry-news/ftc-consent-order-requires-spanish-language-tila-disclosures-spanish-language-advertisements; Rich, J. (2015, September). FTC Celebrates Hispanic Heritage Month. *Federal Trade Commission.* Retrieved from https://www.consumer.ftc.gov/blog/2015/09/ftc-celebrates-hispanic-heritage-month (describing FTC enforcement actions that "combat deception and fraud in marketplaces targeting Hispanic communities.").

[167] Consumer Financial Protection Bureau. (2014, October 23). *Live from Long Beach: CFPB Debt Collection & the Latino Community Roundtable*. Retrieved from http://www.consumerfinance.gov/about-us/blog/live-from-long-beach/.

[168] *Id.*

[169] Consumer Financial Protection Bureau, 2016. This document proposes a Statement of Rights be included along with the validation notice, and proposes that it be translated for LEP consumers under certain conditions.

ii. The Bureau must require that debt collectors include a Spanish translation on the reverse of every validation notice and require a Spanish-translated Statement of Rights.

The proposed rule places the burden on Spanish-speaking consumers to request a Spanish-language translation of their validation notice without any guidance; and, makes it only optional for debt collectors to provide a Spanish-language disclosure stating they can request this Spanish language validation notice.[170]

One alternative from the Small Business Review Panel Outline would require debt collectors beginning collection on an account to include a Spanish translation on the reverse of every validation notice and a translation of the Statement of Rights.[171] We advocated for this alternative then, and strongly urge the Bureau to consider adopting this alternative now.[172] In support of this alternative, the Bureau stated that approximately 65 percent, or 16.4 million people of the 25.6 million individuals who speak English "less than very well," are Spanish speakers.

The CFPB now states in its proposed rule, with respect to requiring Spanish translation, that it:

> [D]eclines to propose a mandatory requirement that debt collectors provide translated validation notices to consumers. Requiring debt collectors to provide a translation on a separate page with each validation notice could result in significant cost on a cumulative, industry-wide basis, especially for smaller debt collectors and for languages whose use is not prevalent in the United States.[173]

The Bureau's response is unacceptable and fails to consider the needs of the vast number of LEP individuals. Indeed, long-held judicial principles and FTC enforcement actions establish that under the FDCPA, Spanish speakers are entitled to protections from debt collectors.

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[170] Debt Collection Practices, 84 Fed. Reg. at 23351 ("Proposed § 1006.34(d)(3)(vi)(B) would permit debt collectors to provide a statement in Spanish in the consumer response information section that a consumer can use to request a Spanish language validation notice.").
[171] Consumer Financial Protection Bureau, 2016. This document states that "The second alternative under consideration would require debt collectors beginning collection on an account to include a Spanish translation on the reverse of every validation notice and Statement of Rights."
[172] Stegman, M. & Stifler, L. (2016). Initial Analysis of Consumer Financial Protection Bureau's Proposed Outline to Address Debt Collection Abuses. *Center for Responsible Lending*. Retrieved from https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_debt_collection_cfpb_sep2016.pdf. This document states that "CRL supports the CFPB in its efforts to ensure that the validation notice and Statement of Rights are accessible to as many consumers as possible, particularly limited English proficiency (LEP) populations, and supports the use of translated validation notices and Statements of Rights."
[173] Debt Collection Practices, 84 Fed. Reg. at 23352.

a. Judicial principles support translating the validation notice into Spanish.

Courts have held that for purposes of the FDCPA, Spanish speakers constitute 'least sophisticated consumers,' entitled to protections. Specifically, because Spanish-language speakers are a "mainstream" population, they are representative of "least sophisticated consumers," and as a result, their interpretation of a debt collection letter is "entitled to protection from behavior of debt collectors that violate the FDCPA."[174] The "least sophisticated consumer" standard is objective and "measured by how the least sophisticated consumer would interpret the notice received from the debt collector."[175] Further, since the FDCPA is a strict liability statute, consumers do not need to show intentional conduct by a debt collector.[176]

Notably, courts have thus far focused on cases involving attorneys sending debt collection letters containing English-language text, together with Spanish-language text. However, because Spanish speakers are a "mainstream" group, and their interpretation of debt collection letters must therefore be honored, it follows that an all-English-language letter would be insufficient under the FDCPA. Moreover, courts recognize that because Congress passed the FDCPA to protect consumers from "abusive" practices, Congress also "intended that . . . the [debt] notice be *clearly conveyed*."[177]

The proposed rule provides that debt collectors have the option of including a disclosure stating that Spanish-speaking consumers can request Spanish-language validation notices. However, where a debt collector knows or should know of a person's LEP status, case law does not necessarily support an optional proposal. In fact, as one court concluded, the act of including one Spanish-language sentence, embedded in the English text, was evidence that the collector should have known "the English notice was clearly not sufficient to inform these Spanish-speakers of their rights."[178]

Further, courts have held that under the FDCPA, "any. . . communication. . . may not overshadow ... the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."[179] In one principal case, the court held that a Spanish-language sentence instructing Spanish speakers to call a certain phone number, inserted within the text of an otherwise English-language debt collection letter, "overshadowed" the required disclosures and violated the FDCPA.[180] A communication is overshadowing when "it conveys ...

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[174] *Ehrich v. I.C. System, Inc.,* 681 F. 2d 265, 268-71 (E.D.N.Y. 2010) (holding that Spanish-speakers are a "mainstream group" that fall outside other "bizarre" or "idiosyncratic interpretations" of a "least sophisticated consumer," and noting that a 2008 census showed the percentage of Spanish speakers in the U.S., and in N.Y was 12.2 percent and 14.2 percent respectively).
[175] *Russell v. Equifax A.R.S. and C.B.I. Collections*, 74 F.3d 30, 34 (2d Cir. 1996).
[176] *Id*. at 33.
[177] *Ehrich,* 681 F. 2d at 272 (quoting *Russell,* 74 F.3d at 35) (emphasis added).
[178] *Id*.
[179] *Id*. at 270.
[180] *Id*.

information in a confusing or contradictory fashion so as to cloud the required message with uncertainty,"[181] and leaves "the least sophisticated consumer uncertain as to her rights."[182] In the case of a Spanish-speaker, a debt collector may violate the FDCPA when it leaves "the Spanish-speaker uncertain as to his or her rights, failing to clearly state the available options" by encouraging the Spanish speaker to call and "potentially waive his or her rights to challenge the validity of the debt." This creates "the misimpression that they understood the appropriate steps to take if they had questions, when in fact, their rights were not explained to them."[183]

The established judicial principles that debt notices both must be clearly conveyed, and must not overshadow required disclosures, demand that a debt collection letter sent to a Spanish speaker must *also* be *clearly* conveyed through language that does not *overshadow* required disclosures. Such clarity would be impossible to achieve through an all English-language letter with just an optional sentence for collectors to include, that Spanish speakers may request a Spanish language validation notice. In order to clearly convey a notice without overshadowing its disclosures as required by the FDCPA, then, a debt collection letter and its disclosures must also be provided in Spanish from the beginning.

The Bureau names the cost to smaller debt collectors, for languages whose use is not prevalent in the United States, as reason not to provide Spanish language translations. However, the statistics we provide, which are also cited in the Small Business Review Panel Outline, lay to rest the argument that Spanish is not a prevalent language in this country. Moreover, as just discussed, courts have specifically held that Spanish-language speakers are considered a "mainstream" population in the U.S. whose interpretation of debt collection letters is entitled to protection.[184] Thus, the cost-benefit analysis the CFPB cites in support of its decision tips heavily in favor of debt collectors providing a translated validation notice and Statement of Rights so Spanish-speaking consumers can simply understand the status of their accounts. The CFPB, by providing model translations to debt collectors on its website, in Spanish and other languages, can significantly aid in making this process more accessible for debt collectors.

b. FTC enforcement actions support translating the validation notice into Spanish.

Several FTC enforcement actions addressing abusive debt collection have specifically found that collectors target Spanish-speaking debtors, further supporting the argument that the benefits outweigh the costs with respect to mandating the validation notice be translated into Spanish. For instance, the court ordered a $1.5 million judgment against Centro Natural Corp, an abusive debt collection operation that targeted Spanish and English speakers, and ordered that it cease debt collection activity.[185] In this case, Centro Natural Corp conducted "a nationwide

[181] *DeSantis v. Computer Credit, Inc*., 269 F.3d 159, 161 (2d Cir. 2001).
[182] *Russell,* 74 F.3d at 35.
[183] *Ehrich*, 681 F.2d at 272.
[184] *Id*. at 268-71.
[185] Order, *Fed. Trade Comm'n v. Centro Natural Corp*., No. 14-23879-CIV (S.D. Fl. July, 15, 2105), https://www.ftc.gov/system/files/documents/cases/150715centronatural-order.pdf.

telemarketing scheme that preys on Spanish-speaking consumers" using "deceptive and abusive tactics to pressure consumers to 'settle' debts that consumers [did] not actually owe[.]"[186]

In another FTC action, a California court ordered that yet another abusive debt collection operation, Rincon Management Services—which targeted English speakers and Spanish speakers with scripted calls in Spanish—pay over $23 million and stop its debt collection activity.[187] In that case, Rincon demanded a certain amount of the alleged debt plus an additional amount they asserted were for "court costs" and "legal fees."[188] If the consumers did not pay, Rincon's collectors threatened to have them arrested, their wages garnished or their property seized.[189] In a third FTC action against RTB Enterprises, Inc., or Allied Data Corporation, the court ordered that the Texas-based collector pay $4 million for its abusive activities again targeting Spanish and English speakers.[190] The complaint alleged that "[a]pproximately 10 percent of Allied's collectors collect debts in Spanish" and "in numerous instances, Allied's collectors use[d] more abusive debt collection tactics against Spanish-speaking consumers than against English speaking consumers."[191]

These enforcement actions underscore the need for the Bureau to adopt a rule that adequately protects Spanish-speaking borrowers. If the CFPB is truly concerned that "[consumers] with limited English proficiency may benefit from translations of the validation notice in some circumstances," then its current decision not to accommodate Spanish speakers by mandating a systematized, standard practice to ensure that they understand important debt collection notices should be seriously reconsidered.[192] When almost two-thirds of the American population would potentially benefit, the CFPB should require a Spanish translation on the reverse side of every English validation notice and recommended Statement of Rights.

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[186] Complaint, *Fed. Trade Comm'n v. Centro Natural Corp.*, No. 14-23879-CIV, para. 2 (S.D. Fl. Oct. 20, 2014), https://www.ftc.gov/system/files/documents/cases/141023centrocmpt.pdf.
[187] Final Order, *Fed. Trade Comm'n v. Rincon Management Servs., LLC*, No. 5:11-cv-01623-VAP-SP (C.D. Cal. Mar. 26, 2014), https://www.ftc.gov/system/files/documents/cases/140403rinconorder.pdf.
[188] Complaint, *Fed. Trade Comm'n v. Rincon Management Servs., LLC*, No. 5:11-cv-01623-VAP-SP (C.D. Cal. Mar. 26, 2014), https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111026rinconcmpt.pdf.
[189] *Id.*
[190] Final Order, *Fed. Trade Comm'n v. RTB Enters., Inc.* , No. 4:14-cv-01691 (S.D. Tex. June 19, 2014), https://www.ftc.gov/system/files/documents/cases/140625rtbstip.pdf.
[191] Complaint, *Fed. Trade Comm'n v. RTB Enters., Inc*., No. 4:14-cv-01691 (S.D. Tex. June 19, 2014), https://www.ftc.gov/system/files/documents/cases/140625rtbcmpt.pdf.
[192] Debt Collection Practices, 84 Fed. Reg. at 23351.

iii. For non-Spanish speaking LEP individuals, the Bureau should require that under certain circumstances, debt collectors include a translation on the reverse of the validation notice and a statement of rights in a language the consumer understands.

In addition to mandating that collectors translate the validation notice into Spanish, we strongly urge the CFPB to mandate that collectors provide a translation of the validation notice in other languages under certain circumstances, including when:

- The debt collector's initial communication with the consumer took place predominantly in a language other than English;
- The debt collector received information from the creditor or a prior collector indicating that the consumer prefers to communicate in a language other than English;
- The debt collector receives a request from the consumer seeking any information in the consumer's preferred language, including the proposed tear off portion of the validation notice; and/or
- The debt collector later communicates with the consumer in a non-English language, in which case the collector must send the translated validation notice at that time.

The first two circumstances were outlined as an alternative in the Small Business Review Panel Outline. We are disappointed to see that the CFPB has now completely deviated from these commonsense alternatives from the Outline. In fact, the Bureau is not proposing any provisions signaling a commitment to ensuring non-Spanish speaking LEP consumers receive the validation notice in a language they can comprehend, despite the fact that, after Spanish, in the U.S., "there are seven languages spoken by nearly 5 million LEP individuals[.]"[193]

What we are requesting the Bureau do with respect to non-Spanish speaking LEP borrowers is a modest proposal, in essence asking that if and when the collector has good reason to believe that a consumer's preferred language is not English, the collector should then be required to accommodate that consumer. In fact, the Seventh Circuit has suggested that English-only debt letters (specifically, dunning letters) targeting LEP groups may in fact be deceptive when collectors know that consumers have a difficult time understanding English because protection of LEP groups under the FDCPA differs from the protection the FDCPA affords other "unsophisticated consumers." The Seventh Circuit reasoned that the FDCPA "is intended for the protection of "unsophisticated" consumers (sophisticated consumers presumably do not need its protection)[.]"[194] Therefore, in deciding whether representations in collectors' letters are

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[193] Survey 5-Year Estimates, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001 (accessed February 22, 2016) (83.4 percent of 25.3 million LEP speakers is 21,100,200 minus 16,192,000 LEP Spanish speakers is 4,908,200).

[194] *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007).

misleading, "the court asks whether a person of modest education and limited commercial savvy would be likely to be deceived."[195] But, the Seventh Circuit asserts that "if the debt collector has targeted a particularly vulnerable group—say, *consumers who he knows have a poor command of English*—the benchmark for deciding whether the communication is deceptive would be the competence of the substantial bottom fraction of *that* group."[196] Indeed, as the Seventh Circuit advises, it makes sense that standards governing what is and is not deceptive under the FDCPA would differ depending on whether or not a consumer proficiently grasps the English language.

Given that LEP consumers are more likely to experience poverty than non-LEP communities in the U.S., as well as face significant language barriers with respect to understanding the status of their alleged debts, the Bureau should enact a rule that seeks to remove—not further reinforce—these barriers. Again, the CFPB, by providing model translations to debt collectors on its website, in Spanish and other languages, can significantly aid in making this process more accessible for debt collectors. Under the circumstances we outline above, the Bureau should require that the validation notice be translated into a language the consumer understands, in addition to requiring the translation of a Statement of Rights, which we ask that the Bureau mandate.

VI. The Permissible Methods and Frequency of Contacts the Proposed Rule Sets Forth Opens the Door to Overly Aggressive Collection Tactics and Harassment.

The CFPB's proposed rule opens the door to debt collectors harassing consumers. First, it permits an excessive number of calls per debt per week. The proposal further sanctions harassment by introducing new methods by which a collector may contact a consumer – email, text, private social media messages – and imposes no limits. While each proposal, alone, is troubling enough, taken together, the communications proposals authorize harassing and aggressive collection tactics that will harm already struggling individuals and families.

Consumer harassment in a huge concern with regard to debt collection practices. In 2017, the CPFB conducted a survey providing an in-depth analysis of consumers' encounters with the debt collection industry.[197] According to the survey, approximately one-third of consumers – or more than 70 million Americans – were contacted by a collector about a debt in the previous 12 months. Most of these debts were for medical or credit card debt. The survey results emphasize the need for strong oversight of the industry, particularly when it comes to harassing conduct. The survey found:

- One-in-four consumers report threatening contact from a collector;
- Three-in-four consumers report that collectors did not honor a request to cease contact;

[195] *Id*.
[196] *Id.* (emphasis added).
[197] Consumer Financial Protection Bureau, January 2017.

- More than half of consumers report incorrect contact for at least one debt;
- Over one-third of consumers report being contacted at inconvenient times;
- Nearly 40 percent of consumers report that a collector attempted contact four or more times per week, with 17 percent reporting that the collector tried contacting them eight or more times per week; and
- One-in-seven consumers contacted about a debt report being sued.

Media reports provide further examples of harassing conduct. For one consumer, harassing conduct by Navient Corporation, one of the largest student loan servicing companies, caused enormous stress. According to Michelle Lannon, Navient called her sister; they called her grandmother who died ten years ago; they called her father, who died three years ago; and they called her friend and housemate.[198] In another story of debt collection harassment, Terry returned to her job following sixteen months of cancer treatment. Then she began receiving numerous phone calls from a debt collector who sought to recoup an alleged debt owed to a former landlord.[199] She shared records proving she had paid the debt ten years earlier, but the debt collector garnished her wages, taking more than $6,000 from her paychecks.

In the current proposed rule, the CFPB sets a limit of seven telephone call attempts per debt per week.[200] In addition, once the debt collector and consumer have a telephone conversation, the collector must wait at least seven days before calling the consumer again.[201] While we appreciate the limit of one telephone conversation per week, the number of permitted call attempts is excessive, particularly when considering it is per debt. As many consumers facing debt collection have multiple accounts,[202] the seven calls per debt per week limit could quickly escalate. For families struggling with multiple debts, the total communications from collectors will be overwhelming.

For instance, the CFPB survey in 2017 found that the majority of consumers who had been contacted about repaying a debt in the prior year had been contacted about more than one debt, with 57 percent contacted about two to four debts, and 15 percent contacted above five or more debts.[203] With seven call attempts per week per debt, a borrower with five medical debts in collections could be contacted up to 35 times in a week, even if the same debt collector was collecting all of the accounts. We urge the CFPB to make contact limits per

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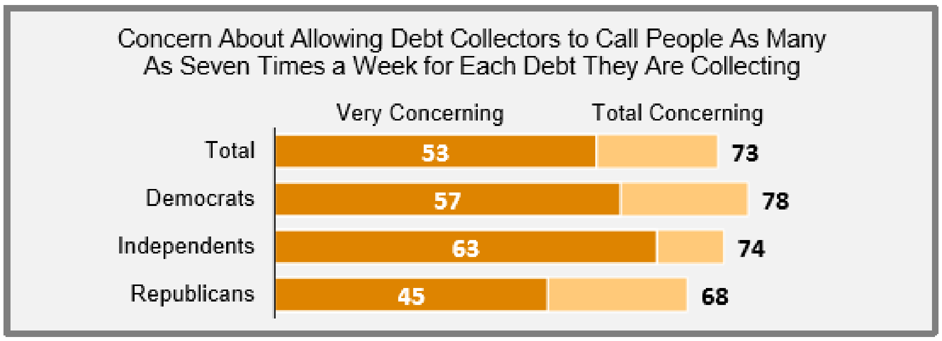
[198] Ortiz, E. (2019, June 24). Student Debt Scams Flourish with Rise in Robocalls, Advocates Say. *NBC News*. Retrieved from https://www.nbcnews.com/news/education/student-debt-scams-flourish-rise-robocalls-advocates-say-n1016921.
[199] Saunders, L. and Bergmark, M. (2019, September 6). A Cancer Survivor Paid an Old Debt, But Collectors Garnished her Wages Anyway. It's Part of a Disturbing Trend That's About to Get Worse. *Business Insider*. Retrieved from businessinsider.com/debt-collector-cfpb-wages-make-things-worse-americans-opinion-2019-9.
[200] Debt Collection Practices, 84 Fed. Reg. at 23401.
[201] *Id.*
[202] *Id*. at 23312. According to CFPB research, almost 75 percent of consumers with at least one debt in collection have multiple debts in collection.
[203] *Id.*

consumer rather than per debt. We recommend that collectors be limited to three attempted calls and one conversation per consumer per week.

Strong majorities across parties are very concerned about many of the individual components of the CFPB debt collection rule as they relate to permissible contact by debt collectors, according to the 2019 AFR/CRL poll.[204] Nearly three-quarters (73 percent) of voters are concerned about the CFPB allowing debt collectors to call people as many as seven times a week for each debt they are collecting, including 78 percent of Democrats, 74 percent of independents, and 68 percent of Republicans (see Figure 3).[205]

Figure 3: Strong Majorities Opposed to Allowing Debt Collectors to Call People Seven Times Per Week Per Debt



Source: Americans for Financial Reform and the Center for Responsible Lending poll conducted by Lake Research Partners and Chesapeake Bay Consulting, 2019.

Additionally, the proposal explicitly permits collectors to contact consumers through email, text messages, and private social media direct messages, in addition to phone calls.[206] In fact, the proposal states that in addition to the number of phone calls per week, it "would not limit how many mailed letters, emails, and text messages debt collectors could send."[207] The collector need not obtain prior consent to contact the consumer by these methods and the contact attempts could be unlimited until the consumer affirmatively opts-out or tells the collector to stop contacting them.[208] This formula would permit unscrupulous debt collectors to harass consumers via email, text, and social media direct messages. Collectors could theoretically ping a consumer until the consumer affirmatively tells the collector to stop. This is problematic for multiple reasons: it signifies permission to harass borrowers through multiple communications forms at once; such digital communications could in fact confuse and overwhelm borrowers who cannot distinguish between spam and legitimate debt collection and may result in them disregarding important communications; and, such unlimited communications violate basic privacy expectations. If the CFPB is going to permit new communication methods, it must put clear limits on these methods. The onus should be on the collector to obtain consent from the

[204] Americans for Financial Reform and the Center for Responsible Lending, 2019.
[205] *Id*.
[206] Debt Collection Practices, 84 Fed. Reg. at 23400.
[207] Debt Collection Practices, 84 Fed. Reg. at 23312.
[208] Debt Collection Practices, 84 Fed. Reg. at 23275.

consumer to be contacted via electronic communication, rather than putting the burden on the consumer to opt out. In addition, the collector must allow the consumer to opt-out by any method that is convenient for them.

According to the AFR/CRL poll, strong majorities of likely voters are also concerned about the email, text, and social media provisions of the CFPB debt collection rule (see Figure 4).[209] Seventy-four percent of voters find contact via direct messaging on social media platforms like Twitter and Facebook to be concerning, 70 percent of voters are very concerned about allowing debt collectors to send an unlimited number of emails to collect debts, 69 percent are concerned about allowing debt collectors to send collection notices by email or text without verifying that the email address or phone number is still active or accessible, and 69 percent are concerned about allowing debt collectors to send text messages to people without the person's permission (see Figure 4).[210]

[209] Americans for Financial Reform and the Center for Responsible Lending, 2019.
[210] Americans for Financial Reform and the Center for Responsible Lending, 2019.

Figure 4: Most Voters Oppose CFPB Proposed Debt Collection Rule's Email, Text, and Social Media Provisions

% Total Concerning (% Very Concerning)	Total	Democrat	Independent	Republican
Allowing debt collectors to contact people by private direct messaging on social media platforms like Twitter and Facebook	**74 (58)**	80 (63)	76 (67)	66 (49)
Allowing debt collectors to send an unlimited number of emails to collect debts	**70 (52)**	75 (57)	76 (55)	62 (44)
Allowing debt collectors to send collection notices by email or text without verifying that the email address or phone number is still active or accessible	**69 (51)**	75 (54)	68 (56)	63 (45)
Allowing debt collectors to send text messages to people without the person's permission	**69 (52)**	74 (56)	73 (57)	62 (44)

Source: Americans for Financial Reform and the Center for Responsible Lending poll conducted by Lake Research Partners and Chesapeake Bay Consulting, 2019.

The proposed rule would also allow collectors to send validation notices electronically.[211] However, it would be extremely problematic for collectors to send the validation notice through an email, text, or social media message. The FDCPA requires that collectors send a validation notice to the consumer, detailing the debt and describing the consumer's right to dispute the debt.[212] The CFPB proposal would permit collectors to send this important notice without proper procedures to ensure the consumer will receive and view important

[211] Debt Collection Practices, 84 Fed. Reg. at 23275.
[212] 15 U.S.C. 1692g.

communications.[213] In fact, the U.S. Court of Appeals for the Seventh Circuit recently found that using hyperlinks to direct consumers to a validation notice does not comport with the FDCPA.[214] The CFPB's proposal also undermines consumer privacy and makes it easier for scammers to engage in malware and phishing.[215] We concur with NCLC's extensive comments outlining the issues with respect to how validation notices are provided as per the proposed rule, and discussing the privacy implications for consumers if the proposed rule is left unrevised.

The CFPB's communication method and frequency proposals are problematic individually and collectively. Seven calls per week per debt is excessive and could potentially sanction harassing behavior by debt collectors. Similarly, the permissible electronic communications – email, text, and private social media messages – could sanction harassment, particularly considering the CFPB does not place any explicit limits on these forms of communication. Taken together, these provisions simply open the door to consumers being harassed by debt collectors, with no recourse.

VII. "Limited Content Messages" Must be Considered "Communications" under the FDCPA; the Bureau's Proposal to Exempt "Communications" from the FDCPA will Harm Consumers.

We are concerned that the Bureau proposes to exempt so-called "limited content messages," defined in proposed § 1006.2(j),[216] from the definition of "communication" under the FDCPA.[217] Both the intentionally far-reaching statutory definition of "communication" under the FDCPA, and the courts' broad interpretation of that far-reaching definition, support the position that "limited content messages" should certainly be considered communications under the FDCPA. The Bureau's proposed rule, which exempts these messages from the definition of communications, would have the problematic result of exempting them from critical FDCPA protections that prohibit repeat harassment of consumers by abusive collectors. Thus, we urge the Bureau to eliminate the provision exempting "limited content messages" from the definition of "communication" under the FDCPA.

The FDCPA clearly defines "communication" as "the conveying of information regarding a debt [either] directly or indirectly to any person through any medium."[218] The statute broadly defines "communication" as a conveying of information "regarding a debt."[219] Courts have held

[213] Collectors should be required to comply with the federal E-Sign Act if they want to send the validation notice electronically. The CFPB should also refuse to exempt validation notices from the E-sign requirements.
[214] *Lavallee v. Med-1 Solutions LLC*, No. 1:15-cv-01922-DML-WTL (7th Cir. 2019).
[215] Vladeck, D. (2019, Aug. 23) The Consumer Bureau's Reckless Plan for Debt Collection. *Wired*. Retrieved from https://www.wired.com/story/the-consumer-bureaus-reckless-plan-for-debt-collection/.
[216] Debt Collection Practices, 84 Fed. Reg. at 23399-400.
[217] *Id*. at 23399 (see § 1006.2(d)).
[218] 15 U.S.C. § 1692a (2).
[219] *Id.*

that the broad definition of "communication" reflects the purpose of FDCPA, and a narrow interpretation can open consumers up to potential acts that would violate the FDCPA.

The purpose of the FDCPA is to ban any conduct, "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[220] In this vein, courts have held that "limited content messages" do constitute "communication," contrary to what the Bureau now proposes.[221] In their reasoning, courts have emphasized the pragmatic concern that exempting certain messages from the FDCPA would allow debt collectors to circumvent statutory requirements by permitting them to repeatedly contact debtors with messages containing minimal content.[222] For example, in *Ramirez v. Apex Financial Management, LLC*,[223] a debt collector left twenty-one messages, without specifically referencing the debt, on a consumer's answering machine. Drawing on the legislative purpose of the FDCPA to protect consumers from debt collectors' harassing conduct, the court concluded that exempting messages that lack specific content [about the debt] "would be in grave conflict with the standards that underlie the FDCPA."[224]

Courts typically give the FDCPA language a broad meaning, based on its unambiguous language. For example, the court in *Hart v. Credit Control, LLC*,[225] found that it need not look any further than the statutory language of the FDCPA to decide that the limited content message is a "communication."[226] The court emphasized that by choosing to omit any qualifier other than requiring that the call must be "regarding a debt," Congress intended to cover a*ny* information, as long as it regards a debt.[227] As such, there is no requirement in the statute that the information must be specific or thorough in order to be considered a communication "regarding a debt."[228]

In addition, many courts have found that voicemail messages containing even minimal information related to a debt are "communications" under the FDCPA.[229] For instance, in *Hosseinzadeh v. MRS Associates*,[230] the plaintiff brought suit against the defendant debt

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[220] 15 U.S.C. § 1692d.
[221] *See Hart v. Credit Control, LLC,* 871 F.3d 1255 (11th Cir. 2017; *Ramirez v. Apex Fin. Mgmt., LLC*, 567 F. Supp. 2d 1035 (N.D. Ill. 2008); *Hosseinzadeh v. MRS Assocs.*, 387 F. Supp. 2d 1104 (C.D. Cal. 2005).
[222] *See, e.g., Ramirez v. Apex Fin. Mgmt., LLC*, 567 F. Supp. 2d 1035, 1042 (N.D. Ill. 2008).
[223] *Id.* at 1035.
[224] *Id.*
[225] 871 F.3d 1255 (11th Cir. 2017) (The defendant argued that because the voicemail "essentially reveals no more than a hang-up call," it cannot be a "communication." However, the court said adopting that view would cause it to ignore the broad statutory language.).
[226] *Id.*
[227] *Id*.
[228] *Id*.
[229] *See*, *e.g*., *Edwards v. Niagara Credit Sols., Inc*., 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008) (finding that a voicemail instructing the listener to return the call, in order to discuss an "important matter" indirectly conveyed information about the debt).
[230] 387 F. Supp. 2d 1104 (C.D. Cal. 2005).

collector based on a series of voicemails referring only to a "very important matter."[231] The messages requested that the consumer call back a specified toll-free number and warned that failure to call the number would result in "a decision-making process that [the consumer would] not be a part of."[232] The court found that although the messages may not have "technically" mentioned specific information "about a debt or the nature of the call," the indirect references to the debt were sufficient to bring the messages under the FDCPA's definition of "communication."[233] Furthermore, when analyzing "communications" under the FDCPA, courts have consistently used the "reasonably construed to imply a debt" standard. For instance, both *Brown v. Van Ru Credit Corp*[234] and *Marx v. General Revenue Corp.,*[235] reason that if the third-party who hears the message may glean from the communication's limited information that it is regarding a debt, based on knowledge outside of the communication itself, it can reasonably be construed to imply a debt.[236]

Therefore, the FDCPA and the courts interpreting it are clear: even minimal information related to the debt constitutes "communication" under the FDCPA, as that is what Congress intended. As a result, the "limited content message" examples that the Bureau provides, which reference "an account," with a name and number to call would likewise be considered "communication" under the FDCPA.[237] Moreover, in considering what constitutes a "limited content message," collectors would need to be specific enough to avoid running afoul of the FCDPA, and debt collectors would need to properly identify themselves in all communications with a consumer, or risk violating the Act.[238] For instance, if collectors fail to disclose in any communication with a consumer that they are "attempting to collect a debt and that any information obtained will be used for that purpose,"[239] they violate the Act's prohibition on utilizing "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt."[240] Generally, this provision requires collectors to give either their name or their employer's name and also to state that the communication is being made in an attempt to collect a debt

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[231] *Id.* at 1107-08.
[232] *Id*.
[233] *Id.* at 1116.
[234] 804 F.3d 740 (6th Cir. 2015) (holding a voicemail left by the collector, which requested a return call from the payroll account leaving a phone number to call, a reference number, the name of the caller and her employer, Van Ru Credit Corp, was not a "communication" under the FDCPA because it did not expressly reference the debt nor could it reasonably be construed to imply a debt).
[235] 668 F.3d 1174 (10th Cir. 2011) (holding facsimile sent to consumer by collector, which sought to verify consumer's employment status, was not a "communication" under FDCPA because it did not expressly reference the debt nor could it reasonably be construed to imply a debt).
[236] *Brown,* 804 F.3d at 744; *Marx,* 668 F.3d at 1183.
[237] Debt Collection Practices, 84 Fed. Reg. at 23410 (Supplement I to Part 1006—Official Interpretations Section 1006.2(2)(j)(2)(ii) ("The following example illustrates a limited-content message that includes the content described in both § 1006.6(j)(1) and (2): "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.")).
[238] 15 U.S.C. § 1692e(11).
[239] *Id*.
[240] 15 U.S.C. §1692e.

explicitly.[241] Second, if a debt collector "place[s] . . . telephone calls without [a] meaningful disclosure of [his] identity,"[242] they violate the FDCPA.

Thus, permitting limited content messages to fall outside the scope of the term "communication" under the FDCPA will deprive consumers of the true nature of the message, risking the possibility that a consumer responds to the call based on a false understanding. Additionally, it is highly probable that were a third party to hear such a message, that they would rightly assume the message was in reference to a debt, thus violating the FDCPA.[243] Such an outcome would be inconsistent with the purposes of these prohibitions and illustrates the harm in the proposal. The Bureau's proposed rule, in allowing debt collectors to repeatedly contact debtors with messages containing minimum content by exempting them from the FDCPA, will only further open the door for abusive and harassing collection practices. Thus, we urge the Bureau to eliminate the provision exempting "limited content messages" from the definition of "communication" under the FDCPA.

VIII. The Proposed Validation Notice Needs Improvement and the Small Business Review Panel Outline-Proposed Statement of Rights Should be Required.

The proposed rule includes a model validation notice which contains concerning elements.[244] First, the validation notice should not include an option to make a payment, as this may confuse consumers into thinking they must make a payment to lodge a dispute.[245] The purpose of the validation notice is to provide information about the debt, and it should not be used in a way that simultaneously pressures the consumer to make a payment.

Moreover, many consumers may wish to dispute a debt electronically and are unlikely to mail a notice in the mail. Particularly considering the increased technologies collectors may use to contact a consumer, the CFPB should require collectors to provide a method of disputing the debt electronically, in addition to providing the "tear-off" option.

The Small Business Review Panel Outline also included a Statement of Rights, which would provide consumers with information to determine whether they owe a debt and to navigate the debt collection process.[246] The Outline's Appendix G contained a reasonable list of

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[241] *See* 15 U.S.C. §1692e. The Act does not prescribe specific language collectors must use but saying some variation of the words "this is an attempt to collect to debt" suffices to comply.
[242] 15 U.S.C. §1692d(6).
[243] 15 U.S.C. §1692c(b) ("Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.").
[244] Debt Collection Practices, 84 Fed. Reg. at 23409.
[245] *Id.*
[246] Consumer Financial Protection Bureau, 2016.

information that would be required to be included in the Statement of Rights.[247] Yet, the proposed rule no longer contains this requirement. Instead, the consumer is directed to the CFPB website.[248] This is insufficient. We believe the CFPB should require this disclosure, as many individuals are unaware that they have specific rights when dealing with debt collectors, let alone what their specific rights are. Providing an easily understood Statement of Rights would be useful for individuals to better protect their rights. Additionally, the CFPB does not summarize testing related to the Statement of Rights in the proposed rule. We urge the CFPB to provide transparency by releasing the results of its consumer testing.

IX. The Proposed Rule Contains Important Protections that Should be Retained in a Final Rule.

Notwithstanding the various concerns we have with the proposed rule, there are a number of provisions in the proposal that we urge the Bureau to retain in the final rule.

i. The limit of one conversation per week is appropriate.

Though we believe that the number of calls allowed under the proposed rule is too high, we appreciate that the proposed rule limits debt collectors to one conversation per week.[249] Unless initiated by a consumer, debt collectors do not need to talk with a consumer more frequently than once a week. However, to align with our recommendation to limit the number of calls on a per consumer basis, not per debt basis, we likewise urge that the final rule limits debt collectors to one conversation per week, per consumer.

ii. Consumers should have the ability to stop collection attempts through certain mediums of communication while not stopping all communications.

The Bureau is right to ensure that consumers have the ability to ask debt collectors to stop calling them or communicating with them by any communication method without stopping all forms of communication.[250] Some consumers may not want to be contacted by a certain

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[247] *Id*.

[248] *Id.* (the Validation Notice states: "Learn more about your right under federal law. For instance, you have the right to stop or limit how we contact you. Go to www.consumerfinance.gov). See also Debt Collection Practices, 84 Fed. Reg. at 23279 n.37 ("While the Bureau tested a statement of consumer rights disclosure, this proposal would not require debt collectors to provide such a disclosure to consumers. Instead, the Bureau proposes to require certain debt collectors to provide on the validation notice a statement referring consumers to a Bureau-provided website that would describe certain consumer protections in debt collection").

[249] Debt Collection Practices, 84 Fed. Reg. at 23401 (see § 1006.14(b)(2)(ii))("… 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…Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.")).

[250] Debt Collection Practices, 84 Fed. Reg. at 23402 (see §1006.14(h)(1)("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.")).

communication method, such as email or cell phone, but may prefer contact at their home phone, for example. Others may not want to communicate with debt collectors on the phone but instead prefer communication in writing. Clarifying this right under the FDCPA will be critical to ensuring that consumers are not harassed while also allowing them to communicate with debt collectors, thus preventing unnecessary debt collection lawsuits from being filed, which can happen when consumers request collectors to stop all communication. Likewise, it is right that the Bureau classify continued communication in a medium of communication that the consumer explicitly requested the collector not use to be a violation of Section 806 of the FDCPA.[251] We urge the Bureau to retain this provision in the final rule and to make clear that consumers can request that all calls from the collector stop, unless the consumer requests to stop calls only to a specific phone number.

iii. The prohibition on the sale, transfer, or placement of certain debts should be retained in a final rule.

We also urge the Bureau to retain the prohibition on the sale, transfer, or placement of certain debts contained in proposed § 1006.30(b), including debts discharged in bankruptcy, debts already paid, and debts subject of an identity theft report.[252] The sale, transfer, or placement of these debts, debts for which consumers have no legal responsibility to pay, serves no purpose for consumers and instead will only further financial and emotional harm to these consumers. Because of the problematic nature with time-barred debt, as detailed above, we urge the Bureau to consider prohibiting the sale, transfer, or placement of time-barred debt as well.

iv. Debt collectors should be prohibited from "parking" debts on consumer credit reports.

Another critical provision that we urge the Bureau to retain is the prohibition against "parking" debts on consumer credit reports. In other words, the Bureau is proposing to prohibit debt collectors from furnishing information about a debt to consumer reporting agencies before communicating with the consumer about the debt.[253] We support this proposal. A consumer should not first learn of a debt in collections when it shows up on their credit report. The furnishing of negative information, such as a debt in collections, to credit bureaus can have significant negative consequences for consumers, namely a drop in the consumer's credit score, which can then increase the cost of future credit for the consumer, make it more difficult for a consumer to obtain affordable housing, and jeopardize some job opportunities.[254] As the

[251] *Id.*
[252] Debt Collection Practices, 84 Fed. Reg. at 23403.
[253] *Id*. (see §1006.30(a)("[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.")).
[254] Consumer Financial Protection Bureau. (2014, December*) Consumer credit reports: A study of medical and non-medical collections*. Retrieved from https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf.

Bureau's own research shows, "parking" debts on credit reports is more common in the collection of medical debt, where additional concerns arise when insurance companies ultimately pay the claims underlying the debts.[255]

v. The use of public social media platforms to collect debts should remain prohibited.

Finally, though we have concerns about the Bureau's proposal to authorize debt collectors to use electronic communication methods without providing frequency limits for those methods of communication, we urge the Bureau to finalize that portion of the rule that prohibits debt collectors from communicating or attempting to communicate with a consumer through a social media platform whereby the communication is publicly visible.[256]

X. Conclusion

For all of the reasons discussed above, the undersigned groups urge the Bureau to strengthen its proposed debt collection rule in the ways set forth in this comment. Revising the proposed rule will move the needle towards ending unfair and abusive practices in the debt collection market and protecting consumers who are struggling financially, particularly communities of color and low- to moderate-income consumers.

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[255] *Id.*

[256] Debt Collection Practices, 84 Fed. Reg. at 23403 (see §1006.22(f)(4)("[a] debt collector must not:…[c]ommunicate or attempt to communicate with a consumer in connection with the collection of a debt by a social media platform that is viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi).")).