BANK POLICY INSTITUTE

September 18, 2019

Via Regulations.gov

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

Re: Debt Collection Practices (Regulation F) (CFPB-2019-0022; RIN 3170-AA41)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the notice of proposed rulemaking issued by the Consumer Financial Protection Bureau regarding debt collection practices under Regulation F, 12 C.F.R. part 1006, implementing the Fair Debt Collection Practices Act ("FDCPA").[2] BPI is supportive of the CFPB's goal of clarifying the requirements under the FDCPA. Updating the FDCPA's requirements to account for modern communication technologies and practices will provide further benefit to consumers by allowing them to make better-informed decisions about managing their debts.

Effective debt collection is critical to the U.S. system of consumer credit and maintaining a safe and sound banking system. BPI members play a central role in the provision of credit to U.S. consumers. They originate many types of consumer credit, including mortgages, auto loans, student loans, credit cards, personal loans, and other products. They also service loans and engage in so-called "first-party" debt collection related to the loans they originate.[3] While BPI members generally do not engage in debt collection as defined by the FDCPA, they do rely on third-party collectors and also look to the standards applied under the FDCPA to inform their own servicing activities.

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 CFPB, Proposed Rule, *Debt Collection Practices (Regulation F)*, 84 Fed. Reg. 23,274 (May 21, 2019).

3 As the proposed rule explains, "[w]hen an account becomes delinquent, initial collection efforts often are undertaken by the original creditor or its servicer. The FDCPA typically does not cover these first-party recovery efforts." Proposed Rule, *supra* note 2, at 23276. First-party collection activities are distinct from the third-party collection activities covered by the CFPB's proposal. *See id.* ("If a consumer's payment obligations remain unmet, a creditor may send the account to a third-party debt collector to recover on the debt in the third-party debt collector's name. A creditor may choose to send an account to a third-party debt collector for several reasons, including because the third-party debt collector possesses capabilities and expertise that the creditor lacks. Third-party debt collectors usually are paid on a contingency basis, typically a percentage of recoveries."); *see* also DeMayo, FTC Informal Staff Letter (May 23, 2002) (outlining the scope of those collection activities that may be viewed as being conducted by the original creditor).

Accordingly, BPI strongly believes that any final rule should reflect the important role debt collection plays in the U.S. economy. It also should ensure that debt collection activities are permitted in a way that allows consumers to meet their financial responsibilities and does not increase the cost of credit to U.S. consumers or trigger unintended consequences for consumers.

Our comments reflect the view that the CFPB's proposed rule should adhere to the key principle of furthering consumers' ability to understand and manage their debts, while modernizing the debt collection legal framework in a practical and workable manner for all involved parties. Furthermore, in seeking to modernize the regulatory framework for debt collection activities, it is important for the CFPB not only to consider the current state of debt collection practices and existing technology, but also to implement a regulatory framework in a manner that accommodates future technological or other changes under which debt collection activities may operate.

I. Executive Summary

- Debt collection is critical to the broad provision of credit to U.S. consumers and promotes a safe and sound banking system; thus, any final rule should consider the potential overall impact of each substantive requirement to the debt collection marketplace.

- Any final rule should avoid reliance on the CFPB's general UDAAP authority, and the CFPB should expressly state that the collection activities conducted by creditors are distinct from those conducted by third-party debt collectors under the FDCPA and therefore are not subject to the same standards.

  - First-party collections are fundamentally different from third-party collections and should not be covered in any manner by a proposed rule designed for third-party debt collection activity.

  - The CFPB's reliance on UDAAP is unnecessary and risks creating legal uncertainty for first-party collections, which would have a detrimental impact on consumers.

  - The proposed call frequency limits are particularly ill-suited to first-party collections and would curtail the ability for lenders and other first-party collectors to provide beneficial outreach to consumers.

- Collectors should be permitted to use the consumer's previously expressed contact preferences, and the rule should clarify the standards for "inconvenient" contacts.

  - Debt collectors should be allowed to respect a consumer's previously expressed preferences for communications methods.

  - The standards for "inconvenience" in contacts should only restrict contacts that a collector knows or should know are inconvenient to the consumer, provide that restrictions must be reasonable and knowable, and not impose excessive burdens related to work communications.

- The proposed restrictions on debt sales and debt litigation are valuable but overbroad.

  - The restrictions on sale or transfer of debt should apply only where the collector has been notified that a valid identity theft report has been filed as to the debt.

- The proposed rule should be modified to allow for a safe harbor in circumstances where a debt may be time-barred and where a collector has reasonable policies and procedures to avoid pursuing or threatening litigation.

- The final rule should also clarify whether the prohibitions against the sale or collection of debt discharged in bankruptcy apply to liens that exist following a bankruptcy.

➢ The CFPB also should clarify its requirements related to personal representatives, original-creditor notices, and validation notices.

- The final rule should clarify the standards applicable to determining representatives of a decedent's estate.

- The final rule should define "original creditor," for purposes of the original-creditor notification, to provide meaningful information to the consumer.

- The final rule should clarify how mid-period debt should be calculated for purposes of a validation notice.

II. Debt collection is critical to the broad provision of credit to U.S. consumers and promotes a safe and sound banking system; thus, any final rule should consider the potential overall impact of each substantive requirement to the debt collection marketplace.

The provision of consumer credit requires a properly functioning system of debt collection. Institutions lend money to consumers with an expectation that loans will be repaid. Restrictions on collections that frustrate this expectation could ultimately result in lenders making less credit available to consumers, or alternatively in more expensive credit to offset the increased risks and costs of collection. The most significant impact could fall on consumers with weaker credit histories.[4]

Academic studies have shown that restrictions on third-party debt collection practices reduce the amount of credit available to consumers.[5] For example, one empirical examination of state-law debt collection regimes demonstrated that higher levels of regulation on consumer debt collection practices were associated with meaningfully lower amounts of credit available to consumers.[6] This study noted that debt collection "is particularly essential for consumers who are considered high-risk, as they are more likely to be able to access credit in an environment where lenders are able to mitigate losses through post-default collection."[7] A staff report from the Federal Reserve Bank of New York likewise found that "restricting collection activities leads to a decrease in access to credit and to a deterioration in indicators of financial health."[8] The study determined that all consumers were subject to decreases in credit following an increase in debt collection regulation and, notably, that "the decrease in

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[4] *See* Todd J. Zywicki, The *Law and Economics of Consumer Debt and Its Regulation*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658326.

[5] *See* Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit*, Fed. Reserve Bank of Phila., Working Paper No. 15-23, https://www.phil.frb.org/-/media/research-and-data/publications/working-papers/2015/wp15-23.pdf?la=en.

[6] *Id.* at 31. ("[S]tricter debt collection regulations reduce the number of third-party debt collectors and lower recovery rates on delinquent credit card loans. This, in turn, leads to fewer openings of revolving lines of credit.").

[7] *Id.*

[8] Julia Fonseca, Katherine Strair, and Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, FED. RES. BANK OF N.Y. STAFF REPS. No. 814 at 15 (May 2017), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf?la=en.

access to credit is stronger for borrowers with low credit scores."[9] These studies highlight the risk that increasing the cost of debt collection may impair the availability of consumer credit.

From a bank perspective, a robust system of third-party debt collection allows banks to focus on their core competencies and to manage their lending risks. Because banks specialize in originating loans and servicing their customers, rather than handling late-stage consumer collections, effective third-party debt collection enhances banks' efficiency and effectiveness by allowing banks to outsource collection activities and focus their resources on core lending and servicing activities. In addition, a well-functioning debt collection system permits banks to mitigate any potential lending risk with the knowledge that a debt can be recovered at a reasonable cost. Correspondingly, the ability to sell debts to third-party collectors also allows banks to manage risk in their lending portfolio.

It is therefore not surprising, as the proposed rule recognizes, that creditors may bear many of the costs of increased debt collection regulations: "[C]reditors could experience indirect effects from the proposal to the extent they hire FDCPA-covered debt collectors or sell debt in default to such debt collectors. Such creditors could experience higher costs if debt collectors' costs increase and if debt collectors are able to pass those costs on to creditors."[10] In addition, a unique challenge for banks, unlike other creditors, is the obligation to oversee any activities of third parties, including those of third-party debt collectors.[11] Should the changes from the proposed rule become final, banks could face additional oversight and regulatory burdens associated with monitoring third-party vendors engaged in debt collection or with regulatory actions stemming from conduct by third-party vendors. In addition, much of the information that third-party collectors will use to comply with the rule's mandates, such as for itemization and verification, will be required to be provided by the original creditor. Creditors may not currently collect some of the information envisioned to be provided under the rule, or they may not currently maintain it in a format that will allow it to be shared with outside collectors. The CFPB's final rule should fully consider the impact of these potential burdens in developing a final rule.

III. Any final rule should avoid reliance on the CFPB's general UDAAP authority, and the CFPB should expressly state that the collection activities conducted by creditors are distinct from those conducted by third-party debt collectors under the FDCPA and therefore are not subject to the same standards.

The proposed rule relies principally on the CFPB's FDCPA authority and, on its face, would apply only to "debt collectors" as defined under the FDCPA.[12] However, the proposal also includes certain requirements based on the prohibition against unfair, deceptive, and abusive acts and practices ("UDAAP") articulated under the Dodd-Frank Act.[13] The proposed rule therefore leaves open whether conduct that violates requirements implemented pursuant to

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9 *Id.*

10 Proposed Rule, *supra* note 2, at 23391.

11 *See e.g.*, OCC, Risk Management Guidance: Third-Party Relationships (Oct. 30, 2013); FRB, Guidance on Managing Outsourcing Risk, SR 13-19 (Dec. 5, 2013); FDIC, GUIDANCE FOR MANAGING THIRD-PARTY RISK, FIL-44-2008 (June 6, 2008); CFPB, SERVICE PROVIDERS, 2016-02 (Oct. 31, 2016).

12 Proposed Rule § 1006.1(c). The Supreme Court has held that entities that collect debt for their own accounts are not "debt collectors" under the FDCPA. *Henson v. Santander Consumer USA Inc.,* 137 S. Ct. 1718 (2017).

13 *E.g.,* Proposed Rule, *supra* note 2, at 23307–08, 23401 (limiting call frequencies limits under the authorities of FDCPA section 806(5) and Dodd-Frank Act section 1031(b)).

the proposed rule might also be viewed by the CFPB as a UDAAP violation if conducted by a first-party collector.[14] The use of UDAAP in this context poses a risk that the proposed rule could be applied more broadly by the CFPB, beyond the activities of third-party debt collectors, to cover other "covered persons" or "service providers" subject to the CFPB's authority. Because *all* providers of consumer financial products and services—including banks servicing their own borrowers—are subject to the CFPB's general UDAAP authority, the identification of a practice as a UDAAP could have unanticipated consequences for all covered institutions and their customers.[15]

The CFPB's reliance on UDAAP could have serious consequences for banks. To apply a standard designed for third-party debt collectors to banks would run counter to the FDCPA's fundamental distinction between first-party and third-party collection. Congress emphasized that the FDCPA was designed to serve "as comprehensive legislation which fully addresses the problem of collection abuses."[16] Congress also clearly delineated the difference between first-party and third-party collection, specifically in that it chose to exclude first-party collection from regulation under the FDCPA. Congress's judgment on this matter was, in part, based on the fact that banks and other creditors "generally are restrained by the desire to protect their good will when collecting past due accounts."[17] For this reason, the FDCPA explicitly provides that a creditor collecting under its own name is not subject to the FDCPA.[18]

A. First-party collections are fundamentally different from third-party collections and should not be covered in any manner by a proposed rule designed for third-party debt collection activities.

The proposed rule invites significant legal uncertainty for first-party collections. Rules designed for third-party debt collectors should not apply to first-party collectors like banks, as these entities are profoundly different in their business models, consumer relationships, economic incentives, borrower engagement, and reputational interests.

First-party collectors simply do not present the same risks as third-party collectors, because first-party collectors inherently have a strong incentive to protect consumers. Banks, for example, have a significant stake in maintaining a reputation for good customer service and in cultivating deep relationships with their customers. Aggressive collections tactics are generally inconsistent with these goals: consumers are unlikely to gravitate to an institution that harasses consumers or treats them in an adversarial manner. By contrast, consumers generally do not choose to do business with a third-party debt collector, and the debt collector often has little incentive to develop a long-term relationship with the consumer.

The differences between first-party and third-party collectors are particularly salient for borrower phone contacts. Limiting contact in the first-party context can be especially detrimental to borrowers. Calling a customer

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14 *See id.* at 23282 n.69 (stating that "Where the [CFPB] proposes requirements pursuant only to its authority to implement and interpret sections 806 through 808 of the FDCPA, the [CFPB] does not take a position on whether such practices also would constitute an unfair, deceptive, or abusive act or practice under section 1031 of the Dodd-Frank Act."); *see also* 23314 n. 313 and 23317 n.331 ("The [CFPB] has not determined in connection with this proposal whether telephone calls in excess of [proposed limitations[by creditors and others generally not covered by the FDCPA would constitute an unfair act or practice under section 1031(c) of the Dodd-Frank Act if engaged in by those persons").

15 12 U.S.C. § 5536(a)(1)(B).

16 S. REP. 95-382, 6, 1977 U.S.C.C.A.N. 1695, 1700. Indeed, this committee report stated that the FDCPA was so comprehensive "that the administrative agencies charged with enforcement are specifically prohibited from issuing additional rules or regulations applicable to persons covered by this legislation." *Id.*

17 *Id.* at 2, 1977 U.S.C.C.A.N. at 1696.

18 12 U.S.C. § 1692a(6)(A).

who has just missed an auto loan payment, for example, may prevent significant damage to the person's credit history or avoid repossession. Early servicer contact for delinquent mortgage loans can allow borrowers to consider loss mitigation and avoid losing their homes. Banks frequently contact consumers promptly after the consumer misses a payment; this type of contact can serve as a helpful reminder to consumers, help avoid future problems, and mitigate any escalation. Third-party debt collectors, in contrast, usually become involved only after a debt has reached late-stage delinquency, when resolution options or other solutions are generally more limited.

Thus, the proposed rule's limits on call frequency would be entirely inappropriate in the first-party collection context. They would restrict salutary efforts to contact customers to remind them of the payment or to allow for early loss mitigation or workout solutions. Further, if applied to first-party collection, the proposed limits could seriously complicate the relationship between banks and their customers—for example, by preventing banks from communicating about other products obtained by the consumer or by restricting the ability to offer alternative products. The same is true of the proposed restrictions on contact methods: these rules could cause significant disruption if applied to banks and other first-party collectors by unduly constraining them from communicating with their customers.

B. The CFPB's reliance on UDAAP is unnecessary and risks creating legal uncertainty for first-party collections, which would have a detrimental impact on consumers.

The final rule should make absolutely clear that nothing in the rule applies to first-party collection activities. This could be accomplished in two complementary ways.

First, the final rule should avoid any reliance on the CFPB's UDAAP authority. Reliance on UDAAP is unnecessary, because the CFPB already possesses authority under the FDCPA to define and enforce improper debt collection practices.[19] The use of UDAAP in the context of a rule explicitly limited to third-party collections activities creates regulatory uncertainty, particularly as to how the CFPB might use these provisions against an original creditor. It may also cause significant confusion at the state level among authorities empowered to enforce similar state-based consumer protections and further confusion related to conflicting judicial interpretations applicable to banks. While the CFPB has publicly stated an intention to exclude first-party collectors from the application of its proposed rule, by engaging in a third-party debt collection rulemaking under its UDAAP authority, the proposal suggests that the CFPB nevertheless seeks the ability to enforce the rule against first-party collection without directly promulgating a rule applicable to such activity.[20]

Moreover, the administrative record here is insufficient to justify use of the CFPB's UDAAP rulemaking authority. The CFPB has not explained why, given the authority it already has under the FDCPA, it is necessary to invoke UDAAP. Nor has the CFPB cited any evidence that would support invoking its UDAAP rulemaking authority to prescribe the call frequency limits it proposes. Because the final rule could affect first-party collectors' compliance decisions even if it does not formally apply to such activities, the CFPB should include such costs of compliance (including the potential for reduced collections by banks and increased cost of credit to consumers) in its overall cost-benefit analysis. As Director Kraninger has explained, where there is uncertainty about an obligation's parameters, this "makes it harder for businesses that want to comply with the law to do so. And this uncertainty creates

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19 *See* 15 U.S.C. § 1692d (prohibiting a debt collector from "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt"); § 1692f (prohibiting any "unfair or unconscionable means to collect or attempt to collect any debt."); § 1692l (entrusting the CFPB with enforcement and regulatory powers in these areas).

20 *See* CFPB, Prepared Remarks of CFPB Director Richard Cordray on Field Hearing on Debt Collection (July 28, 2019), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-debt-collection/.

impediments to innovation and other salutary developments in the marketplace."[21] Furthermore, the CFPB has also not explained why fixed call frequency limits are necessary in light of other related protections already available to consumers, such as the Telephone Consumer Protection Act.[22]

Second, the final rule should state that its requirements apply to third-party collections only and that none of those requirements should be construed as a judgment by the CFPB that the same conduct is impermissible, under UDAAP or otherwise, if carried out in a first-party collection. Although the proposed rule is technically (and properly) applicable only to third-party collections, a clear statement of this kind is necessary to avoid potential legal uncertainty. First-party collectors, such as banks, are committed to fully complying with consumer protection laws, and to that end, many institutions have looked to FDCPA requirements to inform their first-party collections activities. In fact, many creditors go beyond what is set forth under the FDCPA, honoring Cease and Desist requests (written and oral) and requests to discontinue calls to a specific phone number or communications through other channels. The CFPB's 2013 bulletin on consumer debt collection only reinforced the industry's understanding that restrictions on third-party collection activity may inform the standards that apply to first parties.[23] Thus, some institutions may, as a practical matter, believe it necessary to apply the new standards of a final rule unless the CFPB makes very clear that those standards do not apply in the first-party collection context.

Finally, clarification is needed to prevent UDAAP standards from applying to first-party collection in effect if not by design. State regulators often rely on federal UDAAP standards in interpreting similar terms under state laws and may engage in investigative or enforcement activities based on those standards. Even if the UDAAP standards of the final rule do not directly apply to first-party collection, lenders may find themselves practically subject to the same requirements. Similarly, regardless of the formal scope of the rule, private litigants may seek to bring state-law actions relying on the CFPB's identification of certain conduct as "unfair." Clarification in the final rule is needed to guard against such unintended consequences.

C. The proposed call frequency limits are particularly ill-suited to first-party collections and would curtail the ability for lenders and other first-party collectors to provide beneficial outreach to consumers.

The CFPB's proposal places several limits on the frequency and manner in which a debt collector may contact consumers. Notably, the proposal would prohibit collectors from placing more than seven calls within seven consecutive days to a consumer regarding the collection of a particular debt,[24] or from making a call "within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt,"[25] unless the consumer consents to the call.[26]

Extending these restrictions to first-party collections through the CFPB's use of its UDAAP authority would adversely affect consumers by potentially curtailing beneficial outreach by lenders and other first-party collectors.

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21 *See* CFPB, Kathleen L. Kraninger's Speech at the Abusive Acts or Practices Symposium (June 25, 2019), https://www.consumerfinance.gov/about-us/newsroom/cfpb-kathleen-l-kraninger-speech-symposium-abusive-acts-or-practices/

22 *E.g.*, 47 U.S.C. § 227 (requiring certain disclosures and prohibiting the use of auto-dialers in telephone activities without some form of express consent).

23 *See* CFPB, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts*, CFPB Bulletin 2013-07 (July 10, 2013), https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

24 Proposed Rule § 1006.14(b)(2)(i).

25 *Id.* § 1006.14(b)(2)(ii).

26 *Id.* § 1006.14(b)(3).

These communications can be helpful to borrowers in a number of ways. A call from a lender can be an opportunity for a consumer to resolve a situation that is hurting the consumer's credit history, or to better understand the consumer's unique financial situation, preventing escalation. Contact with a lender might also allow consumers to avoid late fees or additional interest that might be incurred, or provide an opportunity to avoid litigation or other material consequences, such as repossession or foreclosure.

In addition, restrictive call frequency limits could be harmful if they restrict a lender's ability to communicate with a consumer to propose payment solutions, especially when the consumer has collateral at stake, such as an automobile or home.[27] Indeed, under the mortgage servicing rules, servicers are *required* to make periodic communications with borrowers, because the CFPB has recognized that these contacts can help inform consumers about their options.[28] These are only a few of the ways in which frequent contact by lenders is often the more consumer-friendly approach.

In light of these concerns, the CFPB should refrain from taking an approach of applying call frequency limits rules designed for third-party collections to first-party collections based on its general UDAAP authority. Therefore, the final rule should not rely on UDAAP, including to implement call frequency limits, and should expressly state that such an application of the rule's frequency limits to first-party collection activity is inappropriate.

IV. Collectors should be permitted to use the consumer's previously expressed contact preferences, and the rule should clarify the standards for "inconvenient" contacts.

A. Debt collectors should be allowed to respect a consumer's previously expressed preferences for communications methods.

The proposed rule would restrict collectors' methods for communicating with consumers in a variety of ways. As a general matter, debt collectors would be prohibited from communicating with a consumer at an unusual or inconvenient time or place.[29] The rule would also specifically prohibit communications or attempts to communicate with a consumer at the consumer's place of employment, "if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication."[30] In addition, the proposal would prohibit collectors from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer.[31]

The CFPB's goal of minimizing inconvenience or embarrassment to consumers is of great importance and is aligned with the ways third-party collectors already are incentivized to avoid inconvenient contact methods. Collectors want to contact consumers in a way that will result in a consumer being willing to discuss a financial obligation. Attempting to contact a consumer through a method that is not convenient to the consumer is not effective for this purpose and demonstrates why a highly prescriptive rule would not be necessary in this case.

The requirements relating to communications methods in the proposed rule are needlessly restrictive, difficult to implement, and would offer few if any countervailing consumer benefits. As a general matter, consumers have already provided preferred communications channels to their lender or servicer, for example, on a credit application or by updating contact information during the life of the account. Those preferences should apply equally

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27 We would note that even where the CFPB proposes an alternative to this form of consumer communication through the proposed use of a limited-content message, the limited information outlined by the CFPB's proposal does not provide the consumer sufficient information to yield a call back, without additional information regarding the debt at hand.

28 *See* 12 C.F.R. § 1024.39 (establishing early intervention requirements for certain borrowers).

29 Proposed Rule § 1006.6(b)(1).

30 *Id.* § 1006.22(f)(3).

31 *Id.* §1006.22(f).

to debt collection activities for the same account. For example, where a consumer has previously provided a work email address to a creditor or servicer, the assumption is that the consumer wishes to be contacted at that address. There is no reason why a debt collector should not be permitted to use the same contact information unless and until the consumer opts out of communications to that address. This is particularly important where a consumer provides, for example, a work email address as the only contact information (and the collector might otherwise have no method of communicating with the consumer). In addition, email senders are already required to offer consumers the right to unsubscribe from receiving messages at an address.[32] The final rule should instead treat the consumer's provision of contact information to a creditor as valid and effective. Thus, if the consumer permitted creditor, servicer, or collector contact through a particular email address or telephone number, it should be presumptively permissible for the debt collector to contact the consumer through the same means until the consumer expressly revokes consent.

Relatedly, the final rule should provide further clarifications around what constitutes a "clear and conspicuous statement" regarding how a consumer can opt out of future electronic communications. While the Official Interpretations indicate that email opt-outs should be in a type size no smaller than the other text in the email,[33] the CFPB should clarify that this comparison excludes graphics, logos or other non-substantive content within the message.

Finally, the proposed rule contemplates the ability to communicate with a consumer via social media as long as the communication cannot be viewed by an unauthorized third party.[34] The CFPB should create a safe harbor for communicating with a consumer by direct message within a social media platform if the social media account exists solely in the name of the consumer, as one can assume that only that consumer has access to private messages to that account holder.

B. The standards for "inconvenience" in contacts should only restrict contacts that a collector knows or should know are inconvenient to the consumer, provide that restrictions must be reasonable and knowable, and not impose excessive burdens related to work communications.

The proposed rule would also prohibit communications at any "unusual time," defined to include any hour outside the period between 8:00 a.m. and 9:00 p.m.,[35] and would ban communications "at any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer."[36] In addition, the rule would prohibit use of an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer,[37] and would only permit text messages to a non-work telephone number.[38]

These requirements are also too restrictive and unnecessary. First, the definition of "usual time" is out of step with consumer behavior and technological advancements since passage of the FDCPA. In particular, where a collector has a telephone number *and* mailing address with different time zones, a collector would only be permitted to call during times convenient for *both* time zones.[39] But many consumers have cell phone numbers from a different location than their provided address (which may in turn be different than their actual address). Often this is because

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32 15 U.S.C. § 7704(a)(3)(A).

33 Proposed Rule, supra note 2, at 23412.

34 Proposed Rule § 1006.22(f)(4).

35 *Id.* § 1006.6(b)(1)(i).

36 *Id.* § 1006.6(b)(1)(ii).

37 *Id.* §1006.22(f).

38 *Id.* § 1006.6(d)(3).

39 *Id.* at 23411.

consumers have retained their cell phone number even while moving to another city or state. Where there is a discrepancy, the mailing address is a far more reliable indicator of the consumer's location than the area code. It should therefore be permissible for a collector to contact a consumer at a time that is not "unusual" based on a borrower-provided mailing address (regardless of area code).[40]

The proposed rule should also clarify that the consumer "convenience" restrictions do not apply to email communications. The proposed rule appears to prohibit contact by email during the times defined by the rule as "unusual,"[41] which would be unnecessarily restrictive. The nature of email technology allows an individual to open, read, and respond to an email at any time that the individual chooses. By definition, a person only accesses email at a time that is "convenient" for the person to read such emails. The final rule should therefore explicitly state that its requirements for "convenient" contact do not apply to email communications.

Second, the prohibition against use of work emails and phone numbers would present operational challenges. Building out collector capacity to identify whether a phone or email address is associated with a work location would require new systems, which still might not be fully effective. There is no master list against which collectors can check an email domain to see if it is a work domain. Moreover, there are work emails that could also resemble non-work-related domain names: for example, an .edu address could belong to a student or university employee. Similarly, there is no clear way to screen for work phone numbers. Doing such checks on a large scale is likely to be expensive—a cost which ultimately would be passed on to creditors (and ultimately consumers). The final rule should therefore expressly allow debt collectors to use a work email address if that work email address was previously provided to the creditor, servicer, or collector by the consumer. At a minimum, the final rule should include a safe harbor for use of email addresses provided by common email providers such as Gmail, Yahoo, or Hotmail.[42]

Third, the prohibition against contact that a collector "knows or should know" is inconvenient to the consumer should only apply to restrictions that are reasonable and knowable to the collector. A collector should not be required to abide by consumer requests regarding contact that are unreasonable or unclear. For example, a vague request not to be contacted "while at school" should not trigger the prohibition against contact at an inconvenient time. Rather, the rule should require that the consumer state specific contact times that would be inconvenient.

Finally, the proposed rule permits the use of email addresses and phone numbers that were "recently" used by a consumer to contact the collector.[43] This is a potentially helpful provision, but the final rule should specify what "recently" means.[44] On this basis, a better alternative would be to permit collectors to use any email address or phone number used by the consumer to contact the collector within the previous twelve months. In normal servicing circumstances, a creditor will be in contact with a consumer at least once a year. In addition, collectors should be allowed to continue to use the relevant contact email or phone number unless and until the consumer revokes consent.

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40 In certain situations, a borrower may have provided one or more mailing addresses to a creditor or collector, which may require consideration of multiple mailing addresses.

41 *Id.* § 1006.6(b).

42 Proposed Rule, *supra* note 2, at 23325.

43 Proposed Rule § 1006.6(c)(3)(i)(A).

44 A similar principle would apply for the purposes of § 1006.6(c)(3)(i)(C).

V. The proposed restrictions on debt sales and debt litigation are valuable but overbroad.

A. The restrictions on sale or transfer of debt should apply only where the collector has been notified that a valid identity theft report has been filed as to the debt.

The proposed rule prohibits the sale, transfer, or placing for collection of a debt if the debt collector "knows or should know" that the debt has been paid, settled, discharged in bankruptcy or is the subject of an identity theft report.[45] The rule would also prohibit a debt collector from selling, transferring, or placing a debt for collection in such circumstances.[46] These provisions of the proposed rule are generally welcome. In particular, consumers should be protected from attempts to collect a debt that is no longer owed. Collection of nonexistent debt is neither necessary nor beneficial to a properly functioning debt collection system.

The proposal regarding identity theft reports presents several specific issues, however. For one, it is not clear when a debt collector "should know" that "an identity theft report … has been filed with respect to the debt." Proposed comment 30(b)(1)(i)(C)-1 describes a scenario in which a borrower provides a copy of the identity theft report to the debt collector. But it is not clear whether there are circumstances short of a borrower communication (*e.g.*, information in the creditor's possession) that would warrant imputing knowledge of an identity theft to the collector. Moreover, even if the collector has access to the identify theft report, it may not always be clear whether the relevant debt is covered by the report.[47]

In addition, the filing of an identity theft report does not necessarily mean that that the underlying debt is invalid. Consumers can sometimes be mistaken about their debts, and it is not uncommon for an identity theft report to be deemed unfounded after further investigation. Allowing a consumer to effectively nullify a debt by filing an identity theft report on it also creates obvious potential for abuse.

To address these issues, the final rule should provide that the restrictions on sale or transfer apply only where the associated debt file indicates the presence of a bankruptcy, settlement, or an identity theft report identifying the specific debt and that no additional diligence is required by the collector. In addition, the rule should state that the prohibition on sale or transfer applies only to a § 605B identity theft report that renders the debt invalid.[48]

B. The proposed rule should be modified to allow for a safe harbor in circumstances where a debt may be time-barred and where a collector has reasonable policies and procedures to avoid pursuing or threatening litigation.

The proposed rule would prohibit collectors from bringing or threatening to bring legal action against a consumer to collect a debt that the debt collector "knows or should know" is "time-barred."[49]

This provision also presents a concern. In particular, it is not clear when a debt collector "should know" that a debt is expired. Statutes of limitations vary dramatically under state law and are not easy to analyze or calculate. In some cases, figuring out the statute of limitations may be impossible based on information in the debt collector's possession. For example, a consumer who has served in the military may be subject to longer or shorter statutes of

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45 *Id.* § 1006.30(b)(1)(i).

46 *Id.* § 1006.30(b)(1)(ii). For the reasons discussed above, such prohibitions should be implemented through the CFPB's rulemaking power under the FDCPA and without reference to the CFPB's UDAAP authority.

47 *See* 12 C.F.R. § 1002.3(i).

48 *See Fair Credit Reporting Act*, 12 U.S.C. § 1681c-2.

49 Proposed Rule § 1006.26(b).

limitations for bringing an action on consumer debt. It is for this reason that state law prohibitions on collecting debt generally require only "reasonable inquiry" into the status of the debt, rather than imposing strict liability.

The final rule should recognize these difficulties and provide a safe harbor where a collector has reasonable policies and procedures to guard against pursuing or threatening litigation for time-barred debts. The final rule should include a further safe harbor that a collector who communicates about a debt within three years of the delinquency is presumptively not attempting to collect on a time-barred debt. This would be consistent with the statute of limitations in most states and would minimize the burden of implementing this protection. The final rule should also confirm that the bona fide error defense in the FDCPA statute applies to this provision, as well as the rest of the rule.[50]

C. The final rule should also clarify whether the prohibitions against the sale or collection of debt discharged in bankruptcy apply to liens that exist following a bankruptcy.

The proposed rule prohibits the sale or collection of any debt that has been discharged in bankruptcy.[51] Nevertheless, the final rule should clarify whether the scope of the restriction extends to liens that may exist based on debt that has been discharged in bankruptcy. When a consumer does not pay a debt, a creditor may acquire a lien on the consumer's property. A lien is not automatically eliminated under the bankruptcy process, and a creditor may retain the right to possession of property unless the consumer pays the amount that the lien secures.[52] The final rule should therefore clarify that the scope of the prohibition against sale or collection of debt discharged in bankruptcy does not prohibit a creditor from maintaining or exercising its security interests, when a debt has otherwise been discharged in bankruptcy.

VI. The CFPB also should clarify its requirements related to personal representatives, original creditor notices, and validation notices.

A. The final rule should clarify the standards applicable to determining representatives of a decedent's estate.

The final rule should include a clearer standard with respect to who is the personal representative of a consumer's estate. The proposed rule defines a personal representative as any person who is authorized to act on behalf of the deceased consumer's estate.[53] As with the mortgage servicing "successor in interest" rule, the variety of state laws in this area means that who is the legal personal representative of an estate can be difficult to determine. The rule should instead provide that a debt collector may treat a person as a personal representative if the collector has reason to believe that the person has the authority to pay the decedent's debts from the assets of the decedent's estate.

In cases where the individual authorized to act on behalf of the estate cannot be located, a collector should be permitted to send the validation notice to the "estate of" the deceased consumer. This would be consistent with the approach in Regulation Z, which imposes no general duty to affirmatively identify a responsible party for the estate.[54]

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[50] 15 U.S.C. § 1692l(c).

[51] Proposed Rule § 1006.30(b)(1)(B).

[52] *See* 11 U.S.C. § 522 (c).

[53] Proposed Rule § 1006.6(a)(4).

[54] *See* 12 U.S.C. §§ 1024.381026.11(c);

B. The final rule should define "original creditor," for purposes of the original-creditor notification, to provide meaningful information to the consumer.

The proposed rule would require that, upon request from a consumer, a third-party collector provide the name and address of the "original creditor" to the consumer electronically or in writing. However, the proposed rule does not define the term "original creditor."[55]

The term "original creditor" is ambiguous, and in any event, consumers sometimes may not be familiar with the entity that originated their loans. For example, a creditor may originate a loan to a consumer and then sell the loan to another creditor that then services the loan and interacts with consumer. If that second creditor then sells the loan to a third-party collector, it may be less informative to provide the consumer with the name of the original lender, with which the consumer had little interaction.

The final rule should therefore define the term "original creditor" for purposes of the original-creditor notification. This definition should provide that the term includes the entity that owned the consumer credit account at the time the account was charged off, even if that financial institution did not originate the account. Allowing use of the name of an entity that consumers are more likely to recognize will be more informative and help consumers identify the debt at issue.

C. The final rule should clarify how the amount of debt should be calculated for purposes of a validation notice.

The proposed rule requires that a debt collector provide a consumer with a validation notice within a specified time after a debt collector begins communicating with a consumer about the debt.[56] This validation notice must include the current amount of the debt as of the "itemization date."[57] The "itemization date" may be the last statement date, the charge-off date, the last payment date, or the transaction date. Flexibility in the itemization date selection is helpful to provide the most relevant information to the consumer, but there remains uncertainty as to whether the notice may include interest accrued prior to the end of the account period. As a further option, for open-end accounts, the CFPB should allow a collector to use a validation notice that is compliant with the periodic statement form requirement of Regulation Z.[58] The Regulation Z-compliant form is designed to give a consumer precise and useful information about their account, and a collector should be permitted to provide this information to the consumer to satisfy the validation notice requirement.

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55 Proposed Rule § 1006.38(c). *Cf.* N.Y. Uniform Rs. for Trial Cts. § 212.14-a(a)(2) ("Original creditor means the financial institution that owned the consumer credit account at the time the account was charged off, even if that financial institution did not originate the account. Charged-off consumer debt means a consumer debt that has been removed from an original creditor's books as an asset and treated as a loss or expense.").

56 *Id.* § 1006.34

57 *Id.* § 1006.34(c)(2).

58 *See* 12 C.F.R. § 1026.7

BPI appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (202) 589-2429 or by email at *Naeha.Prakash@bpi.com*.

Respectfully submitted,

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