COMMENT LETTER

Proposed Rulemaking: Debt Collection Practices, Regulation F

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

Re: Proposed Rulemaking: Debt Collection Practices, Regulation F (16 CFR Part 1006) Docket No. CFPB-2019-0022

Dear Sir or Madam:

The Conference of State Bank Supervisors (CSBS)[1] and the North American Collection Agency Regulatory Association (NACARA)[2] appreciate the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") Notice of Proposed Rulemaking ("NPRM") titled "Debt Collection (Regulation F)" (RIN 3170-AA41). The NPRM implements the Fair Debt Collection Practices Act ("FDCPA") pursuant to the rulemaking authority delegated to the Bureau in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

State regulators license and supervise debt collectors under state debt collection laws and thus have a vital interest in how federal debt collection law is implemented through regulation. Given this interest, we have written this letter to highlight possible issues regarding how the proposed rule would relate to state debt collection laws and regulatory structures, including the obligations of debt collectors and the rights of consumers under those laws. Specifically, as discussed below, state regulators believe:

- The Bureau should clarify the impact of the proposed rule on disclosure requirements imposed by state debt collection laws;
- State law disclosures should be prominently referenced and displayed on all types of debt validation notices so that consumers are better aware of their debt notification and dispute rights under state specific laws;
- The Bureau should provide further clarification on the ways a consumer can opt out of an electronic communication; and
- The Bureau should apply the proposed limit on call attempts by a debt collector on a per consumer rather than a per debt basis and should apply the frequency limits to all methods of communication by a debt

collector.

The Bureau Should Clarify the Impact of the Proposed Rule on Disclosure Requirements Imposed by State Debt Collection Laws

Like other federal consumer financial protection laws, the FDCPA functions as a "floor" rather than a "ceiling" with respect to preemption. Specifically, section 816 of the FDCPA provides that the FDCPA does not preempt state debt collection laws except to the extent that those laws are inconsistent with any provision of the FDCPA, and then only to the extent of the inconsistency. Section 816 also provides that, for purposes of that section, a State law is not inconsistent with the Act if the protection such law affords any consumer is greater than the protection provided by the Act. This means that for a state debt collection law to be preempted by the FDCPA, there must be (1) a determination that compliance with both state and federal law is a physical impossibility; and (2) a determination that the state law is less protective than the FDCPA. The proposed rule implements section 816 in proposed section 1006.104 and largely mirrors the language of the statute. However, the language in the commentary to the proposed rule raises concerns regarding how proposed section 1006.104 relates to disclosure requirements imposed under state debt collection laws.

With respect to state law disclosure requirements, industry has expressed concern regarding overlap between state and federal debt collection disclosure requirements and has recommended that the Bureau consider whether clarifications may be necessary in the event that federal disclosures overlap with state law requirements. Based upon this recommendation, the Bureau is issuing proposed comment 104-1 to address how Regulation F relates to state law disclosure requirements. Proposed comment 104-1 states "A disclosure required by applicable State law that describes additional protections under State law does not contradict the requirements of the Act or the corresponding provisions of this part."

While we appreciate the desire to provide greater clarity, state regulators have questions as to the impact of proposed comment 104-1 because, as written, it is susceptible to multiple, conflicting interpretations and does not necessarily track with the language of section 816. On the one hand, comment 104-1 could be read as providing only that compliance with both the proposed rule and any, currently applicable, state law disclosure requirement would not be physically impossible. This interpretation would be consistent with section 816. However, comment 104-1 could also be read as providing that a state law disclosure requirement is preempted because it only describes the same protections afforded under federal law. This interpretation would not be consistent with section 816, and thus, if the latter is the intended interpretation, then state regulators would oppose the inclusion of comment 104-1 in the proposed rule.

For this reason, state regulators request that the Bureau clarify the intent and impact of comment 104-1.

State Law Disclosures Should Be Prominently Referenced and Displayed on All Debt Validation Notices

The requirement to provide debt validation information is an important component of the FDCPA and was intended to improve the debt collection process by helping consumers confirm that they actually owe the debt attempting to be collected. Section 809(a) of the FDCPA generally requires a debt collector to provide certain information to a consumer either at the time that, or shortly after, the debt collector first communicates with the consumer regarding the collection of a debt. This required information, also referred to as validation information, includes important details about the debt and about consumer protections, such as the consumer's rights to dispute the debt and to request information about the original creditor. The document that contains the validation information is generally referred to as the "validation notice".

The proposed rule states that currently, validation notices, combined with the limited disclosure of consumers' rights with respect to debt collection, may limit a consumer's ability to fully exercise their dispute rights under FDCPA section 809.[3] The Bureau is therefore proposing a model validation notice form (Model Form B-3) that a debt collector could use to comply with the FDCPA's validation notice and disclosure requirements. The proposal requests further input on what validation information should be provided to a consumer and how best to display that information on the model validation notice form.

State regulators believe that the reference to and placement of state law disclosures should be prominent in order to ensure that consumers are truly aware of their rights under state law. In light of this position, state regulators have concerns about how state law disclosures are currently referenced on the model validation notice. Specifically, proposed section 1006.34(d)(3)(iv) would permit a debt collector to include, on the front of the validation notice, a statement that disclosures required by applicable state law appear on the reverse of the notice and, on the reverse of the validation notice, any such state law disclosures. Consistent with this, the front of the model validation notice includes the statement "review state law disclosures on reverse side, if applicable".

While state regulators appreciate the reference to state law disclosures, the placement of the reference on the model notice may not be sufficiently prominent and may lead consumers to overlook state law disclosures. For instance, the model validation notice only directs consumers to review state law disclosures after directing the consumer to "contact us [debt collector] about payment options" even though contacting the debt collector can have the effect of waiving the consumer's right to further validation information. Similarly, state regulators believe that the placement of state law disclosures on any electronic validation notice should be clear and conspicuous to the consumer receiving such notices. Accordingly, the proposed rule should clarify where these state law disclosures should be placed in electronic validation notices so that consumers do not miss this information when viewing a validation notice sent via email, text, or any other electronic-medium.

Finally, state regulators believe that the Bureau should consider including a state license number or the Nationwide Multi-State Licensing System (NMLS) identification number if a debt collector is required to be licensed in a state. As licensure is a prerequisite to collection activity in those states, including issuance of the model validation notice, it is important to promote disclosure of such authority to engage in the collection business. As currently proposed, the model validation notice does not require the inclusion of the state license number or NMLS ID on the notice. Requiring collectors to put their state license number or NMLS ID on the validation notice will assist state regulators in examining for compliance with state debt collection laws. It will also help consumers validate the identity of the collector through NMLS Consumer Access[4] or another form of license identification platform offered by a state regulator. Given the clear benefits to regulators and consumers, state regulators request that the proposed notice requirements incorporate a requirement to disclose a license number or an NMLS ID, where applicable.

In sum, state regulators want to ensure that all applicable state law disclosures are prominently displayed and referenced in validation notices to ensure that consumers are aware of their rights under state debt collection law. We encourage the Bureau to consider the recommendations made above to ensure state law disclosures are sufficiently prominent.

The Bureau Should Provide Further Clarification on the Ways a Consumer Can Opt Out of an Electronic Communication

Section 1006.6(e) of the proposed rule would require a debt collector who communicates or attempts to communicate with a consumer electronically about a debt using, among other things, a telephone number for text messages or other electronic-medium address, to include a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the

debt collector to that address or telephone number. While the proposed rule notes that the statement to opt out must be “clear and conspicuous” it is largely silent as to whether a collector would be permitted to require a consumer to opt out through communication channels other than that used to contact the consumer.

Accordingly, proposed section 1006.6(e) raises questions as to the ways in which a collector could restrict a consumer’s right to opt out of electronic communications. For instance, as written, section 1006.6(e) could permit a debt collector to require a consumer to opt out of future electronic communications to mail in a letter requesting to opt-out. In addition to this process being burdensome or inconvenient to a consumer, the lack of clarity on the one or more ways a consumer can opt out of further electronic communications will make it harder for examiners to evaluate for compliance during an examination. To limit consumer confusion and avoid unduly complicating examination processes, state regulators believe that the proposed rule should require debt collectors to permit consumers to opt out of electronic communications through any communication channel or at least any electronic communication channel. More generally, further clarification on what the delivery standard is for a company regarding a consumer's right to opt out of electronic communications will be helpful to consumers, debt collection companies, and state regulators.

The Bureau Should Apply the Proposed Limit on Call Attempts by a Debt Collector on a per Consumer Rather than a per Debt Basis and Should Apply the Frequency Limits to All Methods of Communication by a Debt Collector

Section 806(5) of the FDCPA prohibits debt collectors from making telephone calls to a consumer repeatedly with the intent to annoy, abuse, or harass. The law does not identify a specific number of telephone calls or telephone conversations within any timeframe that would violate the statute. The Bureau states in the proposed rule that frequent telephone calls are often a consistent source of consumer- initiated litigation and consumer complaints to both federal and state regulators. In light of this concern, the Bureau is proposing section 1006.14(b)(2) which would prohibit debt collectors from attempting to call a consumer about a particular debt more than seven times within seven consecutive
days. Importantly, under this proposed call frequency limit, the number of calls a debt collector may place to a consumer is tied to the particular debt in question and not on a per consumer basis.

State regulators are concerned that applying the proposed frequency limits on a per debt basis may lead to consumers receiving more calls than necessary to effectively communicate a consumer’s obligation to pay a debt. For example, if a consumer has five separate debts owed to a particular debt collector, the proposed rule would permit up to a total of thirty-five call attempts (seven per each debt) within a consecutive seven-day period. Additionally, state regulators are concerned that the proposed frequency limits conflict with the frequency limits imposed under some state debt collection laws given that states that impose call frequency limits generally do so on a per consumer basis, not on a per debt basis.
Accordingly, state regulators recommend applying the proposed call frequency limit on a per consumer basis in order to reduce the possibility for conflict with state law, provide clearer parameters to industry, and reduce the potential for consumer confusion and harm.

Additionally, the Bureau’s proposed frequency limits would apply only to telephone communications but would not apply to communications by mail, text message, or email. The Bureau has requested input on whether to broaden the scope of the portions of the proposed rule covering calls specifically, including the frequency limits, to include these other methods of communication. States that impose frequency limitations on communications with consumers generally apply those limits to all forms of communication, not simply telephone calls. To minimize the potential for conflict, state regulators believe that the proposed limits on debt collectors contacting a consumer should be consistent and applicable to all forms of communication, not just telephone

communications. This approach will foster a consistent foundation for state policymaking in the debt collection space and promote consistency across the various channels of communication a debt collector uses to contact a consumer. Accordingly, state regulators recommend that all communications, regardless of method, be subject to the contact frequency limit.

Conclusion

CSBS and NACARA appreciate the opportunity to comment on the proposed rule. As discussed above, state regulators are requesting further clarification on the intent and impact of the proposed rule on disclosure requirements imposed by state debt collection laws. Furthermore, state regulators believe that prominently referencing and displaying state law disclosures on debt collection notices will help consumers gain greater awareness of their debt notification and dispute rights under state laws.
Additionally, state regulators encourage the Bureau to provide further clarification on the ways a consumer can opt out of electronic communications and revise the proposed approach to frequency limits on contacting consumers. We look forward to continued engagement with the CFPB on this important issue.

Sincerely,

John Ryan
President and CEO
Conference of State Bank Supervisors

Elizabeth Benotti
President
North American Collection Agency Regulatory Association

Footnotes

1 CSBS is the nationwide organization of banking regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. State regulators charter and supervise 79 percent of all banks in the United States. In addition, state regulators are the primary licensing authority and supervisor for a variety of non-depository industries, including mortgage lenders and servicers, payday lenders, money service businesses, among others. CSBS, on behalf of state regulators, operates the Nationwide Multistate Licensing System (NMLS) as the database of record for the licensing and registration of more than 20,000 entities that provide non- bank financial services across multiple industries.

2 NACARA is an association comprised of state and municipal governmental agencies that regulate the debt collection industry and administer and enforce laws and regulations. NACARA's member agencies regulate debt collectors through such methods as licensing or registration, compliance and consumer protection examinations, responses to consumer complaints, and administrative or civil enforcement actions.

3 See Proposed §1006.34(c)(1) Debt Collector Communication Disclosure, 84 Fed. Reg. 23339 (May 21, 2019).

4 NMLS Consumer Access is available at www.nmlsconsumeraccess.org.

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