September 18, 2019

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial
Protection 1700 G Street NW
Washington, DC 20006

Re: Debt Collection Practices (Regulation F), Proposed Rule
Docket Number CFPB-2019-0022

Dear Ms. Jackson:

The National Creditors Bar Association ("NCBA") appreciates this opportunity to submit the following comments in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") *Proposed Rule for Debt Collection Practices (Regulation F)*, 84 Fed. Reg. 23274 (May 21, 2019).

Respectfully Submitted,

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President, National Creditors Bar Association

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NATIONAL CREDITORS BAR ASSOCIATION

COMMENTS IN RESPONSE TO THE CONSUMER FINANCIAL PROTECTION BUREAU'S NOTICE OF PROPOSED RULEMAKING FOR DEBT COLLECTION PRACTICES (REGULATION F)

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INTRODUCTION TO NCBA

The National Creditors Bar Association ("NCBA") is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt. NCBA member firms practice law in a manner consistent with their responsibilities as officers of the court and must adhere to applicable state and federal laws, rules of state civil procedure, state bar association licensing, certification requirements, and the rules of professional conduct of the state where they practice. NCBA's values are: Professional, Ethical, Responsible.

Important facts about NCBA members firms are as follows:

- Over 2,000 creditors' rights attorneys in over 500 law firms and other creditors' rights practices in all 50 states, Canada, Puerto Rico, and the U.K;
- 70% of law firms are considered small businesses pursuant to the Small Business Administration classification;
- 40% practice creditors' right law in multi-state jurisdictions;
- 26% are woman- and minority-owned law firms;
- 75% are members of their State Creditor Bar Association;
- NCBA member law firms devote over 20% of their overall operating budget to compliance costs;
- NCBA member law firms are subject to an average of 24 audits per year by their clients and devote over 80 hours per month preparing for those audits; and
- 20 creditors' rights practice groups including:

Type and % of firms practicing	
Commercial Collections	67%
Judgment Enforcement	67%
Contracts - General	62%
Credit Cards	62%
Auto Loans	57%
Bankruptcy	57%
Credit Unions	57%
Foreclosure	57%
Repossession/Replevin	57%
Landlord/Tenant	52%
Liens/Mechanic's Liens	43%
Medical Bills	38%
HOA	33%

Government/Tax	28%
Probate	28%
Student Loans	28%
FDCPA Defense	24%
Insurance Subrogation	24%
Utilities/Communications	19%
Family Support	9%

Attorneys, like lenders and consumers, are a necessary part of the "credit economy." Sixty percent of NCBA members represent small businesses including local retail establishments, small or regional banks, credit unions, and small medical providers. These are long-term attorney-client relationships that have existed on average for over 22 years. These small business clients do not have vast legal departments or even in-house attorneys and rely on their local attorneys to ensure that outstanding receivables are paid so that their businesses can continue to operate. NCBA is comprised of small law firms whose attorneys serve the needs of their local community.

Attorneys who are members of NCBA law firms understand that they are officers of the court and work diligently to ensure that consumers, especially those that appear *pro se* in court, are treated fairly and with dignity and respect. Although our legal system is adversarial, NCBA attorneys make every effort to work with consumers throughout the legal process including efforts to help resolve their debts in a reasonable manner.

OVER-ARCHING THEMES AND IMPORTANT CONSIDERATIONS

NCBA applauds the Consumer Financial Protection Bureau ("CFPB" or "Bureau") for taking the important step in providing a formal regulatory scheme around the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C.§ 1692, *et seq*. NCBA generally supports the NPR to the extent it attempts to regulate debt collection activity, and not the practice of law, as discussed below. The NPR shows deliberate and thoughtful consideration by the Bureau to ensure the FDCPA achieves its purpose while at the same time taking into consideration that the Act must evolve and expand into the 21st Century.

The following reflects some of the common themes reflected in NCBA's comments and take-away considerations for the CFPB as they move forward with final rules for debt collection:

The CFPB Must Consider the Practice of Law Exception in Dodd-Frank and Not Attempt to Regulate Attorney Conduct

In 2010, the Dodd-Frank Act specifically established the Bureau. The Bureau's authority, however, was limited to exclude oversight of attorneys who were engaged in the practice of law (the "practice of law exclusion"). Congress nonetheless provided an exception to the practice of law exclusion as follows:

> (2) Rule of construction. [The exclusion] shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the offering or provision of a consumer financial product or service described in any subparagraph of section 5481(5) of this title—
>
> > (A) that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or
> >
> > (B) that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service. [1]

The legislative history makes clear that this exclusion was adopted to avoid

> giving the new Bureau authority to regulate the practice of law [which] could materially interfere with and jeopardize sensitive aspects of the attorney-client relationship, including the attorney-client privilege and work product protection that enable clients to obtain sound legal advice from their attorneys on a protected confidential basis.

[1] 12 USC § 5517

Congressman John Conyers also emphasized that “[a]ny regulation from a new source would unavoidably conflict with the existing rules and lines of accountability…. Our committee was determined to avoid any possible overlap between the Bureau's authority and the practice of law."

The House Judiciary Committee clearly anticipated that any effort to regulate lawyers in light of the exclusion would be the subject of active involvement of and input from courts and state bar associations.

> It is generally contemplated that the new Bureau will make rules regarding various aspects of its authority. Any determinations by rule, or otherwise, regarding what activities constitute the practice of law should be consistent with the views and practices of the State supreme court or State bar in question as to what activities it regards as part of the practice of law and oversees on that basis, giving appropriate deference to comments received from the State supreme courts and State bars, supplemented with further guidance as appropriate from the other indicia set forth in section 1027(e)(2).

On February 17, 2012, the Bureau issued a Proposed Rule for Defining Larger Participants in Certain Consumer Financial Product and Service Markets which included debt collection. NCBA, then known as the National Association of Retail Collection Attorneys (“NARCA”), submitted comments to the Bureau’s Proposed Rule urging the Bureau not to consider the supervision of attorneys who practice in the area of debt collection. The American Bar Association and others provided similar comments. NCBA pointed out that the proposed rule to supervise attorneys would undermine the attorney-client privilege. NCBA noted:

> Given the lack of statutory protection for disclosure of privileged materials to the Bureau, it is entirely possible that a court may determine that the production of a client’s confidential and privileged documents by a law firm to the Bureau results in a waiver of the client’s privileges and confidences with respect to matters addressed in those documents. Such a determination would have a serious and detrimental effect on the attorney-client relationship and would create “another barrier for attorneys to build the level trust necessary for clients to feel they can openly communicate with their attorneys. And without the free flow of information between an attorney and client, surely the quality of representation an attorney can provide will be adversely impacted.” *American Bar Assn v. F.T.C,* 671 F.Supp.2d at 87.

Unfortunately, the Bureau rejected these comments and found that because “attorneys represent clients with interests adverse to consumers’ – §5517(e)(2)(B) preserves the Bureau’s authority [to regulate] those services.”.

In *CFPB v. Law Offices of Frederick J. Hanna,* 11 F. Supp 3d. 1342 (N.D. Ga. 2015), the District Court for the Northern District of Georgia, adopted the Bureau’s interpretation of § 5517(e)(2)(B) noting that the exception would apply to attorneys like NCBA members because

although consumers are not receiving legal advice from NCBA attorneys, the filing of a lawsuit against a consumer for a debt owed is deemed to be in connection with a "financial product or service." [2] In the *Hanna* case, the Bureau investigated a law firm's litigation activities and concluded that their process for doing so should have been done differently. Thus, by proceeding under the authority of § 5517(e)(2)(B), the Bureau, as an agency of the executive branch, effectively regulated the practice of law.

It is difficult to understand what "not receiving legal advice" found in § 5517(e)(2)(B) is intended to mean. The exception may be intended to apply to: (1) debt settlement attorneys; (2) attorneys acting as escrow agents; or (3) attorneys who sell products to consumers without selling simultaneous legal advice, e.g., do-it-yourself form wills or leases, among other options. It appears, however, that the Bureau interprets the provision to mean that all attorneys who represent clients adverse to consumers are somehow subject to Bureau regulation simply because the consumer is the defendant, without regard to whether or not these attorneys are engaged in "the practice of law." Therefore, all attorneys who represent clients against consumers are at risk of federal regulation.

However, the Bureau has also brought actions against law firms that do in fact represent consumers in connection with financial products or services; such has bankruptcy services as well as mortgage and debt relief services. *See, e.g., CFPB v. Howard Law, P.C. et al*, Case No. 8:17-CV-00161 (C.D. Cal. 2017); *CFPB v. Mortgage Law Group*, Case No. 14-CV-512 (W.D. Wis., 2014); and *CFPB v. Morgan Drexen, et al*, Case No. SACV13-01267 (C.D. Cal. 2013). Accordingly, NCBA questions whether there is an exclusion for the practice of law. As the Bureau's past enforcement actions have indicated, the exceptions to the general exclusion apply in all scenarios, whether an attorney represents a consumer or is otherwise adverse. Therefore, under what circumstance is the Bureau not in fact regulating the practice of law?

NCBA provides this historical background in order to reiterate its position that a federal regulatory agency, like the Bureau, should not be looking to regulate attorney conduct when engaged in the practice of law. Such oversight of state licensed attorneys, whether by enforcement or regulation, violates the separation of powers doctrine embodied in the Constitution.

Model Form B-3, Appendix B, Levels the Playing Field for Attorney and Non-Attorney Debt Collectors.

NCBA supports the CFPB's proposal to have a form validation notice that can be used industry-wide by any debt collector, whether they are an attorney or a non-attorney debtor collector. While certain requirements of the form still need to be clarified and possibly revised, NCBA is encouraged that the use of the form will allow consumers to fully understand their rights as they enter into the debt collection process while at the same time provide debt collectors with clear expectations of their responsibilities.

That Model Form B-3 provides a safe harbor to any debt collector who uses it from liability pursuant to the requirements set forth in Sections §§ 1006.34(a)(1)(i) and (d)(1) is also encouraging. Section §1006.34(d)(1) states that "the validation information described in

[2] *Id*. at 1354.

[1006.34(c)] must be clear and conspicuous". Therefore if a debt collector uses the Model Form and provides all the required information as set forth in Section § 1006.34(c) in a clear and conspicuous manner, then a debt collector can presume that she has complied not only with the proposal as stated but with § 809.[3] Furthermore, given the standardization of the Model Form, NCBA strongly encourages the Bureau to expand the Model Form's safe harbor provisions to § 807[4] and its subparts as long as the information contained in the Model Form is accurate and otherwise complies with the requirements set forth in Section § 1006.34(c).

Rules Must Be Clear in Order to Prevent Frivolous Lawsuits Against Debt Collectors.

NCBA's comments to the NPR reflect the historical experiences of members who for forty (40) plus years have been subject to inconsistent interpretations of the FDCPA. Guidance around standard practice and procedure under the FDCPA has been left to the courts, resulting in a patchwork of inconsistent opinions which has resulted in a constant state of flux and uncertainty in compliance expectations for industry members. The intent and purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not completely disadvantaged."[5]

However, the mission of the FDCPA has been lost. Rather than protect consumers from the egregious conduct of unscrupulous debt collectors, the FDCPA has become nothing more than a breeding ground for a cottage industry of attorneys looking to benefit themselves rather than the consumers whose interests they are supposedly representing.[6]

Therefore, NCBA urges the CFPB to consider that any final rule be abundantly clear and not conspicuously vague. Non-compliant behavior by any debt collector should be evident to a consumer as well as other debt collectors. Debt collectors who fail to implement compliance programs and who disregard the rights of consumers must be harshly punished. However, debt collectors who follow the rules ought not be sued because an attorney who knows that it will be too costly for the debt collector to fight the claim, even if they win, will still pursue frivolous

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[3] 15 U.S.C. § 1692g(a)

[4] 15 U.S.C. § 1692e

[5] FDCPA Section § 802, 15 U.S.C. 1692(e)

[6] *See Ocampo v. Client Services, Inc*, 2019 WL 2881422 (18-cv-4326, E.D. N.Y. July 3, 2019) Cases like this – litigation over whether an innocuous debt collection letter is in technical compliance with the FDCPA – are far afield from the original intent behind the FDCPA, i.e. preventing "collection abuses such as use of obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002) (internal quotation marks omitted). This is a "lawyer's case," by which I mean that it alleges a defect of which only a sophisticated lawyer, not the least sophisticated consumer, would conceive. We cannot lose sight of the consequences of these creative exercises – the cost of litigation in the collection industry logically must increase the cost of credit, especially to the least sophisticated consumer, as at least some of those costs will be passed on. *See Akoundi v. FMS, Inc.,* No. 14-cv-366, 2014 WL 3632008, at *3 n.1 (S.D.N.Y. July 22, 2014) ("Imposing liability for technical falsehoods that have no bearing on the debt or the ability to dispute it furthers no conceivable consumer interest and only increases the cost of credit by subjecting debt collectors to frivolous claims.") (internal quotation marks omitted). That is fine if it is necessary to protect the least sophisticated consumer.

cases against debt collectors in order to extract a "quick" settlement. The final debt collection rules must focus on compliance and not this sort of litigation extortion.

The CFPB Must Define "Verification" in Order to Provide a Workable Dispute Process.

Throughout these comments, NCBA encourages the Bureau to define the term "verification of the debt" and to set forth a specific framework for a dispute process. For decades, consumers have been frustrated that their disputes go unanswered and the debt collectors are not confident that the information being provided in response to a dispute satisfies the requirements of the FDCPA. NCBA believes that there is a simple process by which a workable dispute process can be effectuated, and it requires the joint responsibilities of both debt collectors and consumers. The fundamental elements NCBA proposes are as follows:

1. Requiring consumers to provide the current name and all other names used with the creditor, and some other identifying information, such as address, telephone number, account number, date of birth, and/or social security number;
2. Requiring consumers to fully and completely articulate their disputes and to provide some support evidence/documentation of same; and
3. Defining verification to show that the amount sought by the debt collector is the same amount the creditor shows is owed.

Building upon this framework will result in less confusion by the consumer who will be satisfied that their dispute is being given the appropriate attention and increase debt collector confidence that they have fully complied with the expectations of the FDCPA.

NCBA COMMENTS

§ 1006.2 Definitions.

1. *Communicate or Communication - §1006.2(d)*

p. 52 - *The Bureau requests comment on proposed § 1006.2(d) and on proposed comment 2(d)–1 and on whether additional clarification about the definition of communication would be useful.*

Consent in the Framework of Alternative Communication Methods.

Section §1006.2(d) tracks the language of the statute verbatim, "'communication' means the conveying of information regarding the debt directly or indirectly to any person through any medium".[7] NCBA believes the ability of collection attorneys to communicate with consumers using text and email is a great benefit to consumers. However the NPR failed to discuss the interplay between the proposed rules, new proposals being develop by the Federal Communications Communication ("FCC") regarding call blocking, the requirements for consent to text as set forth by the Cellular Telephone Industry Association ("CTIA"), as well the Telephone Consumer Protection Act, ("TCPA"), 47 U.S.C. § 227. While NCBA applauds the CFPB for moving the debt collections industry into the 21st Century and specifically condoning the use of other mediums of communication, careful consideration must be given to the challenges debt collectors will face by using these mediums for a legitimate purpose, especially text.

Modern day communication focuses on texting:

- 90% of people say they'd rather receive a text than a phone call from a business;[8]
- 90% of consumers would rather be texted than called on the phone for a sales call;
- 89% of consumers want to use messaging to communicate with businesses;[9] and
- 91% of people who text prefer text to voicemail. [10] (RingCentral, Text Request).

The Centers for Disease Control and Prevention ("CDC") reports that, as of 2018, 54.9% of all households did not have a landline phone.[11]

The FCC recently issued a Declaratory Ruling which allows telephone and cellular telephone carriers to block calls based upon "reasonable analytics" and not whether the call itself is

[7] FDCPA Section § 803, 15 U.S.C. 1692a(2)
[8] *Texting Statistics That Answer All Your Questions*, by Kenneth Burke, May 24, 2016, updated January 24, 2019 (relied upon sources: Franchise Help, Text Request)
[9] *According to Skipio* – written by Andrew Gibson, May 22, 2018
[10] (RingCentral, Text Request)
[11] https://www.diversetechgeek.com/2019/05/22/most-us-households-no-longer-have-landline-phones, May 22, 2019

legitimate.[12] This will make legitimate calls to consumers all the more difficult for collectors. Therefore, while it is commendable that the CFPB sees texting as a reasonable and appropriate way to communicate with consumers about their legitimate debts, the medium of texting maybe not be the most viable option. NCBA encourages the CFPB to work with the FCC to ensure that the FCC's proposals do not otherwise negate the important attempts by the CFPB to improve the important and necessary communications between consumers and debt collectors.

Additionally, CTIA consent standards require a consumer to enroll in or subscribe to a text messaging service. In other words, consent from a consumer does not automatically trigger texts from a debt collector. If a creditor has obtained consent from the consumer to use text, at best all a debt collector can do is send an invite to a consumer and hope that a consumer says "yes" to subscribe to a debt collector's SMS/text messaging service. Otherwise only a consumer can initiate a request to subscribe or receive texts. These standards conflict with the required content of the CFPB's proposal for a Limited Content Message. *See* Section § 1006.2(j). As discussed herein, although the Limited Content Message is not deemed a communication under the FDCPA, it may otherwise violate CTIA standards since the text must first be initiated by the consumer if there was no prior consent.

The lack of consent by the consumer also raises concerns regarding violations of the TCPA. Again, while sending a Limited Content Message in the form of a text to a consumer may not violate the FDCPA, if the text was sent using an automatic telephone dialing system ("ATDS"), that same message may violate the TCPA if there was no prior express consent. The interplay between these various statutes and standards is critical. NCBA urges the CFPB to collaborate with both the FCC and the CTIA to develop a workable framework that encourages the importance of communication while at the same time protects consumers and provides clarity for the debt collection industry.

2. ***Debt Collector - §1006.2(i)(2)(vi)(C)***

p. 49 - *<u>The Bureau generally requests comment on whether additional clarification is needed for any of the proposed definitions and on whether additional definitions would be helpful.</u>*

"Default" Must Be Defined.

The definition of "default" must be clarified in order to properly determine who is a debt collector. Section §1006.2(i)(2)(vi)(C) defines debt collector to exclude a party who is collecting a debt that was not in default at the time such person obtained the debt. Unfortunately, the FDCPA does not define "default," and the CFPB has not proposed a definition of "default" either. The CFPB must include a definition for "default," driven by the legislative intent

[12] *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket Number 17-59, FCC-19-51, June 7, 2019.

underlying the FDCPA. Using a definition for default that depends on whether the debt has been deemed uncollectable or charged off will maintain the distinction between an account which can be brought current, in order to maintain the creditor relationship, or an account that cannot be brought current and thus terminating the creditor relationship. Rather than have divergent views about when a debt is in default, defining the word "default" would benefit all parties involved - the consumer, the creditor, and the debt collector by providing certainty, predictability and transparency. [13]

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[13] "In applying the FDCPA, courts have repeatedly distinguished between a debt that is in default and a debt that is merely outstanding, emphasizing that only after some period of time does an outstanding debt go into default." *Alibrandi v. Financial Outsourcing Services, Inc*., 333 F.3d 82, 87 (2nd Cir. 2003) (citation and footnote omitted). Thus, case law rejects the proposition "that default occurs immediately after a debt becomes due." *Id.*; *see also Hamilton v. Avectus Health Care Solutions, LLC*, 2015 WL 5693610, *8 (N.D. Ala. Sept. 29, 2015) (rejecting notion that "outstanding" and "in default" are synonymous under the FDCPA). Indeed, "[t]he Act's legislative history is consistent with construing 'in default' to mean a debt that is at least delinquent, and sometimes more than overdue." *De Dios v. International Realty & Investments*, 641 F.3d 1071, 1075 n.3 (9th Cir. 2011).

Courts have used various metrics to determine if a debt was in default at the time the debt was referred, rather than just outstanding or delinquent, which would fall outside the purview of the FDCPA. Courts typically turn first to dictionary definitions, but dictionaries tend to define "delinquent" and "default" as being behind in payments and not making agreed to payments. "Delinquency" appears to indicate a shorter period of time in which the consumer is behind on payments, and "default" appears to be a longer period. *Steward v. CMRE Fin. Servs., Inc*., No. 2:15-CV-00408-JAD-NJK, 2017 WL 4390102, at *3 (D. Nev. Sept. 28, 2017) (noting a "significant difference between a debt that is in default and a debt that is merely outstanding or delinquent"). Other courts have relied upon how that the contract defines "default." *Kapsis v. American Home Mortg. Servicing, Inc*., 923 F.Supp.2d 430, 440–43 (E.D.N.Y. 2013); *Alamo v. ABC Fin. Servs., Inc*., C.A. No. 09–5686, 2011 WL 221766, at *5 (E.D. Pa. Jan. 20, 2011); *Prince v. NCO Financial Services, Inc*., 346 F.Supp.2d 744, 748 (E.D. Pa. 2004); *Hartman v. Meridian Financial Servs., Inc*., 191 F.Supp.2d 1031, 1044 (W.D. Wis. 2002).

Some courts have rejected the contractual definition and found that referral of the debt to a third party demonstrates the debt is in default. *See Magee v. AllianceOne, Ltd*., 487 F.Supp.2d 1024 (S.D. Ind. 2007). Similarly, some courts have considered whether the creditor classified the debt as in "default" at the relevant time. *See Haber v. Bank of Am., N.A*., C.A. No. 14–0169, 2014 WL 2921659 (E.D. Pa. June 27, 2014).
Other courts have looked to the classification by the creditor at the relevant time when the debt is referred to a collection attorney. For instance, in one case, the creditor, a hospital, used a collection agency after its initial efforts had failed in what was termed a pre-collect or early out program. When the debt was deemed uncollectable and classified as "bad debt," and the creditor, the hospital, had no further involvement with the account. *Church v. Accretive Health, Inc., No*. CV 14-0057-WS-B, 2015 WL 7572338, at *10 (S.D. Ala. Nov. 24, 2015), *aff'd*, 654 F. App'x 990 (11th Cir. 2016). This analysis tracks with several types of debts, such as credit card debt, which is "charged off" to "bad debt" because the credit card company deems the debt uncollectable. Congress intended to distinguish between "[c]reditors, 'who generally are restrained by the desire to protect their good will when collecting past due accounts,' " and "debt collectors, who may have 'no future contact with the consumer and often are unconcerned with the consumer's opinion of them.'" S. Rep. 95–382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696. "If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collections practices, effectively the same as that between originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection." *F.T.C. v. Check Investors, Inc*., 502 F.3d 159, 174 (3d Cir. 2007) (*quoting Schlosser v. Fairbanks Capital Corp*., 323 F.3d 534, 538 (7th Cir. 2003)); *see also Ruth v. Triumph Partnerships*, 577 F.3d 790, 797 (7th Cir. 2009) ("The purchaser of an already-defaulted debt—like the debt collector, and unlike the originator and servicer of a non-defaulted debt—has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect.").

Given the Legislature's decision to regulate those that collect debt where the creditor does not have a continuing relationship with the consumer, NCBA would propose to define "default" as the point in time when the account is "charged off,"[14] written off, deemed uncollectable, a demand was made by the debt collector for payment in full, or when a partial payment will not reinstate the account such that the creditor will continue to extend credit on the account. The debt is not in "default" if a partial payment will bring the account current. For example, with a credit card, a consumer could continue to make monthly payments, with the intent of ultimately being able to use his credit card and maintaining the relationship with his credit card company. But when the delinquency is too old, a credit card company will close the account and demand the entire amount, as well as charging off the account. The distinction between default and delinquency can often be objectively determined by whether the creditor demands a partial payment and the relationship continues or there is a demand for payment of the entire debt, where even if the debt is paid in full, the account will not be re-opened.

3. ***Limited Content Message - §1006.2(j)***

p.66 - *The Bureau requests comment on whether there are other communication media, such as email, by which debt collectors should be permitted to leave limited-content messages,* including in particular on the advantages and *disadvantages of the proposed approach, which would not permit debt collectors to send limited-content messages by email*.

p.66 - *The Bureau also requests comment on the proposed commentary [2(j)-4]*

Email and the Name of the Creditor Must Be Included in the Limited Content Message.

NCBA fully supports and commends the CFPB for recognizing the importance of the Limited Content Message ("LCM") as a tool with which to facilitate the debt resolution process. The interpretation by the courts, for the past several decades, has been harmful to debt collectors and consumer alike; thwarting the ability to initiate the communication process by leaving a simple message on a voicemail. Allowing debt collectors, and in this case attorneys, opportunities to responsibly attempt to engage consumers, NCBA believes will reduce the amount and necessity of repeated calls and messages.

NCBA also applauds the CFPB for including text messaging within the LCM proposal but, as noted above, additional consideration and expansion is needed in order to align with the requirements of the TCPA and CTIA standards. NCBA would propose that the optional content in Section § 1006.2(j)(2) also include the use of short codes and language which would allow the consumer to enroll/subscribe to the debt collectors SMS/text messaging service, without otherwise violating the FDCPA. NCBA would encourage the CFPB (1) to engage with the FCC to ensure that compliance under Regulation F would not otherwise conflict with FCC's interpretation of the TCPA and the ability of legitimate debt collectors to contact consumers,

[14] See, 26 U.S.C. §§ 165 & 166.

and (2) to engage with CTIA to ensure that a limited content message can otherwise comply with industry standards.

The Bureau must also consider allowing an LCM to include the name of the creditor. If the goal of the LCM is to initiate communication, then the consumer must be given enough relevant information with which to respond. Given the prevalence of spammers, robo-callers, and hackers who use emails and text, an LCM can only be as worthwhile as the response from the consumer. Including the name of the current creditor would go a long way in providing the consumer with the relevant information to make an informed decision about their response. The proposed required content of § 1006.2(j)(1) will only lead the consumer to skepticism and more questions even before making the determination as to whether or not to respond. By simply stating, "I am calling/contacting you about your Capital One Account" would not disclose any information about the debt. Creditors contact consumers all the time about their accounts and the inclusion of the creditor's name will only increase familiarity.

NCBA also encourages the CFPB to include email as an approved medium with which to send an LCM. In its analysis, the CFPB acknowledges the numerous courts who have held that the use of the debt collector's name is not a communication and did not convey information about the debt.[15] In *Zortman v. J.C. Christensen & Associates,* 870 F. Supp. 2d 694 (D. Minn. 2012), the court found that leaving the name of the debt collector on a voicemail, without any other information about the debt, was not a communication. Certainly, in the *Zortman* scenario, the there was a significant likelihood that a third party could overhear the message, yet the court found no FDCPA violation.

Allowing email to be an included medium for an LCM would be unique to the consumer. The likelihood of a third party seeing an LCM by email is remote. However, as noted above the intent and purpose of the LCM should be to provide the consumer with enough information to make an informed decision to respond. Including the email address of the debt collector provides that critical piece if information to the consumer as well as provide assurance to the consumer that the email is legitimate and not spam. As with text messages, the CFPB has given the consumer a very powerful tool with which to opt-out of any future LCM messages. The logic of excluding emails does not fit with the Bureau's underlying purpose to ensure that consumers receive important information about their debts and to encourage communication. Email is an important tool that should not be overlooked.

4. *"Person" Defined - § 1006.2(k)*

No Specific Request for Comment by the CFPB

The FDCPA Does Not Define "Person" and the CFPB's Definition Is Too Expansive.

The NCBA has concerns with the CFPB's definition of "person" given that the FDCPA does not

[15] *See NPR at p. 60, footnote, 173*.

define person at all. As written the definition is overly board and will expand the reach of the statute to include additional entities that the FDCPA never intended. NCBA refers the CFPB to the comment submitted by the North Carolina Creditors Bar Association on this section of the NPR. NCBA supports and agrees with this position and urges the Bureau to delete Section §1006.2(k).

§ 1006.6 Communication in Connection with Debt Collection.

1. ***Definitions - §1006.6(a)(1)***

No Specific Request for Comment by the CFPB

The Definition of "Spouse" Must Consider Registered Domestic Partners.

The Bureau has only sought comment on Section §1006.6(a)(4), however NCBA would like to request that the Bureau consider revising the definition of Section §1006.6(a)(1) regarding a consumer's spouse. To reflect the changing nomenclature, this definition should include registered domestic partners in addition to the term "spouse." Registered domestic partners and similar relationships are recognized by state law. Without adding this clarification, this section may provide a basis not only for litigation but may prevent critical information from being passed along to the consumer. Given the diversity of the current population, the requested revision would be beneficial for consumers and with little cost to the industry.

2. ***Prohibitions regarding unusual or inconvenient times of places - §1006.6(b)(1)***

p. 82 - *The Bureau requests comment on proposed § 1006.6(b)(1) and on comment 6(b)(1)–1, including on whether other general clarifications regarding inconvenient times or places would be useful or whether other examples and illustrations would be instructive.*

Examples of Notification of Inconvenient Times and Places Must Include Complete Information from the Consumer and Debt Collectors Must Be Allowed to Inquire in Order to Honor the Consumer's Request.

NCBA welcomes the inclusion of *Official Commentary* that would be associated with Regulation F. For far too long, debt collectors have had to rely on a variety of court decisions, CFPB informal guidance and more recently consent orders in enforcement actions to determine compliance conduct in relation to the FDCPA.

The examples identified in comment 6(b)(1)-1 do not fully demonstrate all the realistic examples of consumers identifying that a communication was made at an inconvenient time or place. Unfortunately, consumers are not always specific when they convey that contact is being made at an inconvenient time or place. Debt collectors must be permitted to ask 2-3 follow-up questions in order to obtain more specific information in order to honor a consumer's request.

By failing to appropriately demonstrate that the contact was inconvenient, consumers as well as debt collectors will not understand why the communication is not productive resulting in frustration by the consumer.
NCBA proposes additional examples:

- Assume that a consumer tells a debt collector that the consumer “is busy” or “cannot talk.” Based on these facts, the consumer has only conveyed that the call at this particular time or place is inconvenient and has not conveyed whether this time or place or day of the week would be inconvenient on another occasion. The debt collector must be able to confirm whether this is so.

- As to Example iii on p. 498, additional information would clarify what is meant by “do not contact me at school.” If the debt collector called the consumer on a cell phone when the debt collector was told not to communicate with the consumer at school, additional information may be needed before the debt collector knows or should know that a call placed on a cell phone would be received while the consumer is at school. Another example may be if the debt collector knows that the consumer is a teacher, the debt collector then knows or should know that calls placed to the cell phone during school hours would be prohibited as communications known to be inconvenient to the consumer.

A consumer’s preference with regards to where and when to be communicated with about a debt is vital for debt resolution. NCBA fully supports a consumer’s request of when to be called and when not to be called. However, some minimal responsibility must be placed upon consumers to articulate these preferences. A short exchange with a debt collector may go a long way to prevent consumer frustration and promote productive communication.

3. *Prohibitions regarding consumer represented by an attorney - § 1006.6(b)(2)(i)*

p.85 - *The Bureau requests comment on proposed § 1006.6(b)(2)(i), including whether additional clarification regarding this prohibition would be useful.*

The Rules Must Define What Is a Reasonable Time Period for a Consumer Attorney to Confirm Representation.

Section §1692c(a)(2) of the FDCPA does not define what is a reasonable amount of time a consumer attorney has to confirm a request from a debt collector to confirm her representation of the consumer. Proposed Section §1006.6(b)(2)(i) provides no clarity and the CFPB has not included any further commentary. For NCBA members who frequently communicate and interact with counsel for consumers, especially when a lawsuit has been filed, this clarity is critical. NCBA Members report that all too often a consumer will advise that they have an attorney, however attempts to contact the consumer’s attorney often go unanswered and in many instances this is purposely so, in order to create an FDCPA violation.

NCBA proposes that the CFPB add a commentary, 6(b)(2)(i)-1, which provides clear guidelines for a consumer's attorney to respond to a debt collector's request for confirmation of representation, Those proposals are as follows:

- A consumer must provide their attorneys' full contact information, name, address, telephone number and if applicable email, in order to confirm the consumer is in fact "represented by an attorney";
- A lawyer representing a consumer must be licensed within the state where the legal action is being brought or could be brought pursuant to Section §1692i(a)(2) and must enter an appearance on behalf of the consumer; and
- Upon a request from a debt collector, a consumer attorney must respond and confirm representation of the consumer within five (5) working days or seven (7) calendar days from the date of the request.

4. **Opt-out notice for electronic communications or attempts to communicate – § 1006.6(e)**

p.118 - *The Bureau requests comment on proposed § 1006.6(e).*

p.119 - *The Bureau also requests comment on whether to specify the period within which a debt collector must process a consumer's request to opt out pursuant to proposed § 1006.6(e), and, if so, what that period should be.*

The Rules Must Provide Safe Harbor Language for Opt-Out and Consider Processing Times.

NCBA supports opt-out provisions when using email and text. The proposed rules however are silent on processing times. The CAN-SPAM Act, 15 U.S.C. §7701, *et seq.*, requires that all commercial email provide consumers with the option to opt-out or unsubscribe. The Federal Trade Commission ("FTC") has issued guidance on compliance with CAN-SPAM including guidance on processing times.[16] Generally, an opt-out mechanism must be able to process an out-out within 30 days after the email is sent and the opt-out request must be honored within 10 business days. The NCBA urges the CFPB to follow the FTC guidance when it comes to emails to consumer in regard to the collection of a debt. NCBA believes that its members will be able to process opt-outs within 24-48 hours, which is a similar time frame for processing cease and desist requests. Providing a clear timeline will avoid confusion and frustration for both debt collectors and consumers.

The CTIA guidelines call for providing an opt-out for text messaging but do not discuss processing time. As noted above, NCBA members will more likely be able to process an opt-out request pursuant to a text fairly quickly, within 24-48 hours, however, NCBA encourages the CFPB to set a firm deadline, similar to the processing time for email.

[16] https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business, September 2009

Finally, the CFPB must provide clear safe harbor language, with some variations, to ensure that a consumer understands the correct verbiage required to opt-out of an email. The NCBA recommends that for email debt collectors use the term "unsubscribe"; with regard to texting, the CTIA recognizes words like "stop", "end", "cancel", "quit" and "please let me out". Most texts will provide the exact language required to opt-out and the consumer will be required to respond using that language. If the consumer chooses to use a different word other than what the debt collector provided, then additional processing time for the consumer's request must be allowed.

§ 1006.14 Harassing, oppressive and abusive conduct

1. Frequency limits, seven calls within seven days - § 1006.14(b)(2)(i)

p. 143 **-** *The Bureau requests comment on whether debt collectors currently are able to, or under the proposed rule would expect to be able to, establish right-party contact through voicemails or electronic media, such that debt collectors may have less of a need to place repeated telephone calls to consumers.*

p. 144 - *The Bureau requests comment on the proposal to apply frequency limits on a per-debt, rather than on a per-consumer, basis.*

The Determination of Right Party Contact Has Not Been Defined.

Currently, the NPR provides no definition for "right party contact" and the CFPB must do so in order to achieve its objective of providing a concrete framework in determining what is harassing and abusive conduct. The Bureau must provide clear steps a debt collector must use in order to determine whether they have in fact connected with the right party. Will it be enough for the debt collector to rely on the information from the creditor or will the debt collector need to take additional steps and start the process a new? What information needs to be elicited from the consumer in order to confirm the right party? Is date of birth and social security number enough? Is the consumer willing to provide that information?

NCBA believes it should be enough to rely on the representation from the consumer as to who they are in order to move forward with communication. If the consumer is not truthful about who they are, then the collector should not be held liable for third party disclosure. However, at present it is extremely difficult to establish right party contact because consumers are skeptical of speaking with someone they do not know and who is asking them for their social security number. Electronic media may alleviate this awkwardness but given the number of hackers and reluctance to respond to an email from an unknown domain, right party contact maybe as equally difficult as trying to speak to a consumer over the phone.

NCBA Does Not Support the Frequency Limit of Seven Calls Within a Seven Day Period, but Any Frequency Limit must be on a Per-Account Basis.

The NCBA does not support the proposed rule which applies the call frequency limitations and directs the Bureau to the comments submitted by ACA International for further analysis.

Members of the collection industry have raised concerns about applying the call frequency limitation on a "per consumer" basis as suggested in the NPR. Any rule which results in the call frequency limitation to a particular consumer (rather than to a particular debt) is likely to create greater uncertainty about how and when calls can be placed, as well as an increased risk of bona fide errors and inadvertent noncompliance.

First, debts are placed with collection entities and law firms on an account-level basis – not on a consumer-level basis. Under a "per-consumer" application, a collector would be required to adequately calculate and prevent calls placed to a particular consumer on an existing account when a new account is later placed with its office. The current software and systems in place track debts by account and attempt to batch them together by consumer. But this can be a complex and imperfect process. However, case management systems are not set up to track the amount of calls in a given time period per consumer, rather it is tracked by account. Furthermore if there are multiple consumers associated with the account like the case of a minor child and an adult guardian or spouses jointly responsible for a particular medical debt, a determination will need to be made as to which consumer to call and then track to ensure that the co-borrower is not called twice in the same day, especially if they reside at the same residence. If there is going to be any call frequency limit, something NCBA opposes, the preferred approach is to apply the call frequency limitations on a per-debt basis. That way calls to the consumer can be tracked by what account or accounts are being discussed and limit contacts in that manner.

2. Frequency limits, one call per seven days - §1006.14(b)(2)(ii)

p. 155 -*The Bureau request comment on proposed §1006.14(b)(2)(ii)*

Limiting Calls to One Call Within a Seven Day Period after Contact Will Be Harmful to Consumers.

The Bureau's proposal to limit calls to one call per seven (7) days after contact has been made with the consumer, overlooks certain instances where contact with the consumer would be vital to ensure that future harm can be avoided. This is especially true when the debt involves a motor vehicle.

When a creditor refers an auto loan account to a collection law firm, many times it to ensure that the vehicle can be recovered. Law firms are sometimes tasked with reaching out to the consumer before proceeding with a replevin or other legal proceedings to secure the collateral. Efforts are made by the law firm to contact the consumer to see if arrangements can be made to avoid repossession. Time is usually of the essence, measured in days and not more than a week. There are many instances where the law firm makes contact with the consumer who

states they need time to see what they can do to pay. However, under the CFPB's proposal, the law firm would not be able to reach out to the consumer for another 7 days. If no payment is received prior to the 7 days, the vehicle will most likely be repossessed. While the law firm would have wanted to work with the consumer in order to help them keep their car, the proposal discourages that outreach. While text and email may provide alternative options, if the consumer opts out, the debt collector is left with no ability to reach out to the consumer to prevent the car from being repossessed.

The FDCPA has not been repealed and Section §1692d still prohibits a debt collector from engaging in any conduct, the natural consequence which is to harass, oppress or abuse a consumer in the connection with the collection of a debt. When a payment from a consumer would prevent a greater harmer (like the loss of a vehicle or the freezing of a bank account), preventing a debt collector from contacting a consumer with that one week time period does not achieve parity for a consumer.

3. Certain telephone calls excluded from the frequency limits. – §1006.14(b)(3)

pp. 157-158 - *The Bureau requests comment on proposed §1006.14(b)(3) and its related commentary, including on whether any other types of telephone calls should be excluded from the frequency limits.*

Frequency Limits Cannot Apply During Pending Litigation.

Telephone calls related to litigation must be excluded from any frequency limits. Litigation is fluid, and the process can vary based on the court and state. Attorneys may be directed to contact the consumer to advise of a hearing cancellation, courtroom number change, coordinate the date for a hearing or mediation and, most importantly, respond to settlement discussions. Consumers will be harmed if a debt collector is limited to 1 call per week after contact. Given the sensitive nature and timing of communication that occurs during the pendency of litigation, sending a letter in some circumstances is simply not appropriate or feasible.

As noted on p. 37 of the Small Business Review Panel Report, the Panel recommended that "the Bureau consider whether any modifications to the proposal are appropriate for communication that occurs after a law firm filed a complaint".[17] Despite the Panel's recommendation the Bureau has chosen not to propose an exception for legally required communications,

> because the Bureau understands that very few legally required communications must be delivered by telephone and that, with

[17] Bureau of Consumer Fin. Prot., U.S. Small Bus. Admin., & Office of Mgmt. & Budget, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Debt Collector and Debt Buying Rulemaking* (Oct. 2016), https://files.consumerfinance.gov/f/documents/cfpb_debt-collector-debt-buyer_SBREFA-report.pdf.

> respect to the few such communications that must be delivered telephonically, it appears unlikely that a debt collector would need to place more than seven telephone calls to a consumer within a period of seven consecutive days to deliver the required communication.[18]

This analysis is deeply flawed, and the Bureau fails to provide any evidence or data that overrides the Panel's careful consideration of this issue presented by collection attorneys, both during the Small Business Regulatory Enforcement Fairness Act (SBREFA) proceeding and by their written submissions.[19]

For example, in certain states, the rules of civil procedure and local rules require that attorneys and parties meet and confer prior to a scheduling conference or prior to a discovery dispute. This may take more than one call per day and certainly more than one call per week. The failure to meet and confer would result in collection attorneys, in an effort to effectively prosecute their case on their client's behalf, being unable to certify that she acted in good faith to discuss discovery deadlines and issues in the case or resolve discovery disputes.

The Model Rules of Professional Conduct ("RPC") 4.3 require a heightened duty by licensed attorneys when dealing with unpresented parties including consumers in debt collection matters. All 50 states have adopted the RPC, in whole or in part, including the section related to unrepresented parties. Many courts throughout the country, including small claims divisions in state courts require the filing attorney to take responsibility for communicating all information to an unrepresented consumer and greatly encourages attorneys and consumers to engage in communication in an effort to resolve the case.

The proposed prohibition of one call within a seven (7) day consecutive period after contact with the consumer in §1006.14(b)(2)(ii), ignores both state requirements and the professional responsibility of licensed attorneys. This proposal misunderstands the time-sensitive nature of communications that can occur during the course of litigation. While a collection attorney may not need to make more than 7 calls within a 7 day period, there may be instances where an attorney needs to make multiple calls in the same day in order to coordinate a new hearing date, to notify a consumer of a request for a continuance or to assist the consumer in obtaining that continuance, and to provide a consumer with information and documents that may need to be executed in order to settle or dismiss a case. The Bureau has not taken into consideration that most communications during the course of litigation happen verbally. The Bureau's proposal to limit communication during the litigation process will be a significant disruption for attorneys and consumers, who will be denied vital and critical information which if not provided could result in an adverse disposition to the consumer.

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[18] See, NPR at p.158.

[19] Small Business Review Panel Report, at Appendix A (Written submissions of Yale Levy, Esq., Levy & Associates, LLC, Nathan Willner, Esq., Lyons, Doughty & Veldhuis, P.C. and Larry Zimmerman, Esq., Zimmerman & Zimmerman, P.A.)

4. Definition, particular debts - §1006.14(b)(5)

p. 170 *The Bureau requests comment on: (2) whether any types of debts other than student loans should be aggregated, such that multiple debts that were serviced under a single account number at the time the debts were obtained by the debt collector (or met other specified conditions) would be treated as a single debt for purposes of the frequency limits*

The Bureau Should Not Seek to Aggregate Only Student Loans.

The CFPB proposes to treat student loans differently from other debts by aggregating all student loan debts that are serviced under a single account. The Bureau does not seek to aggregate other forms of debt and NCBA suggests they should not. All debt types need to be treated the same in order to not confuse the consumer and to ensure that the debt collector can adequately provide accurate information to the consumer. Given the fact most debtors have multiple accounts and debts due, allowing for the combining of certain debts but not others will cause confusion among the consumers. The consumer will need to distinguish between multiple debts during a potential telephone conversation between a debt collector and a consumer.

The Bureau's reasoning to aggregate student loan debt from other forms of debt is due to the time and nature of the debt and when each would become due. However other debt types, like medical debt, can result from the same date or event. NCBA has no issue in aggregating debts to ensure consumers can be provided with a holistic picture of their financial obligations but the CFPB's proposal to exclude other debt types is misguided. All debt types need to be treated equally in order to reduce confusion on the part of the consumer.

§ 1006.18 False, deceptive or misleading representation or means

1. Safe harbor for meaningful attorney involvement in debt collection litigation - §1006.18(g)

pp. 181 - *The Bureau requests comment on whether the safe harbor proposed for meaningful attorney involvement in debt collection litigation submissions provides sufficient clarity for consumers, attorneys, and law firms*.

The Bureau Has No Authority to Regulate Attorney Process in Litigation, Therefore the Meaningful Attorney Involvement Proposal Must Be Withdrawn.

NCBA acknowledges the CFPB's attempt to propose a rule that would provide clarity for consumers and for debt collection attorneys, as well as the Bureau's attempt to create a "safe harbor" that would reduce FDCPA litigation against attorneys collecting consumer debt who are in compliance with the FDCPA. Proposed Rule §1006.18(g), however, will not meet any of these

stated goals. The Proposed Rule has no textual basis in the FDCPA or any other federal statute; does not make anything clear or "safe" for consumers or attorneys; improperly interferes with the practice of law, the attorney-client privilege and the attorney work product doctrine. It will not provide clarity for consumers, attorneys or law firms regarding a judicially-created "meaningful attorney involvement" doctrine in connection with debt collection litigation. If adopted, the Proposed Rule will certainly result in increased and more protracted litigation by consumers against debt collection attorneys. For the reasons discussed below, the NCBA respectfully submits that Proposed Rule §1006.18(g) should be withdrawn.

<u>No authority for rulemaking on "meaningful attorney involvement"</u> -- As a threshold matter, there is no support in the plain language of the FDCPA for using the statute to dictate standards for "meaningful attorney involvement" in the preparation and filing of debt collection litigation pleadings. The FDCPA regulates false or misleading statements made by collectors, and in particular §1692e(3) of the Act prohibits non-attorney collectors from falsely representing that they are, in fact, attorneys. A licensed attorney, however, does not and cannot violate §1692e(3) of the FDCPA, because any communication transmitted by a licensed attorney is indisputably "from" an attorney.

The FDCPA does not include the phrase "meaningful attorney involvement" anywhere in its text. Nor does the Supreme Court's narrow holding in *Heintz v. Jenkins*, 514 U.S. 291 (1995) lend support for the Proposed Rule. *Heintz* did not involve a pleading filed in a state court, nor did the Court refer to "meaningful attorney involvement" anywhere in the opinion. *Heintz* merely held that an attorney who regularly, through litigation, attempts to collect consumer debts can qualify as a "debt collector" under the FDCPA. Thus, the NCBA respectfully submits that the CFPB lacks the authority to use the FDCPA as the basis for fashioning a proposed "safe harbor" for "meaningful attorney involvement" for debt collection litigation filings.

<u>No authority to regulate the process attorneys use when representing clients</u> -- The FDCPA does not regulate the process by which a debt collection attorney represents its creditor clients when preparing and filing pleadings in cases. The process used to generate debt collection litigation pleadings is determined by the attorney, in consultation with their client. As in every other area of the law, that process will vary based on the nature of the claims involved, and the laws and procedures that apply in the jurisdiction where the claims are being pursued. To the extent a debt collection attorney owes a duty to his client to engage in a professionally appropriate process while preparing and filing litigation pleadings, this duty is governed by rules of professional conduct and by state law. The specific contents of pleadings filed by debt collection attorneys on behalf of their clients in lawsuits, and the procedures used when prosecuting those cases in state court, are also governed by the specific rules of those state courts.

Consumers have an interest in the final content of debt collection litigation filings that are served upon them. But consumers have no basis for knowing about, or attempting to dictate, the process used by their adversaries when generating debt collection litigation filings. The FDCPA simply has no role to play here.

Infringing on the practice of law, the attorney-client privilege and work product -- By allowing consumers to challenge the process by which a debt collection attorney represents its creditor client when preparing and filing litigation and pleadings, the Proposed Rule improperly interferes with the practice of law. It also infringes on the attorney-client privilege, the attorney-work product doctrine, and impairs the attorney's ability to protect client confidences.

Under the Proposed Rule, a debt collection attorney would be unable to demonstrate that he met the proposed "safe harbor" for "meaningful attorney involvement" without revealing to his adversary and to the Court all of the steps the attorney took on behalf of the client. This disclosure would include revealing all the documents and legal authorities the attorney reviewed for the client, and why, based on the attorney's training and judgment, the attorney reached the conclusion that the client's claim was warranted in fact and law. This cannot be done without revealing client confidences and/or waiving the attorney-client privilege. Nor can it be accomplished without revealing the attorney's work product, as it requires a showing of what the attorney reviewed, and why he reached certain legal opinions for the client.

Thus, the NCBA respectfully submits that the proposed "safe harbor" should be removed, because a federal agency like the CFPB is without power to adopt rules that regulate the practice of law. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("since the founding the Republic, the licensing and regulation of lawyers has been left exclusively to the states"). Indeed, the Proposed Rule would require a certain classification of licensed attorneys (debt collection attorneys) to meet a federally-imposed standard for "meaningful attorney involvement" in the process they use to prepare and file pleadings for their clients, a requirement that impermissibly intrudes on powers reserved to the states.

The "safe harbor" provides no clarity as it does not make anything "safe." Although the NCBA supports the CFPB's efforts to bring clarity for consumers and attorneys through the rule-making process, the Proposed Rule 1006.18(g) would create the opposite result. In fact, the use of the term "safe harbor" is a misnomer, because Proposed Rule § 1006.18(g) does not make anything "safe" for consumers or for lawyers.

Unlike the proposed model language for a §1692g letter and unlike the required and optional content of a "limited content message", there is no precise language in Proposed § 1006.18(g) that can be used by attorneys in pleadings that would provide a "safe harbor" to clearly communicate with a consumer, while shielding the attorney from FDCPA liability. Nor does the Proposed Rule include a specific checklist or procedure that an attorney can follow to provide better clarity for consumers, and also provide protection for the attorney from FDCPA lawsuits. Thus, even assuming, without conceding, that the FDCPA and the Dodd-Frank Act grant the CFPB the power to dictate the process that debt collection attorneys must follow when preparing state court pleadings to be filed in every courthouse across the country, or the power to dictate what those attorneys must say in those state court pleadings, the Proposed Rule does not provide any guidance.

Given this lack of clarity, the Proposed Rule will not reduce litigation filed against debt collection attorneys. To the contrary, by invoking the so-called "safe harbor" defense, a debt collection attorney would simply invite invasive and protracted discovery from the consumer concerning their client confidences, their attorney-client privileged communications, and their attorney work product.

The Proposed Rule does not track Fed. R. Civ. P. 11's standards -- In the NPR, the Bureau asserts that Proposed §1006.18(g) is grounded in the standards set forth in Fed. R. Civ. P. 11. The CFPB notes that Fed. R. Civ. P. "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)." NPR, p. 181. This is not correct, however, as the Proposed Rule does not mirror Fed. R. Civ. P. 11, and it is significantly more restrictive than Rule 11.

For example, Rule 11 allows an attorney to pursue a legal position for a client whenever there is "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." *See* Fed. R. Civ. P. 11(b)(2). Proposed 1006.18(g), by contrast, only gives a safe harbor to a debt collection attorney if the claims, defenses or other legal contentions made by the attorney are "warranted by existing law." This means there is no safe harbor from an FDCPA claim if the debt collection attorney was seeking, on behalf of his client, to extend, modify, or reverse existing law or establish new law. This proposed rule will improperly penalize attorneys who advocate on behalf of their clients for an extension, modification or change in existing law.

Similarly, with respect to factual contentions made in pleadings, Fed. R. Civ. P. Rule 11 allows them to be asserted if they "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *See* Fed. R. Civ. P. 11(b)(3). Proposed § 1006.18(g), however, only provides a safe harbor to debt collection attorneys if the factual contentions made on their clients behalf "have evidentiary support." Again, the Proposed Rule substantially hinders a debt collection attorney's ability to advocate on behalf of her client. It penalizes the attorney for making factual assertions for the client based on what the attorney believes discovery, or a further investigation will prove.

Additionally, the "safe harbor" suggested by the CFPB does not mirror the process required to seek sanctions under Fed. R. Civ. P. 11. In order to perfect a claim for a violation of Rule 11, an adversary must first serve a detailed motion providing notice as to why the specific pleading or motion allegedly violates Rule 11; the responding party then must be allowed the opportunity to amend or withdraw said pleading or motion. Thus, unlike the Proposed Rule, a party invoking Rule 11 must have some concrete basis for the alleged violation, and if they seek sanctions without first providing a notice and an opportunity to cure, they face sanctions for improperly invoking Rule 11.

The NCBA Considered and Rejected Alternative Proposals. -- The NCBA respectfully submits there is no statutory basis under either the FDCPA or the Dodd-Frank Act to establish a "meaningful attorney involvement" standard meant to regulate the process by which a debt collection attorney prepares and files debt collection litigation on behalf of her clients in state

court. For this reason, the NCBA submits that the CFPB should withdraw Proposed § 1006.18(g) from the final rule.

The NCBA considered whether there was some alternative to the "safe harbor" proposal that would provide a true safe harbor, similar to Fed. R. Civ. P. 11(c)(2). After such consideration, however, the NCBA concluded any rule regarding "meaningful attorney involvement" lacks a statutory underpinning in the FDCPA.

The NCBA considered proposing an alternative which would provide that, before a consumer pursues a claim based on lack of "meaningful attorney involvement", the consumer should draft and serve on the debt collection attorney (but not file) a complaint or counterclaim. That complaint or counterclaim must set forth in detail why the consumer contends there was no "meaningful attorney involvement" in the debt collection litigation. The consumer's complaint or counterclaim must include factual details explaining why the consumer believes the factual or legal allegations made by the debt collection attorney were false, why the legal contentions were not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, and/or why the factual contentions had no evidentiary support, or were not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The consumer's claim would not be sufficient if the complaint or counterclaim is based upon speculation or be made only on "information or belief." Consistent with Fed. R. Civ. P. 11(c)(2), after the consumer's complaint or counterclaim is served, the debt collection attorney would then be provided a 21-day "safe harbor" period to withdraw or appropriately correct the challenged pleading. If the pleading is corrected or withdrawn, the consumer cannot file the complaint or counterclaim. If the debt collection attorney does not withdraw or appropriately correct the pleading within the "safe harbor" period, the consumer may proceed to file the complaint or counterclaim.

Another alternative proposal that was considered by the NCBA, but rejected, also would have provided that, as with Fed. R. Civ. P. 11(c)(2), in the event the consumer does not prevail on their "meaningful attorney involvement" claim, regardless if voluntarily dismissed, the court shall award to the debt collection attorney all reasonable expenses, including attorney's fees, that were incurred in defending the claim. Similar to Fed. R. Civ. P. 11(c)(1), the expenses and attorney's fees awarded would be payable by the consumer's attorney, or by the consumer, depending on who the Court determines is responsible.

Ultimately, however, NCBA concluded that these alternative proposals are not viable. For one, how a debt collection attorney can affirmatively show "meaningful involvement" within a 21-day safe-harbor period is subjective at best, and would require, as noted above, an attorney to divulge client confidences in order to effectively respond to the consumer's notice of a claim. Assuming a creditor-client would permit its attorney to reveal such confidences, it would never be enough to satisfy a consumer's belief that adequate "meaningful involvement" existed. Consumers and more importantly the attorneys who brings claims of "meaningful involvement" would not be incentivized to simply withdraw their complaints. That issue would still need to be tried in court.

The alternative proposal would still be improper, as it would embrace a "meaningful involvement" doctrine that finds no support in the text of the FDCPA. It would still allow consumers to file claims challenging the process by which an attorney represents a client, thereby improperly interfering with the relationship between debt collection attorneys and their clients. It would still allow for claims that improperly interfere with the practice of law, the attorney-client privilege, and the attorney work product doctrine. Even under an alternative proposal, if the debt collection attorney correctly concluded there was no basis for the consumer's claim, the consumer could proceed with the claim after the safe harbor period expired. This again would force the debt collection attorney to submit to invasive and protracted discovery relating to privileged communications in order to defend the claim. In short, the proposed alternatives would not address the fundamental problems raised by the Proposed Rule, and thus NCBA concluded that they were also unsupported and unworkable.

§ 1006.22 Unfair and unconscionable means

1. **Restrictions on use of certain media (work email) - §1006.22(f)(3)**

p. 188 - *The Bureau also requests comment on whether more clarification is necessary regarding when a debt collector knows or should know that the debt collector is communicating using a consumer's work email address and, if so, what circumstances should indicate to a debt collector that an email address is provided by a consumer's employer.*

Ambiguities Around Work Emails.

The proposed rule prohibits a debt collector from communicating or attempting to communicate with a consumer using a work email address. The use of the term "knows or should know" creates an ambiguity in interpretation, especially since the CFPB has expressly stated that a consent to contact at work does not transfer from the creditor. Ironically however, if a consumer contacts a debt collector using a work email, the rule provides an exception and now that email address can be used.

How is a debt collector to assess whether its communications using a work email becomes a violation? What if an email address is sent from the debtor's email address and then, at a later time, they withdraw consent to using that email?

There are no parameters which assist a debt collector in determining whether an email address is a work email address. There will be those that are obvious as the employers name may appear in some manner in the @employer address. Many debtors may work and utilize more common email extensions for work such as those issued by telephone and/or internet service providers. Several "free" email addresses are used by individuals for work as they are either free or low cost.

The proposed rule leaves many decisions to be made by the debt collector which could potentially lead to more litigation. For example, if a debtor uses @gmail.com as a work email address, it is certainly not clear or obvious that this email service is being used for work or personal. For that reason, there really should be no reason to differentiate between work or personal emails unless and until a consumer expressly states that they do not want to be contacted at work. Consumer expectations need to be considered. There may be instances where the consumer was already communicating using a work email with the creditor and maybe preferred that the work email address be used. That expectation should not be disregarded once the account is transferred to a debt collector or an attorney.

NCBA recommends that the proposed rule be more definitive in its use of the term "know or should know". There needs to be added parameters to determined when an email address is a "work" email address. Consumers would benefit if the rule provided for specific exclusions to the use of a work email. For example, the rule could carve out an exception that if a consumer uses their work email to communicate that they must include in that communication an alternate non-work email address that responsive communications may be sent to that is not a work email address.

§ 1006.26 Collection of time-barred debts

1. Time Barred Debt Proposal in General

<u>*No Specific Request for Comment by the CFPB*</u>

Lapse of Statute of Limitation Does Not Give Rise to a Private Right of Action.

Before addressing the specific requests for comment, NCBA reminds the Bureau that American jurisprudence has never treated the lapse of a statute of limitations as giving rise to an affirmative claim for relief.[20] "It is axiomatic that the statute of limitations is a shield, not a sword. At both the federal and state levels it has long been established that the statute is available only as a defense and not as a cause of action."[21] Proposed Section §1006.26 is a sword as it creates a cause of action based on the bar of a statute of limitations. Enshrining the

[20] The common law of England did not limit the time for bringing an action on a contract. *Williams v. Jones*, 13 East 449. The first statute of limitations applicable to civil actions on contracts and debt was enacted in 1623, as part of 21 James, c. 16, § 3, which provided that the action must be brought within six years after the right accrued, and that law served as the foundation for American statutes of limitations. See J.K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY, ch. II, ¶¶ 14, 16 (John Wilder May ed., 4th ed. 1861).

[21] *Guild v. Meredith Village Sav. Bank*, 639 F.2d 25, 27 (1st Cir 1980). See also 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 10 (1999)("Statutes of limitations are defensive by nature and are not intended to be used when affirmative relief is sought.")(citing *Gould*; *Lackner v. La Crois*, 25 Cal. 3d 747, 602 P.2d 393, 396 (1979)(same); *Bellevue School Dist. No. 405 v. Brazier Constr.*, 100 Wash. 2d 776, 675 P.2d 232 (1984)(same)); *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1033 (9th Cir. 2003); *In re Estate of Jotham*, 722 N.W.2d 447, 456 (Minn. 2006); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456 (Tenn. 2012); *Bernoskie v. Zarinsky*, 383 N.J. Super. 127, 135, 890 A.2d 1013, 1018 (App. Div. 2006).

prohibition of suing on a time-barred debt turns centuries of jurisprudence on its head, exposing debt collection attorneys and their clients to unprecedented liabilities and standards of care.[22]

In ordinary civil litigation, the plaintiff is not required to plead the applicable statute of limitations; rather, the statute of limitations is an affirmative defense that must be asserted in an answer, lest it be waived.[23]

Couple that with the reality that the majority of courts do not recognize a mistaken interpretation of state law or unsettled law as an aspect of the bona fide error defense to the FDCPA.[24] While the bona fide error defense is nonetheless available where the collection on a time-barred debt occurred where the collector was unaware of the key facts,[25] it does not appear to be available when the debt collector is wrong on the law, and the statute of limitations assessment involves a legal determination.[26]

Finally, because whether or not a claim is time-barred involves a legal determination, a lay debt collector who makes a representation to a consumer that a debt is or is not beyond the period

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[22] *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807 (1879) (explaining that the 1623 "English statute of limitations of the 21st of James I ... was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country."); A. Wistrich, *Procrastination, Deadlines and Statutes of Limitations*, 50 Wm. & Mary L. Rev. 607, 610-611 (2008) (" The direct ancestors of American statutes of limitation can be traced back for centuries. The first English statute of limitation for real property actions was enacted over five hundred years ago. Subsequent versions grouped real property actions into categories to which time limits of various lengths were assigned depending upon the character of the right sued upon. A later, more refined, and more comprehensive version of this approach, commonly known as the Limitations Act of 1623, included personal as well as real property actions. That statute provided the model upon which most American statutes of limitation are based.").

[23] 51 Am. Jur. 2d Limitation of Actions § 377. *See e.g., Abbas v. Dixon*, 480 F.3d 636, 640 (2d Cir. 2007)("The pleading requirements in the Federal Rules of Civil Procedure, however, do not compel a litigant to anticipate potential affirmative defenses, such as the statute of limitations, and to affirmatively plead facts in avoidance of such defenses.").

[24] *Compare Thompson v. Midland Funding, LLC*, 375 F. Supp. 3d 774 (E.D. Ky. 2019) (collecting cases) (bona fide error defense not available for mistaken interpretation of state law, post-*Jerman*); *Verburg v. Weltman, Weinberg & Reis Co., L.P.A*., 295 F. Supp. 3d 771, 774 (W.D. Mich. 2018); *with Gray v. Suttell & Assocs*., 123 F. Supp. 3d 1283, 1288 (E.D. Wash. 2015) ("This Court finds that the bona fide error defense may be available in a case alleging defendants filed suit outside the applicable statute of limitations where the applicable limitations period has not been provided by the state legislature or resolved by the state courts."); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1275 (M.D. Fla. 2008); *Parkis v. Arrow Fin. Servs., LLS*, No. 07 C 410, 2008 WL 94798, at *7 (N.D. Ill. Jan. 8, 2008); *Almand v. Reynolds & Robin, P.C*., 485 F. Supp. 2d 1361, 1365-67 (M.D. Ga. 2007) (finding defendants did not knowingly and intentionally file a time-barred suit where there was no controlling or persuasive authority from the state supreme court as to which statute of limitations applied); *Simmons v. Miller*, 970 F. Supp. 661, 664 (S.D. Ind. 1997) (finding no intentional misconduct that would violate the FDCPA where neither the state legislature nor the state supreme court had pronounced the applicable statute of limitations).

[25] *Abdollahzadeh v. Mandarich Law Grp., LLP,* 922 F.3d 810, 815 (7th Cir. 2019).

[26] 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 4.

prescribed by applicable law for bringing an action to collect a debt, may be accused of engaging in the unauthorized practice of law under state law.[27] Imposing a requirement on lay debt collectors to make a legal determination or engage legal counsel to make the determination as to the timeliness of every debt placed for collection before engaging in collection, would impose a substantial cost and burden on lay debt collectors.

2. Definitions - §1006.26(a)

p. 195 - *The Bureau requests comment on the proposed definition [of statute of limitations] and on whether any additional clarification is needed*

"Statute of Limitations" and "Time-Barred" Debt Are Not Appropriately Defined.

The definition provided for the term "statute of limitations" amounts to a gross over-simplification of the complexity of the determination required to determine "the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt." There is no question that the assessment of whether remedies to enforce any given obligation is barred by the statute of limitations involves a legal determination, [28] based on relevant facts and governing law, and there is not always a clear answer to the legal question as to what the period prescribed by applicable law is for bringing a given legal action. Courts evaluating FDCPA claims based on collecting alleged time-barred debts are often called upon to assess and determine unsettled legal questions along with competing contentions about the governing statute of limitations for a particular obligation.[29]

It is also generally understood that the passage of time operates to bar the remedies available to enforce an obligation,[30] but not as a bar of the underlying right to payment.[31] Thus, after the expiration of the limitations period on the obligation, the statute of limitations does not eliminate the debt itself nor the debt collector's right to contact the consumer in an attempt to

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[27] *Am. Auto. Ass'n v. Merrick*, 117 F.2d 23, 25 (D.C. Cir. 1940) ("giving of advice prior to collection of a claim and the urging of legal propositions in discussions with the person from whom collection is attempted does involve the practice of law and may be performed only by lawyers…."); *In re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369, 372–73, 3 N.E.2d 746, 748 (1936) (concluding that collection agency engaged in the unauthorized practice of law because in part, it "determined whether or not legal proceedings should be instituted …."); *McMillen v. McCahan*, 14 O.O.2d 221, 167 N.E.2d 541, 551 (Ohio Com. Pl. 1960) ("The Court is clearly of the opinion that the giving of advice as to whether a claim is good or not is the giving of advice as to legal rights. This is essentially the character of the service that is performed by an attorney in the practice of law.").

[28] 1 C. CORMAN, LIMITATION OF ACTIONS § 1.1, p. 4.

[29] *Panico v. Portfolio Recovery Assocs., LLC*, No. CV 15-1566-BRM-DEA, 2016 WL 4820628, at *4 (D.N.J. Sept. 14, 2016), *rev'd and remanded*, 879 F.3d 56 (3d Cir. 2018).*Greene v. Midland Credit Mgmt.*, No. 17-1322, 2019 U.S. Dist. LEXIS 1383, *9 (D.N.J. Jan. 3, 2019); *Hordge v. First Nat'l Collection Bureau, Inc.*, No. 4:15-CV-1695, 2018 WL 4103017, at *4–5 (S.D. Tex. July 5, 2018).

[30] *Davis v. Mills*, 194 U.S. 451, 454, 24 S. Ct. 692, 694, 48 L. Ed. 1067 (1904).

[31] *Davis*, 194 U.S. at 454; *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011).

collect the debt.[32] In other words, collection activity involving demands for payment may take place after the limitations period expires, so long as there is no express or implied representation that the creditor may resort to legal remedies that it can no longer take or fails to convey the potential impact of payment on a time-barred debt.[33]

Because the creditor's location,[34] place where the debtor resides,[35] place of repayment,[36] terms and conditions expressed in the obligation,[37] and conduct (such as circumstances surrounding partial payment, imprisonment, bankruptcy, acknowledgement of indebtedness)[38] affecting the bar date determination (i.e., the deadline for filing suit) may change during the debt's life cycle, the statute of limitations assessment may lead to different conclusions at different times.
The assessment under the applicable statute of limitations must take into account a variety of factors, including:

a. The place where the parties to the transaction were located when the transaction occurred;[39]
b. The place where the parties to collection are located at the time collection begins;[40]
c. The place where the suit will be brought;
d. The nature of the obligation as written or non-written;[41]
e. Whether the creditor accelerated the remaining payments due or demanded the full balance;[42]

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[32] *Green v. NCO Inovision*, No. 09–410, 2010 WL 147934, at *3 (D.N.J. Jan.11, 2010); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000).

[33] *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 509 (5th Cir. 2016) (effort to collect is not automatically unlawful, but letter violates FDCPA if it could lead unsophisticated consumer to believe her time-barred debt is legally enforceable); *Buchanan v. Northland Group, Inc.*, 776 F.3d 393, 397 (6th Cir. 2015) (offer to settle time-barred debt could violate Act by failing to disclose that suit would be time-barred or that partial payment would remove statute of limitations bar).

[34] *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1213 (9th Cir. 2001).

[35] *Becker v. Mktg. & Research Consultants, Inc.*, 526 F. Supp. 166, 170 (D. Colo. 1981).

[36] RESTATEMENT SECOND, CONFLICT OF LAWS § 195 (1971).

[37] *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 717 (6th Cir. 2015).

[38] *Nilsson v. Kielman*, 70 S.D. 390, 392, 17 N.W.2d 918, 919 (1945) (credits given by defendant toward obligation did not qualify as partial payment); *Thacker v. Bank of N.Y. Mellon*, 2019 U.S. Dist. LEXIS 40734, *16-18 (W.D. Wash. Mar. 13, 2019) (acknowledgement of debt extended limitations period); *Robin v. Ely & Walker Dry Goods Co.*, 137 S.W.2d 164, 165 (Tex. Civ. App. 1940), writ refused (statute of limitations on account claim was tolled during Defendant's incarceration in Oklahoma).

[39] *Glob. Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529, 715 N.E.2d 482, 485 (1999) (cause of action accrues "where the plaintiff resides and sustains the economic impact of the loss.").

[40] *Ko v. Eljer Indus., Inc.*, 287 Ill. App. 3d 35, 42, 678 N.E.2d 641, 646 (1997) (construing 735 ILCS 5/13–210 (West 1994) (Illinois borrowing statute only applies if none of the parties is an Illinois resident).

[41] *Annotation, What constitutes a contract in writing within statute of limitations*, 3 A.L.R.2d 809 (1949).

f. The time when the cause of action accrued;[43]
g. Whether any conduct of the parties interrupted, restarted or suspended the operation of the running of the statute of limitations, such as by acknowledgement of the debt,[44] partial payment,[45] bankruptcy,[46] or forbearance agreements;[47]
h. Whether state tolling provisions apply;[48] and
i. Unsettled law.[49]

A single obligation may be the subject of more than one cause of action, which in turn, may subject the debt to more than one statute of limitations. By way of example, a cause of action on a credit card obligation may be based on a written contract, an account stated claim,[50] or an unwritten contract theory of recovery.[51] The prescribed period of limitations for a written contract theory of recovery may be longer than the prescribed period of limitations for the quasi-contract theory of recovery. Attorneys often plead more than one count under different theories of liability, a practice permitted in every state.
States do not have uniform periods of limitations for causes of action on financial obligations.[52] Depending on the state where the action is brought, an action for breach of a financial obligation may be subject to a statute of limitations anywhere between three to ten years.[53]

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[42] *Annotation, Acceleration provision in note or mortgage as affecting the running of the Statute of Limitations*, 34 A.L.R. 897 (1925); *Annotation, When statute of limitations begins to run against note payable on demand*, 71 A.L.R.2d 284 (1960).

[43] *CMACO Auto. Sys., Inc. v. Wanxiang Am. Corp*., 589 F.3d 235, 242, n. 7 (6th Cir. 2009).

[44] *Thacker v. Bank of N.Y. Mellon*, 2019 U.S. Dist. LEXIS 40734, *16-18 (W.D. Wash. Mar. 13, 2019).

[45] *Annotation, Payment on account as removing or tolling statute of limitation,* 36 A.L.R. 346 (1925); *Annotation, Payment on account, or claimed to be on account, as removing or tolling statute of limitations*, 156 A.L.R. 1082 (1945); *Annotation, When Statute of Limitations begins to run against action to recover upon contract payable in instalments*, 82 A.L.R. 316 (1933).

[46] 11 U.S.C. §§ 108(c), 362(a)(1), 1301(a); *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 206 (5th Cir. 2018) (while in effect, bankruptcy stay operated to toll statute of limitations on foreclosure); *In re Swintek*, 906 F.3d 1100, 1106 (9th Cir. 2018) (bankruptcy stay tolled limitations period for lien enforcement).

[47] *JPMorgan Chase Bank, N.A. v. Mullen*, Case No. 2:16-cv-426, 2019 U.S. Dist. LEXIS 20034, *14 (S.D. Ohio Feb. 7, 2019).

[48] Annotation*, Provision of statute of limitation excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state*, 148 A.L.R. 732 (1944); *Avery v. First Resolution Management Corp*., 568 F.3d 1018 (9th Cir. 2009), *cert. denied,* 130 S. Ct. 554, 175 L. Ed. 2d 383 (2009) (applying Oregon law).

[49] *See supra, n. 42.*

[50] *Nyberg v. Portfolio Recovery Assocs., L.L.C.,* No. 3:15-CV-01175-PK, 2017 WL 1055962, at *3 (D. Or. Mar. 20, 2017); *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 19, 372 S.W.3d 324, 336 (2010) (written contract); *Colorado Nat. Bank of Denver v. Story*, 261 Mont. 375, 378, 862 P.2d 1120, 1122 (1993) (account stated).

[51] *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642, 655, 909 N.E.2d 876, 886 (2009) (oral contract).

[52] 50 State Statutory Surveys: Civil Laws: Civil Procedure, 0020 Surveys 1 (West)(reprinting State by State Analysis pdf, Richard A. Leiter and William S. Hein & Co., Inc. (2016)).

Further, according to one source, "about three-fourths" of the states have enacted borrowing statutes.[54] A sampling of 27 states' borrowing statutes appears below.[55] In effect,

> [a] borrowing statute is a legislative exception from the general rule that the forum state always applies its statute of limitations to a cause of action, and provides that the forum state will apply the statute of limitations from the foreign jurisdiction in which the cause of action accrued. A borrowing statute thus comes into play when the cause of action arises in another state, and addresses the situation where a plaintiff fails to sue within the time period allotted by the state where the action accrued, and then files suit in another state's court to avoid the time bar.[56]

For purposes of determining the time and place of the accrual of a cause of action under borrowing statutes, there are three tests courts usually employ in contract cases – (1) the place of injury or performance, (2) the last significant event, and (3) the center of gravity/significant contacts.[57] Under borrowing statutes, the law of the state the action is brought is used to determine where the cause of action accrued or arose, and once that state is identified, the law of the other state is assessed to determine when the cause of action accrued.[58]

Additionally, states vary in the way a partial payment effects the statute of limitations. Some states treat a partial payment as a renewal of the promise to pay, resetting the statute of

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[53] N.C. Gen. Stat. § 1-52 (3 years); Ky. Rev. Stat. Ann. § 413.160 (10 years).

[54] *U.L.A., Uniform Conflict of Laws-Limitations Act, Prefatory Note* (Supp.1989)("Another consequence [of the substantive-procedural dichotomy] was that about three-fourths of the state enacted so-called "borrowing statutes" which followed no regular pattern but required application of a limitation period other than the forum state's if some stated aspect of the cause of action occurred in or was connected with another state. These borrowing statutes are often difficult to interpret and apply. They have been the source of considerable judicial confusion."). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142, 143 (1971). *See generally Cope v. Anderson,* 331 U.S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602 (1947) (applying Ohio and Pennsylvania borrowing statutes) (location of bank defined where the cause of action arose under Ohio's former borrowing statute, G.C. § 11234 (1939)).

[55] Arizona - ARIZ. REV. STAT. § 12-506; California - CAL. CIV. P. CODE § 361; Colorado - COL. REV. STAT. § 13-80-110; Delaware - DEL. CODE ANN., tit. 10, § 8121; Florida - FLA. STAT. ANN. § 95.10; Idaho - IDAHO CODE § 5-239; Illinois - ILL. COMPILED STAT. ANN., Ch. 735/13-210; Indiana - IND. CODE ANN. § 34-11-4-2; Kansas- KANS. STAT. ANN. § 60-516; Kentucky - KY. REV. STAT. ANN. § 413.320; Maine - MAINE REV. STAT. ANN., tit. 14, § 866; Michigan - MICH. COMP. LAWS ANN. § 600.5861; Missouri – MO. REV. STAT., § 516.190; North Carolina - N.C. GEN. STAT. ANN. § 1-21; Nevada - NEV. REV. STAT. § 11.020; New York - MCKINNEY'S C.P.L.R. § 202; Ohio – R.C. § 2305.03(b); Oklahoma - 12 OKL. ST. ANN. § 105; Oregon - OR. REV. STAT. § 12.430; Pennsylvania - 42 PA.C.S.A. § 5521; Texas - TEX. CIV. PRAC. & REM. CODE § 16.067; Utah - UTAH CODE ANN. § 78B-2-103 (1953); Virginia - VA. CODE ANN. § 8.01-247; West Virginia - W. VA. CODE, § 55-2A-2; Washington - WASH. REV. CODE § 4.18.020; Wisconsin - WISC. STAT. ANN. § 893.07; Wyoming - WY. STAT. ANN. § 1-3-117.

[56] 51 Am. Jur. 2d Limitation of Actions § 88.

[57] *Abraham v. General Cas. Co. of Wisconsin*, 217 Wis.2d 294, 302-12, 576 N.W.2d 46 (1998).

[58] *CMACO Auto. Sys., Inc. v. Wanxiang Am. Corp.*, 589 F.3d 235, 242, n. 6 (6th Cir. 2009).

limitations date to run from the date of last payment; other states treat the import of the partial payment as a question of fact relating to the question of intent to renew the promise to pay, and some states do not permit a partial payment to reset the statute of limitations at all.[59]

NCBA provides the foregoing broad overview to highlight the complexity involved when making the legal determination as to the period prescribed by applicable law for bringing a legal action to collect a debt. NCBA member attorneys do not file lawsuits beyond what they determine to be the applicable statute of limitations after careful and considerable analysis. Thus, while debt collectors may be familiar with the concept of the statute of limitations, mandating an unassailable legal determination to have been made of the specific bar date for every debt in collections by lay debt collectors and attorneys collecting consumer debt, sets an unascertainable and unrealistic aspiration that will often resort to the benefit of hindsight.

To clarify the meaning of the term the "period prescribed by applicable law" appearing in Section §1006.26(a)(1) and the term "applicable statute of limitations" appearing in Section §1006.26(a)(2), we recommend that the definition be modified as follows:

1. Impose a temporal component to the definition, so that each limitations determination is tied to the collection activities of each collection effort undertaken with respect to the debt;

2. Define applicable law to be the place where the debtor resides, is believed to reside at the time the collection effort commences, or the appropriate venue where the consumer signed the contract;[60]

3. Limit the scope of the collector's obligation in making the limitations determination to a reasonable investigation based on objectively ascertainable facts; and

4. Limit the circumstances under which a debt collector will be charged to know or should know that a given debt is time-barred to instances where the law is settled and clearly established.[61]

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[59] *See generally*, Annotation, *Payment on account, or claimed to be on account, as removing or tolling statute of limitations,* 156 A.L.R. 1082 (1945). *Compare* ALA. CODE § 6-2-16 ("No act, promise or acknowledgment is sufficient to remove the bar to an action created by the provisions of this chapter, nor is such evidence of a new and continuing contract, except a partial payment, made upon the contract by the party sought to be charged before the bar is complete or an unconditional promise in writing signed by the party to be charged thereby."); Ga. Code Ann. § 9-3-112 ("A payment entered upon a written evidence of debt by the debtor or upon any other written acknowledgment of the existing liability shall be equivalent to a new promise to pay."); Iowa Code Ann. § 614.11 ("Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same."); *with* ARIZ. REV. STAT. § 12-508 ("When an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged thereby.")

[60] *See*, § 811, 15 U.S.C. §1692i(2)(A).

NCBA recommends that the definition appearing in § 1006.26(a)(1) and (2) be revised to read as follows:

(1) *Statute of limitations* means the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt in the state where the debtor resides at the time the collection activity is taken with respect to such debt, based on a reasonable investigation of objectively ascertainable facts.

(2) *Time-barred debt* means a debt for which clearly established law demonstrates the applicable statute of limitations where the debtor resides at the time the collection activity

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[61] We propose the Bureau spell out a "qualified immunity" standard that takes into consideration whether the law was clearly established at the time and a reasonable person would have known the claim to be time-barred, modeled after the qualified immunity standards developed in civil rights cases. *See supra*, n. 21. *See also, generally, Kisela v. Hughes*, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) ("police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue. … An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'") (*quoting Plumhoff v. Rickard*, 572 U.S. ——, ——, 134 S. Ct. 2012, 2023, 188 L.Ed.2d 1056 (2014)); *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19, 102 S. Ct. 2727, 2738–39, 73 L. Ed. 2d 396 (1982):

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

(footnotes omitted)(*quoting Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L.Ed.2d 288 (1967)).

is taken with respect to such debt, has expired, based on a reasonable investigation of objectively ascertainable facts.

3. Suits and threats of suit prohibited - §1006.26(b)

p. 199 - *The Bureau requests comment on proposed §1006.26(b) and on whether any additional clarification is needed.*

The Bureau Has Failed to Define "Legal Action."

The phrase "bringing a legal action" in Section §1006.26(b) is problematic and requires modification and/or clarification. The use of the term "legal action" could be interpreted to expand the scope of the proposed rule beyond what appears to be contemplated by the Bureau, and beyond the requirements of the FDCPA. NCBA recommends "legal action" be modified, or an exclusion be provided, to limit the scope of rule to only "lawsuits" and to exclude other types of judicial proceedings which, although based upon time-barred debts, are not in violation of the FDCPA.

Because "legal action" is not defined, any action in a legal proceeding which would not otherwise violate the FDCPA, like the filing of a proof of claim in bankruptcy matters on a time-barred debt, could arguably be construed to be as a "legal actions" and also be prohibited under the proposed rule. However as was seen in *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017), such an action is not a violation of the FDCPA, albeit it was done in a legal bankruptcy proceeding. Other "actions" such as garnishments and probate claims could likewise be argued to be subject to the rule if this term is not otherwise clarified, thus producing needless litigation costs for consumers and creditors alike in matters not contemplated by the rule.

The term "legal action" is an open compound with individual definitions that, when combined, result in a definition so expansive as to include virtual ANY proceeding in ANY court of law. Black's Law Dictionary provides the following:

> **"legal**, adj. 1. Of or relating to the law; falling within the province of the law . . . 2. Established, required, or permitted by law; . . . 3. Of or relating to law as opposed to equity."
>
> **"action**. 1. The process of doing something; conduct or behavior. 2. A thing done; ACT (1). 3. A civil or criminal judicial proceeding."

Black's Law Dictionary, 902 (7th ed. 1999).

Commentators have elaborated on the term "action":

> An action has been defined to be an ordinary proceeding in a court of justice, by which one part prosecutes another party for

> enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. But in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment.

1 Morris M. Estee, *Estee's Pleadings, Practice, and Forms* § 3 at 1 (Carter P. Pomeroy ed., 3d ed. 1885) (emphasis added).

The similarity between the terms "action" and "suit" has been described as follows:

> The terms 'action' and 'suit' are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of law as 'actions,' and of those in courts of equity as 'suits.' In olden times there was a more marked distinction, for an action was considered as terminating when judgment was rendered, the execution forming no part of it. A suit, on the other hand, included the execution. The word 'suit,' as used in the Judiciary Act of 1784 and later Federal statutes, applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him.

Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3 (2d ed. 1899).

Although the definitions of "legal action" and "suit" clearly have overlap and are commonly seen as synonymous, bankruptcy matters have been specifically recognized as distinct from ordinary civil lawsuits by the U.S. Supreme Court. "[T]he context of a civil suit differs significantly from a Chapter 13 bankruptcy proceeding." *Midland Funding*, *supra,* 137 S. Ct. at 1413. In *Midland Funding*, the Supreme Court noted various concerns that lower courts' had in regard to lawsuits filed on stale debts, such as the concern that debtors might unwittingly repay stale debts, that few unsophisticated debtors would understand that a statute of limitations would be a defense to a stale debt, that passage of time would dull a debtor's knowledge of the validity of a stale debt, that the debtor may no longer have records of the debt, or that a debtor might simply pay the debt to avoid the cost and embarrassment of a suit. *Id.* In response the Court pointed out the distinctions between an ordinary civil lawsuit and a bankruptcy proceeding, and stated:

> These considerations have significantly diminished force in the context of a Chapter 13 bankruptcy. The consumer initiates such a proceeding, and consequently the consumer is not likely to pay a stale claim just to avoid going to court. A knowledgeable trustee is available. Procedural bankruptcy rules more directly guide the evaluation of claims. And, as the Eighth Circuit Bankruptcy

> Appellate Panel put it, the claims resolution process is 'generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit.' These features of a Chapter 13 bankruptcy proceeding make it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection, and disallowance.

Id. at 1413-15.

These distinctions, however, are not recognized when the term "legal action" is used in the proposed rule. Although seemingly synonymous, the term "legal action" has a broader connotation than the term "lawsuit," seemingly encompassing any and all proceedings in a court of law or equity. Whereas the term "lawsuit" commonly has a narrower connotation encompassing a smaller universe of applicability that may afford the necessary room to exclude bankruptcy proceedings and other proceedings, which although judicially determined are not commonly understood to be considered "lawsuits."

Both the language of proposed Section §1006.26(b) ("(b) Suits and threats of suit prohibited.") and the analysis, indicate an intent to prohibit "lawsuits" on time barred debt. It appears a mere scrivener's error that the proposed rule used the term "legal action" in the text of the rule. We recommend that in proposed Section §1006.26(b), the term "legal action" be modified, or an exclusion be provided, to limit the scope of rule to "lawsuits" and to exclude other types of judicial proceedings which, although based upon time-barred debts, are not in violation of the FDCPA.

In order to exclude matters that are distinct from those contemplated to be within the scope of Section §1006.26(b), the term "legal action" should, at minimum, be substituted with the narrower term "lawsuit" or, in the alternative, a specific exclusion for the filing of a proof of claim on a time-barred debt in bankruptcy matters, and exclusion for other matters not commonly considered to be lawsuits, should be included within the rule for more specific clarification, in order to avoid unnecessary litigation.

§ 1006.30 Other prohibited practices

1. Communication prior to furnishing information - §1006.30(a)

p. 203 - *The Bureau requests comment on proposed §1006.30(a) and its related commentary*.

Clarity Is Needed with Regard to How to Satisfy the Requirements of the Proposed Rule.

The NCBA recognizes the intent of the proposed rule but there are concerns over its application. Namely, as drafted, Proposed Comment 30(a)-1 remains vague and ambiguous.

The Proposed Commentary seeks to incorporate the definition of a communication found in the FDCPA and adopted by the CFPB in the NPR. However, this proposal would require confirmation that a communication was received or that a communication occurred before an account can be reported to a credit bureau. The FDCPA, itself, does not provide for that. In fact, all a debt collector is required to do is send a validation notice pursuant to FDCPA § 1692g. Unless the notice is returned, the assumption is that the notice was provided. Here, the CFPB seems to infer that a communication has to be made, and there needs to be some confirmation of same, before there can be credit reporting. If the CFPB is concerned about the receipt of notice to the consumer, then NCBA recommends that the CFPB not use the "communication" definition and state specifically that ". . a debt collector must convey information regarding a debt to the consumer through any medium for purposes of credit reporting only. . ." .

Second, the phrase in the commentary which states "…but a debt collector would not satisfy the communication requirement if the debt collector attempted to communicate with the consumer but no communications occurs" is equally ambiguous. As noted above, the standard for the receipt of a written communication is simply that the letter was sent and not returned. Furthermore, consider the situation where a debt collector mails a letter to the consumer, only to learn days later that the address was no longer valid. While the safe harbor rule provided in proposed Section §1006.42(e) (sending a validation notice by mail) likely applies, the Comment does not account for a situation when a debt collector mails a letter to the consumer, then immediately furnishes information to a consumer reporting agency, only to later learn that the mail was returned as undelivered. Under such a situation, it is unclear whether the debt collector satisfies its obligation under Section §1006.6(b). After all, the proposed Rule only requires a debt collector to communicate with the consumer prior to furnishing the information to a consumer reporting agency without providing any grace period for the consumer to receive and read the letter.

Under the well-recognized "mailbox" rule, a debt collector's letter is considered to be served when it is placed in the mail, not when the consumer actually reads it. So, does a debt collector comply with this requirement as soon as it sends the written communication? What address can the debt collector send it to? What if the consumer claims to have never received/read it?

To avoid these scenarios, NCBA recommends amending the proposed rule and/or comment to include a five (5) business day grace period between when a written communication is sent and when the debt collector can furnish information to a consumer reporting agency. The five-day grace period provides reasonable time for the written communication to be delivered (or emailed) and read by the consumer. This recommendation alleviates the Bureau's concerns of furnishing information prior to informing the consumer of the collection activity without hamstringing debt collectors' collection efforts. This recommendation also minimizes the likelihood of litigation as the debt collector can easily track the five days between when the written communication was sent and when the information was furnished. Finally, this recommendation provides a debt collector protection from suit if the mail is returned to the debt collector as undeliverable.

Additionally, the NCBA recommends including in the comment language permitting debt collectors to use the consumers last known address to send written communication equally placing the burden on both debt collectors (to use the most recent information) and consumers (to provide a forwarding address to the postal office is they relocate).

2. Prohibition on the sale, transfer or placement of certain debts – §1006.30(b)(1)

p. 209 - *The Bureau requests comment on all aspects of proposed §1006.30(b)(1). The Bureau requests comment on whether any of the currently proposed categories of debts should be clarified and, if so, how; and on whether additional clarification is needed regarding the proposed "know or should know" standard.*

Clarity and Safe Harbors Must Be Provided in Order to Ensure That the "Know or Should Know" Standard Is Met.

The CFPB's proposed rule addresses identity theft in the context of debt collection. Under Section §1006.30(b)(1), the CFPB proposes that a debt collector is prohibited from selling, transferring, or placing for collection a debt if the collector knows or should know that an identity theft report was filed with respect to the debt. An example is provided, that a collector knows or should know that an identity theft report was filed if the debt collector received a copy of the identity theft report.

The NCBA agrees that a debt should not be sold, transferred or placed for collection where the collector is aware that the debt arose through identity theft. However, the devil is in the details. In particular, the NCBA believes that the proposed knowledge requirement begs for precision. The "know or should know" standard will lead to unnecessary litigation.

Is the actual knowledge requirement premised on receipt by the debt collector of the report from the consumer? Is the knowledge imputed from the creditor, who may receive such a report but not be inclined to pass it along? Is knowledge of a fraud report imputed by a prior collector that, for whatever reason, decides not to pass this information down the chain of collections? Is actual knowledge of identity theft on one account imputed to another, similar or derivative account? Is a credit bureau dispute by a consumer alleging identity theft or "true fraud" sufficient to place a collector / furnisher on notice of identity theft, or is the criteria more basic, that knowledge is only evident where the debt collector receives a copy of an identity theft report from the consumer or a representative of the consumer. Critically, the "knowledge" aspect of this proposed rule significantly exposes debt collectors to unnecessary lawsuits and liability. Unlike bankruptcy information, which is public record, there is no such database for identity theft.

The same need for clarification arises with respect to the prohibition of the sale, transfer or collection on accounts that have been discharged in bankruptcy. Plainly, debt collectors avoid collecting on discharged debts. Many collectors utilize commercial databases to reasonably assess whether debts are subject to bankruptcy or have been discharged through bankruptcy.

The frequency of such "scrubs" varies from scrubs at placement to regular "scrubs" over the life cycle of collections to monitoring services which alert debt collectors daily. A reasonable standard requiring bankruptcy scrubs on accounts placed with a collector or prior to the sale, transfer, or placement of an account for collections, providing safe harbor to debt collectors, is of critical importance. The standard "known or should have known" should be logically tied to direct knowledge that a debt was discharged in bankruptcy and a "should know" standard should be imputed only through mandatory bankruptcy scrubs at the time of sale, transfer or placement of the account for collections. In the event that a scrub of the account fails to capture that the account was extinguished in bankruptcy, this rule should impose a safe harbor provision insulating the debt collector from liability under the FDCPA.

As to Identity Theft Reports, actual knowledge to the debt collector, requiring the consumer or a representative of the consumer provide a copy of the identity theft report to the collector, should be the standard. Further, the identity theft report should specifically identify the subject debt being collected. In this day of the internet and the fax machine, there is little burden on a consumer being required to provide the identity theft report to the debt collector. Avoiding the "should know" ever-expanding standard would frame concise knowledge requirement that is easily met by the consumer and the debt collector.

As to knowledge that a debt was extinguished in bankruptcy, the "know or should know" standard is effective. However, the CFBP should go further by establishing simple criteria for such knowledge. First, the CFPB should require bankruptcy scrubs using commercial databases before a debt is sold, transferred or placed for collection. This is the "stick" for compliance, as it comes with a cost to the debt collector. The "carrot" should be safe harbor language, where, if a debt collector conducts a scrub within 30 days prior to selling, transferring or placing a debt for collections, the debt collector cannot be held liable based on inherent imperfections in the bankruptcy scrub databases (i.e., misspelled names, incorrect addresses and clerical errors).

§ 1006.34 Notice for Validation of Debts

1. Definitions; Itemization Date - § 1006.34(b)(3)

p. 224 - *The Bureau requests comment on proposed § 1006.34(b)(3) and on comment 34(b)(3)–1, including on whether the itemization date definition will facilitate compliance with the requirement to disclose the validation information in § 1006.34(c)(vii) through (ix), and on whether additional clarification regarding the itemization date definition is needed.*

p. 225 - The Bureau requests comment on whether the proposed definition should mandate a single reference date, which would standardize validation notices across all relevant markets, and if so, what reference date might be suitable for all types of debt.

p. 225 - The Bureau requests comment on whether the proposed itemization date definition should be structured as a prescriptive ordering of potential reference dates, such as a hierarchy.

p. 225 - The Bureau requests comment on whether the use of any particular reference date, such as the last statement date, is more likely than other reference dates, such as the charge-off date, to improve consumer understanding of the required disclosures.

Disclosure of the Itemization Date Selected Would Provide a More Meaningful Disclosure to the Consumer.

NCBA appreciates the Bureau's effort to provide flexibility as to the "itemization date" and the Bureau's recognition that debt types have different complexities. However, the proposed methodology with regard to the itemization date is problematic both from the consumer and debt collector perspective. NCBA respectfully submits that the use of an itemization date without the disclosure of which option is selected is not likely to create a meaningful disclosure and, as explained more fully below, the use of certain options provided will not increase consumer understanding. Additionally, the key to using a successful itemization date requires the cooperation of the referring creditor as each and every option provided thus far falls solely in the realm of the creditor's knowledge and not that of the debt collector.

Of the options provided, at least two of the options are problematic. For instance, the "charge-off date" which is defined as being the date the debt was charged off, is not a date likely to be universally recognized by consumers, even though it is widely used in the industry. While we recognize that certain states may require the calculation of balances from charge-off, it is not a date most consumers are going to readily recognize. Since the sole purpose of the date is informational to the consumer, NCBA believes the use of charge-off may be of little value. The use of "last payment date" requires clarification. As defined, "last payment date" means "the date the last payment was applied to the debt." The proposal is unclear as to whether payments would include credits or payments received from third parties. For instance, for auto deficiency debt, there usually are additional credits to the account, including refunds of insurance add-ons and sales proceeds, after receipt of the last payment from the consumer. It is therefore unlikely that a consumer will recognize the last payment date or that it would provide a meaningful disclosure.

The least problematic of the options presented is the last statement date; however, NCBA believes the Bureau has recognized that not all credit products are serviced through periodic statements. This option and that of the last transaction date are the two options which are most likely to improve consumer understanding of the required disclosures.

The selection of an itemization date as defined in Section §10006.34(b)(3) will not facilitate compliance with the requirement to disclose the validation information requested in Section

§1006.34(c)(vii) through (ix) as it is not necessarily a date that is readily recognizable by the consumer. If the purpose is to insure compliance with Section §1006.34(c)(vii) through (ix) by providing a fixed date from which any changes may be made and to insure an accurate balance, the debt collector should be required to identify any date certain and disclose the balance as of that date. Accurate information can be provided as long as the balance is consistently calculated from the same date. To insure compliance, the debt collector should be required to identify the date in its books and records in compliance with proposed Section §1006.100.

NCBA would not support a prescriptive ordering of a potential reference date. Such a mandate would be onerous on debt collectors and significantly increase the costs of collection which would in turn increase the costs of credit. Creating a prescriptive ordering would additionally eliminate the flexibility the Bureau has sought to create. The only way a prescriptive ordering could work is if the Bureau could identify each and every credit product subject to debt collection and identify which validation date would be prioritized for that credit product.

2. Definitions; Validation period - §1006.34(b)(5)

p. 232 - *The Bureau requests comment on proposed §1006.34(b)(5) and on comment 34(b)(5)–1. In particular, the Bureau requests comment on debt collectors' current practices for determining the end of the validation period. The Bureau also requests comment on whether the length of the five-day timing presumption should be modified and on whether different timing presumptions should apply depending on whether a validation notice is delivered by mail or electronically, for example by email or text message. Finally, the Bureau requests comment on whether a different timing presumption should apply if validation information is provided orally.*

Clarification as to What Constitutes the Validation End Date Is Warranted.

The NCBA supports the Bureau's stated goals of providing clarity to consumers about when their verification rights expire. However, it is difficult, if not impossible, to determine when a consumer "received" a debt collection notice since the overwhelming majority of such notices are sent by regular United States Postal Service mail. Therefore, providing a validation end date does not provide any clarity for debt collectors and consumers alike.

The method proscribed in the proposed rule puts the burden on the debt collectors to disclose the validation end date. However, this presents a new source of risk and liability to debt collectors. Although this new information is being provided to consumers, debt collectors will have to be the guarantor that the mail will be delivered in due course, notwithstanding weather events, work stoppages and labor issues and similar events, which are outside a debt collector's control.

The proposal makes no mention nor provides any guidance for consumers regarding the when in fact their dispute would be effective. Must the consumer send their dispute or request for

verification by the date certain on the date of the notice, or must the debt collector receive that dispute by such date? The proposed rule does not clearly define when the deadline expires for the consumer to request verification and/or dispute the validity of the debt.

The current interpretation of the FDCPA by the debt collections industry is to effectively honor a consumer's verification request or validation dispute at any time it is received by the debt collector. The crux of the consumer's request will be honored at day 15, 25, 45, 90 for example. Debt collectors presently use 35 days from the date the letter was mailed (sent) as an assumption of delivery and receipt. This current assumption does not factor Saturdays, Sundays and "public" holidays.

Also, in cases where the first notice is returned, it is the practice of debt collectors to restart the 35-day clock when a new validation and verification letter is mailed (sent). This occurs most often when the initial notice is returned undeliverable or, in some cases, the mail is not returned, but other indicia exists that the consumer may not or did not receive the first notice.

The Bureau should use 35 days for the assumption of delivery and not provide for end-date limitations (public holidays, Saturday, Sunday). The Bureau's proposed rule states that if the end date is on a public holiday, then an additional day must be added to the date certain requirement that a debt collector must provide. The Bureau also requires the debt collector to exclude end dates that are either Saturday or Sunday. The Bureau does not provide authority that debt collectors may use to determine which holidays the debt collector must adjust letters to accommodate? Federal holidays? State holidays? Puerto Rico? Washington, D.C.? Local holidays? Further, the Bureau provides no explanation why Saturdays end dates are unacceptable since mail is delivered on Saturday.

If the Bureau creates a new burden for debt collectors to identify and list the end date for the verification/validation rights, then such end date must be simplified. The presumption of 35 days from the sending (mailed date) of the letter is the best alternative for debt collectors and for consumers.

There should be no difference in the 35-day presumptive delivery end date across the different modes of validation/verification notice delivery. The consumer could be confused where she is receiving a notice for one debt by mail that conflicts with another notice received for another debt by electronic delivery.

3. Validation Information; debt collector's name and mailing address - §1006.34(c)(2)(i)

p. 237 - *The Bureau requests comment on proposed §1006.34(c)(2)(i) and on whether additional clarification would be useful.*

Appropriate Information Must Be Provided to the Consumer to Ensure InquirIes Are Properly Addressed.

NCBA supports providing the debt collector's name and mailing address to the consumer in a validation notice. The proper identification of the parties involved in the collection of the debt will lead to more productive communication regarding questions about the debt, insuring that consumers have a complete understanding of any issues involved and a potential resolution without resorting to the legal process. Additionally, providing the ***best*** address for the consumer to communicate with the debt collector also will serve these same purposes.

NCBA believes use of a name in the validation notice with which the consumer may be most familiar would assist the consumer and protect the debt collector from exposure under the Act. Providing the ***best*** address for the debt collector will provide certainty to both the consumer and debt collector. Additionally, it will put the consumer in contact with representatives of the debt collector trained to address such inquiries.

Currently, members of the debt collections industry are being sued for violation of the Act for failure to state their full and official business name. For example, the name of the debt collection entity may be "Smith, Jones, Williams and Peters, LLC", but it goes by the trade name "Smith Jones." The letterhead of the debt collector shows "Smith Jones." Currently, the debt collector could be found in violation of the Act because the name could be considered a false misrepresentation.

However, if the consumer called the debt collector, the phone would be answered "Smith Jones," consistent with what the consumer would see on the validation notice. Use of the shortened or trade name would be beneficial to the consumer as there would be consistency in the identification of the debt collector throughout all communications so the consumer would know s/he is communicating with the proper party.

Furthermore, many NCBA member firms have multiple offices and thus addresses. Most NCBA member firms and large debt collectors in general have a central address to which communication should be sent regarding the validation of a debt. Persons there are trained specifically to deal with consumer requests. The debt collector should be able to choose the most appropriate address that will provide the consumer the most information should the consumer decide to engage the debt collector.

Clarification on the use of trade names and requiring consumers to respond to an address where personnel are trained specifically to assist them provides (1) consistency in communication for the consumer; (2) ensures the consumer communicates with debt collector representatives best able to assist them; and (3) avoids delays in having to transfer calls, letters and the like and ensures that the consumer receives validation information faster. More certainty in this area also will prevent law suits from being filed against debt collectors for seemingly innocent situations not meant to confuse the least sophisticated consumer.

NCBA suggests that consumers then be required to communicate with a debt collector, specifically to request validation, at a specific address stated in the validation notice.

Communication at another address should not be deemed effective. This suggestion is not meant to confuse the consumer, nor avoid the debt collector's responsibilities to validate the debt; it is meant to put the consumer in contact with members of the debt collector's staff best trained to provide the most complete and most expeditious reply to the request for validation. The address could be provided in the validation notice in a conspicuous fashion for full disclosure.

This is best explained by an example. Assume the debt collection law firm has a central office in Atlanta, GA, but is collecting debts in Tennessee. The validation notice was sent from the Atlanta office under the abbreviated name of the firm, Smith Jones. Assume also the law firm has an office in Tennessee that would handle litigation of matters where suit is filed in that state. The Tennessee consumer may look up the debt collector and find the Tennessee address despite receiving a validation notice from the firm's Atlanta office. The law firm determines that the best address for the validation notice would be the Atlanta location. The rule must make it clear that the Atlanta office's address is the address the consumer must send a response for the validation request to be handled appropriately. This is a better option for the consumer since they will be communicating with personnel trained to assist them and will not result in associated delays when dealing with a branch office. This is better for the debt collector since they will not have to try to transfer the call to the Atlanta location, provide contact information for the Atlanta office to the consumer if that call cannot be transferred, and/or take down information and pass it along to the Atlanta office. NCBA recognizes that communications of this sort are difficult for the consumer on many different levels and believes the use of the best address for the consumer will help allay some of those concerns.

4. Validation information; consumer's name and mailing address - §1006.34(c)(2)(ii)

p. 238 - *The Bureau requests comment on proposed §1006.34(c)(2)(ii) and on comment 34(c)(2)(ii)–1, including on whether additional clarification would be useful. The Bureau specifically requests comment on how debt collectors currently determine the complete version of a consumer's name if creditors or third parties, such as a skip tracing vendors, provide conflicting name information. The Bureau also requests comment on what a debt collector should be required to do to reasonably determine the consumer's complete name information.*

Reasonable Determination as to the Consumer's Name Must Be Clarified.

The proposed rule requires, within the validation notice, that the debt collector include the consumer's name and mailing address. In its Section by Section analysis, the Bureau sets forth the expectation that "the consumer's name and mailing address should reflect what the debt

collector reasonably determines is the most complete version of the consumer's name whether obtained from the creditor *or another source*." [62] (Emphasis supplied).

The expectations set forth by the Bureau suggest that, prior to sending the validation notice, debt collectors must engage in a factual investigation as to the identity of the consumer. In reality that is not the case, because the validation notice is generally the first contact by the collection law firm, and the text of the FDCPA does not require any investigation until a dispute is received. Information about the consumer's name is usually provided by the creditor who had the relationship with the consumer. That information often includes: (a) the name of the consumer as dictated by creditor guidelines; (b) the name of the consumer as it appears on the credit application, contract, or other originating document; or (c) the name of the consumer as it appears on the last periodic statement. To the extent the Bureau is suggesting that debt collectors are expected to skip trace and verify the full identity of the consumer by third party means, the suggestion is cost prohibitive to debt collectors and not without its own risks to consumers. Such costs are unnecessary if the information is received from the creditor who had the established relationship with the consumer and there is no other information to suggest that the consumer's name is otherwise different.[63] Moreover, as case law indicates, third party skip tracing servicers are not necessarily accurate indications of the consumer's identity. *See, e.g., Rhinehart v. CBE Group, Inc.* 714 F. Supp. 2d 1183 (M.D. Fl. 2010) (where debt collector made multiple calls to consumer's father due to information provided by third party skip tracing company).

NCBA generally supports the proposed commentary, 34(c)(2)(ii)-1, but suggests that the "or another source" language be omitted or that further clarification be provided that allows the debt collector, for purposes of the debt validation notice and its initial communication to the consumer, to rely upon the most complete information provided by the creditor in its source documents.

5. Validation information; merchant brands - §1006.34(c)(2)(iii)

p. 239 - *The Bureau requests comment on proposed §1006.34(c)(2)(iii) and on comment 34(c)(2)(iii)–1. In particular, the Bureau requests comment on whether merchant brand or similar information should be required for debts other than credit card debts.*

The Use of Merchant Brands Helps Consumers Understand to Whom the Debt Is Owed.

NCBA supports the Bureau's proposal to include the merchant brand in the validation notice to the extent that such information is *available* to the debt collector. The lending community that forwards accounts to debt collectors should be encouraged to provide this information.

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[62] NPR at p. 237.
[63] The average cost of an Accurint search is $4.00 per basic request.

Merchant brands are helpful to understand not only credit card accounts, but accounts that are underwritten by a lender in the form of open or closed end credit that would and should fall under this rule. Examples would be furniture stores, appliance stores, and electronic stores that allow consumers to purchase items on credit. That credit may not be represented by a "credit card" and could be actually owed to a bank or other financier. Consumers are likely more familiar with their account with "Electronics World" than the "Bank of XYZ".

NCBA agrees with the Bureau that this information is helpful to the consumer and facilitates discussions about the debt that is owed. Uncertainty breeds mistrust. Requiring this information to be included on validation notices would help span that breach. NCBA appreciates that the Bureau is requiring that this information be included in the validation notice only when available to the debt collector, since obtaining that information is usually beyond the debt collector's control. NCBA would encourage the Bureau to require lenders, debt sellers, and debt purchasers to provide that information. NCBA does have concerns in instances where the merchant brand information is not apparent on the face of the account statements or provided in the assignment from the owner of the debt, whether or not this would be in violation of the proposed rule**.** Therefore, it is incumbent upon creditors and lenders to supply this information. NCBA recommendations that what would be deemed "available" to the debt collector, and thus subject to this rule, would be instances only where the merchant brand was found:

- On the face of the credit card statements;
- On the face of the transcript of credit card payments (account history);
- Separately provided by the owner of the debt in its assignment to the debt collector; or
- Separately provided in an affidavit of balance, sent by the owner of the debt with the assignment and prior to the validation notice being sent.

NCBA appreciates that the Bureau has identified this issue. Debt collectors do not have the ability to force their clients to provide this information when the clients assign matters to them. It is particularly problematic with purchased debt. NCBA agrees that placing this information on the validation notice would be beneficial to both the consumers who will recognize the debt, and for debt collectors when speaking with consumers. It will lead to better, more informed, and more meaningful discussions regarding the debt.

6. Information about consumer protection - §1006.34(c)(3)(i)

p. 250 - *The Bureau requests comment on proposed §1006.34(c)(i)*

The Bureau Seeks an Expansive and Improper Definition of "Validation."

NCBA supports proposed Section §1006.34(c)(3)(i) which generally tracks the language of 15 U.S.C. § 1692g(4). However, Model Form B-3 does not follow the proposed rule and instead states that if a consumer "calls or writes to debt collector buy the end of the validation period,

the debt collector must stop collections on any amount the consumer disputes until the debt collector sends information that shows the consumer '**<u>owes the debt.'"</u>** [Emphasis added]. Neither the proposed rule nor the Section-by-Section Analysis defines the term "owes the debt." Such a statement is a legal conclusion and is a different standard than providing verification of the debt. The FDCPA does not provide a definition of verification and the proposals put forth are silent on this definition as well. The term "owes the debt" will confuse consumers because the verification information required to be provided under the statute will not meet the "owes the debt" standard and will more than likely be unsatisfactory to consumers. Requiring debt collectors to send information to show that the consumer owes the debt will unnecessarily increase costs to debt collectors. The proposal would also require debt collectors to meet a standard that is not otherwise intended under the FDCPA.

NCBA recommends that the Bureau use the identical language of the statute and advise the consumer that the debt collector will stop collection on any amount disputed until the debt collector provides "verification of the debt." The Bureau could include a statement which defines verification in line with current Circuit court interpretation of verification. For instance, confirming in writing that the amount being demanded is what the creditor is claiming is owed from the consumer.

NCBA has significant concerns that the use of the term "owes the debt" to define verification creates an undue burden upon debt collectors without creating any real benefit to the consumer, especially if the consumer provides a generic dispute. This process creates more frustration for the consumer because if the consumer feels any dissatisfaction with the underlying product or service which created the debt, providing creditor information which confirms the balance due from the consumer will not satisfy the consumer's objections. Both the debt collector and the consumer need to come into the verification process with the same expectations. Failing to appropriately define and explain the verification process will only leave the consumer more confused and frustrated with the debt collection process as a whole. Using the term "owes the debt" will further delay the debt resolution process, which is of no benefit to the consumer.

Numerous Circuit courts have defined verification narrowly and have not imposed a duty upon debt collectors to show that the debt is owed. *See Dunham v. Portfolio Recovery Associates*, 663 F.3d 997 (8th Cir. 2001) citing *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999); *Haddad v. Alexander, Zelmanski*, *Danner & Fioritto*, 758 F.3d 777 (6th Cir. 2014) ("It would be both burdensome and significantly beyond the Act's purpose to interpret § 1692[g] as requiring a debt collector to undertake an investigation into whether the creditor is actually entitled to the money it seeks."); *Walton v. EOS CCA*, 885 F.3d 1024 (7th Cir. 2018) ("The verification assures the consumer that the creditor actually made the demand the debt collector said it did and equips the consumer to evaluate the validity of the creditor's claim."). The Bureau's proposal is a departure from consistent case law.

7. **Information about consumer protection - §1006.34(c)(3)(iii)**

p.253 *The Bureau requests comment on whether debt collectors require additional clarification about how to comply with FDCPA section 809(a)(3) [1692g(3)]*

The Bureau Must Clarify How a Consumer Can Dispute a Debt.

NCBA members support disputes from consumers whether they are made orally or in writing. However, in light of recent case law, especially within the courts of the Third Circuit Court of Appeals, the NPR would better serve its purpose to clarify the FDCPA by specifically stating that a debt collector can advise a consumer of either option, orally or in writing, to effectively dispute a debt. There are some discrepancies regarding these dispute options within the actual proposed rule and the Section-by-Section Analysis. While the Model Form B-3 provides the consumer with the option to "call or write" a debt collector to dispute the validity of the debt, the actual rule says nothing about either option. Both consumers and debt collectors would greatly benefit if the Bureau fully articulates in the actual rule that a dispute may be made either orally or in writing to be effective.

Inconsistency between the proposed rule, the Model Form B-3 and the Section-by-Section Analysis do little to clarify whether, for a consumer's dispute to be effective, it must be provided orally or in writing. Recent decisions within the courts of the Third Circuit Court of Appeals have created more confusion rather than clarity on this issue. The Bureau's reference to a few recent decisions within the Third Circuit[64] do little to highlight the confusion and concerns debt collectors were faced within the past year when attempting to comply with the requirements of § 1692g(a)(3). A brief history of the case law is warranted.

In *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991), the Third Circuit Court of Appeals held that for a dispute to be effective under § 1692g(a)(3), it must be in writing. This was a clear departure from the majority of the Circuit courts holdings throughout the country, and more importantly, from Congress' intent that no such writing requirement was otherwise mandated. To date, no other Circuit has adopted *Graziano*. Furthermore, *Graziano* provided no guidance to debt collectors regarding how to effectively disclose to the consumer this writing requirement for disputes without running afoul of the statutory language of the FDCPA. Fortunately, for two decades, debt collectors within the Third Circuit have been able provide consumers with the requisite disclosures as mandated by the FDCPA while at the same time still accepting oral disputes.

Unfortunately, there has been a flurry of activity within the Third Circuit regarding this issue within the past 18 months. Numerous lawsuits have been filed against debt collectors alleging that the use of the statutory notice did not effectively advise the consumer that for their disputes as to the validity of the debt to be effective, they must be in writing.[65] Ironically, many

[64] NPR, p. 252.

[65] *See Guzman v. HOVG, LLC*, 340 F. Supp. 3d 526 (E.D. Pa. 2018)*motion to dismiss denied*. (Validation notice did not effectively convey consumer's validation rights under FDCPA, even though it parroted the language of the statute; court says more is required but did not state what that language should be); *Durnell v. Stoneleigh Recovery Assocs., LLC*, (No. 18-2335), 2019 WL 121197 (E.D. Pa. Jan. 7, 2019) (Holding that a validation notice that "mirror[ed] the language" of the FDCPA section 809 still violated the FDCPA because disputes must be in writing.

courts in the Third Circuit also recognized that a conflict exists in the proper interpretation, but nonetheless, the strict liability aspect of the FDCPA provides little relief and guidance for otherwise compliant debt collectors. Many courts have stated that "[While] it is true that the validation notice closely tracks the statutory language of § 1692g(a), unfortunately for Defendant, however, the statutory language is subject to conflicting interpretations in this Circuit." [66]

NCBA recommends that the Bureau clearly specify both in the final rule that, unless the consumer contacts the debt collector to dispute the validity of the debt, or any portion of the debt, ***either orally or in writing***, before the end of the validation period, the debt collector will assume that the debt is valid. This will be the only way to resolve the conflicting court interpretations within the Third Circuit and that could exists in other courts as well.

8. **Consumer Response Information - §1006.34(c)(4)**

p. 261 - *The Bureau specifically requests comment on whether validation information should include consumer response information, and, if so, on whether any of the proposed items should be excluded or any additional items should be added.*

p. 263 - *The Bureau requests comment on proposed §1006.34(c)(4)(i), including on whether any dispute prompts should be added, revised, or removed.*

The "Tear Off" Section of the Validation Notice Will Not Lead to Debt Resolution.

As proposed, the segregated dispute section, "tear off," does not provide a vehicle for meaningful dispute resolution. While we applaud the simplification of the dispute process and the ultimate goal of insuring debt collection is accurate, the mechanism provided by the rule is likely to increase the number of frivolous disputes by simply inviting consumers to check a generic box which will increase the costs of collection significantly. NCBA supports a more robust format which would require the consumer to not only identify the nature of the dispute with some specificity, but also provide any documentation he or she may have to support the dispute.

NCBA recommends eliminating the prompts and instead provide the consumer with instructions as to how to dispute the debt which requires the consumer to state the particular basis for the dispute, and to provide any documentation they may have to support the dispute.

Court provided proposed safe harbor language but cautioned that the "notice could run afoul of the law in another circuit where the court of appeals has held a debtor can dispute a debt orally or in writing."); *Henry v. Radius Global Solutions*, 357 F. Supp. 3d 446 (E.D. Pa 2019) (same); and *Cadillo v. Stoneleigh Recovery Associates*, No.17-7472, 2019 WL 1091391 (D, N.J., Mar 8, 2019 (same)

[66] *See Vedernikov v. Mercantile Adjustment Bureau, LLC,* No. 18-17364, 2019 WL 1857119 (D. N.J. April 25, 2019); *Grady v. Portfolio Recovery Associates*, No. 18-2393, 2019 WL 2226015 (E.D. Pa May 23, 2019); *Joseph v. Rickart Collection Systems, Inc.*, No. 19-5413, 2019 WL 2281581 (D. N.J. May 29, 2019); and *Smith v. American Coradius International* No. 19-0546, 2019 WL 2501469 (M.D. Pa June 17, 2019).

For instance, if the amount is wrong, the consumer should be expected to advise what they believe the correct balance is and if available, provide documentation as to why they believe that is the correct balance. Similarly, if there is another basis for the dispute, there needs to be an explanation as to the basis of the dispute and an expectation that they provide any documentation as to the basis for the dispute. Simply allowing consumers to check a box, without more, will likely encourage consumers to dispute debts whether or not they are in fact in dispute in order to place a hold on the collection efforts while the debt collector seeks validation. Furthermore, if a consumer has a real dispute, checking off an innocuous box does nothing to assist the debt collector in trying to resolve the dispute expeditiously.

As was identified in the Small Business Review Panel Report, a dispute form with simple check boxes and no further expectations placed on the consumer is likely to encourage disputes in an effort to stop or slow the collection process. The law firms NCBA surveyed revealed that they currently receive disputes on 5% or less of their files. Of those disputes, less than 1% of those were deemed valid disputes which necessitated closing the files. It is widely expected, and acknowledged by the Bureau, that should the dispute prompts be adopted, the number of disputes will increase. Many expect the number of disputes to triple or quadruple. The current cost to the average law firm to investigate a dispute is $15. Our members are currently spending between $7,000-$11,000 per year investigating disputes. If the number of disputes increase as expected, the cost will similarly increase and is likely to jeopardize the smaller law firms who are already operating on a minimal margin.

While we welcome making the dispute process as transparent as possible and encourage consumers to utilize their dispute and validation rights, a meaningful dialogue must take place between the consumer and the debt collector. This requires consumers to provide meaningful information as to the nature and basis for their dispute and including applicable documentation which supports it.

9 Form of Validation Information; Safe Harbor, Optional Disclosures; - §1006.34(d)(2)

p.273 **-** *The Bureau requests comment on proposed §1006.34(d)(2) and on proposed comment 34(d)(2)–1.*

Use of Optional Disclosures Must Be Clarified and the Use of Model Form B-3 (Appendix B) Must Be Expanded to Include 15 U.S.C. § 1692e.

NCBA supports the use of a safe harbor when a debt collector utilizes Model Form B-3 (Appendix B) in order to comply with the validation requirements in the NPR. However, NCBA has concerns regarding the ability to use optional disclosures, state mandated disclosures, and disclosures required by applicable law.

Although the Bureau's proposal permits disclosures to be placed on the reverse side of the validation notice, the proposal is silent as to whether a debt collector can choose to use a

second page. Small businesses comprise a large proportion of the NCBA membership and currently many of these businesses utilize a second page. In some cases, these businesses use a third page, rather than the reverse side of the first page, to provide optional or state-required disclosures. The Bureau should expressly provide in its final rule that the words "reverse side" are interchangeable with "next page" or words of similar effect. The Bureau's proposed safe harbor does not appropriately shield such debt collectors that place the language on the reverse or subsequent pages. This lack of a true safe harbor will not provide the intended benefits of certainty for debt collectors. As such, the Bureau should directly and expressly state that disclosures can be effectively conveyed as a matter of law if placed on the reverse page (or subsequent pages), if there is an appropriate acknowledgment on the front of the notice.

If a debt collector properly employs an optional disclosure (as required by judicial decisions and orders) on the reverse side as required, some judicial decisions and orders state that such placement on the reverse side of a letter would effectively frustrate and overshadow the consumer's reading of the letter. The NPR has not addressed the conflict that the placement of a disclosure would create with relevant state laws. Debt collectors in those states, like Colorado, will be conflicted as to whether follow state or federal law. The scope of the safe harbor for use of Model Form B-3 by a debt collector is limited to the conveyance of Section §1006.34(a)(1)(i) and (d)(1). The rule should go further and protect debt collectors if they follow the rule and form and convey state and optional required language on the "reverse" or subsequent pages.

Further, a growing list of states have required that debt collectors who collect on purchased and health care consumer debt provide extensive additional disclosures detailing information that is similar to, but not exactly like, Model Form B-3. Some states set forth different language with regard to how the itemization is provided. Debt collectors in those states will now face a dilemma when determining whether to satisfy the Bureau's rule or the state's rule on itemization, while also avoiding confusing the consumer, uncertainty, and litigation risk for the debt collector.

The Bureau must also define through official commentary or other methods the perimeters of what it means to be "substantially similar." Presently, the Bureau's "substantially similar" reference will be an impetus for costly and inefficient litigation and uncertainty for debt collectors on the meaning and application. NCBA proposes that "substantially similar" be given the same definition as found in the Truth-in-Lending Act. [67]

NCBA applauds the CFPB's efforts to provide guidance to collectors and clarity for consumers by drafting Model Form B-3 as a safe harbor to be used for transmitting the validation notice. Any collector, including an attorney or a collection agency, who uses the Model Form B-3 will have

[67] *See* 12 C.F.R. pt. 1026, sup. I, pt.5, apps. G & H(a) (creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the Act's protection from liability," provided the changes are not "so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses.).

complied with Sections §1006.34(a)(1)(i) and §1006.34(d)(1) of the Proposed Rules, and by doing so, the collector will also have complied with Section §1692g(a) of the FDCPA. To ensure that Model Form B-3 provides collectors with a true safe harbor, however, the CFPB should clarify that the use of the form by any collector, including an attorney or a collection agency, also complies with Section §1692e of the FDCPA and all subparagraphs thereof. The form was designed so that collectors can convey to consumers in a clear and conspicuous manner all of the information required by Section §1692g(a) of the FDCPA. Thus, if collectors use the form, there will be no legitimate basis for claiming the notice is false, deceptive or misleading under Section §1692e. Approving the use of the form in this manner would put all collectors, both attorneys and non-attorneys, on a level playing field.

10. Form of Validation Information; Spanish-language translation disclosure – §1006.34(d)(3)(vi)(A) & (B)

pp. 280-281 *The Bureau requests comment on proposed §1006.34(d)(3)(vi)(A) & (B)*

Spanish Language Disclosures Must Remain Optional.

NCBA appreciates that the NPR recognizes the diverse population in this country by having an option for consumers to request forms in Spanish. However, NCBA has concerns about the Spanish-language translation disclosures and encourages the CFPB to (1) keep the Spanish language or any other foreign language translation disclosure optional, (2) provide the translation of any form, and (3) provide a safe harbor if the provided translation is utilized.

In an attempt to aid Spanish speaking consumers with the understanding of their rights in a validation notice, the Bureau suggests that the form in English should contain two optional disclosures.[68] However, this could create an expectation to the consumer that all future communications with the law firm will be in Spanish. This could be construed as misleading and thus result in litigation against the law firm.

Moreover, the cost to have all forms, or even just the validation notice translated, could be burdensome for NCBA members. 70% of NCBA member firms are small law firms with small staffs. In certain areas of the country, there may not be a large Spanish-speaking base of consumers or potential staff members. Therefore, there may not be a staff member available to translate the forms. Requiring the law firm to translate the forms would force the law firm to retain an outside vendor. NCBA believes that the CPFB should provide the necessary and translated forms on their website to alleviate the economic burdens on small firms.

The Spanish language, like the English language, has different dialects. These variations could result in litigation against creditor's rights law firms as the form could be deemed to be misleading. Worse, if the law firm does not have a Spanish speaking staff member, the law firm has to assume that document was translated correctly.

[68] See, Section § 1006.34(d)(3)(iv)(A) & (B).

To illustrate that point, the word "can" in Spanish is two different words depending on the part of speech (lata if a noun or poder if a verb). The proposed validation notice contains the statement: "What else can you do?" The translation should be ¿Que mas puede hacer? Unfortunately, the translation service that the law firm hired translated the sentence as ¿Que mas lata hacer? Assume that the law firm exercises a level of precaution and goes to Google Translate to double check the work of the translation service. The law firm has no way to know that puede should have been used instead of lata, as Google Translate will show 'can' in the translation. This poor translation could result in litigation against a law firm as the letter could be deemed misleading for this typo.

For the reasons outlined above, the Bureau must keep the Spanish or any other future language disclosures optional, provide any translations, and provide a safe harbor for any debt collector and creditor's rights attorney and law firm utilizing the translations provided by the Bureau.

§ 1006.38 Disputes and requests for original-creditor information.

1. **Responses to disputes; providing copy of verification of the debt or judgment - §1006.38(d)(2)(i)**

p. 291- *The Bureau requests comment on proposed §1006.38(d)(2)(i).*

"Verification" Must Be Defined.

Like the FDCPA, the proposed rule does not define what it means to verify a debt. As noted above, Model Form B-3 states that a debt collector will stop collection activity until proof that the consumer "owes the debt" is provided. This is a departure from what courts have held qualifies as verification.[69] There would be value to the consumer if the Bureau articulated what it means to verify the debt. This will assist the consumer in a better understanding their account in order to compare it to what they believe the dispute to be. Providing a definition of verification will go along a long way in assisting the consumer in resolving their dispute as well as resolving their debt.

2. ***Responses to disputes; duplicative disputes - §1006.38(d)(2)(ii)***

p. 294-295-*The Bureau requests comment on proposed § 1006.38(d)(2)(ii) and proposed comment 38(d)(2)(ii)–1, including on whether any additional clarification is needed. In particular, the Bureau requests comment on how debt collectors currently handle repeat disputes and the costs to debt collectors of doing so, distinguishing, to the extent possible, between repeat disputes filed during the validation period and repeat disputes filed after the validation period. The Bureau also requests comment on whether, in responding to disputes that would qualify as duplicative disputes under the proposed rule, debt collectors*

[69] See *Walton* supra.

expect to use the method in proposed §1006.38(d)(2)(i) or the method in proposed §1006.38(d)(2)(ii)

Requiring Consumers to Fully Articulate Their Disputes Will Allow Debt Collectors to Better Address Legitimate Disputes.

NCBA appreciates that the Bureau addresses duplicative disputes. These are a common occurrence. Some consumers send identical dispute letters concerning the same debt more than once. The letters frequently fail to contain any information to aid the debt collector in resolving the nature of the consumer's dispute, and often do not contain sufficient information to allow the debt collector to identify the debt at issue. This causes a delay resolving the dispute.

Duplicate disputes have become a significant issue in the debt collection industry with debt settlement companies sending multiple disputes on the same account, sometimes without the consumer knowing about it. While NCBA appreciates the Bureau's attempt to rectify this problem, the NPR seems to require that a debt collector to do more work when the consumer has acted intentionally. Section 1692g(b) of the FDCPA[70] requires the debt collector to validate a debt once. The statute imposes no other requirement upon a debt collector. As noted above, if the Bureau would articulate a clear definition of what it means to verify the debt and what a debt collector is required to do, then duplicate disputes would not only be easily identified, but also easily disposed. Consumers and more importantly debt settlement companies who use the dispute process to delay the legitimate collection of debt, do a great disservice to those consumers who have legitimate disputes. Debt collectors should be devoting time and resources for those legitimate disputes.

As noted, throughout NCBA's comments in response to the NPR, the issue of disputes can be resolved by:

1. Requiring consumers to provide the current name and all other names used with the creditor, and some other identifying information, such as address, telephone number, account number, date of birth, and/or social security number;
2. Requiring consumers to fully and completely articulate their disputes and to provide some support evidence/documentation of same; and
3. Defining verification to show that the amount sought by the debt collector is the same amount the creditor shows is owed.

§ 1006.42 Electronic Disclosures

[70] See, 809(b); 15 USC §1692g(b)

1. **Providing required disclosures, in general - §1006.42(a)(1)**

p. 297 - *The Bureau requests comment on this approach, including on whether the Bureau should address oral delivery of required disclosures and, if so, what standards should apply, including how an oral disclosure could be provided in a form that the consumer may keep and access later. The Bureau also requests comment on the frequency with which debt collectors provide required disclosures orally today and the frequency with which debt collectors would expect to provide disclosures orally under the proposed rule.*

p. 298- *The Bureau requests comment on the current practices of debt collectors upon learning that a consumer has not received a required disclosure—for example, because the disclosure has been returned as undeliverable—as well as the risks, costs, and benefits that these practices pose to consumers and industry. The Bureau also requests comment on whether a delivery method that does not satisfy proposed Section §1006.42(a)(1)'s notice requirement should be permitted as long as the debt collector confirms that the consumer received actual notice.*

NCBA Supports Oral Delivery of Certain Disclosures.

NCBA supports allowing oral delivery of the required disclosures. Currently, debt collectors provide multiple disclosures orally, including but not limited to, mini-mirandas, notifications that the call is being recorded, and various disclosures regarding accepting post-dated checks and payment arrangements. With regard to the latter, post-date check and payment arrangements are followed up with letters memorializing the arrangements. With regard to the disclosures contemplated under Section §1006.42, providing a memorializing letter, either in writing or for those that accept electronic delivery, via email, text or hyperlink, is a sufficient form to provide a consumer access to the information at a later date.

Conflict Exists with Regard to Alternative Procedures – Is Oral Consent Required?

The proposed rule provides conflicting instruction with regard to the alternative electronic disclosures for the validation notice described in Section §1006.34(a)(1)(i)(B). In the proposed rule itself, the purpose of Section §1006.42(c) is to allow for an alternative method of electronic disclosure of the validation notice, by allowing a debt collector to rely upon an email or phone number provided to the creditor or prior debt collector that they could have used to provide E-Sign consent.[71] Yet, the Electronic Disclosure Options chart provided by the Bureau[72] acknowledges that such alternative method would only be available if there was an initial verbal communication waiving the opt-out period required in Section §1006.42(c)(2)(ii)(B). If a

[71] NPR, p. 479.
[72] https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/debt-collection-practices-regulation-f/

verbal conversation is required with the consumer, then what would be the purpose of relying upon the email address that was provided to the creditor or prior debt collector?

In other words, it does not appear that the alternative provided in Section §1006.42(c) is actually providing an alternative method to provide the validation notice. As noted in Electronic Disclosure Options chart, a debt collector could not send the validation notice electronically using the alternative in (c)(1) because the notice of the opt-out period would be a communication from a debt collector, which would require the debt collector to provide the validation notice within 5 days. The debt collector could not send out the electronic notice in five days because to do so would violate the optional provisions.

The Delivery Requirements of Electronic Disclosures Are Beyond the Requirements of the FDCPA.

NCBA is concerned that the expected delivery of electronic disclosures may prove to be a burden upon a debt collector that is not contemplated by the FDCPA. The current standard only requires a debt collector to have a reasonable belief that the message has been sent and permits a debt collector to rely upon the contact information provided by the creditor and/or the consumer. For instance, with regard to a validation notice, the FDCPA requires that a debt collector "send the consumer a written notice;" it does not require that the debt collector confirm actual receipt or notice by the consumer. In the Section-by-Section Analysis, the Bureau states that if a disclosure is not delivered, then the debt collector has not provided the disclosure in a manner that is reasonably expected to provide actual notice.[73] It is understandable that upon return mail or return electronic notification a disclosure would be deemed not to have been sent. However, in the case of regular mail, if the notice is not returned, a debt collector is permitted to make the assumption that the disclosure was sent. In the case of electronic disclosures, a debt collector is not given the benefit of that assumption. This would pose significant risk to a debt collector if after the initial communication (i.e. a phone call), the electronic disclosure containing the validation notice is returned because of a bad address. Because of the bad address, the debt collector has now failed to comply with the FDCPA because under the proposed rules, the debt collector has not sent the validation notice within 5 days of the first communication. If the validation was sent by regular mail, and not returned, the debt collector would have fully complied. Not only does this put a heightened burden upon the debt collector, it provides no responsibility on the consumer to provide updated information. This rule would drive lawsuits regarding the failure to provide actual disclosure, even when it was of no fault of the debt collector and potentially caused by the tactics of plaintiff's attorneys. NCBA proposes that electronic communication must be given the same or similar weight as regular mail. Only if the email is returned as undeliverable would a disclosure be deemed as not provided. To demand otherwise from electronic communication would result in the Bureau exceeding the limited of the statutory language of the Act.

Furthermore, the Bureau's interpretation that the failure to comply with the requirements of

[73] NPR, p. 299.

Section §1006.42(a)(1) results in a violation of Section §1692(d), unfair and unconscionable means to collect a debt, is equally misplaced. Nothing in the list of prohibitive conduct suggests that upon sending an electronic notice to a consumer that the debt collector has no reason to believe is incorrect or returned is an unfair or unconscionable means to collect a debt. Furthermore, the plain language of Section §1692g does not impose a requirement upon a debt collector other than to "send" a notice.

2. Requirements for certain disclosures provided electronically, E-Sign - §1006.42(b)(1)

p. 307 **-** *The Bureau requests comment on proposed § 1006.42(b)(1) and on proposed comment 42(b)(1)– 1, including on the extent to which debt collectors currently obtain E-SIGN Act consent directly from the consumer. If debt collectors currently do not obtain such consent, the Bureau requests comment on the reasons why not and on any specific circumstances in which debt collectors rely instead upon consent the consumer originally provided to the creditor under the E-SIGN Act. The Bureau also requests comment on whether to permit such reliance, or transfer of consent, in certain specific circumstances and, if so, what those circumstances should be*

NCBA Members Must Be Able to Rely on Consent Obtained from Creditors.

The requirements of E-Sign generally do not apply to the business operations of many NCBA members. Members generally fulfill their obligations to provide written disclosures (e.g. the validation notice) by sending consumers written correspondence via U.S. Postal Service delivery. Aside from the validation notice, which is required to be provided in writing only if not included in the initial communication with the consumer, there are few instances in which a debt collector must provide a disclosure to a consumer in writing such that the requirements of E-Sign would apply.[74] There are few instances in which debt collectors are required to follow the consent and verification requirements of E-Sign when communicating with consumers electronically. As a result, most NCBA members do not obtain E-Sign Act consent to communicate with consumers electronically.

The proposal obligates debt collectors to obtain E-Sign Act consent to provide the validation notice electronically when that notice is required to be provided in writing pursuant to § 1006.34(a)(1)(i)(B). However, obtaining E-Sign Act consent from consumers after an account has gone into default remains difficult and collectors are not likely to receive consent from consumers once their relationship with the creditor has terminated. In order for debt collectors to fulfill their disclosure obligations using an electronic record pursuant to the E-Sign Act, a debt collector will most likely rely on the E-Sign Act consent provided to the creditor.

[74] Section §808(2), 15 USC §1692f(2) (Accepting a a post-dated check by more than 5 days unless such person is notified in writing of the debt collector's intent to deposit such check…)

The purposes of the E-Sign Act are fulfilled even when a debt collector is permitted to rely on the consent given to a creditor. By completing an E-Sign Act consent process, consumers demonstrate their desire to communicate about their debt obligation electronically. That consent focuses more on the purpose of the electronic communications – the debt – than the identity of the company with whom the communications are being sent/received. By completing the E-Sign Act consent process, consumers create reasonable expectations that they will receive electronic communications at their given email address or telephone number for any reason related to the debt. They may even expect to not receive communication from their creditor in other ways, like telephone calls and U.S. Postal Service mail. Importantly, by completing the E-Sign Act consent process, consumers are demonstrating their ability to receive the electronic communications being sent. To the extent a debt collector sends similar electronic communications to a consumer about their debt, E-Sign ensures that consumers have previously consented and that they can receive what the collector is sending. Disallowing a debt collector to honor the consumer's communication preference that was provided to the creditor frustrates the consumer's ability to communicate about their debt in their preferred method of communication and deprives the debt collector of making valuable contact with a consumer. Worse yet, the debt collector must then attempt communications with the consumer using communication channels disavowed by the consumer (via the E-Sign Act communication preference) such as by telephone and U.S. Postal Service mail.

3. Requirements for certain disclosures provided electronically, undeliverability - §1006.42(b)(3)

p. 311 - *The Bureau requests comment on proposed § 1006.42(b)(3), including on how a debt collector who attempts to deliver a required disclosure electronically may become aware that the disclosure has not been delivered. The Bureau also requests comment on whether debt collectors should be required to take any steps in addition to those described in proposed § 1006.42(b)(3).*

Deliverability Must Only Be Premised on Confirmation that the Disclosure Was Sent and Not Whether It Was Read.

There is currently technology that would notify a debt collector if an electronic disclosure was not successfully transmitted, however, such notification should be treated like a mail return notification. Notification of un-deliverability does not change the fact that the notice was sent for purposes of the FDCPA. Instead, un-deliverability is notice to the debt collector that a new address/number is needed. Upon receipt of a new address/number, the disclosure should be re-sent, but the notice of un-deliverability does not change or alter the fact that the debt collector sent the notice to the address in its files and has complied with the FDCPA. A debt collector is not responsible to make sure that a consumer opens and reads mail sent to its home address, therefore, a debt collector should not be required to take any additional action with regard to electronic information. It should only be the debt collector's requirement to provide the information to the consumer; it is up to the consumer to determine what he or she does with that information.

4. Requirements for certain disclosures provided electronically, accessibility - §1006.42(b)(3)

p. 314 - *The Bureau requests comment on proposed § 1006.42(b)(4) and on proposed comment 42(b)(4)–1. In particular, the Bureau requests comment on the cost to debt collectors of developing and using a validation notice that is responsive to screen size and accessible via screen readers, including the one-time costs of designing such a disclosure and the ongoing costs of populating such a disclosure with information about individual debts. The Bureau also requests comment on how those costs might change if the Bureau provides debt collectors with source code for a version of the validation notice that would comply with proposed § 1006.42(b)(4). In addition, the Bureau requests comment on whether the original-creditor disclosure described in proposed §1006.38(c) and the validation-information disclosure described in proposed §1006.38(d)(2) should be subject to proposed §1006.42(b)(4).*

The Bureau Must Recognize that E-Sign and Safe Harbors Can Ensure that Debt Collectors Will Be in Compliance with Accessibility Requirements.

The proposal requires debt collectors to provide the validation notice in a "responsive format" that is reasonably expected to be accessible on a screen of "any commercially available size." This requirement poses unique challenges on debt collectors to (1) have knowledge of all commercially available screen sizes; and (2) immediately adapt to new display technologies in ways not yet conceived by the marketplace. No portion of the proposal defines the term "screen." Instead, the Bureau discusses in general terms the prevalence of smart phones and tablets throughout the marketplace. Yet, the proposal leaves unanswered many questions, such as whether the face of an electronic wristwatch constitutes a "screen" under the proposal such that a debt collector must provide validation disclosures readable by a consumer's smart watch. When consumers communicate via the dashboard of their automobile, are debt collectors expected to code their validation notices in a manner by which they can be accessible by every automobile sold in the United States? The proposal's broad sweep creates a risk which debt collectors cannot reasonably avoid because of the rapidly changing technological environment in which consumers are adopting new "screen" technology. The need for this requirement is also avoided by the remaining obligations of the proposal, specifically, E-Sign.

The proposal requires debt collectors to comply with E-Sign when providing the validation notice. The primary purposes of E-Sign in the context of debt collection are to ensure (1) the consumer has consented to electronic communications; and (2) the consumer is capable of receiving what the debt collector is sending. When debt collectors complete the requirements of E-Sign, both consumers and collectors can be assured that the consumer understands the technology required to view electronic communications received by a debt collector and that the consumer has taken the further important step of demonstrating their ability to receive the intended electronic communications. Adding an additional requirement that a debt collector guarantee that its communications can be accessible on a screen of "any" available size serves

no additional purpose toward the goal of ensuring consumers can receive what the debt collector is sending. Instead, E-Sign contains the built-in mechanism of ensuring consumer receive what is sent. The additional requirements of “screen size readability” imposes an unnecessary duplication of obligations already addresses by compliance with E-Sign.

Notwithstanding the above, NCBA agrees with the Bureau that providing the source code for a version of the validation notice that would comply with the proposed rule requiring disclosures to be accessible in “any” screen size would benefit consumers and debt collectors alike. NCBA encourages the Bureau to publish such source code and further to include in the final rule a safe harbor from liability for debt collectors who use the Bureau’s source code. The Bureau’s final rule should protect debt collectors from liability for violations of this obligation when the collector uses the Bureau’s source code designed to comply with the screen size requirements.

NCBA Supports Accessibility Requirements for Requests for Original Creditor Information but Not for Providing Verification of the Debt or Copy of the Judgment.

With respect to the application of screen size requirements on the disclosure identified in proposed Section §1006.38(c), NCBA submits that there is no good reason to exclude Section §1006.38(c) from the requirements of Section §1006.42(b)(4) or to otherwise distinguish the disclosures required by Section §1006.34(a)(1)(i)(B) from the disclosures required by Section § 1006.38(c). Application of Section §1006.42(b)(4) is not the same, however, when addressing the requirements contained in Section §1006.38(d)(2)(i). Compliance with Section § 1006.38(d)(2)(i) does not require the debt collector to provide consumers with written disclosures, but instead involves providing consumers with documents substantiating the debt. While written disclosures can be provided to consumers in a “responsive format,” providing documents to consumers such as an underlying credit agreement or copies of monthly billing statements does not lend itself to responsive formatting when the content of those documents is fixed, static or even an image. Section 1006.38(d)(2)(i) does not impose a disclosure requirement and therefore, application of Sections § 1006.42(b)(4) to § 1006.38(d)(2)(i) would be misplaced.

5. Alternative procedures for providing certain disclosures electronically - §1006.42(c)

p.319 **-** *The Bureau requests comment on proposed §1006.42(c), including on whether the requirements relating to consent in section 101(c) of the E-SIGN Act—including as the Bureau proposes to interpret them—impose a substantial burden on electronic commerce in the debt collection context, and on whether proposed § 1006.42(c) is necessary and sufficient to eliminate those burdens.*

The Bureau’s Interpretation of E-Sign Is Burdensome and Confusing and Will Result in Extensive Risk to Debt Collectors and Provide Little Value to Consumers.

NCBA does not believe that E-Sign has a place in the debt collection process. While NCBA fully supports a consumer's right to consent to be contacted through electronic communications, be it email or text, incorporating the onerous requirements of E-Sign into communications where consumers may not otherwise expect them will create more barriers and impediments to communication.

Clearly the Bureau recognizes the burdens E-Sign can create for consumers and debt collectors alike by proposing the alternative procedures in Section§1006.34(c). However, the alternative procedures lack clarity as to whether the Bureau is using its authority to provide an exemption under the E-Sign Act pursuant to § 101(d).[75] Furthermore, given the recent decision in *Lavallee v. Med-1 Solutions,*[76] hyperlinks may not be an appropriate method to send notices to consumers.

First the text of Section §1006.34(c)(1) states the following:

> (c) *Alternative procedures for providing certain disclosures electronically*. A debt collector who provides the validation notice described in §1006.34(a)(1)(i)(B), or the disclosures described in §1006.38(c) or (d)(2), electronically need not comply with paragraph (b)(1) of this section if the debt collector:
>
> (1) Provides the disclosure by sending an electronic communication to an email address or, in the case of a text message, a telephone number that the creditor or a prior debt collector ***could have used*** to provide electronic disclosures related to that debt in accordance with section 101(c) of the E-SIGN Act; [Emphasis added].

If Section §1006.34(c) is supposed to provide a true exemption as noted in § 101(d), it fails to achieve that objective and in many ways conflicts with the Section-by-Section analysis. The proposal as drafted would require the debt collector to determine what steps the creditor did or did not undertake in order to obtain E-Sign, but ultimately decided not to use the email address for E-Sign. This is simply not how debt collectors and their clients interact with one another and this is not the type of information creditors maintain. Therefore, if NCBA's interpretation is correct, it seems unlikely that this proposal provides any alternative at all.

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[75] **(d) Authority to exempt from consent provision**

(1) In general

A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c) of this title if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

[76] 932 F.3d 1049 (7th Cir. 2019)

The Bureau correctly recognizes in the Section-by-Section Analysis that it will be extremely difficult for debt collectors to obtain E-Sign prior to using an email to send a validation notice. "The process for obtaining consumer consent under the E-SIGN Act may impose a substantial burden on electronic commerce in the unique context of debt collection." [77] "For these reasons, the Bureau proposes Section §1006.42(c), which describes procedures a debt collector may use to provide the required disclosures electronically without the need to comply with section 101(c) of the E-SIGN Act." [78] The Bureau's analysis can only be true if the Bureau is exercising its full authority pursuant to § 101(d) of the E-Sign Act to provide debt collectors with a full exemption from the consent requirements. However the proposed rule does not suggest that is the case.

Compounding this confusion is the Bureau's analysis in Section §1006.42(b) which states that consent to E-Sign cannot be transferred.[79] Therefore, NCBA cannot see how Section § 1006.42(c) provides any alternative for debt collectors other than to obtain E-Sign consent directly from the consumer. Given the difficulties debt collectors have in contacting consumers in the first place, it seems unlikely that debt collectors as well as collection attorneys will utilize this process with consumers.

Assuming that E-Sign consent is obtained from the consumer, the recent case of *Lavallee* and its interpretation of email communications and hyperlinks may require to the Bureau to revisit this proposal. In *Lavallee*, the Seventh Circuit Court of Appeals held that the emails sent by a debt collector to the plaintiff containing hyperlinks which allowed the plaintiff to download the validation notices did not satisfy the validation notice requirements of the FDCPA. Most notable about the decision was the fact that the Seventh Circuit held that the emails to the Plaintiff were not communications because they said nothing about the debt, and the emails themselves did not provide the disclosures as required under Section §1692g of the FDCPA.

Lavallee must be instructive to the Bureau if it truly intends to proceed forward with the delivery of electronic communications to consumers. First, the Bureau must make an interpretation that hyperlinks associated with the delivery of required disclosures are communications in order to protect debt collectors from liability for their use. The issue of consent was not raised in *Lavallee*, rather the issue of notice and in this case actual notice rather than "the reasonable expectation of actual notice" as defined in Section §1006.42(a)(1). As noted above in NCBA's comment, if the Bureau is going to permit the use of electronic communication, then a level playing field must exist. *Lavallee* suggests that the use of electronic communication requires a heightened notice requirement. The Bureau must correct this discrepancy. If the consumer consents to the use of email, that consent must also include the use of hyperlinks for the delivery of disclosures as well.

[77] NPR, at p.315.
[78] NPR, at p.317.
[79] NPR, at p.305 (For E-Sign, a debt collector must obtain affirmative consent from the consumer; a debt collector may not rely on E-Sign consent from the creditor).

Finally, the Bureau must use its exemption authority found in §101(d) of the E-Sign act to exempt debt collectors from obtaining consent through E-Sign. The NPR articulates a better approach to obtaining consent to email from consumers found in Section §1006.6(d). That approach should apply to disclosures as well.

6. Safe Harbors, validation notice contained in the initial communication - §1006.34(e)(2)

p.337 **–** *The Bureau requests comment on proposed §1006.42(e)(2)*

The Bureau Has Not Created a Safe Harbor and E-Sign Is Not Applicable to Validations Notices That Are Contained in the Initial Communication.

NCBA does not believe that E-Sign is applicable to validation notices that are contained in the initial communications. Thus, the Bureau has no authority to mandate that E-Sign be used in this circumstance.

Section 101(c)(1)[80] of the E-Sign Act states the following:

> Notwithstanding subsection (a), if a **statute, regulation, or other rule of law** requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce **be provided or made available to a consumer in writing**, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if [certain conditions are met]. [Emphasis added].

Section 1692g(a) of the FDCPA states:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, **unless the following information is contained in the initial communication** or the consumer has paid the debt, send the consumer a written notice containing… [Emphasis added].

Pursuant to the FDCPA, the requirement of a written validation notice is triggered **only** if it is not given in the initial communication to the consumer. Since Section §1692g does not impose a writing requirement, the Bureau cannot interpret E-Sign to do so. Section 101(b)(1) of E-Sign Act specifically states that it cannot "limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under

[80] 15 U.S.C. § 7001(c)(1)

such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in non-electronic form."

The proposal set forth in Section §1006.42(e)(2) is flawed and provides no safe harbor even when sending a validation notice in the initial communication. First, Section §1006.42(e)(2) still requires compliance with Section §1006.42(b) which requires a debt collector to get E-Sign consent. Second, even if the debt collector chooses to follow the alternative procedures provided in Section §1006.42(c), there would be some requirement to get either E-Sign consent or determine the use of an email that the creditor could have used to obtain E-Sign consent. In either scenario, a debt collector would be required to do some sort of E-Sign analysis even though the validation notice sent as part of the initial communication is not subject to E-Sign. NCBA cannot see how any safe harbor is provided as long as there is a mandate to comply with the requirements of E-Sign.

A true safe harbor would be to eliminate the requirement that a validation notice sent in the initial communication does not have to comply with E-Sign as long as the debt collector complied with the consent provisions found in Section §1006.6(d)(3) including compliance with Section §1006.6(e).

§ 1006.100 Record Retention.

p. 339 - *The Bureau requests comment on whether the two alternative proposed end dates of the retention period provide sufficient clarity on calculating the retention period.*

NCBA Supports Reasonable Record Retention Procedures but Clarification Is Needed to Determine Proper End Date for Retention.

Under this proposed subpart D, debt collectors must retain evidence of compliance with Regulation F and the FDCPA for a length of time starting from the date the collector begins collection activity and ending until three years after either 1) the collector's last communication or attempted communication in connection with the collection of the debt; or 2) from the debt is settled, discharged, or transferred to the debt owner (creditor) or to another debt collector.

The NCBA fully supports the Bureau's stated goals for the proposed record retention requirement under Section §1006.100, including maintaining proof of compliance with Regulation F, and providing clarity on the length and type of records to be maintained. The NCBA agrees with the Bureau that any record retention rule should provide easily determinable beginning and end dates and the costs (and risks) of such record keeping should not outweigh the benefits. Also, requirements as to the form and method of the recordkeeping should be well defined so that member businesses may align existing policies and, as applicable, invest in new record keeping alternatives that meets all requirements herein.

NCBA supports defining the beginning date and the Bureau's proposed three-year retention period as the maximum length of time that should be required to comply with the proposed rule. The three-year period strikes the right balance in light of the present risk associated with cyber liability, data breaches and associated data exfiltration resulting from the rare, but increasing, data breaches. Furthermore, NCBA attorney members are governed by state and local ethics requirements for the practice of law and three years seems to be the minimum amount nationwide that attorneys must retain their client's records.

The NCBA agrees that the date of beginning collection activity sufficiently sets forth the expectation on debt collector members. The ending date "trigger" options provided by the Bureau (***three years from last communication or attempted communication***; ***the debt is settled, discharged, or transferred to the debt owner or to another debt collector***) do provide adequate alternatives to address the majority of account closure reasons. However, the terms noted in the proposed rule are not terms normally used by the industry. It is suggested that the Bureau use the word "closed" as a substitute to "transferred to debt owned" to denote when a debt collector closes her file and sends back to the creditor/owner.

The Bureau's proposed calculation of the end date raises some concerns. First, the alternatives set forth in Sections §1006.100(a)(1) and (2) are presented in the disjunctive (or). NCBA suggests including a statement that the debt collector can choose the option which occurs first. For example, if the last communication or attempted communication was in year one, yet the account was not closed until year six, it would make sense if the debt collector could destroy the records after year four, rather than wait until year nine. The lesser of the two alternatives effectively resolves the unintended consequences arising from requiring a debt collector attorney being required to retain such records (and non-public personal information of consumers) 10, 15, or 20 years or more where the debt collection attorney has not communicated to a consumer or third party for extended periods of time.

The Bureau must keep in mind that the cost and risk of maintaining consumer debt collection records is significant. Data, email, and phone recording servers range from $2500 to $15,000 each, depending on the relative storage space and processing speeds of the server, operating software and licensing, encryption, and warranty costs. The more records that are kept, particularly phone recordings and scanned images such as emails, letters, and court pleadings, the more costs will increase upon debt collectors, most of whom are small businesses. At present, most debt collectors have incorporated these expenses into daily operations. The Bureau must consider that any additional requirements to retain records for more than three years could impose a significant expense upon NCBA members.

§ 1006.108 Exemption for State Regulation - Appendix A

p. 346 *The Bureau requests comments generally on proposed § 1006.108 and Appendix A, and whether any additional clarification is needed.*

NCBA Supports Appendix A but Recommends That the CPFB Adopt a Strict Timeline for Application and Acceptance.

The Bureau notes that proposed Appendix A is a restating of the current Sections § 1006.1 through §1006.8 with "certain organizational changes, minor changes for clarity and to more closely track the statute." One of those changes relates to how the Bureau intends to act on requests for exemption. It notes that the NPR "proposes to amend the current notice system for acting on State requests for exemption to a proposed and final rule system."[81]

With regard to the Bureau's new proposal, the Appendix does not provide a timeframe with which the Bureau will make a determination on a State request for exemption and publish its determination in the Federal Register. We believe that a timeframe with which the Bureau will make a determination will aid states and provide certainty to consumers and debt collectors and will reduce the likelihood that states' requests become stale and based on inaccurate information. More specifically, if those requests are pending for long periods of time, the basis and supporting information for the request may change. One piece of supporting information that states are required to submit relates to how their offices "provide for adequate enforcement of the applicant State law, . . . [including] personnel, [] funding, . . . [and] fiscal arrangements for administrative enforcement." If a request for exemption is pending for a long period of time, that information may change; especially if a state election or change in officers occurs in the intervening time period. It is unclear from the proposed Appendix what steps a state must take to withdraw and re-submit any such application. However, the likelihood that this problem will arise would be combated if the proposed Appendix included the above timeframes. Furthermore, the proposal does not appear to take into consideration those states which may already have an exemption in place. The proposal is silent about whether such exemptions are grandfathered in or whether states will be required to re-apply for such an exemption.

NCBA believes that a timeframe or deadline is necessary to reduce the likelihood that a debt collector may unknowingly act in a way that violates a governing rule and that causes consumer harm. Specifically, if a State has a pending application for an exemption, a debt collector within that State should be made aware of the Bureau's timeframe in ruling on such an application. By providing a timeframe, it reduces the uncertainty in the State about whether a State is or is not exemption from the proposed Rules and the FDCPA.

Many of the entities who will be interacting with this rule, including NCBA members, collect debts in multiple jurisdictions. Those entities will want to seek to provide the best service for the creditors, which are their clients, consistent with protecting consumers from conduct that violates the rule. If a state has applied for an exemption, but the entity is unable to locate any response by the Bureau to that application, the entity may be uncertain whether the state is exempt and what rules govern its conduct in connection with consumers. In that regard, the entity may be left to try to predict what rules govern its conduct and may take a course of

[81] NPR, p. 483

action that, while well-intentioned, violates the governing rules. However, if the application process is revised to include a timeframe or deadline by which the Bureau will respond to a state's request for exemption, that increases the likelihood that the entities will correctly determine which rule governs their conduct and will take action that is consistent with that rule. This will ultimately benefit consumers.

Additionally, there is nothing in the proposal regarding conflicts between state law and the FDCPA or the proposed rules. For instance, if the proposed model disclosure is adopted, there is currently no space on the model disclosure for additional required state disclosures. Some states require its specific disclosure be on the front of any letter, but the proposed rules make no comment of how a debt collector can or should overcome such a conflict. Thus, the debt collector risks either violating the FDCPA or violating its state law; in either scenario, the debt collector has practically doomed itself to some form of litigation if not regulatory action.

The same tension exists with respect to the proposed call caps. While the Bureau proposed to limit calls to 7 times per week per account, some states (notably the Commonwealth of Massachusetts) have a more severe restriction. Using Massachusetts as an example, under the proposed Rule, would Massachusetts need to apply for an exemption in order to enforce its stricter call cap? If so, are debt collectors in Massachusetts allowed to use the broader call cap number proposed by the Bureau until such an exemption is granted?

NCBA believes that the Bureau has crafted a valuable part to the rule by proposing Appendix A. Providing state's with procedures for seeking exemption from the rule provides certainty to the states and debt collectors and fosters protection of consumers in those states.

B-3 Model Form Validation Notice - Appendix B

No Specific Request for Comments

NCBA Supports the Bureau's Model Form but Further Clarity Is Needed.

The NCBA fully supports the Bureau's proposed adoption of a standardized validation notice. Ensuring notification of a consumer's rights under the FDCPA is a common goal for the collection industry, consumer advocates, and the CFPB. The Model Form, incorporating the suggested changes below, will accomplish this shared goal.

The NCBA does have concerns regarding the proposed validation notice. First, the Model Form does not currently include a date. Typically, a validation letter includes a letter date so that both the debt collector and consumer know or can reasonably calculate the validation period as provided for in Section §1692g(a).

Second, the Model Form currently lists the entire account number. Many creditor grantors no longer include full account numbers in their correspondence with consumers as doing so creates a privacy concern, or an elevated risk of fraud or identity theft. NCBA Firms have

similar concerns, not only driven by their clients (in many cases the creditor grantor) but also by local rules of civil procedure which prohibit using a full account number in litigation. Thus, NCBA Firms, as a matter of course, truncate such account numbers. NCBA recommends the CFPB take the same approach and truncate the account number in the Model Form down to the last 4 digits.

Finally, the Model Form informs the reader to see the reverse side for other important information and the text of the NPR indicates that the reverse side should be used to inform the reader of state-specific and other information. *See* § 1006.34(d)(3), page 474 of the NPR, ("*Optional disclosures*. A debt collector may, at its option, include any of the following information if providing the validation information required by paragraph (a)(1) of this section."). The CFPB must be cognizant that some state-specific language requires disclosure on the front side of any validation notice. To remedy this conflict, the referenced language could be changed from "Review state law disclosures . . ." to read "See additional disclosures . . ." which then allows front-side disclosures (as needed/required) plus additional disclosures on the back as well.

NCBA has provided comments to the proposal with regard to the consumer response in the validation notice. *See*, Section §1006.34(c)(3). If the Bureau decides to keep the check-boxes, then the NCBA recommends the addition of the following parenthetical: "Please describe on reverse or separate sheet of paper and attach additional information related to your dispute." [Currently it's designed in such a way that it's too easy to simply check a box without describing the basis for the dispute and providing documents/information to support the dispute.]

A website and/or e-mail that is specifically set for "Call or write us" or dispute "electronically" [82] should be listed. The general website for the debt collection agency or law firms are generally not where consumers should be directed as most websites are designed for marketing and clients and may be confusing for consumers. To avoid any misunderstanding, specific websites or e-mails should be utilized for consumer disputes and interaction.

Prior to the publication of the NPR, the Bureau's position was that any letter from a debt collection law firm carried with it an implied threat of suit. NCBA requests that the CFPB clarify that use of the Model Form by a debt collection law firm will act as a safe harbor to such claims, including those advocated by consumer attorneys. Use of the Model Form should be a safe harbor not only for violation of Section §1692g but for Section §1692e as well.

Issuance of Advisory Opinion - Appendix C

p. 493 - The Bureau requests comments on whether additional clarification regarding the effect of conformity with Bureau advisory opinions would be helpful.

[82] See comment on p. 50.

NCBA Supports Appendix C but Recommends That the CPFB Adopt a Strict Timeline for Application and Acceptance.

NCBA supports the proposed rule containing a provision related to advisory opinions and that provision providing protection for any act done or omitted in good faith and conformity with any advisory opinion issued by the Bureau. NCBA believes that a timeframe or deadline on the issuance of advisory opinions should be incorporated into the rule.

Appendix C to the NPRM provides guidance for entities requesting an advisory opinion from the Bureau. Appendix C ¶ 2. It prescribes that "[d]esignated officials will review and respond to requests for advisory opinions." *Id*. However, Appendix C does not provide any timeframe or deadline for the Bureau officials to respond to the request for advisory opinions. A situation may arise where an entity submits a request for an advisory opinion and, while it is awaiting a response, is forced to take action. In that event, the entity is left in the position of trying to predict how the Bureau might respond or how a jury might decide the issue of whether or not liability should be imposed years later. The better approach is to provide entities guidance when an issue is unclear or ambiguous under the rule and provide that guidance in a timely fashion. Such an approach lessens the likelihood that an entity may go forward in a way that the Bureau sees as harming consumers. It is easier for an entity to delay taking any action if it knows the Bureau will provide a response within a certain timeframe.