



February 28, 2014

By electronic delivery to:

www.regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

Re: Advance Notice of Proposed Rulemaking on Debt Collection Practices; Docket No. CFPB-2013-0033, RIN 3170-AA41

Dear Ms. Jackson:

The American Bankers Association,¹ the Consumer Bankers Association,² and the Financial Services Roundtable³ (collectively, the Associations) appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (Bureau) advance notice of proposed rulemaking on debt collection practices (ANPR).⁴

I. Summary of Comment

We support the Bureau's decision to issue an ANPR as it initiates this rulemaking. The number and range of the questions asked underscore the breath of issues, industries, and individuals potentially affected. Today, outstanding consumer debt stands at \$11.8 trillion, including mortgage debt,⁵ and the collection of this debt plays an important role

¹ American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$185 million in assets.

² Consumer Bankers Association is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

³ Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs. For more information, visit FSRoundtable.org.

⁴ 78 Fed. Reg. 67848 (Nov. 12, 2013); we understand that the rulemaking will be limited by the jurisdiction of the CFPB to consumer protection issues arising from the collection of a "consumer financial product or service...offered or provided for the use of consumers primarily for personal, family, or household purposes." See 12 U.S.C §5481(4)(a)

⁵ Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, 3Q13, available at <http://www.newyorkfed.org/householdcredit/2013-Q3/index.html>.

in the functioning of the consumer credit market. The collection of delinquent debt reduces creditors' losses from non-repayment and helps promote the availability and affordability of consumer credit, holding down the cost of credit to borrowers who honor their commitments. Promoting responsible borrowing ensures future access to credit, which is vital to millions of consumers because it makes it possible for them to manage their future income so that they can purchase goods and services that might otherwise be out of reach if they had to pay the entire cost at the time of purchase. In addition, retailers, utilities, and service providers, large and small, all depend on recovering balances due for goods and services provided. Thus, the Bureau's policy choices will be felt across the U.S. economy.

Considering the importance of these issues, the Associations appreciate the fact that the Bureau seeks to build on the record developed by the Federal Trade Commission (FTC) and to understand current debt collection practices, consumer experiences with those practices, and challenges and opportunities presented by technological and operational advances. A fundamental finding of the FTC's 2013 study of the debt buying industry is that consumers dispute only 3.2% of the debts that debt buyers attempt to collect.⁶ Thus, in more than 95% of collections, consumers recognize the debt as their own and do not challenge the amount being collected. This fact provides significant context for addressing the questions posed in the ANPR. It suggests that for the overwhelming majority of debt collections the emphasis should be on facilitating how, as the Bureau notes, "collection efforts indirectly support responsible borrowing by underscoring the obligation of consumers to repay their debts *and by incenting consumers to do so.*"⁷ In other words, for the millions of customers who from time to time rely upon debt for a variety of purposes, debt collection reform should be about encouraging and enabling borrowers to overcome the obstacles that interfere with their ability to meet their admitted obligations.

For the remaining three percent of cases that represent disputed debts, the reform effort should (i) assure fair and dignified treatment of debtors who assert their disputes in good faith and (ii) facilitate both informal resolution methods and expedited invocation of third party adjudication options that can vindicate the parties' respective due process rights.

The Associations and our members fully support the Bureau's goals of updating the Fair Debt Collection Practices Act (FDCPA),⁸ modernizing its communication provisions, and generally enhancing genuine consumer protections in debt collection. In that context, we hope that as the Bureau moves forward with its work it will be guided by the following considerations:

⁶ See Federal Trade Commission Report: *The Structure and Practices of the Debt Buying Industry* (January 2013), p.36, available at <http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (FTC Debt Buyer Study).

⁷ 78 Fed. Reg., *supra* at 67849 (emphasis added).

⁸ 15 U.S.C. §§1692-1692p.

- The distinction between first and third party collections recognized by the FDCPA and the Bureau should be maintained.** As the Bureau notes, the FDCPA is limited to third-party debt collectors and does not provide a valid legal basis for regulating original creditor (first-party creditor) enforcement of its loan agreements with borrowers.⁹ The FDCPA was enacted to establish ethical guidelines for the collection of consumer debt by third-party debt collectors and was neither intended nor designed to cover the collection practices of first-party creditors. The Associations strongly oppose placing FDCPA-like restrictions and requirements on first-party creditors, as they are both unwarranted and incongruent with the lender-borrower relationship. The distinction between first-party creditors and third-party collectors is a reasonable one that is supported by substantial policy considerations. Unlike the relationship between third-party collectors and debtors, the lender-borrower relationship is usually a longstanding one, covering the entire lifecycle of a loan. The creditor also has strong business incentives to foster the relationship as in many instances it has a multi-faceted relationship with the consumer. As a result of these important principles, the FDCPA’s exclusion of an original creditor collecting in its own name was a carefully considered Congressional decision, and nothing in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) suggests that Congress intended to reverse that judgment.
- There is neither a legal nor factual basis to translate FDCPA prohibitions into unfair, deceptive or abusive acts and practices rules for the regulation of first-party creditor collection.** We appreciate the fact that the Bureau has not prejudged the regulatory path it should take, and specifically seeks input on the “basic premise that it should generally seek to harmonize any rules it develops for third-party collectors and first-party collectors, *except to the extent that the law, facts, or policy considerations warrant different treatment.*”¹⁰ Our comments seek to identify such considerations as well as to suggest, where possible, alternative paths forward. Accordingly, we oppose the wholesale extension of the FDCPA to first-party creditors using the Bureau’s rulemaking authority under Dodd-Frank Act §1031 to prohibit unfair, deceptive, or abusive acts and practices (UDAAP).¹¹
- Customer engagement is critical and should be encouraged.** Customers facing financial hardship are best served if they are in contact with their creditor. Doing so helps customers avoid late fees, minimize negative impacts to their credit report, avoid account closures, and take advantage of loss mitigation and other workout programs. Thus, it is essential that any new rules promote, not inhibit,

⁹ 78 Fed. Reg. *supra* at 67852.

¹⁰ *Id.* at 67853 (emphasis added).

¹¹ 12 U.S.C. § 5531(c)(1).

customer engagement with the first-party creditor. In addition, the Associations urge the Bureau to initiate educational and public service campaigns designed to encourage *consumers* to take responsibility for reaching out to their creditor when they have experienced a financial reversal.

- **The collection of delinquent debt is vital to the availability and affordability of consumer credit.** The number and breadth of the questions presented by the ANPR suggests that the Bureau intends to address simultaneously a wide range of perceived consumer protection concerns arising in debt collection. Even with a long implementation period, a wholesale change to debt collection would impact significantly the cost of collections. This, in turn, would affect the ability of first-party creditors to work with delinquent customers and the cost and availability of credit for *all* consumers, particularly the vast majority who honor their commitments in a timely manner. The Associations urge the Bureau to prioritize and sequence its policy initiatives, beginning with those issues that present the greatest risk to consumers. Consumers will be best served by proposed regulations that are designed to serve a clear and pressing need, are structured to use the least burdensome means to address that need, and are tested to ensure their efficacy. Given that complaint data show that consumer concerns are several times more likely to be expressed about third-party debt collectors than first-party creditors, priority should be assigned to reforming that segment of the industry first.

II. Validation Notices, Disputes, and Verifications

Due to the primacy of the issues concerning FDCPA requirements for validation notices, disputes, and verifications, our comments will address the questions presented in section III of the ANPR first.

1. Requiring first-party creditors to send a validation notice is unnecessary, incongruent with the creditor-borrower relationship, and harmful to consumers.

As noted previously, the ANPR seeks input on the “basic premise that it should generally seek to harmonize any rules it develops for third-party collectors and first-party collectors, except to the extent that the law, facts, or policy considerations warrant different treatment.”¹² The Associations believe that all three of these considerations – the law, facts, and policy – oppose adoption of rules that would require a first-party creditor to validate and verify debt.

The statutory framework of the FDCPA recognizes that third-party debt collectors are *third parties*, new entities, unknown to the consumer, who assert a right to collect a

¹² *Id.* at 67853.

debt owed to the creditor. Unlike the creditor-borrower relationship that has been ongoing for some time, the introduction of a third-party into the creditor-borrower relationship has the potential to generate questions from consumers. They may have questions about the legitimacy of the third-party debt collector or its legal authority to collect the debt. In addition, many consumers perceive the placement of an account with a third-party debt collector as an escalation of collection efforts.

Accordingly, section 809 of the FDCPA requires that a third-party debt collector, within five days of the initial communication with a consumer in connection with the collection of any debt, provide a “validation notice” that includes information about the debt collector, identifies the debt being collected, and describes the process by which a consumer can seek additional information. The validation notice must include the following information:

- The amount of the debt;
- The name of the creditor to whom the debt is owed;
- A statement that unless the consumer disputes the validity of the debt or any portion of it within 30 days after receipt of the notice, the debt will be considered to be valid by the debt collector;
- A statement that if the consumer notifies the debt collector in writing within 30 days of the notice, the collector will provide the name and address of the original creditor, if different from the current creditor.

Finally, although not a part of the validation notice’s required disclosures, FDCPA §809(b) states that if the consumer notifies the debt collector in writing within 30-days of receipt of the notice that (1) the debt, or any part of it, is disputed, or (2) that the consumer requests the name and address of the original creditor, the debt collector shall cease collection until the debt collector obtains verification of the debt, a copy of the judgment, or the name of the original creditor and mails that information to the consumer.¹³

The application of similar requirements to first-party creditors is unnecessary and likely to confuse consumers. After all, the consumer opened the account with the creditor (or the creditor’s predecessor), has used the account for some period of time, often years, and has been receiving communications from the creditor including regular statements reflecting transactions, payments, account balances, and the accrual of interest and fees. Thus, there is no need for the first-party creditor to introduce itself to the consumer when the first-party creditor initiates collection activities.

¹³ 15 U.S.C. §1692f.

i. Imposing the FDCPA's debt validation requirements on first-party creditors will harm consumers.

Indeed, many consumers would find receipt of a debt validation notice from the first-party creditor alarming and, in some instances, offensive. While it is more common for third-party debt collectors to collect debt that is seriously delinquent, and in most cases has been charged off, first-party creditors reach out to consumers at early stages of delinquency. Many consumers flow in and out of delinquency but never advance to late stage delinquency because they pay their bills after receiving payment reminders. These consumers benefit from early payment reminders that help them protect their credit histories and avoid the increasingly negative consequences of slipping further into delinquency. If the FDCPA's debt validation requirements are imposed on first-party creditors, a debt validation notice will have to precede a payment reminder to a consumer whose payment may be only a couple of weeks delinquent. Its messaging about "debt collection" may create an unnecessarily threatening environment, making it difficult for first-party creditors to open lines of communication with customers at the critical early stages of delinquency.

Application of the debt validation rules to first-party creditors would further inhibit beneficial communications between the creditor and consumer. Under FDCPA §809(b) if a consumer notifies the collector in writing that the debt is disputed or requests the name of the original creditor within 30-days of receipt of the validation notice, the debt collector is required to cease all collection efforts. In addition, any collection activity and communication during the 30-day period may not "overshadow or be inconsistent with the consumer's right to dispute the debt or request the name and address of the original creditor." As discussed above, beginning with the first missed payment, first-party creditors reach out to the customer with payment reminders and if appropriate describe options the creditor offers to help delinquent consumers get back on track, including fee waivers, forbearance, settlement plans, and re-aging programs. Section 809(b), however, would prohibit first-party creditors from initiating these communications during the 30-day period, because any contact could be characterized as an attempt to collect the debt or a communication that overshadows or is inconsistent with a consumer's right to dispute the debt. With the first-party creditor unable to reach out, communication is unlikely to occur, and most consumers will slide further into delinquency with all of its attendant negative consequences.¹⁴

In addition, application of section 809's dispute process would not add any meaningful consumer protections to the creditor-borrower relationship. The Truth-in-Lending Act and Regulation Z ensure that consumers are provided with complete and accurate account information throughout the account relationship; establish billing error dispute

¹⁴ Our members report that even now at early stages of delinquency too few consumers initiate communication with the creditor to discuss their situation and explore alternatives for resolving the delinquency. The financial services industry, however, wants to encourage opening lines of communication immediately in hopes of helping the consumer resolve the delinquency and remain a customer.

resolution rights (including for allegations of fraud); and provide rights to a consumer who has a claim or defense against a merchant or service provider. The Electronic Fund Transfer Act and Regulation E establish consumer protections in connection with payments made by electronic fund transfers, including mechanisms for reporting errors, unauthorized activity, and fraud. Finally, the Fair Credit Reporting Act and Regulation V require accurate credit reporting and provide consumers with the right to dispute incomplete or inaccurate information. Thus, existing consumer protection laws provide ample opportunities for consumers to dispute the debt – either its amount or their responsibility for it – throughout the creditor-borrower relationship.

Moreover, receipt of a validation notice from a first-party creditor may suggest to a consumer that its dispute process should apply, resulting in the consumer failing to take advantage of other, and potentially superior, resolution rights. In light of the ongoing relationship between first-party creditors and consumers and the consumer protections they are afforded under existing consumer protection laws and regulations, requiring first-party creditors to comply with the FDCPA's debt validation requirements will not provide any meaningful additional protections to consumers but will have harmful effects on borrowers and on their relationship with their creditors.

ii. Requiring first-party creditors to comply with the FDCPA's debt validation requirements will create a significant burden.

Compliance with the FDCPA's debt validation requirements by first-party creditors would impose significant costs and burdens that would weigh on the cost and availability of credit. For our larger members, implementation would require establishment of an automated system to generate and send the validation notices, integration of that system with existing systems of record for all consumer loan products, and establishment of new workflow processes to track and respond to verification requests. Ongoing compliance would necessitate the hiring and training of additional employees to manage and oversee those systems and fulfillment of verification requests and disputes. Smaller financial institutions may not automate the process, but compliance would require modifications to servicing systems to generate validation notices, and of course they would have to establish new procedures to ensure that notices are sent and to track and respond to verification requests and disputes. Finally, small institutions would incur training expenses and may have to hire additional employees to accommodate the new compliance obligation.

We encourage the Bureau to consider consumer and creditor experience with the Commonwealth of Massachusetts' recent enactment of a law requiring first-party creditors to validate debt. Several of our members report that implementing Massachusetts' law took between twelve and eighteen months, and during that period they ceased all communication and collection efforts with delinquent consumers living in the Commonwealth. As a result, many consumers who might have been able to work with their creditor to resolve their early-stage delinquencies lost that opportunity.

One of our larger bank members tracked the cost of implementing the Massachusetts' law and used that information to estimate the burden of complying with a similar requirement in 50 states. The bank estimates it would take 20-24 months to complete the work (to build the automated systems, program the necessary interfaces, hire and train employees, and test). The bank also estimates that one-time information technology expenses just for that bank would cost at least \$1.4 million and annual operating costs would be at least \$16.2 million (\$2.4 million for additional FTEs, \$12 million to produce and send the validation notices, and \$1.8 million for verification request fulfillment).

Ultimately, these costs will be passed on to all consumers in the form of higher product prices, higher interest rates, and/or reduced access to credit. These indirect but predictable impacts, however, pale in comparison to the immediate and direct impacts that will be felt by those who might have been helped out of early-stage delinquency but were denied that opportunity because debt validation rules inhibited communication between the creditor and consumer. Thus, the benefits of mandating a debt validation and verification process for first-party creditors are negligible when balanced against the lack of need, the potential negative consequences for consumers, and the onerous burden of compliance.

2. The financial services industry supports the goal of improving the information conveyed by a validation notice, but urges the Bureau to test the effectiveness of proposed additions.

Citing concerns expressed by the FTC and consumer groups that the information included in current validation notices may be insufficient to permit consumers to recognize the debt, the ANPR requests comment on a variety of possible additions and modifications to the validation notice. The financial services industry fully supports the goal of ensuring that the validation notice clearly and effectively conveys salient information about the debt and the debt collector. We agree that the information included in the notice is an important first step toward ensuring that consumers can recognize the debt or exercise their right to dispute it in the context of third-party collections.

It is important to recognize, however, that any modifications or additions will require the development, operation, and maintenance of new workflow processes by both first-party creditors and the third-party debt collectors, as first-party creditors must transfer the information to the third-party creditor. These changes will, of course, increase costs—in some instances significantly. Where providing the additional information will require major system changes and increased fulfillment costs, we urge the Bureau to test the effectiveness and value to consumers of providing the specific additional information and to balance these against the increased costs. Consumer testing should explore both consumer understanding of the additional information *and* its

effectiveness. We believe that the former may be tested through qualitative studies. The effectiveness of the information, however, should be subject to rigorous quantitative testing to determine whether it reduces the incidence of consumer questions as demonstrated by decreases in the volume of non-frivolous verification requests and disputes.

In addition, the financial services industry offers the following specific comments regarding the additions and modifications under consideration:

- **Current owner of the debt:** We agree that where the current owner of the debt is not the original creditor, the validation notice should include the current owner's name, address, and telephone number so that consumers may contact the owner of the debt directly with any questions.
- **Name of the original creditor:** The financial services industry supports this addition with the caveat that in some cases the name of the original creditor may not be available. Some consumers have had a credit relationship with a creditor for many years, even decades. Over the course of that relationship, mergers, acquisitions, and portfolio sales may have occurred, resulting in changes to the creditor name and account number. As a result, it would be challenging, and in some cases impossible, to determine the name of the lender that originally extended credit. That entity, moreover, may not be the creditor that the consumer currently associates with the debt. Rather, it is the name and the account number of the *last* creditor – the creditor who held the account at the time of charge-off – which the customer should recognize. Thus, we suggest that the term “original creditor” be redefined as the “charge-off creditor.” After all, it was the charge-off creditor with whom consumers last had an account and from whom they would have been receiving regular statements, and in the case of a revolving credit card account, the charge-off creditor's name and account number would have been on the credit card in the consumer's wallet.¹⁵
- **Account number (or a truncated version) used by the original creditor:** The financial services industry supports this addition with the clarification “account number (or a truncated version) used by the charge-off creditor.”
- **Name of the brand associated with the debt:** We believe comparable information is conveyed by requiring the validation notice to include the name and account number of the charge-off creditor. The name of the brand associated with the debt, where different from the original creditor (*e.g.*, the

¹⁵ The Bureau should understand, however, that there really is no “one-size-fits-all” term that can be applied in all cases. The term “charge-off creditor” is appropriate for revolving debt that has been charged off, but would not apply for validation notices sent regarding debt in collection that has not been charged off.

name of a retail partner on a private label or co-branded credit card) is not always available due to mergers, acquisitions, portfolio sales, and other valid and normal business reasons.

- **Date and amount of last payment by the consumer:** The financial services industry generally supports this addition with the clarification, *if available*. Some consumers have never made a payment on the account in collection, so there would not be anything to report. In addition, the Bureau should understand that for some institutions, extracting this information for all accounts may pose a significant burden due to the fact that pre and post charge-off loan servicing systems are often separate systems with limited connectivity.
- **Type of debt (e.g., student loan, auto, etc.):** The financial services industry supports this addition.
- **Names and addresses of joint borrowers:** We question whether this addition is appropriate and would support it only with the qualification, *if the information is available and to the extent allowed by state law*. Providing joint borrower information would be of minimal value to consumers in assisting them to recognize the debt. Moreover, creditors are dependent on *consumers* keeping them informed of address changes that occur after origination. Life events such as separation and divorce or the maturation of minors often result in address changes that are not communicated to the bank. We urge the Bureau to consider carefully the wisdom of imposing a reporting obligation for information that may be inaccurate.
- **Social security number (last four digits):** The financial services industry does not support this addition; even a truncated social security number, when combined with the other information included in a validation notice, increases the risk of identity theft.

The final additions under consideration are that the validation notice include (1) an itemization of the debt, and (2) a copy of the last periodic statement sent to the consumer. Prior to adopting a rule that would require all validation notices to include either requirement, the financial services industry urges the Bureau to test consumer understanding of the information *and* its effectiveness for helping consumers recognize the debt. As described below, both will require the industry to incur significant costs to extract that information, automate the production of the documents, develop and maintain new workflow processes and quality control checks, and deliver the documents.

- **Itemization of the Debt:** Current systems of record and servicing platforms are not programmed to produce such statements; therefore, requiring an itemization of the debt for all validation notices will demand extensive

programming changes to produce the itemization. Moreover, our members anticipate that the calculations will be particularly challenging – both to produce and for consumers to understand – in those instances in which there have been fee waivers or interest rate adjustments. In addition, managing the production of the itemization and verifying the accuracy of the information will require the development and maintenance of a new workflow process, which in turn will necessitate the hiring of additional employees. Finally, the delivery itself – whether by file transfer protocol (FTP) site, secure email, courier, or mail – imposes additional employee, equipment, and technology costs. Thus, implementation and ongoing fulfillment will add significantly to collection costs, which we believe are only warranted if consumer testing demonstrates that consumers understand the itemization and that it improves their ability to recognize the debt.

The term “itemization of the debt” refers to an identification of the total amount due in a way that shows the interest and fees that have been added to the debt since charge-off. The ANPR requests comment on a number of ways that the debt could be itemized. Assuming that testing demonstrates that consumers understand and benefit from receiving an itemization of the debt with a validation notice, the financial services industry believes that alternative #2 would provide the most salient information and would be appropriate for the following categories of consumer debt: revolving, secured installment, unsecured installment. Alternative #2 would require the amount due to be itemized as follows: (1) the amount of the debt at charge-off, (2) the total of interest added after the date of charge-off, (3) the total of all fees or other charges added or credits posted after the date of charge-off, and (4) any payments or credits received after the date of charge-off.

- **Copy of the last periodic statement sent to the consumer:** The financial services industry understands that attaching a copy of the last statement sent to the consumer may help consumers recognize that the debt is in fact theirs. However, this requirement also will require significant system changes, the development and staffing of new workflow processes, and considerable delivery costs. Our members anticipate that even if technology and automation are heavily utilized, a large number of statements will have to be manually located. As discussed above, the banking industry urges the Bureau to test the effectiveness of providing the last statement with every validation notice. Here, we suggest that “effectiveness” should be judged by whether the inclusion of the last statement reduces the incidence of consumers legitimately requesting verification or disputing the debt. Our members expressed a willingness to provide the last statement *if* testing demonstrates a verifiable and significant reduction in the number of consumer verification requests and disputes because the increased cost associated with producing the statement would be partially offset by lower costs associated with investigating and responding to consumer

disputes. In addition, the Bureau should understand that providing an exact “reproduction” of the statement may not be possible; in those circumstances, any future requirement should permit the essential information (again, as identified by consumer testing) from the last statement to be provided in an appropriate form on the validation notice.

3. The financial services industry supports FDCA rules defining “dispute” and establishing clear standards for the investigation of disputes and the verification of debt.

When conducting any rulemaking under the Federal consumer financial laws, including the FDCA, Section 1022 of the Dodd-Frank Act directs the Bureau to consider “the potential benefits and costs to consumers and covered persons, including the potential reduction of access to products or services resulting from the rule, and the impact on covered persons.”¹⁶ It is clear that many of the regulatory options being considered – like the additions to the validation notice discussed above – will add costs to the collection process. Thus, it will be important for the Bureau also to consider regulatory changes that will promote efficiency and reduce costs where possible. We believe that defining what constitutes a “dispute” requiring investigation and verification, and equally important, defining what is not a dispute, presents one such opportunity.

As previously explained, under section 809(b) of the FDCA, consumers have the right to dispute and receive verification of the debt that third-party debt collectors attempt to collect.¹⁷ However, the FDCA does not (1) define what constitutes a “dispute,” (2) set standards for what is required to investigate a dispute, or (3) define what constitutes “verification of the debt.” Unsurprisingly, the void has not served consumers, third-party debt collectors, or creditors well. Consumers have been advised by credit repair organizations and Internet postings to respond to a validation notice with a written dispute, whether or not the consumer actually disputes the debt. Our members estimate that the vast majority of the disputes they receive do not include a specific claim that can be researched; they simply assert that the consumer disputes the debt.¹⁸ With nothing to investigate, creditor and debt collector investigations and verifications are frequently subject to criticism. Moreover, responding to these non-specific assertions of dispute consumes time and resources that should be devoted to investigating and resolving legitimate consumer disputes.

One of our members reviewed all of the collection-related disputes and complaints received by six of the bank’s consumer lending product groups in 2013. To identify

¹⁶ 15 U.S.C. §5512.

¹⁷ Although FDCA §809(b) clearly authorizes the consumer to file a dispute with the third-party debt collector, not the first-party creditor, first-party creditors also receive disputes under state debt collection laws that have a parallel debt validation provision.

¹⁸ In addition, our members report that they also receive many disputes that are clearly submitted by, or at the direction of, a credit repair or debt elimination organization. These “form” disputes assert generic allegations about the consumer’s dispute.

“frivolous” disputes, the bank searched for those that simply asserted, “I dispute the debt” and did not include any additional information and for “form” disputes submitted by or on the advice of a debt elimination or credit repair organization. The bank found that 97.7% of the disputes it received in 2013 were frivolous.

The bank’s data on collection-related disputes and complaints submitted by consumers in 2013:

Total Collection Related Disputes and Complaints	39,801	100%	
Complaints	760	1.9%	
Disputes (validations and verifications)	39,041	98.1%	
Non-Frivolous Collection Related Disputes and Complaints	1,658	4.2%	
Complaints	760	1.9%	
Disputes (validations and verifications)	898	2.3%	
Frivolous Collection Related Disputes and Complaints	38,143	95.8%	
Complaints	-		
Disputes (validations and verifications)	38,143	97.7%	*
* Percent of Disputes (validations and verifications) that are frivolous.			

To reduce the time and resources expended responding to frivolous disputes, the financial services industry urges the Bureau to use its rulemaking authority under the FDCPA to define what constitutes a “dispute” and to set standards for the information or documentation that must be included with a dispute to trigger an investigation and verification of the dispute. We believe that the FCRA and Regulation V’s definition of a “direct dispute”—and equally important, its definition of a “frivolous or irrelevant dispute”—as well as its standards for responding to the same, offer an established framework that allows creditors and third-party debt collectors to allocate time and resources to investigating, resolving, and responding to legitimate questions by consumers about the debt being collected.

The financial services industry encourages the Bureau to write a rule under the FDCPA defining the term “dispute” that is consistent with Regulation V’s definition of a “direct dispute.” However, recognizing that throughout the lending relationship the consumer has had the opportunity under Regulation Z to assert billing errors, payment processing errors, and disputes against merchants and service providers (and have those errors resolved) the industry believes that the definition of a dispute under the FDCPA should be limited to *current or pending* assertions of identity theft or fraud and/or assertions that the amount due is incorrect. In other words, the disputes that would trigger an investigation under the FDCPA would be those that respond to the critical questions: is the debt mine, and is it the correct amount? Thus, the definition of dispute should exclude all errors and disputes that were asserted, investigated, and resolved by the first-party creditor.

We believe that the rules should also mirror Regulation V's standards for the content of a direct dispute notice. Thus, a dispute under the FDCPA should be required to include (1) sufficient information to identify the account that is in dispute, (2) specific information the consumer is disputing and an explanation of the basis of the dispute, and (3) all supporting documentation or other information reasonably required by the first-party creditor or debt collector to substantiate the basis of the dispute. Such a requirement will benefit consumers, as it will encourage them to help collectors understand the basis for their disputes and reach a resolution. It also should discourage unscrupulous credit repair organizations from instructing consumers to dispute the debt as a matter of course.

In addition, we support adoption of a "reasonable investigation" standard similar to that of Regulation V for disputes that meet both the definition and contents requirements. A reasonable investigation under Regulation V requires a review of all relevant information provided by the consumer with the dispute notice, which should decrease consumer concerns about mistaken collection attempts. However the standard would also provide a degree of flexibility for creditors and the collection industry.

To ensure further that first-party creditors and third-party debt collectors spend their time and resources investigating and verifying legitimate disputes, we urge the Bureau to adopt rules that define "frivolous and irrelevant" disputes. We suggest the following language that is consistent with Regulation V's definition:

A dispute is frivolous or irrelevant if:

1. The consumer did not provide sufficient information about the dispute, such as:
 - Specific information as to what the consumer is disputing and an explanation of the basis for the dispute; and
 - Supporting documentation or other relevant information reasonably required by the creditor or debt collector to substantiate the dispute; or
2. The dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer with respect to which the first-party creditor or debt collector has already investigated or previously determined to be frivolous or irrelevant; or
3. The dispute appears to have been submitted by, to have been prepared on behalf of the consumer by, or to have been submitted on a form supplied to the consumer by, a credit repair organization as defined in 15 U.S.C 1679a(3).

We also urge the Bureau to adopt a rule that states that a creditor or debt collector is not required to investigate a frivolous or irrelevant dispute and instead is authorized to respond to those disputes with a standardized notice identifying the reasons for that determination and any information required to investigate the disputed information.

Although the financial services industry agrees that first-party creditors and debt collectors should strive to respond to consumers quickly, it does not believe it is necessary to establish deadlines for responses to FDCPA disputes. The time to respond to disputes may vary depending upon a variety of factors, including the nature of the dispute and the information provided by the consumer. Even requests for verification may take time to review and respond to, particularly if the bank has to respond to specific requests for documentation. Striving to meet a regulatory deadline should not compromise the thoroughness of the review, which is ultimately more important for the consumer. Consumers are not harmed by the lack of a deadline because creditors have an incentive to resolve the problem as quickly as possible, since collection activity must cease until the debt is verified.

The financial services industry also believes that FDCPA rules should clearly distinguish between a “request for verification” and a “dispute.” The vast majority of consumers know that they owe the defaulted debts that are in collection. A request for verification of the debt should be defined as a request for (1) information a consumer needs to recognize the debt in collection, and/or (2) for information showing that the third-party debt collector is authorized to collect the debt. Our members see the fulfillment of a verification request as a path to resolution, ensuring that the consumer has the necessary information to begin discussing how the underlying obligation can be resolved. A dispute, in contrast, represents a challenge to the consumer’s responsibility for the debt – as discussed above, a claim of identity theft or fraud and/or an assertion that the amount due is incorrect.

Similar to the “reasonable investigation” standard for disputed debt, the financial services industry urges the Bureau to avoid prescribing particular forms of information and documentation that must be reviewed and/or provided to the consumer to verify a debt. It is not necessary to create an immediate costly requirement to provide documentation and data for all accounts when not all accounts require this documentation. Instead, we believe there should be a “reasonable verification” standard, a flexible requirement that is responsive to the type of loan and the nature of the consumer’s request. If a customer questions the amount owed, it is unnecessary to provide account origination agreements that potentially date back many years and may be irrelevant to the “amount due” question. There also exists the need to manage carefully the transfer of information due to privacy concerns. The larger the amount of information transferred the greater the risk to the customer of identity theft.

III. Transfer and Accessibility of Information upon Sale or Placement of Debt

Part II of the ANPR seeks information “to assist in the development of proposed rules for creditors, debt buyers, and third-party collectors to create a comprehensive and coherent system for information about debts.”¹⁹ It suggests that the Bureau may be considering rules that would establish national standards for the information and documents that must be transferred when charged-off consumer debt is placed with third-party collection agencies or is sold to debt buyers. In addition, the Bureau seeks feedback about the sharing of information and documents about charged-off consumer debt through a national, central repository for consumer debts.

The Associations support the Bureau’s goal of improving the integrity and flow of information about debts. The financial services industry agrees that the information and documentation that is transferred to third-party debt collectors and debt buyers should ensure that debt collector “attempts to collect debt are for the right amount and are directed to the right consumer.”²⁰ However, we do not believe that these goals can only be achieved through a rulemaking that establishes national standards mandating specific information and documentation that must be transferred upon the placement or sale of debt.

We caution that the adoption of a national standard – a mandatory, minimum list – is likely to result in overbroad requirements that will be unnecessary for the vast majority of collections. We note that the FTC’s 2013 study of the debt buying industry found that consumers dispute only 3.2% of the debts that debt buyers attempt to collect.²¹ Thus, in more than 95% of collections, consumers recognize the debt as their own and do not challenge the amount being collected.

Although we agree that technological innovations have improved the ability of first-party creditors and third-party debt collectors to obtain, store, and transfer information and documents related to consumers and their debt, there are nevertheless costs as well as data privacy and security risks associated with these processes that must be considered and balanced against the dubious benefits that will inure to the relatively small number of consumers who have questions about the debt being collected.

¹⁹ *Id.* at 67854.

²⁰ Federal Trade Commission, *Collecting Consumer Debts: the Challenges of Change - A Workshop Report* (February 2009) at i, available at <http://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf>.

²¹ FTC Debt Buyer Study, *supra* at 36.

1. The Bureau should consider the California Fair Debt Buying Practices Act's framework for the flow of information and documentation about debts that are sold.

The ANPR states that at the joint FTC-CFPB Roundtable on Data Integrity and Information Flows in Debt Collection (Roundtable),²² participants generally expressed support for national standards requiring the transfer of certain information and documents with debt sales, but could not reach consensus on a specific list. This is unsurprising given the number, diversity, and varied technological sophistication of creditors and debt buyers active in markets for charged-off debt and the variety and age of the consumer debts that are bundled into portfolios.

Under the circumstances, our members believe that rather than trying to reach consensus on specific information and documentation that must be transferred with all debt sales and placements, the Bureau should consider the framework of the California Fair Debt Buying Practices Act (the Act) as a model for both placements and sales.

Section 1788.52 of the Act requires that a third-party debt collector **possess** certain **information** about a debt prior to contacting a consumer in an attempt to collect the debt. The information described is consistent with many of the additions to the debt validation notice for which the Bureau has requested comment.²³ It is information that should enable a third-party debt collector to address the key questions consumers may have upon receipt of a validation notice from a third-party with whom they have no prior relationship: what is the debt, is it the right amount, and who is the entity collecting it? However, because it is information about the debt – as opposed to documents relating to the debt – the cost of obtaining, storing, and transferring the information is minimized, relatively speaking.

In addition, the Act requires that a third-party debt collector **have access to documents** that establish the terms of the credit agreement and that the consumer incurred the debt being collected. It does not, however, require the debt collector to possess the documents for every account prior to initiating collection activity. Instead, it requires the debt collector to obtain and provide those documents to the consumer free of charge and within 15-days of a consumer's written request for information or proof of the debt. Thus, the Act clearly recognizes that a relatively small number of consumers dispute the debt, and it establishes a framework that ensures they have access to appropriate documents without interfering unduly with debt sales and market efficiencies.

²² For additional information about the Roundtable, see <http://www.ftc.gov/bcp/workshops/lifeofadebt>.

²³ See part II, section 2 of this comment letter.

Section 1788.52 of the California Fair Debt Buying Practices Act states:

(a) A debt buyer shall not make any written statement to a debtor in an attempt to collect a consumer debt ***unless the debt buyer possesses the following information:***

(1) That the debt buyer is the sole owner of the debt at issue or has authority to assert the rights of all owners of the debt.

(2) The debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt. This paragraph shall not be deemed to require a specific itemization, but the explanation shall identify separately the charge-off balance, the total of any post-charge-off interest, and the total of any post-charge-off fees.

(3) The date of default or the date of the last payment.

(4) The name and an address of the charge-off creditor at the time of charge off, and the charge-off creditor's account number associated with the debt. The charge-off creditor's name and address shall be in sufficient form so as to reasonably identify the charge-off creditor.

(5) The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt. If the debt was sold prior to January 1, 2014, the name and last known address of the debtor as they appeared in the debt owner's records on December 31, 2013, shall be sufficient.

(6) The names and addresses of all persons or entities that purchased the debt after charge off, including the debt buyer making the written statement. The names and addresses shall be in sufficient form so as to reasonably identify each such purchaser.

(b) A debt buyer shall not make any written statement to a debtor in an attempt to collect a consumer debt ***unless the debt buyer has access*** to a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on debt for which no signed contract or agreement exists, the debt buyer shall

have access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor. For a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy this requirement.

(c) A debt buyer shall provide the information or documents identified in subdivisions (a) and (b) to the debtor without charge within 15 calendar days of receipt of a debtor's written request for information regarding the debt or proof of the debt.²⁴

The financial services industry believes that such a framework addresses the consumer protection concerns identified by the FTC and the Bureau but does not impose unnecessary uniformity and expense. It ensures that debt buyers and third-party collectors have access to documents "as needed" to address specific account questions and circumstances. For example, where the consumer does not contest the account but only disputes the amount due, it is unnecessary to provide account origination agreements. Instead, approaching the need for documentation "as needed" creates a sustainable process that permits and anticipates future document-flow but does not create an immediate and costly requirement to provide a uniform set of documents for all accounts that may never be necessary. In addition, the statutory scheme recognizes the need to manage carefully the transfer of information due to privacy concerns, for the larger the amount of information transferred, the greater the risk and consequences of data breaches.

2. The Bureau should balance the costs and benefits of requiring additional information to be transferred with debt placements and sales.

In its 2009 report, *Collecting Consumer Debts: The Challenges of Change*, the FTC observed:

Technological innovations over the past thirty years have increased exponentially creditors' and debt collectors' ability to obtain, store, and transfer data about consumers and their debts. In response to this new capability, many industry members use more efficient means of transferring data and store more data for longer periods of time than their predecessors.²⁵

The Associations agree with this statement but note that there are nevertheless costs associated with these processes that must be considered and balanced against the

²⁴ CAL. CIV. CODE §1788.52.

²⁵ FTC Workshop Report, *Collecting Consumer Debts: The Challenges of Change* (February 2009), p. 17, available at <http://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf>.

consumer protections to be gained by the transfer of additional information about consumers and their debt. Each data point must be recorded at origination or during servicing and may require modification of origination and servicing platforms to accommodate the new fields. In addition, charge-off systems of record must be able to store and transfer the information. Then, as always, workflow processes must be changed and employees must be trained to collect and record the information. As the Bureau reviews its policy options, we encourage it to consider the broad range of resources and technological capabilities of members of the banking industry.

The financial services industry offers the following specific comments about the information fields under consideration:

- **Customer’s language preference:** Those creditors that record a customer’s language preference typically only note a language preference if the underlying contract was closed in that language, and existing systems could not accommodate a large number of language preference fields. The adjustments to systems of record, however, are just one potential cost that must be considered. The Associations urge the Bureau to consider the practical implications of any requirement to track language preference and transfer that information to third-party debt collectors and debt buyers. For example, would the Bureau require all accounts with a language preference indicator be subject to written and verbal communications solely in that language preference? Clearly, such a requirement would change significantly the burden/benefit analysis and should be subject to further public comment and review.
- **Customer’s status as a servicemember:** Our members record and transfer this information, *if known*. In the current low interest rate environment, many members of the Reserves do not inform the bank of their status at origination. Moreover, there may be limited value in transferring this information, because it is the servicemember’s active duty status at the time of collection that controls, so it is incumbent on the third-party debt collector to check the servicemember’s status using the Department of Defense (DOD) Defense Manpower Data Center database prior to taking action to enforce the terms of the contract.²⁶
- **The fact that a customer is deceased:** The financial services industry typically records and transfers this information to a third-party debt collector or buyer, *if known*.²⁷ If a third-party debt collector with whom the first-party creditor has

²⁶ The Associations are firm in our support of the Servicemember Civil Relief Act (SCRA), which recognizes the special burden placed on active duty servicemembers in trying to meet their financial obligations while serving their country. Unfortunately, the current Department of Defense’s database often makes it challenging for our members to comply with the SCRA. The database can misidentify the active duty status of a servicemember, particularly with respect to members of the National Guard or Military Reserves. And too often, the database’s search function returns inaccurate or unclear results. We urge the Bureau to work with DOD to improve the accuracy and utility of the SCRA database.

²⁷ Additional issues related to the collection of decedents’ debts are discussed in part IV, section 7, pp. 33-34 *infra*.

placed the debt learns that the customer is deceased, that information is to be conveyed to the first-party creditor when the account is recalled.

- **Cease communication requests:** The financial services industry typically records and transfers this information to a third-party debt collector or buyer. If a third-party debt collector with whom the first-party creditor has placed the debt receives a cease communication request, that information is to be conveyed to the first-party creditor when the account is recalled.
 - **Attorney representation:** The financial services industry typically records and transfers this information to a third-party debt collector or buyer. If a third-party debt collector with whom the first-party creditor has placed the debt learns that a consumer is represented by an attorney, that information is to be conveyed to the first-party creditor when the account is recalled.
 - **The fact that a customer disputes the debt:** Currently, there is no uniform practice regarding the transfer of information that a consumer disputes the debt. As discussed previously, our members urge the Bureau to define the term “dispute” as a *current or pending* assertion of identity theft or fraud and/or an assertion that the amount due is incorrect or unrecognizable. If the Bureau adopts this definition, the industry agrees that information that a customer disputes the debt (so defined) should be transferred with debt sales and placements. (In fact, most of our members will not sell or place an account with a pending identity theft or fraud claim or a disputed amount.) However, the financial services industry does not believe that information about frivolous or duplicate disputes, disputes that were asserted by the consumer and resolved under Regulations Z or E, or disputes that have been investigated and closed, should be transferred with the debt. Nor should they prevent the placement or sale of debt.
3. The financial services industry opposes the establishment of a centralized repository for the storage and sharing of information and documents related to consumer debts.

The ANPR notes that at the FTC-CFPB Roundtable a number of participants discussed the potential for establishing a centralized repository for the storage and sharing of information and documents related to consumer debt.²⁸ The Associations recognize that private third-party vendors have developed (and may be developing) software applications and secure inter-company network exchanges that offer data storage and transfer solutions that provide features and efficiencies attractive to some first-party creditors, third-party debt collectors, and debt buyers. Others choose to manage the

²⁸ 78 Fed. Reg. *supra* at 67856.

information and document exchanges internally, preferring to retain more direct control over the security and privacy of customer financial records and other information.

Regardless of the choice individual creditors are making, it is important to recognize that it is a *choice*, and that the financial services industry strongly opposes the establishment of a mandatory, centralized repository for the storage and sharing of information and documents related to consumer debts. Such a repository would present significant data security, privacy, reconciliation, and governance challenges.

A centralized repository of information and documents relating to delinquent consumer debt – names, addresses, phone numbers, account numbers, social security numbers, and more – would be a highly attractive target for hackers and identity thieves around the globe. Maintaining the security of the information would be a daunting task, considering the ever-increasing number and sophistication of cyber-attacks.

A centralized repository would also present privacy challenges. The database would hold vast amounts of private information, ranging from the identifying information discussed above to information about income and assets (on credit applications or paperwork submitted pursuant to loss mitigation reviews), purchases (on credit card statements), and in many instances information about medical problems, employment, separation, divorce, or other hardships that may have been recorded in servicing notes. A sophisticated system to mask the personally identifiable information would have to be established, and access would have to be highly controlled, but experience demonstrates that breaches would occur inevitably, and given the information available would have severe consequences.

Similarly, a centralized repository would present challenges related to protecting proprietary business information and strategies. Access to the information and documents stored would have to be carefully controlled, for competitors could easily discern proprietary pricing, interest assessment, or settlement strategies by reviewing customer files.

In addition, experience with the Mortgage Electronic Registration System (MERS) has demonstrated the challenge of keeping information current in a centralized repository. A centralized repository of consumer debt would demand timely ownership updates, balance updates, and consumer status updates – i.e., information that the consumer has filed bankruptcy, is deceased, or in the case of a servicemember, has been assigned to active duty or has returned from active duty. To ensure that the information is current would require sophisticated and reliable interfaces with a number of agencies and organizations.

Finally, there would be a number of governance issues presented: who would “build” and maintain the repository, how would it be paid for, who would have access, who

would have responsibility for maintaining the security integrity of the information, and who would incur liability in the case of a cyber-attack or other data or privacy breach?

Recent experience building and operating the health insurance exchange network underscores the technological challenges presented and suggests that issues and “glitches” not yet anticipated would arise undertaking a project of such scale. We believe, however, that the list above is enough to discourage further consideration of a mandatory national repository of charged-off consumer debt.

4. The Bureau should test whether receipt of a notice that debt has been sold improves consumers’ ability to recognize debts.

The FDCPA does not currently require notification to a consumer when a debt has been sold or placed with a third-party for collection. The ANPR states, “Consumers may have difficulty recognizing a debt or knowing who to pay because a debt may be sold and resold multiple times or placed for collection multiple times with the result that a consumer may receive communications from several debt collectors, possibly naming several debt owners, over a period of several years.”²⁹ Thus, the Bureau seeks to explore the costs and benefits of requiring a first-party creditor to send a “goodbye notice” when debt is sold or placed with a third-party debt collector.

While willing to consider sending a goodbye notice when debt has been sold to a debt buyer, the financial services industry opposes a similar requirement for debt placements. When debt has been sold to a debt buyer, there is a fundamental change—an end—to the relationship between the creditor and consumer. In the case of a debt placement, however, the first-party creditor continues to own the account and hopes to maintain a relationship with the consumer. The charged-off account has simply been placed with a third-party for collection for a period that typically lasts three to four months. At the end of that time period, the account will return to the first-party creditor and may be worked internally again or placed with another third-party debt collector. Our members believe that sending a goodbye notice with each transfer of the account may confuse consumers. In addition, they point out that third-party debt collectors in the case of a debt placement immediately begin collections and are required by the FDCPA to send a validation notice to the consumer within five days, making a goodbye notice redundant. In contrast, when charged-off accounts are sold, the debt buyer may not immediately initiate collections, so the consumer may not be informed right away about the entity that is entitled to collect on the account.

Thus, a stronger case can be made for requiring a goodbye notice after an account has been sold,³⁰ and a few of our members report that they have begun sending goodbye

²⁹ *Id.*

³⁰ Inasmuch as some have pointed to RESPA as an example, unlike a notice of servicing transfer under RESPA that *anticipates* the transfer, we believe that a goodbye notice would only be appropriate for a debt sale if it were to be sent within a defined period of time *after* the sale.

notices informing customers that their account has been sold and providing the name and contact information of the debt buyer. However, those creditors that have begun sending the goodbye notice have found, so far, that it has not reduced the number of questions, complaints, and verification requests they receive from consumers. This experience is, in effect, a live experiment that can help inform policymaking.

We caution that every new regulatory requirement – every new notice that must be created and sent to consumers – adds cost to the collections process and should not be *presumed* to help consumers. Accounts that are sold may have been in collection for some time, and typically the consumers have been completely unresponsive to creditor outreach. The Bureau should not assume that these consumers will open a goodbye letter from the creditor. Instead, the Bureau should test whether receipt of a goodbye notice has any impact on consumer experience – specifically, test whether receipt of the notice reduces the number of consumer disputes and verification requests. The Associations would be happy to help identify members willing to participate with the Bureau in such a test.

IV. Debt Collection Communications

1. Introduction

The Associations preface our response to the ANPR questions about debt collection communications by underscoring the fact that first-party creditors are motivated to maintain and build upon relationships with their customers and communities. To promote customer engagement, the financial services industry has expended significant time and resources to provide consumers with a variety of communication channels and options for receiving important account updates, including text and email alerts that an account balance is low, a payment is coming due, or a payment has been missed. The increasing number of consumers who elect to receive these messages each year shows that they are helpful and valued account management tools. The Bureau should avoid inhibiting such communications by promulgating unnecessary or overbroad rules governing collections-related contacts. Doing so would take away important account management tools, could inhibit adjusting communications in keeping with changes in customer preferences and technological innovation, and may result in *more* customer accounts in collection if it inhibits communications that can help customers avoid or address debt problems.

Similarly, when financial institutions seek to contact consumers regarding a missed payment, it is in the consumer's best interest for the creditor to do so and to do so quickly. Early customer contact can allow the first-party creditor to offer more options for resolution, helping the consumer protect his or her credit rating, and it may forestall the need for the creditor to take subsequent legal action to collect the debt or enforce its security agreement.

Indeed, as the Bureau considers debt collection reform, the Associations believe that considerable attention should be given to encouraging consumer responsibility—responsibility for seeking financial assistance and even welcoming rather than avoiding a creditor’s early outreach to address delinquency issues when they can be most easily resolved. Working with the banking industry and reputable credit counseling agencies, the Bureau should develop educational materials that explain how engagement dramatically improves the likelihood of a successful resolution of a delinquency and describe generally the programs available from a lender or a reputable credit counseling agency for consumers facing financial hardship.

In addition, the financial services industry urges the Bureau to provide guidance on the use of new technology. We believe that a cornerstone of the guidance should be respect for the consumer’s choice of communication channel. If the consumer voluntarily provides an email address or cell phone number on a credit application, that action should represent the consumer’s decision that the technology is sufficiently secure and private. Accordingly, the Bureau should clearly state that the first-party creditor may contact the consumer using that email address or cell phone number. Similarly, we believe that when a first-party creditor sends an outgoing communication via technology to the consumer, the consumer should be able to respond to the creditor using that technology.

2. First-party creditor communications should not be inhibited by the “mini-Miranda” warning.

FDCPA §807(11) declares it is a false, deceptive, or misleading representation for a third-party debt collector to fail to disclose in the initial written or oral communication with the debtor that the debt collector is attempting to collect a debt and that any information obtained from the debtor will be used for that purpose. Subsequent communications also must include this warning, which has been dubbed the “mini-Miranda” warning. The required disclosure was intended to protect consumers from the use of false or deceptive representations by third-party debt collectors about the collector and purpose of the communication.

As the name suggests, providing the mini-Miranda warning at the beginning of communications is comparable to informing a customer of his Fifth Amendment right against self-incrimination, and it immediately creates a hostile and adversarial environment. In order to enhance customer engagement and financial success, first-party creditors should have the ability to leave voicemails, emails or texts with customers, particularly for communications related to outreach efforts, uninhibited by the mini-Miranda warning that is required in the case of third-party collection efforts.

In addition, the mini-Miranda “warns” customers that the communication is an attempt to collect a debt, but not all first-party creditor communications about a debt are collection attempts, and the mini-Miranda sends the wrong message. Customers can

only take advantage of a workout or loss mitigation program if they feel comfortable speaking to the creditor. If required as a preface to all first-party creditor conversations, the warning might end conversations before they really begin. Moreover, in those instances in which the consumer and creditor are working together to resolve the delinquency, consumers would be frustrated by being forced to listen to the warning at the beginning of all follow-up conversations.³¹

The financial services industry strongly urges the Bureau not to invoke authority under Dodd-Frank Act §1031 to require first-party creditors to provide the mini-Miranda warning in all collection-related communications with customers.

3. Standards interpreting §805(a)(1)'s prohibition on contacting consumers at "any unusual time or place" should encourage consumer engagement.

The financial services industry typically follows FDCPA §805(a)(1)'s prohibition on contacting consumers at "any unusual time or place or at a time or place known or which should be known to be inconvenient to the consumer." Therefore, we have responded to the ANPR questions related to §805.

i. Inconvenient times

FDCPA §805(a)(1) further states, "In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8:00 o'clock antemeridian and before 9:00 o'clock postmeridian, local time at the consumer's location." Accordingly, first-party creditors attempt to communicate with consumers between 8:00 a.m. and 9:00 p.m. local time. As previously discussed, creditors are motivated to maintain a positive relationship with their customers and a good reputation in the communities they serve, so they have no interest in annoying or harassing customers with communication attempts at unusual or inconvenient times or barraging customers with phone calls, email, or text messages.

We agree that providing clarity around the application of §805(a)(1) to new technologies would be useful, but we caution the Bureau against unduly burdening collectors with obligations to know, or anticipate, an inconvenient time or place. We encourage the Bureau to propose common sense rules or guidance interpreting §805(a)(1) that recognize the need for consumer engagement, encourage consumer responsibility, and respect consumer choices.

³¹ Permitting customers to opt-out of future use of the warning would do nothing to undo the hostile and adversarial atmosphere that has been created. Moreover, it would require implementation of procedures and system changes to record, store and transfer the consumer's decision to opt-out, which would add significant costs.

For example, with respect to the requirement that collection calls occur only between 8:00 a.m. and 9:00 p.m. local time, we support a rule that gives debt collectors a safe harbor for calls placed between 8:00 a.m. and 9:00 p.m. for the time zone associated with the mailing address in the creditor's system of record. That address will generally be the address provided by the consumer at the time of application, and it appropriately recognizes a consumer's responsibility to notify the creditor of any change of address.

As the Bureau is aware, the area code associated with a phone number the customer has provided is an unreliable location indicator because of two realities of modern life: consumers travel with their mobile phones, often crossing time zones, and consumers routinely retain their cell phone number when they move from one place to another. In fact, the portability of cell phone numbers suggests that increasingly, creditors and debt collectors will face a situation where a customer's address and area code reflect different time zones. Thus, we would oppose a rule banning calls during inconvenient hours at *either* location because it would ultimately harm consumers by limiting opportunities for creditor-customer engagement.³²

Similarly, we urge the Bureau to clarify that FDCPA §805(a)(1) does not apply to text and email messages. The reason for designating certain hours presumptively inconvenient was to prevent the telephone from ringing while consumers or their families were asleep. The receipt of an email or text messages does not present a comparable threat of disruption. Consumers can turn off audible alerts indicating that a text or email message has arrived, and they control when to read a message. In fact, this control, coupled with the anonymity that email and text messages offer, means that many consumers prefer these communication channels. The Bureau should exercise care not to impose unnecessary barriers to their use as doing so may ultimately harm, not help, consumers.³³

ii. Unusual or inconvenient places

As stated above, the Associations believe that the Bureau's interpretation of §805(a)(1) should be guided by acknowledgement of the importance of promoting consumer engagement, the exercise of personal responsibility, and respect for consumer choice. Although first-party creditors typically abide by consumer instructions not to call their place of employment, they would oppose a blanket prohibition on all communication with customers at work. Some consumers choose to be contacted at work and provide their work telephone number and/or email address as their contact information.

³² Although technology capable of determining whether a particular number is a wireline or a wireless phone number exists, it is not fail proof. Moreover, no (legally permissible) technology is available to determine the consumer's location at the time of a call.

³³ A further problem in applying FDCPA §805(a)(1) to email and text messages is that the time that a message is sent and when it is received are not always the same nor under control of the sending party. Applying such a standard to email and text messages would of necessity need to be based upon the time of day that the debt collector sends the message, because that is within the collector's control whereas delivery of the message and receipt by the consumer are not.

Restricting the consumer's ability to receive communications at work where the consumer has provided work contact information makes little sense and is of no benefit to the consumer.

In a related vein, the financial services industry strongly opposes the idea that debt collectors should be responsible for determining a particular employer's policy on receipt of personal phone calls or email messages. Managing to such a standard would be impossible. If such an expectation were in place, first-party creditors would be forced to cease communication with anyone while at work, potentially cutting off communication with those who have provided their work phone number and email address as their preferred contact information. Instead, we believe that consumers should bear responsibility for informing the creditor or debt collector if their employer prohibits personal calls or email messages.

We also urge the Bureau to reject the notion that the locations listed in Question 68 are presumptively inconvenient and oppose placing responsibility on a first-party creditor or debt collector to "know" that a consumer is visiting any of the places listed. Requiring collectors to track their customers would not only be burdensome, most customers would object to the invasion of privacy. Instead, a common sense and cost effective solution would be to place responsibility on the consumer to turn off his or her cell phone when visiting a place where receiving a call would be inconvenient.

4. The financial services industry opposes bright-line rules on the frequency of collection-related communications by first-party creditors.³⁴

FDCPA §806(5) bars a debt collector from "causing any telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." The ANPR explores whether it should clarify this prohibition with guidance or bright-line rules.

First, the financial services industry strongly opposes the adoption of UDAAP rules applicable to first-party creditors that mirror FDCPA section 806(5) unless there is documented, verified, and widespread evidence that first-party creditors are calling consumers with the "intent to annoy, abuse, or harass." We do not believe such evidence exists.

The ANPR points to consumer complaints about debt collection, and in particular, "[T]he most frequent debt-collection related complaint in the FTC's Consumer Sentinel database is that a collector is calling repeatedly or continuously, conduct in which collectors may be engaged to annoy, abuse or harass the recipients of these calls."³⁵

³⁴ Although the ANPR addresses the subject of calling frequency within Section V, Unfair, Deceptive and Abusive Acts and Practices, the Associations have chosen to address the topic here because it is a communication issue.

³⁵ 78 Fed. Reg. *supra* at 67863.

This statement, however, fails to identify whether these complaints were asserted against first-party creditors or third-party debtors—a critical omission.

Year after year, collection-related complaints about first-party creditors (referred to as “in-house collectors” by the FTC Sentinel database) are significantly lower than complaints about third-party collectors. In 2012, complaints about third-party debt collectors accounted for 19.8% of all the complaints the FTC received, and complaints against in-house collectors totaled just 4.3% of all complaints the FTC received. Similarly, in 2011, the FTC received complaints about in-house collectors, representing 4.9% of all complaints received.³⁶ The Bureau began accepting consumer complaints about debt collection through its Consumer Response Portal on July 10, 2013. As of February 12, 2014, the CFPB Consumer Complaint Database reported 13,546 debt collection complaints and only 2,200 of these were filed against banks, a number that may be inflated as a result of the Bureau’s decision to permit a consumer to file a complaint against a third-party debt collector and to file the identical complaint against the first-party creditor.³⁷

Moreover, it is important to recognize that neither the FTC nor the Bureau verify the accuracy of the information about which consumers complain. Both also acknowledge that not all of the debt collection practices about which consumers complain constitute law or regulatory violations, so the complaint data may overstate the extent of problems with debt collection practices. Finally, the complaint data must be put in context. First-party creditors contact millions of consumers each year. They begin to reach out to customers with payment reminders almost immediately after a payment has been missed and if necessary try to continue to communicate with the customer to explore alternative repayment options. Therefore, even this number of complaints received by either the FTC or the Bureau is a relatively minor proportion when compared with the overall number of bank-consumer communications each year.

The Associations believe that any rulemaking to establish bright-line standards for communication frequencies by first-party creditors must be based on documented, verified evidence of widespread harassment or abuse by first-party creditors, not unverified complaint totals filed against both first and third-party collectors. Before the Bureau even considers proceeding down this path, we believe it will be incumbent on the Bureau to analyze, verify, and report publically on *specific* categories of the debt collection complaints it has received against first-party creditors.

³⁶ See CFPB Annual Report 2013: Fair Debt Collection Practices Act (March 20, 2013), available at http://files.consumerfinance.gov/201303_cfpb_March_FDCPA_Report1.pdf.

³⁷ There is also an unexplained inconsistency between the number of debt collection complaints publically reported by Director Cordray and the number posted on the Consumer Complaint Database. The number reported publically is 31,000 (see Prepared Remarks of Director Cordray to the U.S. Conference of Mayors, January 22, 2014, available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-u-s-conference-of-mayors/>), while the number posted on the Database as of February 12, 2014, is 13,546 (see <http://www.consumerfinance.gov/complaintdatabase/>).

That being said, the financial services industry would support *guidance* on calling frequency, but that guidance should seek to maximize bank-consumer engagement. As noted throughout our comments, first-party creditors are not calling customers with the “intent to annoy, abuse or harass.” Rather, they are trying to reach the customer to explore ways to resolve the delinquency and save the creditor-borrower relationship. This requires having a conversation in which the customer’s situation can be explained and potential workout programs may be identified. The conversations also provide the consumer with the opportunity to dispute the debt or to seek additional information about the debt being collected. Such conversations can also help to identify cases of fraud or identity theft and facilitate action against such crimes.

However, making contact with consumers is often challenging. Thus, the guidance should recognize that to reach a consumer at a time that is convenient often requires multiple attempts per day. Therefore, any guidance should address the frequency of contacts – or *conversations* – a collector has with a consumer, not the number of attempts made. Limiting the frequency of attempts to reach a consumer will negatively impact contact rates and would not be in the best interest of consumers, for there is a strong relationship between the ability to have a conversation with a consumer and the successful resolution of the delinquency.

We do not believe that email or text communications present a comparable risk of being used inappropriately. Text and email messages can be far less disruptive than phone calls, because consumers control when – and whether – to open them. In addition, many consumers, particularly younger consumers, prefer to communicate via email or text, so care must be exercised not to limit unnecessarily this communication channel.

The guidance should not define specific numerical caps for particular forms of communication. Instead, guidance should aid creditors, debt collectors, and examiners in considering the totality of a collection campaign, with its central purpose being the intention to achieve contact with the borrower. Factors to be considered could include (1) the calling pattern, (2) whether the collector continued communication attempts on a particular day even after contact has been made, and (3) whether there were repeated calls to the same number in a short period of time.

In addition, the guidance should acknowledge the fact that consumers would not be well served by “one-size-fits-all” communication standards. Our members report that calling strategies take into consideration significant events in the collections timeline and the negative impact they will have on the consumer. Thus, creditors typically increase efforts to contact a customer before: (1) an account becomes 30-days past due (when most creditors begin reporting to credit bureaus); (2) an account is charged-off (an event that has a dramatic negative impact on a consumer’s credit score); or (3) the creditor takes action to protect its interest with regard to collateral securing the loan.

We believe that it is in the consumer's best interest for calling frequencies to increase, as appropriate, prior to such events.

Finally, we believe the guidance should recognize that email and text messages present less risk of abuse and provide a means of communicating with younger consumers as well as those consumers who appreciate the relative anonymity they afford.

5. Predictive dialers promote efficiency and compliance.

The ANPR asks a number of questions about the use of "predictive dialers." To increase the efficiency of phone calls, first-party creditors employ a variety of automated telephone dialing systems, including predictive dialers, which place calls to a pre-programmed set of phone numbers which when answered can be connected to either a live operator or a prerecorded message. Predictive dialers increase the efficiency of telephone calls and enable more contacts to be made with fewer personnel, reducing the cost of collections. This, in turn, helps to promote the affordability and availability of consumer credit. Most importantly, predictive dialers enable collectors to contact consumers efficiently to inform them about the current status of their accounts. Better-informed consumers have greater opportunities to cure delinquencies, protect their credit, or gain earlier access to debt workout options.

In addition, predictive dialers promote compliance. Because they are programmed with certain numbers to call, they help creditors comply with cease communication requests, requests not to call a place of employment, and they help manage TCPA compliance by excluding cell phone numbers for which a customer has not consented to be called. They also provide the ability to control the number of attempts that are made to a particular number in a day and the hours at which those calls are placed, and they prevent calls from occurring too close in succession. Thus, they can be programmed to execute a collection strategy determined by management rather than leaving it to a manual process dependent upon spreadsheets and collector-level compliance. Finally, many predictive dialers automatically log all calls and call attempts, which helps first-party creditors monitor call center calling patterns. Thus, they ensure a level of compliance that would be impossible to replicate without them.

The financial services industry would oppose rules discouraging the use of predictive dialers, and it does not believe there is a need for a rule to address "dead air" or hang-up calls that occur on occasion with predictive dialers. As noted throughout this letter, making contact with the consumer is the overriding goal of a first-party creditor. Dead air calls obviously run counter to this objective, so care is exercised to program predictive dialers to avoid hang ups and dead air.

6. The financial services industry supports guidance defining what constitutes a “reasonable period of time” a collector must wait for an attorney to respond under FDCPA §.805(a)(2).

Section 805(a)(2) of the FDCPA prohibits communication with a consumer in connection with the collection of debt if the debt collector knows that the consumer is represented by an attorney, unless the attorney fails to respond “within a reasonable period of time.” The ANPR requests comment on how debt collectors calculate a “reasonable period of time.” Because state fair debt collection statutes have provisions that mirror §805(a)(2) of the FDCPA , we are responding to this question.

When first-party creditors learn that a consumer is represented by an attorney, they attempt to contact the attorney, often on multiple occasions by letter and phone call. In the all too common situation when the attorney fails to respond and the first-party creditor resumes efforts to contact the consumer again, the attorney sues the creditor. Unscrupulous attorneys are the only ones benefiting from their lack of responsiveness, as their behavior cuts off communication between the lender and the customer – communication that could lead to a resolution of the delinquency.

Thus, the financial services industry urges the Bureau to define what constitutes a “reasonable period of time,” a period that should not exceed 30 days so that consumers are not harmed by unresponsive counsel. Efforts to contact the borrower after that time period should be granted a safe harbor.

7. The Bureau should clarify FDCPA rules concerning communications with third parties.

- i. Authorization issues.*

FDCPA §805(b) prohibits communication with third parties “without the prior consent of the consumer *given directly to the debt collector.*”³⁸ There is some confusion as to whether the phrase “given directly to the debt collector” requires a power of attorney (POA) or other written authorization to be given directly by the consumer to the debt collector. Obviously such an interpretation would conflict with the very purpose of a POA that anticipates a future inability to address personal financial matters. Thus, a POA would have limited value for a servicemember on active duty or an individual otherwise unable to contact a debt collector directly but who desires to resolve the delinquency. Such a requirement would also conflict with state laws that require a third party to accept direction from an agent under a valid POA. We urge the Bureau to clarify that a POA or other written authorization from the consumer that clearly names the authorized third party and states that the individual is authorized to address the consumer’s financial matters is sufficient, even if it is presented by the third party.

³⁸ 15 U.S.C. §1692c(b)(emphasis added).

ii. Communications with a consumer's spouse.

Throughout the lifecycle of an account the FDCPA permits a debt collector to communicate with a spouse—except when the customer dies. The financial services industry encourages the Bureau to clarify that a surviving spouse remains a “spouse” for purposes of FDCPA §805(b) after the customer dies. Doing so would be consistent with the FTC *Statement of Policy Regarding Communications with the Collection of Decedent debts* (FTC Policy Statement).³⁹ The industry agrees that a first-party creditor or third-party debt collector has an affirmative responsibility not to mislead a surviving spouse about his or her responsibility to pay the decedent’s debts. However, it is often in the best interest of a surviving spouse to speak with a first-party creditor. Frequently, the surviving spouse wants to pay off the debt out of the assets of the decedent’s estate or take over payments for items seen as “family” assets, such as a car or an appliance. In addition, when a surviving spouse is living in a home that secured the decedent’s loan, many spouses are interested in an assumption of the note. It is clearly in the interest of the spouse and the first-party creditor to be able to have conversations to determine if the spouse qualifies for an assumption of the mortgage.

The ANPR also asks whether there are circumstances under which a creditor or debt collector should not be permitted to contact a consumer’s spouse, for example when the individuals are estranged or the consumer has obtained a restraining order against the spouse. We do not believe the Bureau should limit the ability of a debt collector to talk to the spouse as doing so may harm the spouse. For example, in community property states, the consumer’s spouse may be liable for the debt even if the spouse is not on the contract. In addition, under Regulation B if the spouse is an authorized user on the consumer’s credit card account, the spouse’s credit may be negatively impacted by the consumer’s failure to pay.

iii. Communications with “personal representatives” of a deceased consumer.

The FDCPA permits debt collectors to communicate with “executors” and “administrators” about a deceased consumer’s debts, but frequently an individual – a family member, partner, or significant other – who is not an executor or administrator takes responsibility for paying the decedent’s debts from the estate’s assets. The financial services industry encourages the Bureau to clarify that the FDCPA does not bar a debt collector from contacting these “personal representatives” about the debt, as such a bar would conflict with state probate law reforms and would not be in the best interest of consumers. As the FTC recognized:

³⁹ 76 Fed. Reg. 44915 (July 27, 2011), available at <http://www.ftc.gov/os/2011/07/110720fdcpa.pdf>.

If collectors are unable to communicate about a decedent's debts with individuals responsible for paying the estate's bills, because those individuals were not court-appointed "executors" or "administrators," collectors would have an incentive to force many estates into the probate process to collect on the debts. Typically, it is easy and inexpensive under state law for creditors and others to petition for the probate of an estate. The actual probate process, on the other hand, can impose substantial costs and delays for heirs and beneficiaries. Policies that result in the imposition of these costs are contrary to the goal of state probate law reforms to promote simpler and faster alternatives to probate, especially for smaller estates.⁴⁰

In accordance with the FTC Policy Statement, the industry agrees that a first-party creditor or third-party debt collector may not mislead a personal representative into believing that (1) the estate assets are subject to the collector's claim, (2) they are personally liable for the decedent's debts, or (3) the individual has authority to use estate assets to pay the debt if the individual does not have that authority. We encourage the Bureau to adopt rules or issue guidance consistent with the FTC Policy Statement, including the suggested disclosures on the non-liability of a personal representative.⁴¹

The ANPR also asks whether executors, administrators, or personal representatives are informed that the debt being collected was disputed by the decedent. Our members report that they do not collect on disputed debts until the dispute has been resolved.

8. The financial services industry opposes rules that might be interpreted as "mini" cease and desist requests for particular communication channels and for the timing and frequency of contact.

The ANPR solicits comment on the costs and benefits of allowing consumers to (1) limit the media through which collectors may communicate, (2) specify the times or locations that are convenient for collectors to contact them, or (3) restrict the frequency of communications. As stated throughout this comment letter, the importance of consumer engagement with a first-party creditor cannot be overstated and should be encouraged. The consumer "protection" afforded by a cease and desist request is illusory, as it virtually forces creditors to resort to litigation, repossession of the collateral securing the loan, foreclosure, or other contractual and legal rights.

If a consumer is engaged with the first-party creditor, call center personnel will try to respect a consumer's choice for the timing and frequency of communications as efforts

⁴⁰ *Id.* at 44919.

⁴¹ *Id.* at 44922.

are made to consider the various workout options. In addition and as previously discussed, to encourage customer engagement lenders offer a variety of communication channels and generally respond in the medium chosen by the consumer.

However, many servicing systems lack the capacity to capture and fully meet all individual requests for the channel, timing, and frequency of contact – many of which may be individualized to particular channels. Thus, the financial services industry would oppose rules that might be interpreted as “mini” cease and desist requests for particular communication channels and for the timing and frequency of contact. In the end, we believe such rules would impose barriers to consumer engagement, resulting in more negative outcomes to consumers with past due accounts or other payments difficulties.

In a related vein, the industry asks the Bureau to clarify that despite the receipt of a written cease and desist request from a customer, a first-party creditor may send to the consumer disclosures and notices required by Federal and State consumer collections laws. In addition, the Bureau should be aware that (following the lead of California) a number of states have passed a “Homeowner Bill of Rights.” As a prerequisite to foreclosure, these state laws require that a bank or servicer contact the borrower *in person or by telephone* to discuss loan mitigation options.⁴² We urge the Bureau to

⁴² See, e.g., California Civil Code sections:

- 2923.55(a) – prohibits beginning a non-judicial foreclosure until 30 days after the notice in 2923.55(b)(1) is sent, *and* either initial contact has been made with the borrower in person or by telephone, or the servicer has satisfied certain due diligence requirements (which require telephone phone call attempts and additional written notices).
- 2923.55(b)(1) – requires that a notice, similar to the notice required by the DOJ consent judgment/NMS be mailed to the borrower.
- 2923.55(b)(2) - provides that the servicer “shall” contact the borrower in person or by telephone to assess the borrower’s financial situation, provide the HUD counseling number, and inform borrower of the right to a subsequent meeting within 14 days. The discussion of the borrower’s financial situation can wait until the subsequent meeting if one is requested.
- 2923.55(f) - in order to satisfy the due diligence requirements of the above, the servicer must:
 - a. 2923.55(f)(1) - first mail a notice to the borrower informing the borrower of the right to discuss foreclosure alternatives and providing the HUD counseling agency phone number;
 - b. 2923.55(f)(2) – attempt to contact the borrower by telephone on three different days at different times;
 - c. 2923.55(f)(3) – if the borrower does not respond within two weeks after the last call attempt the servicer must send another letter by certified mail giving the HUD number for locating a counseling agency.

Nevada Revised Code sections:

- 107.500 - Requires that a notice, similar to the notice required by the DOJ consent judgment/NMS be mailed to the borrower.
- 107.510(1)(a) - prohibits starting a foreclosure until 30 days after the above notice is sent, *and* either initial contact has been made with the borrower in person or by telephone, or the servicer has satisfied certain due diligence requirements (which require telephone phone call attempts and additional written notices).
- 107.510(2) provides that the servicer “shall” contact the borrower in person or by telephone to assess the borrower’s financial situation, explore options to avoid foreclosure, advise the borrower of the right to a subsequent meeting within 14 days, and provide the borrower the HUD number for finding a housing counseling agency.
- 107.510(5) – requires that in order to satisfy the due diligence requirements of the above, the servicer must:

provide a safe harbor for these communications that otherwise might be construed as a form of debt collection in violation of the cease and desist request.⁴³

V. Unfair, Deceptive, and Abusive Acts and Practices

In part V of the ANPR, the Bureau remarks on the overlapping objectives of the FDCPA and the Dodd-Frank Act to prohibit unfair, deceptive and abusive acts and practices. Of course the Dodd-Frank Act's UDAAP provisions have a broader mandate than those found in the FDCPA, but the Bureau's questions suggest it is contemplating rulemaking under section 1031, its UDAAP authority, to impose FDCPA-like restrictions and requirements on first-party creditors. As a threshold matter, we note that while the Bureau possesses broad authority under section 1031, the FDCPA's exclusion of an original creditor collecting in its own name was a carefully considered Congressional decision, and nothing in the Dodd-Frank Act suggests that Congress intended to reverse that judgment in the enactment of section 1031.

-
- a. 107.510(5)(a) - first send a notice to the borrower informing the borrower of the right to discuss foreclosure alternatives and providing the HUD counseling agency phone number;
 - b. 107.510(5)(b) – attempt to contact the borrower by telephone on three different days at different times;
 - c. 107.501(5) – if the borrower does not respond within 14 days of the servicer's last call attempt, send another letter containing the same information as required in 107.510(5)(a).

Revised Code Washington sections:

- 61.24.031(1)(a) - prohibits beginning a nonjudicial foreclosure until 30 days after completing the proscribed due diligence, or 90 days after the initial contact was initiated if the borrower responds to attempt at initial contact.
- 61.24.031(1)(b) – requires the lender to make initial contact with the borrower by letter and by telephone.
- 61.24.031(1)(c) – requires, among other things, that the letter contain specified information, including the HUD counseling agency number, an explanation that housing counseling is available at little or no cost to the borrower, an explanation that failure to contact a housing counselor might result in the borrower losing the opportunity to mediate, a statement advising the borrower of the right to meet with the beneficiary to discuss possible alternatives to foreclosure, instructions on how to respond to the letter, and a warning that the failure to respond to the letter will mean that a notice of default will issue within 30 days.
- 61.24.031(5)(a) – specifies that the initial contact process starts with sending the letter required by 61.24.031(1).
- 61.24.031(5)(b) – specifies that the lender must attempt to call the borrower on three different days at different times to the primary and secondary phone numbers on the account.
- 61.24.031(c) – specifies that if the borrower does not respond within 14 days after the call requirements are satisfied, the lender must send a certified letter providing most of the same information provided in the initial letter.

Minnesota Statute sections:

- 580.043(2) - Prohibits making a foreclosure referral until the Minnesota Home Owners Bill of Right's loss mitigation requirements have been satisfied.
- 582.043(5) - Outlines Minnesota's loss mitigation requirements.
- 582.043(5)(1) - requires the servicer to "notify a mortgagor in writing of available loss mitigation options offered by the servicer that are applicable to the mortgagor's loan before referring the mortgage loan to an attorney for foreclosure;"

⁴³ See *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010)

Section 1031 incorporates Federal Trade Commission Act limitations on relying on public policy as a primary basis for unfairness findings. Simply asserting that third-party debt collectors and first-party creditors should be regulated under identical standards is the type of public policy assertion that is an insufficient basis for erecting an unfairness rule. Such invocation of public policy concerns for UDAP actions led Congress to restrict the FTC's UDAP authority and impose Magnuson-Moss administrative process requirements on FTC rulemaking. A fulsome consideration of the public policy behind the FDCPA treating creditors and collectors differently militates against asserting parallel regulation under UDAAP.

In the context of such consideration, we encourage the Bureau to take into account fully the contours of that process. This will be the first rulemaking under section 1031 and will set fundamental precedent for the Bureau's future exercise of its rulemaking under the section. It will be the *Marbury v. Madison* of Bureau UDAAP administrative law jurisprudence.

Section 1031 requires the Bureau to have a reasonable basis to conclude that an act or practice satisfies the specific, limited criteria set forth in that section.⁴⁴ Standing alone, it is not reasonable to assume that the fact that an act has been deemed to be unfair or abusive for a designated class with one set of characteristics and circumstances would support a conclusion that the same act is unfair or abusive when engaged in by another class with different characteristics and circumstances.

When it comes to UDAPs (and by extension to UPAAPs), the regulatory and judicial precedent stresses the criticality of particular facts and circumstances in determining whether an act or practice crosses the line. In the supervisory or enforcement context, the facts and circumstances are, by definition, part of the Bureau's record. However, a rulemaking would appear to require a substantial factual, evidentiary, and legal record to support a finding that an act or practice is unfair, deceptive or abusive not just in a specific case but in all circumstances.

Thus, a regulation that identified an act or practice as unfair and prohibiting all first-party creditors from engaging in that practice would require a substantial record. This record would have to show that, across the board, the act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers [and] such substantial injury is not outweighed by countervailing benefits to consumers or to competition." The record would also have to show how each prong of the unfairness definition is met, including, how a specific act or practice causes or is likely to cause substantial injury not reasonably avoidable and how there will not be countervailing benefits to consumers or to competition.⁴⁵

⁴⁴ 12 U.S.C. § 5531(c)(1).

⁴⁵ 12 U.S.C. § 5531(c)(1)(A)-(B).

The same logic would apply to regulations that identified certain acts or practices as abusive or deceptive. In each case, the record would have to support a conclusion that, across the board, the act or practice satisfies all of the elements of the statutory definition.⁴⁶

Second, to the extent that the Bureau is exploring reversing past regulatory acceptance of mainstream industry practices through a UDAAP analysis, the Bureau should exercise care to pursue a standard *prospectively* to prevent deceptive, unfair, or abusive practices. As with any good prescription, it is a remedy to be applied prospectively to cure the particular ills diagnosed. The Bureau should avoid opening the door to retroactive liability.

1. Section 808 of the FDCPA should be updated through rulemaking to provide consumers with improved access to information and more debt payment options.

The Associations make the following recommendations for improving certain provisions of Section 808:

- **Section 808(1):** A strict reading of Section 808(1) could be interpreted to prohibit creditors from providing consumers the option to pay-by-phone due to the restriction on payment fees. We ask the Bureau for clarity on such fees, as a broad restriction on payment fees would unnecessarily exclude a convenient payment option for consumers who are informed of the fee before deciding to make a payment. A simple solution would be for the Bureau to expand the meaning of “expressly authorized” to allow for changes or modifications to the original lending agreement through verbal supplementation. This would allow collectors to offer new payment options as they develop, rather than waiting for regulatory changes before making such options available.
- **Section 808(5):** The restrictions found in section 808(5) of the FDCPA should not be expanded through rulemaking to include mobile phones, email, text messages or other new communication channels. The Associations recognize that some consumer mobile-phone plans directly or indirectly charge consumers for phone calls during certain time periods and that supplemental data plans can cause additional charges to accrue. However, we believe that consumers are better served by not placing section 808(5)’s restrictions on these new communication channels. For an ever-increasing number of consumers, particularly consumers under age 35, their mobile phone is their only available phone line.⁴⁷ As a result, applying section 808(5)’s restrictions onto mobile phones may prevent creditors

⁴⁶ 15 U.S.C. § 5531(d)(1)-(2).

⁴⁷ Some consumer surveys show that 38.2 percent of U.S. households are “wireless only.” See <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> (last visited Feb. 12, 2014).

from reaching out to many borrowers in difficulty. Moreover, a cost-benefit analysis would likely show that the minimal costs to consumers of mobile contacts is significantly outweighed by the potential opportunity for borrowers to receive meaningful debt relief offers. Finally, consumers already have the right to opt-out of all mobile-phone contacts by sending creditors a “cease communication” request.

- **Section 810:** The prescriptions of section 810 of the FDCPA are designed to restrain the practices of third-party collectors and should not be extended to first-party creditors. As has been noted before, first-party creditors have strong incentives to provide their customers who are facing debt difficulties with communications and assistance related to their debt, particularly in situations where the creditor holds multiple debts of the borrower. We agree that consumers should be able to express their preferences about how payments should be applied when the creditor holds multiple debts of the borrower. However, we request that the Bureau provide creditors with liability protections in situations where the borrower directs payments in a manner that is contrary to the creditor’s recommendations. We also agree that borrowers should receive a “payment in full” receipt for a true settlement of an account. However, mandating receipts for every payment received on a delinquent debt would place significant operational burdens on creditors in exchange for few if any benefits to consumers.
2. Imposing substantiation requirements on first-party creditors is unnecessary and incongruent with the creditor-borrower relationship.

As we note in our comments to Section III of the ANPR, the creditor-borrower relationship is formed when the borrower opens an account with the creditor. Therefore, it would seem unnecessary to impose substantiation standards on first-party creditors when it is they who extended the original credit to the borrower and typically have been servicing the loan or credit line. Similar to the issue of debt validation, substantiation requirements are clearly more applicable to third-party collectors, as they are entities that are unfamiliar to the borrower.

3. The Bureau should not interpret Dodd-Frank’s definition of “service providers” to include debt buyers.

The Associations request that the Bureau clarify whether debt buyers are service providers within the meaning of the section 1002(26) of the Dodd-Frank Act. We believe that the distinction between the two is captured in the service provider definition, *i.e.*, “any person that provides a material *service* to a covered person in connection with the offering or provision of a consumer financial product or service.”⁴⁸ Simply put, debt

⁴⁸ 12 U.S.C. §5481(26) (emphasis added).

buyers do not provide a *service* to creditors; the bank-debt buyer relationship is one of seller and buyer.

Without clarity from the Bureau, we are concerned that many creditors may believe that they are required to oversee debt buyers as if they were service providers; this could result in significant negative consequences. As the FTC states in its report on the debt buying industry, “the selling of debts by creditors decreases the losses they incur in extending credit, which, in turn, is likely to lead to an increase in the amount of credit extended and a decrease of the price of that credit.”⁴⁹ The report goes on to note that one of the primary reasons why creditors sell their debt is “to avoid the costs of coordinating and monitoring the conduct of third-party collectors.”⁵⁰ As a result, requiring creditors to oversee debt buyers would limit the ability of many financial institutions, particularly smaller institutions, to sell their charged-off debt. This would harm their ability to minimize loan losses, recover funding, and extend new credit to consumers.

VI. Time-Barred Debt and Partial Payment Disclosures

As the Bureau notes, time-barred debt is a complex subject which is governed by a multitude of state and federal laws. In any given situation, a fundamental question is whether and when the passage of time impairs or extinguishes the consumer’s obligation to repay the obligation. The answer to this question is complicated by the fact that, in some cases, a time-barred debt is revived by a partial payment. Another issue is whether the passage of time affects the lender’s right to collect the debt through non-judicial means. Finally, questions arise as to when and how the passage of time affects the lender’s right to use judicial means to collect the debt.

In the majority of states, the running of the statute of limitations does not extinguish a debt.⁵¹ Certain Federal and state laws allow for non-judicial collection of time-barred debt, even in cases where suing to collect the debt is restricted. Moreover, several courts have held that an attempt to collect a time-barred debt is not a violation of the FDCPA.⁵²

Efforts to collect time-barred debts where such collection efforts comply with applicable law should not be restricted, because in many cases consumers wish to repay time-barred debts based on a number of considerations, including a sense of personal obligation and their desire to protect their credit history.

⁴⁹ FTC Debt Buyer Study, *supra* at 11.

⁵⁰ *Id.* at 12.

⁵¹ See Brief for FTC and CFPB as Amici Curiae Supporting Respondent, *Delgado v. Capital Mgmt. Servs., LP.*, No 4:12-cv-04057 (7th Cir. 2013), available at http://files.consumerfinance.gov/f/201309_cfpb_agency-brief_12-cv-04057.pdf.

⁵² *Id.*; see, e.g., *Freyermuth v. Credit Bureau Services*, 248 F.3d 767 (8th Cir. 2001); *Huertas v. Galaxy Asset Management*, 641 F.3d 28, 32-33; *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 616 (N.D. Ill. 2001).

The Bureau has expressed concern that consumers “may not understand their rights with respect to the collection of time-barred debts.”⁵³ While we share the Bureau’s interest in ensuring that consumers understand their rights, and we look forward to working with the Bureau to improve consumer comprehension, we are concerned by the suggestion that disclosures mandated for one debt collector at the conclusion of an investigation of that party’s egregious practices might be applied to all first-party creditors and third-party debt collectors.

Specifically, the ANPR refers to the disclosure requirements in the *Asset Acceptance* consent order. The debt collection practices in *Asset Acceptance* were particularly egregious and unique. The disclosures required in the consent decree were tailored to the facts and circumstances of that particular case. It would not be appropriate, or consistent with the Bureau’s authority, to impose the *Asset Acceptance* disclosures unless a debt collector similarly explicitly misleads consumers and has been held to violate the FDCPA.

Asset Acceptance bought older debts, and it could be assumed to know that the statute of limitations had run on many of its accounts at the time of purchase. Thus, it was not inappropriate to require the company to disclose that the age of the consumer’s debt restricted Asset Acceptance from bringing suit on the debt.⁵⁴ In most cases, however, determining whether a debt is time barred is challenging and requires a legal judgment. The applicable statute of limitations may not only vary by state law, but also by the type of debt. Limitations periods can also depend on the cause of action alleged – breach of contract or account stated. Thus, the Bureau should not mandate that first-party creditors or debt collectors disclose when a debt is time barred, as this would require the collector to provide legal advice to the consumer.

Any disclosures should be combined with the other disclosures required under the FDCPA or state law and should indicate that a consumer’s debt *may* be time-barred.

1. Partial Payments on Time-Barred Debt Disclosures.

Since it is a legal question in every case as to whether the statute of limitations has run and whether a partial payment will revive the debt, disclosing the impact of a partial payment requires legal research with respect to each debt.

Given the complexity of the topic itself and the variety of individual circumstances, the most effective way to help consumers understand their rights may be a mobile application or online tutorial that guides the consumer through a series of questions and answers to understand his or her specific situation. The Bureau may want to explore collaborating with stakeholders, including states and the legal community, to build a

⁵³ ANPR on Consumer Debt Collection Practices, CFPB-2013-0033 (Nov. 2013), available at http://files.consumerfinance.gov/f/201311_cfpb_anpr_debtcollection.pdf.

⁵⁴ Consent Decree, *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/01/120130assetcmpt.pdf>.

website or mobile application to deliver information on state and federal laws on partial payments and time-barred debts.

VII. Debt Collection Litigation Practices in State and Local Courts

1. Venue Provisions.

The ANPR asks whether under current law, the venue where debt collection actions are filed creates problems for consumers who live in large judicial districts. We believe that the venue requirements of the FDCPA, supplemented by venue requirements in many states, already provide strong protections for consumers. In addition, further restrictions on venue at the federal level could complicate the ability of first-party creditors and debt collectors to comply with state venue requirements.

The FDCPA requires debt collectors to file suit in a judicial district or similar legal entity in which the real property is located or only in a judicial district or similar legal entity: “(A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action.”⁵⁵ Our understanding is that creditors and debt collectors generally file in the judicial district in which the consumer resides.

A number of states impose additional venue requirements for debt collectors. For example, under California’s Fair Debt Collection Practices Act, venue is satisfied only in “the county in which the debtor has incurred the consumer debt or the county in which the debtor resides at the time such proceedings are instituted, or resided at the time the debt was incurred.”⁵⁶ Since the FDCPA allows a debt collector to bring suit in a “judicial district or similar legal entity,” in this case, debt collectors can comply with both federal and state law by filing suit in the appropriate “county.” If the Bureau is considering adjusting venue requirements, we would encourage the Bureau to give careful thought to conflicts between state and federal requirements.

We also urge the Bureau to provide clarification on the appropriate location to file a legal action to enforce an agreement where joint borrowers on the account reside in different judicial districts. For example, where spouses jointly apply for a credit card and subsequently divorce and move to different counties, it is not clear where to file a legal action to enforce that agreement. Acceptance of a credit card agreement is evidenced by the use of the card and there is no signed agreement; thus action cannot be brought in the judicial district where the contract is signed. Accordingly, where borrowers reside in different jurisdictions it is not clear where it is appropriate to file a legal action.

⁵⁵ 15 U.S.C. § 1692i(a),

⁵⁶ CAL. CIV. CODE § 1788.15.

2. State Court Procedural Rules and Other Rules Related to the Administration of Justice.

Most debt collection actions follow state and local court procedural rules. As stated in the ANPR, the administration of justice and regulation “on all subjects not entrusted to the Federal Government, [is] the peculiar and exclusive province, and duty of the State Legislatures.”⁵⁷ Thus, the Bureau will want to take account of state procedural rules as it considers matters related to court procedures or evidence to avoid infringing on states’ rights.

We understand that some states now require the mortgage note to be attached to the complaint in foreclosure actions or other types of mortgage litigation. Thus, any similar requirement the Bureau adopts should take account of state procedural requirements.

Finally, the Associations and their members have observed several instances where a debt collector has filed a complaint in court but is awaiting the consumer’s answer. Rather than formally answering the complaint, the consumer submits an informal complaint to the debt collector’s consumer complaint system or to the Bureau. This informal “answer” creates confusion both for consumers and debt collectors. The consumer may believe that by filing a non-judicial “answer” he or she has responded to the judicial process and preserved his or her rights in that process. For the debt collector, a non-judicial “answer” creates uncertainty in the judicial process. We hope the Bureau will consider addressing issues like this in the context of consumer education and in guidance for debt collectors.

VIII. Conclusion

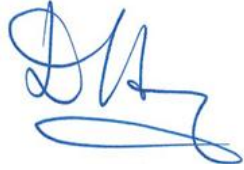
The Associations appreciate the opportunity to comment on the advance notice of proposed rulemaking. We look forward to working with the Bureau to ensure that any rules and other regulatory initiatives that the Bureau undertakes balance the needs and interests of all parties to the debt collection process to promote and encourage the sustained availability of credit at the lowest possible costs to the borrowing public.

Respectfully submitted,



Virginia O’Neill
Vice President & Assistant Chief Counsel
American Bankers Association

⁵⁷ 78 Fed. Reg. *supra* at 67877(citing *Calder v. Bull*, 3 U.S. 386, 387 (1798)).



Dong Hong
Regulatory Counsel
Consumer Bankers Association



Anne Wallace
Senior Director of Consumer Financial Services
Financial Services Roundtable