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Office of Regulations
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Debt Collection Practices (Regulation F); Docket No. CFPB-2019-0022; RIN 3170-AA41.

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members. On behalf of our members, we are writing regarding the Consumer Financial Protection Bureau's (CFPB or Bureau) proposal[1] to amend Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA) [2].

General Comments

The collection of debt payments from borrowers is critical to the safety and soundness of any lending institution. Credit unions, as financial cooperatives, collect debts from their member-owners and, in certain circumstances, retain third-party collectors for this purpose. Credit unions' interest in this rulemaking, therefore, is two-fold: as first-party lenders that are not subject to the FDCPA and as institutions that may retain third-party lenders that are.

In 1977, the FDCPA was enacted to establish guidelines and restrictions on third-party debt collection practices. In doing so, Congress clearly exempted first-party collectors from the law's coverage because first-party collectors have a "desire to protect their good will when collecting past due accounts."[3] Lenders collecting their own debts should be treated differently than third-party debt collectors that exist solely to collect payment from debtors and maintain no ongoing relationship after the collections process has been resolved.

This distinction carries added importance for credit unions because of their not-for-profit, cooperative ownership structure. In contrast to a bank or other for-profit lender whose shareholders have the ultimate interest in the repayment of debts, at a credit union, the other members are the key stakeholders and have a strong interest in ensuring the credit union can take appropriate steps to collect debts owed by their fellow members. After all, the credit union's members will ultimately pay the cost of uncollected debts through higher interest rates on loans and lower rates on savings.

[1] Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019).
[2] 15 U.S.C. 1692 et seq.
[3] S. Rep. No. 95-382, at 2 (1977).

CUNA opposes a debt collection final rule that could result in FDCPA requirements intended for third-party collectors to be applied to first-party collectors, either directly or indirectly; and we urge the Bureau, as it promulgates its first substantive rulemaking under the 42-year old FDCPA, to carefully consider the broad impact its rule will have on consumers and the operations of third-party collectors and seek to limit disruption to this critical function.

The CFPB should ensure the proposed rule does not apply to creditors and first-party debt collectors, which are not directly subject to the FDCPA.

Under prior CFPB leadership, the practice of "regulation through enforcement" created substantial uncertainty in the financial services market. The CFPB has undergone extensive efforts recently in ending that practice and establishing clear "rules of the road" for financial institutions to follow. CUNA has been supportive of this sea change at the Bureau. However, the proposed debt collection rulemaking and its implication that an open question exists as to whether the activities prohibited under the FDCPA proposed rule could also be prohibited under the Bureau's unfair, deceptive, or abusive acts or practices (UDAAP) authority raises concern for first-party collectors. CUNA would strongly oppose the extension of the FDCPA's statutory or regulatory requirements to credit unions engaged in first-party collection activities. We urge the CFPB to re-evaluate its proposed rulemaking to ensure no question exists on this issue and its authority is firmly placed exclusively in the FDCPA.

CUNA acknowledges the CFPB's intent to establish a rule that exclusively applies to FDCPA-covered debt collectors, not first-party collecting credit unions. In fact, the proposal states, "credit unions are generally not debt collectors under the FDCPA and therefore would not be covered by the proposal."[4] However, the proposal could be interpreted as creating uncertainty as to the scope of its coverage due to the inference in two footnotes[5] that some prohibited third-party collection activities could also constitute unfair, deceptive, or abusive acts or practices (UDAAP) under section 1031 of the Dodd-Frank Act. The Bureau takes no firm position on that question, which appears left open. While credit unions are confident that current leadership has no plans to enforce the FDCPA proposal against first-party collectors, the same cannot be assumed for future CFPB leadership or the nation's plaintiff's bar.

Credit unions are concerned the Bureau's direct reference to its UDAAP authority in this FDCPA-grounded rulemaking could open the door down the road for portions of this rule to be applied to first-party debt collectors. CUNA recommends the CFPB remove these references from the final rule in order to avoid the implication – even if unintended – that certain prohibited activities could also be prohibited under UDAAP, which has a broader scope than the FDCPA. In general, we caution the Bureau against leaving substantial questions unanswered in its rulemakings because often when a question exists the courts will answer it, and the result may not be what the CFPB intended.

[4] Debt Collection Proposal at pg. 23329.

[5] Footnote 69 and 331 in the proposed rule both refer to the CFPB's UDAAP and state "[T]he Bureau does not take a position on whether such practices also would constitute an unfair, deceptive, or abusive act or practice under Section 1031 of the Dodd-Frank Act" and "The Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(ii) by creditors and others not covered by the FDCPA would constitute an unfair act or practice under Dodd-Frank Act 1031(c) if engaged in by those persons, rather than by an FDCPA-covered debt collector," respectively.

As stated above, Congress enacted the FDCPA with the clear intent to treat third-party collections and first-party collections differently under the law. At the time, Congress recognized a relationship exists between the creditor and the borrower – this relationship is especially strong in the member-owned, democratically controlled credit union context. The Bureau, in promulgating a rule pursuant to its FDCPA authority, should recognize and respect that separate treatment and avoid incidentally creating an environment where the FDCPA could be applied beyond its intended scope.

In the final rule, CUNA respectfully recommends the Bureau rely solely on its FDCPA authority. The FDCPA provides the Bureau with ample ability to achieve all its desired limitations on third-party collections without exposing credit unions that collect their own debts to expanded regulatory compliance and litigation burden.

While CFPB's proposed rule is not intended to directly apply to credit unions collecting their own debts, we recommend the Bureau address the following issues in the rulemaking:

> *CUNA supports the modernization of the FDCPA by accounting for and permitting greater use of electronic communication technology, but we recommend the Bureau streamline any requirements for obtaining consent to deliver electronic disclosures.*

The proposed rule would require a debt collector to provide required disclosures in a manner that is reasonably expected to provide actual notice to the debtor and in a form the consumer may keep and access later. In the rule, the Bureau clarifies that a debt collector providing electronic disclosures would either need to comply with the E-SIGN Act or a set of proposed alternative procedures. In addition, the debt collector providing electronic disclosures would also need to comply with specified delivery and format requirements.

The creation of a mechanism for debt collectors to provide electronic disclosures is a welcome change to the outdated FDCPA regulation. Credit unions support the CFPB permitting greater use of email in debt collection communications, as email has proven to be an effective, efficient, and often preferred means of commutating between parties. However, the proposed E-SIGN and "alternative" consent requirements are overly complex and could ultimately inhibit debt collectors from communicating with debtors through these preferred technologies. In addition, the "alternative" consent option for third-party debt collectors, which essentially "transfers" E-SIGN consent obtained by a creditor or prior debt collector to the third-party collector, would place increased expectations on creditors that assign out debt. These increased expectations would likely result in creditors experiencing increased costs and record retention issues, and require creditors to develop and maintain new information systems.

Credit unions support the CFPB in their desire to minimize snail mail and telephone communications in favor of email and text message. However, this paradigm shift should be established through clear, streamlined requirements instead of a complex system of obtaining consumer consent that ultimately adds costs on indirectly affected entities.

The proposed requirement to provide the debtor with the ability to opt-out of electronic communications in each communication may be unreasonable and the Bureau should clarify that the opt-outs are specific to that method of communication.

The CFPB's proposed rule would clarify that newer communication technologies, including email and text message, may be used in debt collection. However, the proposal states these electronic communications must include instructions for the consumer to opt out from receiving further emails and text messages. The proposal states that if a debt collector communicates through email or text, then the debt collector must also include in each communication information on methods for the debtor to opt out of further communications.

Credit unions use several methods to provide their members information about their financial accounts. The CFPB's proposal, which would require an opt-out attached to every electronic message, may be unnecessarily burdensome and would further hamper the effectiveness of text messaging and emails as a preferred method of communication. Debt collectors would be required to create new opt-out mechanisms and retain records monitoring opt-out requests from consumers to ensure consistency across systems. In addition, since emails are often not automatically noted in a financial institution's collections software, the opt-out requirement could require substantial system reprogramming to integrate the opt-out information received from email communications with the collections software. To minimize potential disruption, the Bureau should consider permitting debt collectors using electronic communications to provide opt-out information to the debtor on a periodic basis, at the debtor's request, or through a standing notice on the debt collector's website. In addition, the Bureau should clarify that opt-out requests provided by the debtor are specific to that form of communication (i.e., the consumer opting out of text message communications does not also inadvertently opt out of email or other electronic-communication methods used by the debt collector).

The CFPB's proposed bright-line telephone call threshold may provide some clarity to debt collectors but the seven-call limit does not appear to be grounded in sufficient data.

The proposed rule would limit the number of telephone calls a debt collector may place to a consumer about a particular debt within a seven-day period. In general, debt collectors would be prohibited from attempting to call a debtor about a debt more than seven times within a seven-day period. The debt collector would also be prohibited from engaging in more than one conversation with the debtor (i.e. successful contact) about a debt within a seven-day period. The telephone call and conversation limitations are specific to each individual debt account not the individual debtor – for example, a debt collector attempting to reach a debtor with two outstanding accounts may place seven calls for each debt in a seven-day period. Under the proposed rule, a debt collector abiding by the call and conversation limits would not be considered to have "engaged in repeated or continuous telephone calls or conversations with intent to harass," as prohibited by the FDCPA.

While credit unions often appreciate the clarity that can be provided by a bright-line threshold, in this instance the telephone call limitation does not appear to be based in any measurable data. Absent any clear empirical study to establish a threshold, the CFPB's proposed seven telephone call limitation appears to be "arbitrary and capricious" and exposes this provision to a potential legal challenge. We recommend the CFPB engage in a comprehensive study of telephone communications in the debt collection process to more thoroughly evaluate practices in the industry and ground the rule's call limitation in quantifiable data. In addition, CUNA recommends the Bureau avoid extending the proposed contact limitations to contacts made via text message or email. The Bureau's effort in this rulemaking to encourage modern communication methods in the debt collection process would be undermined if the final rule included the same or similar limitations as those established for telephone calls.

In many cases, communications during the debt collection process are intended to provide the debtor with critical information such as available options for repayment plans or debt restructuring. It is possible that establishing a needlessly low restriction on the number of permissible telephone communications under a bright-line limit could lead to consumers having less information available to them about their debts. As a result, these debt-related telephone communications between the collector and debtor are essential to avoiding costly and contentious litigation between the parties. The CFPB should thoroughly and properly study the permissible number of call attempts to ensure effective communication is not needlessly hindered.

The "Limited-Content Message" provision is a positive step, but the Bureau should address several issues that would limit its usefulness.

The proposal would establish and provide sample language for an authorized "Limited-Content Message" that would allow a debt collector to leave a message requesting a call back from the debtor and avoid violating the FDCPA's restrictions. The "Limited-Content Message" itself would not be considered a "communication" under the FDCPA and, if heard or observed by a third-party, it would not constitute a prohibited third-party disclosure.

In addition to providing a safe harbor, the proposed rule would outline the content permitted in a "Limited-Content Message." This would include the debtor's name, a request for the debtor to reply to the message, the name of the <u>natural person</u> or persons the consumer can contact to reply, and a telephone number the debtor can call. The debt collector would also have the option of providing a salutation, date and time of the call, a generic statement that the call relates to "an account," and a suggested date and time for the debtor to reply. While credit unions support the CFPB's attempt to provide additional clarity as to FDCPA communications and create a safe harbor for these messages, the proposed content creates several potential limitations that undermine the usefulness of leaving limited-content messages.

As stated above, a proper "Limited-Content Message" must specify the natural person the consumer can contact to reply. Under the proposal, the debt collector would not be allowed to provide their company name in the message. The requirement to state only a natural person could lead to confusion and be unworkable at entities with larger debt collection staffs. In today's age of spam and fraud, a consumer is likely going to be skeptical of returning a message made by a natural person they do not know personally, especially when the request for a callback is related to a vague mention of "an account." We are concerned that prohibiting debt collectors from using their company name in a proper limited content message would deprive a consumer from having the ability to research the origin of the call and determine its legitimacy. The "Limited-Content Message" is supposed to facilitate better communication between the parties but the natural person requirement will likely undermine that goal. Also, companies of larger scale may have several individuals making and receiving calls from debtors, so it could be unfeasible to include the names of every natural person the debtor could contact and unlikely the debtor will speak to the same exact natural person again.

In addition, the natural person-only approach seems to be unnecessary when you consider how the Bureau treats other types of communications. For example, there is no limitation on listing the company name on a piece of physical mail and in the email context the Bureau has proposed a safe harbor, so long as the email complies with certain procedures, to address the risk of a third-party reading an email "over-the-shoulder" of the intended recipient. The Bureau would be well-within its authority to permit a "Limited-Content Message" to include a company name and still provide a safe harbor from the limitation on third-party communications. And finally, as well-intentioned as the "Limited-Content Message" is, the natural person-only limitation could run afoul of various state laws that require the disclosure of the name of the debt collector in every communication. Debt collectors operating in those states would effectively be unable to take advantage of the flexibility provided by the "Limited-Content Message."

> *The Bureau should clarify that providing information on how debtors can request non-English disclosures does not obligate the debt collector to provide future communications in that language.*

The proposal would permit a debt collector to include statements in the validation notice informing consumers how they may request the validation notice in Spanish, if the collector chooses to provide a Spanish-language translation. In addition, a debt collector would also be able to offer the validation notice translated into any language, if the debt collector also sends an English-language validation notice in the same communication or if the debt collector previously sent an English-language validation notice.

We appreciate that the Bureau has avoided creating a mandatory requirement to provide foreign language disclosures to a debtor, but in the interest of clarity, the Bureau should establish that a collector that provides foreign language disclosures to a consumer does not commit themselves to communicating in that foreign language during all future communications with the debtor. The use of foreign language disclosures will likely be determined based on the needs of the local community, but non-English resources may not always be available. For example, the debt collector may not have an individual on staff able to verbally communicate in the desired foreign language should the debtor choose to follow up on the foreign language communication with a call to the collector. While providing preferred-language disclosures can be a much-appreciated courtesy provided to debtors, the staff resources required to ensure the debt collector can communicate in any foreign language at any time are out of reach for many entities.

> *The CFPB should recognize the complexity of state debt collection laws relative to time-barred debt and adopt a "knowledge" standard for determining prohibited communications.*

The proposal would prohibit a debt collector from suing or threatening to sue on a debt if the debt collector "know[s] or should know that the applicable statute of limitations has expired." The proposed rule does not include any model disclosures related to time-barred debt and the Bureau has stated it will assess whether a debt collector who collects time-barred debt must disclose that the debt collector cannot sue to collect the debt because of its age.

The treatment of time-barred debt is highly dependent on state statutes and a growing body of caselaw. This patchwork of standards has created a complex landscape that debt collectors must parse through in order to determine whether legal remedies are still available on a long-outstanding debt. As the Bureau acknowledges in its proposal: "In some instances, . . . a debt collector may be genuinely uncertain even after undertaking a reasonable investigation; this could occur, for example, when the case law in a State is unclear as to which statute of limitations applies to a particular type of debt."[6] In general, credit unions do not sue their members frivolously and only use litigation as a tool of last resort due to its high cost, inefficiency, and potential for needless disruption in the member-credit union relationship.

Credit unions have concerns with the proposed standard for determining when a debt collector is in violation of the FDCPA for filing suit on a time-barred debt. The "know or should know" standard does not appropriately recognize the complexity of determining the law governing a specific debt collection situation. Instead, CUNA recommends the Bureau consider adopting a "knowledge" standard for communications related to time-barred debts. Under this standard, a debt collection would only be in violation of the FDCPA if the collector has direct knowledge that the debt is time-barred. This standard would expressly prohibit collectors from intentionally misleading a consumer as to the legal status of their debt. The "knowledge" standard would also better focus the regulation to limit the behavior of bad actors that intentionally provide misinformation to debtors while still providing a safe harbor for debt collectors that may inadvertently or unintentionally misspeak as to the debt's status and the legal options available to the collector.

The CFPB should coordinate with the FCC to ensure the debt collection rule is not undermined by actions taken at the Commission that could limit the effectiveness of mobile communications and the ability of financial entities to reach consumers.

Throughout the proposal, the Bureau repeatedly acknowledges that consumers benefit from modern communication methods – like text messages – that allow debt collectors to provide borrowers with real-time information on loan modification or other alternatives. These communications provide the debtor with information critical to mitigating potential financial harm and improving financial health.

The CFPB's proposal attempts to clarify that use of text messages to contact a borrower is permissible under the FDCPA, subject to some requirements. These requirements include the debt collector providing the consumer the ability to opt out or unsubscribe from future emails, text messages, and other electronic communications. We support the CFPB's effort to bring the FDCPA into the modern age and more clearly permit the preferred communications methods of today. However, the Bureau's work has the potential to be undermined by the FCC in two respects:

First, the FCC's interpretations of the Telephone Consumer Protection Act (TCPA)[7], some of which were overturned by the D.C. Circuit, and the lack of clarity regarding the definition of an "automatic telephone dialing system" (autodialer) has largely discouraged businesses and financial institutions from using exactly the communication channels – such as text messages – that are supposed to be encouraged by the proposed rule. CUNA has repeatedly called on the FCC to appropriately define "autodialer" to provide certainty to financial entities that place calls to consumers and resolve the patchwork of TCPA interpretations across several circuit courts. In this case, the uncertainty created by the FCC and subsequent divergent court decisions directly undermines the purported benefit of the proposed bright-line call frequency rule, which is intended to reduce legal uncertainty and litigation costs.

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[6] Debt Collection Proposal at pg. 23329.
[7] Pub. Law 102-243.

Second, while the TCPA has had a chilling effect on legitimate callers, the Act has done little to stem the proliferation of "robocalls" by entities unconcerned with compliance. The FCC has instead turned to authorizing even more call blocking. It recently authorized voice providers to offer analytics-based call blocking on an opt-out basis and is considering allowing blocking for calls that fail a new call authentication technology called SHAKEN/STIR. The proliferation of call blocking has the potential to limit the effectiveness of calls placed to consumers by legitimate businesses – including entities attempting to communicate with consumers about debts or other financial products. CUNA has recommended that the FCC direct voice service providers not to block calls under the SHAKEN/STIR framework until the framework is fully implemented. SHAKEN/STIR is a technology standard that uses digital certificates to verify that the calling number is accurate and has not been spoofed. In addition, CUNA has also called for the creation of a robust challenge mechanism to promptly reverse erroneous call blocking, as well as for the FCC to establish a centralized "critical calls" list that includes fraud alerts and other vital, time-sensitive financial information.

Credit unions encourage the CFPB to work with the FCC to coordinate efforts to ensure its regulations are not contradictory and financial service entities are able to provide information to consumers using modern communication methods, which are often the most preferred and effective means of reaching the consumer.

Conclusion

We look forward to working with the Bureau to ensure third-party debt collectors have clear rules and credit unions collecting their own debts are not unjustifiably subject to the FDCPA. On behalf of America's credit unions and their 115 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,

Alexander Monterrubio
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