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COMPETITIVENESS

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Comment Intake
Bureau of Consumer Financial Protection
1700 G St. NW
Washington, DC 20552

Re: Debt Collection Practices (Regulation F)

To Whom It May Concern:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

CCMC appreciates the opportunity to comment on the proposed rule ("Proposal") issued by the Bureau of Consumer Financial Protection ("Bureau") regarding the creation of a new regulatory framework governing debt collection practices.[1] Debt collection is a critical component of the consumer credit system. Enabling effective collections is essential to maintaining consumers' access to affordable credit. At the same time, collections often occur at moments of significant stress in consumers' lives, making it particularly important for debt collectors always to act in a respectful and professional manner. Any debt collection policy thus must simultaneously accomplish two separate goals: allowing debt collectors to serve their important function in the credit system while ensuring that consumers are treated with dignity and respect.

Accomplishing these two goals in the context of current consumer expectations and technologies requires close and careful attention to how any proposal would work in practice. We consequently are grateful for the Bureau's careful consideration of debt collection rules. As the first regulator with substantive

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[1] *See* Proposed Rule, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019).

rulemaking authority under the Fair Debt Collection Practices Act ("FDCPA"), the Bureau is entering a field that has developed through over 40 years of industry practice and judicial decisions. Rather than rushing to impose ill-fitting, one-size-fits-all regulations—a serious concern in light of the approach that the Bureau initially sketched out in its 2013 Advance Notice of Proposed Rulemaking[2]—the Bureau has taken appropriate steps to study existing practices and challenges in this field. This has included convening a review panel under the Small Business Regulatory Enforcement Fairness Act ("SBREFA").[3] Thank you for your thoughtful approach to this rulemaking.

We also agree with the Bureau, however, that it should act now and issue a rule that clarifies how the FDCPA applies today. As the Bureau notes, the FDCPA became law in 1977, well before it was possible to imagine many of the technological advancements that now are part of everyday life. The FDCPA did not anticipate these technological changes. Nor did Congress originally grant a regulator rulemaking authority that would allow it to explain how the statute applied to emerging technologies. As a result, the FDCPA has become an increasingly poor fit for contemporary collections practices. Moreover, the meanings of various terms within the statute have been interpreted in conflicting judicial decisions. The Bureau consequently must step in and use its congressionally granted rulemaking authority to clarify the FDCPA in a way that both enables effective and successful collections and protects consumers.

The Proposal is an important step towards achieving this goal. We particularly appreciate the Bureau's focus on bringing clarity to the FDCPA, its recognition that any rule governing debt collection must offer practical solutions that allow debt collectors to continue to perform their jobs, and its willingness to listen to all viewpoints during the rulemaking process.

The Bureau still can strengthen the Proposal, however. As drafted, the Proposal puts undue limitations on appropriate collections activities and thereby threatens to undermine credit availability and raise the cost of credit for all consumers. It also fails to draw clear lines around the scope of activities that it seeks to regulate, creating substantial regulatory uncertainty – and corresponding market disruption – by straying into areas that raise different policy questions and that are not properly

[2] *See* Advance Notice of Proposed Rulemaking: Debt Collection (Regulation F), 78 Fed. Reg. 67848 (Nov. 12, 2013) ("2013 ANPR").
[3] *See* Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, *Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), *available at* https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf

subject to notice and opportunity to comment. In particular, the Proposal both unnecessarily and improperly seeks to rely on the Bureau's authority over unfair, deceptive, or abusive acts and practices ("UDAAP") and creates harmful regulatory uncertainty about how any final rule—or principles drawn therefrom—might apply to collections by creditors.

As a result, we would ask the Bureau to take four key steps to strengthen the Proposal before it becomes a final rule:

- Clearly reflect the benefits and importance of collections in any final rule;
- Clarify the rule so that it maximizes the benefit of collections to the credit system and all the consumers it serves;
- Base the rule on the Bureau's clear authority under the FDCPA, not the Bureau's UDAAP authority; and
- Clarify that the rule does not apply—directly or indirectly—to first-party collections.

<u>Discussion</u>

1. Clearly reflect the benefits and importance of collections in any final rule.

Consumer credit plays a critical role in Americans' lives, making it possible for them to buy their homes, pay for college, or cover unexpected expenses. An auto loan can help a consumer get to their workplace. A student loan can open an entirely new professional horizon. A credit card can be used to cover expenses on a broken heating system. In short, without consumer credit, countless Americans would be unable to achieve their own dreams or aspirations for their children.

American consumers understand that their promise to repay is essential to a lender's decision to extend credit. Consumer credit markets would quickly stop functioning if lenders were unable to enforce that promise. Lenders of course do not expect to collect in full on every debt that goes into collection. Still, creditors must expect consumers to take their obligations seriously and to do their best to repay outstanding responsibilities. Lenders would fundamentally reassess their willingness to extend credit were they not able to rely on collections in this manner. Such an outcome would hurt consumers as well as lenders. If lenders were not able to rely on borrowers' promises, the cost of credit would rise as the expected recovery on loans fell and underwriting standards were rewritten. Credit availability would be constrained as creditors became unwilling to extend credit to consumers who no longer fit the risk profiles adopted by the creditor. The opportunities for consumers opened by credit would become limited, from first homes to paying for college. At the same time, debt collectors would look for other opportunities for recovery, including through increased litigation. In short, all consumers would be negatively affected, not just consumers who have entered collections. For that reason, all policy makers should want collections to succeed, allowing it to serve its important purpose in the credit system.

This is particularly true to the extent that the collections process often can lead to better outcomes for individual consumers who are in debt. Collectors routinely work with consumers to develop payment plans that allow them to resolve their debts in a beneficial manner. In doing so, debt collectors can help consumers restore their financial footing and rebuild their own access to credit in the future. (This is particularly true in the first-party collections context where the creditor is working to preserve the customer relationship.) Conversely, preventing debt collectors from speaking with consumers can lead to more fees and interest, which in turn can lead to consumers falling deeper into debt. This can make it harder for debts to be resolved in a way that puts a consumer back on the path to solid financial health and can push more debts towards litigation.

To be clear, no one wants consumers to fall behind on their debts, least of all lenders who must engage in expensive collections activities often to collect only pennies on the dollar. But no one should treat collections activities as somehow inherently suspect or problematic. Collections are a normal and appropriate element of a consumer credit system, and only with repayment can institutions function in a safe and sound manner. That said, we of course recognize that debt collection comes with challenges. Collections typically occur when the borrower has fallen into unexpected financial difficulties, met unforeseen challenges in their personal lives, or has inaccurately budgeted. As a result, the consumer may feel anxiety, embarrassment, or frustration when receiving a call from a debt collector. A consumer also may not have readily available funds with which to pay outstanding bills and may find it difficult to develop a plan to address financial issues going forward. Likewise, the consumer may have concerns about how they will be treated by the collector or about wage garnishment or other possible follow-on consequences.

The Chamber firmly believes that consumers should be treated with dignity and respect throughout the credit lifecycle. Debt collectors do not get a pass from meeting basic standards just because a consumer has hit financial difficulties. We consequently welcome the elements of the Proposal that prohibit abusive conduct that violates the FDCPA. But the Bureau should not discourage legitimate collection activities. Any policy that reduces collections will have negative repercussions across the credit system, harming borrowers broadly. The Bureau should not mistake limiting collections and communications for protecting consumers. The Bureau instead should recognize the benefits of collections and adopt policies that facilitate appropriate and successful collections while simultaneously protecting consumers from unlawful practices. To do so, we would urge the Bureau to more clearly reflect the importance of collections to the credit system and the millions of customers it serves. We identify below specific changes the Bureau can make to the Proposal to accomplish this goal. More broadly, we would ask the Bureau to continue to educate stakeholders on the important role of collections in the credit system, including through any future rulemaking documents and relevant reports.

2. Clarify the rule so that it maximizes the benefit of collections to the credit system and all the consumers it serves.

Consistent with the importance of collections to the credit system as a whole, the Bureau should clarify the FDCPA in a manner that maximizes long-term benefits to consumers broadly.[4] In doing so, it should revise aspects of the Proposal that unduly constrain collections activities and that ultimately will harm consumers.[5] The Bureau instead should pursue policies that maximize long-term benefits for all consumers by supporting credit availability and reducing the cost of credit. To accomplish this goal, we would particularly urge the Bureau (a) to ensure that call frequency limits do not impair appropriate collections activities; (b) to clarify the prohibition against contacting a consumer at an inconvenient time or place; and (c) to make rules around email preferences workable in practice.

[4] The FDCPA and the Consumer Financial Protection Act are not the only laws implicated by this rulemaking. We have heard concerns from many of our members about how this rulemaking will interact with the Telephone Consumer Protection Act. We would ask the Bureau to explain the relationship between those statutes—and harmonize them to the greatest extent possible—including by working with the Federal Communications Commission as appropriate.

[5] Uncertainty about liability under the FDCPA also may unduly constrain collections activities. To that end, the Bureau correctly explains in the ANPR that the FDCPA's bona-fide-error defense applies to "any action brought under the FDCPA." 84 Fed. Reg. at 23299. We have heard some concern, however, that the Bureau's particular focus on that defense in the context of third-party disclosures may be interpreted to suggest that the bona-fide-error defense does not apply to other claims under the FDCPA. Any final rule should reaffirm, consistent with the statutory text, that the bona-fide-error defense is in fact available against any claim under the FDCPA.

a. Ensure that call limits do not impair appropriate collections activities.

Limiting the number of calls that a debt collector can make to a customer is a blunt and often ill-fitting policy tool. A call cap may prevent excessive calls, but it also may prevent a debt collector from helping a consumer. A call limit likewise may not reflect practical realities of the debt collection process, including that a collector may make more frequent calls at the beginning of the process in order to make contact. As a result, a call limit may prevent a debt collector and a consumer from reaching an appropriate resolution for a debt. Conversely, the risk that a debt will end up in litigation increases.

The Proposal would impose a general call cap of seven calls in any seven-day period to an individual consumer about a particular debt and prohibit calls within a seven-day period after speaking with a consumer.[6] Even assuming that the Bureau decides to continue to rely on call caps in any final rule, we would urge it to amend the Proposal to make such call frequency limits as workable as possible. In particular, we would urge the Bureau to take three steps to achieve this goal.

First, we would urge the Bureau to increase call limits imposed by any final rule. The Bureau's goal should be to protect consumers from excessive calling that, by its volume, is highly likely to harm consumers. The Proposal's seven-call limit and one-week cool-off period fall far short of this volume. The Bureau consequently should raise call limits in order to provide debt collectors with sufficient flexibility to perform their important function in the credit system. The Bureau could do so by raising the number of calls that can be made and expanding the relevant time period (e.g., by using a rolling 30-day period for call limits). Whatever approach it takes, we believe that the Bureau can raise frequency limits significantly without risk of harming consumers. In so doing, we would urge the Bureau to be guided by call-frequency studies and discussions with companies about their practices.

Second, the Bureau should expand the list of exceptions to the call frequency limits imposed under the Proposal. Under proposed Section 1006.14(a)(3), calls within four exceptions do not count against those frequency limits.[7] At a minimum, the Proposal should be modified to exclude six further categories of calls: (1) calls initiated by a consumer; (2) calls intended to alert the consumer about possible fraud or other activities that might harm the consumer; (3) calls that are disconnected or ended abruptly for reasons unrelated to the collection efforts (e.g., a call that is ended because a consumer receives another call that they must take); (4) calls to correct or

[6] *See* Proposed § 1006.14(b)(2), 84 Fed. Reg. at 23401.
[7] *See* 84 Fed. Reg. at 23401.

clarify a prior conversation (e.g., a call for clarification in the event that a payment was made but has not gone through as intended); (5) calls that reasonably interpret consumer instructions (e.g., a call at 5pm on Tuesday if the consumer asks the collector to call back at 5pm on Monday, but does not pick up at the appointed time; or a call made after a reasonable interpretation of a non-specific instruction by a consumer such as "please call me later," or "please call me once school is over"); and (6) calls to offer a new settlement term (e.g., a possible loan modification).

Likewise, we would ask the Bureau to clarify that a call only counts for purposes of call frequency limits associated with the debt that was the intended subject of the call when it was initiated (i.e., a consumer that brings up a second debt on a call would not somehow trigger the call frequency limits as to that second debt).

Third, the Bureau should allow debt collectors to rebut the presumption that calls in excess of any call frequency limit violate the FDCPA. While the Bureau may conclude that calls above a defined limit are problematic, we do not think that the Bureau properly could conclude that every call above such a limit is problematic in all cases. The Bureau consequently should allow a collector to make additional calls if it concludes that it has a compelling reason to do so and that doing so will not harm the consumer, and if it appropriately documents that decision. For example, a collector that lacks contact information sufficient to send emails or text messages may conclude that it is important to make additional calls to the consumer. Providing a collector additional flexibility in such circumstances would allow them to meet the purpose of any final rule without running into arbitrary limits that unduly prevent them from filling their function in the credit lifecycle. (Alternatively, the Bureau could identify specific circumstances in which the call limits would be raised, such as when a collector does not email or text the consumer.)

As discussed above, we believe that the call frequency limits set in the Proposal are too low and will unduly impair the ability of debt collectors to perform their important role in the credit system. As a result, we would urge the Bureau to raise the call limits or provide collectors additional flexibility under those limits. At a minimum, we would strongly urge the Bureau not to lower the call limits, either directly or indirectly. We would particularly highlight two considerations to this end:

As an initial matter, and as described above, the call limits in the Proposal are already too low. Further lowering call frequency limits will prevent debt collectors from performing their important function in the credit lifecycle. Rather than facilitating appropriate resolution of debts, such a rule would lead to more fees and penalties, make it harder for consumers to clear their credit reports, push more debts into litigation, and cause more debts to be sold on further down the debt collection chain. This will not only hurt the individual consumer who is responsible for the debt, but will increase lending risk for creditors and reduce their expected recovery in the event of default. This in turn will result in increases in the cost of credit and restrictions in credit availability. While those negative consequences may be felt particularly acutely by higher risk borrowers, they also would affect all consumers, including those who have remained current on their own obligations.

The Bureau should take care to avoid this negative outcome which would hurt consumers in the long run without any countervailing consumer benefit. To be clear, stopping collection calls does not protect consumers. Rather, stopping collections merely shifts costs to other parties in the credit system—and thus ultimately to other consumers. Further reducing call frequency limits would have precisely this effect. The Bureau should not make this mistake.

Moreover, indirectly lowering call limits will have the same negative effects as directly lowering call frequency limits. For that reason, the Bureau should not take any steps that indirectly lower call frequency limits. Rather, the Bureau should confirm that (a) calls will be limited on a per-debt basis (rather than on a per-consumer basis); and that (b) contacts through emails, text messages, or other means do not count towards call limits. The Proposal's current approach to those particular topics is sound and should not be changed.

Limiting calls on a per-consumer basis would greatly increase the risk of consumer confusion and departures from safe and responsible collections practices. It would cause collectors to attempt to cover multiple debts in a single phone call, raising the risk of error and also increasing the likelihood that a call would be overwhelming for the consumer. It also would make it far harder for a debt collector to recover on any individual debt from a consumer with multiple debts in collection. This would be a perverse outcome and is likely to distort the marketplace by encouraging collectors either to avoid holding multiple debts of an individual consumer or to stage their collections activities, thereby extending the period of time for which the collector seeks to collect from an individual consumer.

Likewise, including contacts through emails, text messages, or other means in call frequency limits will discourage collectors from using these new mechanisms for reaching consumers. We are glad that the Proposal does not impose unnecessary limits on the numbers of texts or emails that a debt collector may send to a consumer. Text or email messages are less intrusive than phone calls and can be opened and responded to at the convenience of the consumer. The opt-out rights provided by the Proposal also ensure that a consumer can easily stop the delivery of text or email messages at any time. The Proposal thus is correct not to include emails and text messages in call limits under proposed § 1006.14(b). The Bureau should continue to encourage the use of new technologies that both lower the cost of collections and create clear written records that can be readily scrutinized internally for compliance (as well as in any subsequent regulatory review). Changing course now would have the unfortunate effect of raising the cost of collections and pushing collectors away from potentially less intrusive and more discreet contact mechanisms.[8] The Bureau should be careful to avoid such a counterproductive result that hurts rather than protects consumers.

b. Clarify the prohibition against contacting a consumer at an inconvenient time or place.

Absent consumer consent or the permission of a court, the FDCPA prohibits a debt collector from communicating with a consumer at "a time or place known or which should be known to be inconvenient to the consumer."[9] The FDCPA further provides that, "[i]n the absence of knowledge of circumstances to the contrary," a debt collector should assume that convenient times are from 8 a.m. to 9 p.m. "local time at the consumer's location."[10] The Proposal incorporates this statutory requirement into the rule,[11] with a proposed official interpretation seeking to bring further clarity to this restriction.[12]

We support the statutory goal of avoiding calls to consumers at inconvenient times or places. We also appreciate the Bureau's decision to use official interpretations to try to clarify this prohibition. We are very concerned, however, that the prohibition, as explained in the Proposal, will not be workable in practice.

Most significantly, the Proposal does not explain how a debt collector must respond to ambiguous directions from a consumer. The Bureau gives the example of a consumer who tells a debt collector that it is inconvenient to be called while the consumer is at school.[13] That is understandable and a responsible debt collector, after receiving such information, would not intentionally call the consumer at school. But a debt collector is unlikely to know when a consumer is at school. A consumer might

[8] For this reason, we would urge the Bureau to exclude emails from time-of-day limitations under proposed Section 1006.6. *See* 84 Fed. Reg. at 23400.
[9] 15 U.S.C. § 1692c(a)(1).
[10] *Id.*
[11] Proposed § 1006.6(b)(1), 84 Fed. Reg. at 23400.
[12] *See* Proposed Official Interpretation to Section 1006.6(b)(1), 84 Fed. Reg. at 23410.
[13] *See id.*

have all of their classes on two days of the week, for example, or exclusively be taking evening classes. Adding further to the uncertainty, a consumer might be taking classes only during the fall and spring semesters, or might be taking summer classes as well. The Proposal does not explain how a debt collector should eliminate such uncertainty when the consumer does not provide sufficient information to allow the debt collector to fully understand the consumer's instructions. Nor does it acknowledge the broad range of ambiguous instructions that a consumer may provide to a debt collector. The possible permutations are endless. A consumer might, for example, tell a debt collector that it is inconvenient to speak when a family member is visiting, while the consumer is driving for a ride-sharing service, or when they are taking care of a child. A debt collector may be unable to secure further clarification, even despite its best efforts, leaving it uncertain when it should or should not call the consumer in the future.

Other aspects of the Proposal also will create uncertainty once applied. The Proposal does not clarify, for example, how the inconvenience of a particular time for a consumer affects the ability of a debt collector to contact a co-borrower at that time in the future. We do not think a debt collector should be required to assume that a time that is inconvenient for one borrower is inconvenient for the other borrower. We nonetheless are concerned that the ambiguity in the Proposal will lead to debt collectors taking such steps to avoid the risk of non-compliance.

Uncertainty as to when a collector may call a consumer back will result in artificial and unintended limits on the ability of collectors to speak with consumers and resolve outstanding debts. This will increase the risk of litigation, additional fees, and other unnecessary negative outcomes. The Bureau accordingly should provide clear guidance, whether in any final rule or its accompanying official interpretations, that allows a debt collector to understand when they may or may not call a consumer. To that end, we would encourage the Bureau to state that in cases in which a consumer says that a particular day and time is inconvenient, but ambiguous about what times will be inconvenient in the future, the debt collector should not call at that day and time in the future, but may call at other times.[14] Moreover, we would urge the Bureau to allow a debt collector to email or text even at the identified time since a consumer can easily wait to review the message at a more convenient time or opt out of such messages. Finally, we would ask the Bureau to allow a collector to ask for clarification about what times are convenient for the consumer.

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[14] A generic statement such as "I can't talk right now," in contrast, should not prevent a collector from calling back at the same time on another day, unless the consumer also suggests that the same time will be inconvenience in the future.

In addition, we would ask the Bureau to clarify that restrictions, under proposed § 1006.6(b)(1), on contact at inconvenient times do not apply to email messages. Debt collectors—like many other businesses—often send out emails in batches late at night in order to manage associated bandwidth challenges and to reduce cost. These emails are no more likely to disturb a consumer than the many other emails they receive overnight. Accordingly, there is no basis to prohibit sending emails, even outside normal business hours.

c. Adopt workable rules for email preferences.

The Proposal generally allows a debt collector to use non-work emails to contact a consumer, subject to the limitation that a debt collector must include a "clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address."[15] The Proposal would prohibit the use of work emails for communications related to a debt, however, unless the consumer has consented to the use of such a work email or has emailed the collector from that email address.[16] The premise of this approach is that a debt collector generally can or should be able to tell which email addresses are work email addresses, as opposed to personal email addresses. This assumption is wrong: while it may be possible to identify some email addresses as work addresses, debt collectors are likely to have substantial uncertainty whether it can assume that an apparently personal email in fact is not a work email. Some companies use free email services for business purposes, for example, and some consumers may use an email address provided by an Internet service provider that may not appear to a third party to be a personal email address.

We accordingly urge the Bureau to clarify any final rule so that the limits are clear but still enable debt collectors to use email in a reasonable way to contact consumers. For example, we would ask the Bureau to consider clarifying that a debt collector may, without securing further consent, contact a consumer through any email address provided to it with the account information. Coupled with the consumer's ongoing ability to opt out from further emails at any time, such an approach would strike the appropriate balance of avoiding embarrassment to consumers while allowing debt collectors to use email in a meaningful way.

[15] Proposed § 1006.6(e), 84 Fed. Reg. at 23401.
[16] *See* Official Interpretation to Proposed Section 1006.22(f)(3), 84 Fed. Reg. at 23414.

3. Base the rule on the Bureau's clear authority under the FDCPA, not the Bureau's UDAAP authority.

The Bureau is the first regulator with substantive rulemaking authority under the FDCPA: the federal law that specifically addresses debt collection practices. The Bureau has correctly recognized that the FDCPA consequently is the key basis for any rulemaking on debt collection. Nonetheless, the Bureau has chosen to rely upon its UDAAP authority for certain elements of this rulemaking. This is a mistake. The Bureau has ample authority under the FDCPA. It does not need to – and should not – rely upon its UDAAP authority in this rulemaking. The Bureau should focus on issuing legally justified regulations under the relevant federal statute, not relying upon "catch-all" authorities in hope of reaching a contemplated policy outcome. The Bureau should not attempt to use its UDAAP authority as part of a belt-and-suspenders approach to rulemaking.

As the Bureau explains, Section 1041(b) of the Dodd-Frank Act permits it to prescribe rules "identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *See* 12 U.S.C. § 5531(b). Such rules may include "requirements for the purpose of preventing such acts or practices." *Id.* In order to declare an act or practice to be unfair—and thus unlawful—the Bureau must have a reasonable basis to conclude that: "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." 12 U.S.C. § 5531(c). The Bureau may consider established public policies in making this determination, but such public policy considerations "may not serve as a primary basis for such determination." *Id.*

Here, the Bureau purports to rely on its unfairness authority to impose call limits and to prohibit the sale, transfer, or placement for collection of certain enumerated debts (e.g. those that have been paid or settled).[17] This approach has at least three problems.

[17] The Bureau does not rely upon its deception or abusiveness authority in this rulemaking. Nor should it. The Bureau's deception and abusiveness authorities are not appropriate bases for this rulemaking for the same reasons as its unfairness authority. Moreover, the lack of any notice of potential use of those authorities in this rulemaking would make it inappropriate to base any final rule on either of those authorities.

First, in each case, the Bureau identifies an unfair act or practice without explaining, in adequate detail, the basis for such a determination or why it is insufficient for this behavior to be prohibited under the FDCPA alone.

The Bureau currently has authority to implement the unfairness prohibition through its enforcement authority. Decisions in that context are highly fact-specific and require detailed consideration of each of the elements of an unfairness determination. A rulemaking process should not fundamentally change this analysis. Rather, a practice should only be declared unfair by rule when the Bureau has a reasonable basis to conclude that the contemplated scenarios are categorically unfair. The Bureau should not declare activities to be unfair when the statutory test may only be satisfied under select circumstances. Such an approach would wrongly sweep in both activities that are properly considered to be unfair, as well as activities that would not satisfy the unfairness requirements. The statutory requirements for unfairness may be met in some circumstances, for example, when a debt collector calls a consumer about the same debt in excess of the call limits, or sells a debt subject to an open identity theft report.[18] But the Proposal does not explain in adequate detail why this is true to a sufficient extent to justify categorically declaring that every such action violates the unfairness prohibition. The Bureau does not give adequate detail, for example, explaining why substantial injury will follow from such activities, or why a consumer may not readily avoid such injury. A call that goes beyond a call limit, for example, could allow the debt collector and the consumer to reach an amicable settlement of the debt that ends further fees and penalties, and help the consumer get back on the path to solid financial ground. Countless other similar examples make clear that the Bureau's unfairness authority is too blunt a tool to achieve the policy goals that the Bureau pursues and that, at a minimum, the Bureau must create a much fuller and detailed record if it seeks to make unfairness determinations under Dodd-Frank Act § 1041(c).

The Bureau's approach here should be informed by its experience with the payday lending rule. There, the Bureau initially proposed to impose certain requirements under its unfairness and abusiveness authorities. However, upon further consideration of the insufficient evidence supporting that approach, the Bureau changed course.[19] The Bureau extensively explained in its proposal how the relevant

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[18] Relatedly, we would ask the Bureau to clarify that the prohibition against sale of debt subject to an identity theft report is not violated if the identity theft report has been resolved against the consumer.

[19] *See generally* Notice of Proposed Rulemaking, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252, 4253 (Feb. 14, 2019) ("[T]he Bureau now initially determines that the evidence underlying the identification of the unfair and abusive practice in the Mandatory

provisions of the payday rule had lacked a sufficient factual and legal basis.[20] While the details varied across elements of the payday rule (and are beyond the scope of this comment), the Bureau repeatedly concluded that it had failed to adequately consider facts that informed the various prongs of the abusiveness and unfairness tests. The Bureau should not make the same mistakes here, but should base any final rule on its authority under the FDCPA alone.

Second, the Bureau's approach is misplaced to the extent that it seeks to establish a preventative approach to call limits under proposed Section 1006.14(b)(4). The Proposal fails to state any adequate basis either for imposing a direct prohibition or establishing a safe harbor under its UDAAP authority. Debt collectors will view any safe harbor as tantamount to a direct prohibition, so it is equally important that a safe harbor be clearly articulated and based on a sufficient record. The safe harbor provided in proposed Section 1006.14(b)(4) does not meet that basic standard for the reasons discussed above. Moreover, it is entirely unnecessary and will only confuse the marketplace.

Third, reliance on the Bureau's UDAAP authority will create differing rules for collectors of debts related to a consumer financial product or service, and for collectors of debts that are not related to a consumer financial product or service (e.g. medical debt). Reflecting this complexity, the Proposal is built around two different definitions of obligations subject to collections. The Proposal primarily focuses on "debt," which means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment."[21] However, it also defines "consumer financial product or service debt" as "any debt related to any consumer financial product or service, as that term is defined in section 1002(5) of the Dodd-Frank Act."[22] In other words, the term "debt" refers to all debts subject to the FDCPA and the term "consumer financial product or service debt" refers to debts arising from mortgages, credit cards, and other consumer financial

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Underwriting Provisions of the 2017 Final Rule is not sufficiently robust and reliable to support that determination, in light of the impact those provisions will have on the market for covered short-term and longer-term balloon-payment loans, and the ability of consumers to obtain such loans, among other things.").

[20] *See* 84 Fed. Reg. at 4261-4278.

[21] Proposed § 1006.2(h), 84 Fed. Reg. at 23399.

[22] Proposed § 1006.2(f), 84 Fed. Reg. at 23399. Further complicating matters, when it is used in Proposed § 1006.2(f), the word "debt" has the meaning given it in the Dodd-Frank Act, not the meaning given it by Proposed § 1006.2(h).

products within the meaning of the Dodd-Frank Act. This complicated approach has its roots in the scope of the Bureau's authority under the Dodd-Frank Act (as opposed to the FDCPA) which is limited to "collecting debt related to any consumer financial product or service."[23] As noted above, the result is that different rules apply to debt collectors based on whether they are collecting upon debts that do or do not arise from consumer financial products or services.[24] This is likely to distort behavior in the marketplace, including by creating incentives for debt collectors to specialize in collecting on different categories of debt. As discussed above, the Bureau has identified no sound basis for relying upon its UDAAP authority here. The unnecessary regulatory complexity and uncertainty that such reliance would introduce further counsels against that approach.

4. Clarify that the rule does not apply – directly or indirectly – to first-party collections.

As we have explained in prior comment letters, collections by creditors differ substantially from third-party collections. Different policy approaches are consequently necessary in each context. We therefore would ask the Bureau to confirm that any final rule does not apply – whether directly or indirectly – to first-party collections except in clearly defined circumstances under which creditors are already subject to the FDCPA. Creditors inevitably will have new burdens as they provide debt collectors with information sufficient to support debt collectors' compliance, but they should not be directly or indirectly subject to any requirements or principles announced in any final rule.

a. Collections by creditors differ substantially from third-party collections.

As the Bureau explained seven years ago, collections by creditors are fundamentally different from collections by third-party debt collectors:

> [C]ollections by originating creditors [are] part of a different market from third-party debt collection and debt buying. Collecting overdue debts is not the primary business of originating creditors. Rather, their primary business is to provide credit or other products or services. Collecting unpaid debts is usually an ancillary function. By contrast, neither third-party debt collectors nor debt buyers have originated the

[23] *See* Dodd-Frank Act § 1002(15)(A)(x), 12 U.S.C. § 5481(15)(A)(x).

[24] We recognize, of course, that the differing scopes of the FDCPA and the Dodd-Frank Act grant the Bureau differing statutory authorities over debt collectors based on the types of debts they collect. The Bureau nonetheless would be mistaken to compound this uncertainty by building any final rule around these differing statutory scopes.

> debts they collect or have ongoing business relationships with the consumers from whom they collect debts. Debt collectors are in the business of collecting on debts that were originated by a variety of creditors.[25]

The most significant of the many differences between collections by creditors and third parties is that creditors have an ongoing customer relationship with the consumers.[26] In contrast, third-party collectors frequently are entirely unknown to a consumer in collection,[27] are national, rather than local, operations,[28] and historically often did not know the name of the original creditor.[29] As Congress concluded in 1977, "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them."[30] Congress believed that customer retention and reputational harm, not regulation, was the best check on creditor behavior. It thus excluded creditors from the FDCPA as long as they used their name in collections since that ensured reputational consequences for any misconduct.[31]

Nothing in the two Committee reports issued during consideration of the Dodd-Frank Act suggests that Congress reached a different conclusion in 2010 than it had in 1977.[32] Neither does the Dodd-Frank Act's legislative language suggest that Congress changed its mind about the differences between collections by creditors and third-party collections. Indeed, if Congress had thought at that time that third-party

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[25] Consumer Financial Protection Bureau, Final Rule: Defining Larger Participants of the Consumer Debt Collection Market, Docket No. CFPB-2012-0040, 77 Fed. Reg. 65775, 65783 (Oct. 31, 2012) ("Larger Participant Rule").
[26] *Id.* (distinguishing first-party creditors from third-party creditors on the basis that the former has an "ongoing business relationship").
[27] *See* Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change 27-28 (Feb. 2009) ("2009 FTC Report") (describing complaints to the FTC about collection efforts by unknown debt owners).
[28] 2009 FTC Report 14 ("New technologies have fundamentally transformed the debt collection industry, broadening the scope of operations from local and regional to national, and sometimes even to international.").
[29] 2009 FTC Report v (recommending that FDCPA be amended to require that the name of the original creditor be included in the validation notices).
[30] S. Rep. 95-382, at 2 (1977), *reprinted at* 1977 U.S.C.C.A.N. 1695, 1696 (1977).
[31] *Id.* at 3 ("The term debt collector is not intended to include . . . in house collectors for creditors so long as they use the creditor's true business name when collecting . . . .") (internal quotation marks omitted).
[32] *See* S. Rep. 111-176 (April 30, 2010) (discussing S.3217, but omitting any discussion on this point); H. Rep. 111-367 (Dec. 9, 2009) (discussing H.R. 3126, but omitting any discussion on this point).

and creditor collections should be treated the same way, it would have chosen to bring creditors within the scope of the FDCPA as the Federal Trade Commission ("FTC") previously recommended.[33] Instead, Congress specifically limited the FDCPA rulemaking authority to third-party collectors and used the Dodd-Frank Act's merchant exclusion to prevent rulemaking as to most creditors. There does not even appear to have been significant support for rethinking whether the law should apply to creditors. The FTC reported a few years prior to passage of the Dodd-Frank Act, for example, that "neither consumer advocates nor industry representatives recommended that the FDCPA be generally expanded to cover creditors."[34] Instead, it has long continued to be accepted that collections by creditors are very different from collections by third parties.

b. Different policy considerations apply in the context of collections by creditors.

The differences between collections by creditors and third-party collectors demand different policy approaches in each context. A few examples of how differences between the two contexts may inform different policy approaches demonstrate this point:

- A consumer may be unfamiliar with a debt collector, but should be very familiar with a financial services company with which it has an ongoing relationship. As a result, a consumer generally should be less suspicious or alarmed by calls received from a creditor compared to calls from an unknown collector. This would inform how many calls may be made by a creditor without running a risk of the calls being perceived as harassing or oppressive. Likewise, this distinction would inform what and how much information a creditor or a debt collector should provide a consumer in order to identify the debt at issue.

- A financial institution may have an ongoing relationship both with the consumer who is responsible for the debt and a co-signatory. That relationship may make it easier for such a creditor to engage with the co-signatory about the debt without causing any embarrassment or other harm to the responsible consumer. As a result, policies relating to third

[33] *See* ANPR, 78 Fed. Reg. at 67853 n.51 (discussing 1979 FTC recommendation that Congress "reconsider its decision to exempt creditors from the provisions of the Fair Debt Collections Practices Act") (citing FTC, 1979 FDCPA Annual Report 7 (1979)).
[34] 2009 FTC Report 5, n.27 (describing a 2007 workshop).

parties who may be informed about a debt may differ significantly across contexts.

- A consumer likely will feel less embarrassment about a co-worker or other third party learning that the consumer's bank—rather than a third-party debt collector—had reached out to the consumer. As a result, any justification for rules relating to potential exposure of communications to third parties, such as relating to leaving voicemails or sending messages to work emails, would not apply equally in the context of outreach by creditors.

- Creditors rightly focus on their business, with collections only an "ancillary function."[35] As a result, the economics and mechanisms of collection are different for creditors. Creditors, for example, generally are less efficient collectors.[36] This means that the economic burden of any regulation on creditors—and the cost-benefit analysis to be performed by the Bureau in any rule applicable to creditors—would be substantially different than that borne by third-party debt collectors.

These are only a few examples of how differences between first-party and third-party collections drive different policy considerations. The Bureau should not discount these differences, but should recognize that it cannot properly apply the same policies to first-party and third-party collections.

c. The Bureau should clarify that any final rule does not apply to creditors.

Given the differences between first-party and third-party collections, and the different policy considerations that flow from these factual differences, the Bureau should confirm that creditors' collections practices are not addressed in this rulemaking. Failure to do so will cause enormous regulatory uncertainty for creditors, leading to increases in the cost of credit, limits on credit availability—and corresponding harm to consumers.

Specifically, the Bureau should clarify two points in any final rulemaking:

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[35] *See* Larger Participant Rule, 77 Fed. Reg. at 65783.

[36] Federal Trade Commission, The Structure and Practices of the Debt Buying Industry 11 (Jan. 2013) ("Third-party debt collectors often have expertise (*e.g.,* knowledge of the legal requirements to collect debt in a particular jurisdiction) or enhanced infrastructure (*e.g.*, a specialized database and communication technologies) that allow them to collect more efficiently than creditors can.").

First, the Bureau should clearly state that any final rule does not impose any legal obligations directly upon creditors other than in clearly defined circumstances under the FDCPA (i.e., when a creditor is acting as a "debt collector" within the meaning of that statute). We would ask the Bureau to identify such circumstances in any final rule.[37]

Second, the Bureau should clearly state that any final rule does not impose any generally applicable principles that may be applied against creditors or that should inform how regulators analyze "unfairness" in the first-party collections context.[38] Purporting to be agnostic is not enough.[39] It is critically important for the Bureau to be clearer for three reasons.

- *The rules that should apply to creditors are different.* As discussed above, for example, circumstances that may justify call caps in the third-party collections context are fundamentally different in the context of collections by creditors.[40] For example, it is—and should be—federal policy to encourage early outreach to consumers who may be falling behind on their mortgages. Attempting to apply third-party call limits to collections by mortgage lenders would fly directly in the face of that

[37] We read the Proposal to be consistent with this request, but believe that the Bureau could—and should—be clearer on this point. *See, e.g.*, Proposal, 84 Fed. Reg. at 23372 (stating that "creditors that collect on debts they own *generally* would not be affected directly by the proposal") (emphasis added).
[38] We assume that the Proposal does not intend to suggest that routine servicing activities – i.e., actions taken before a debt is charged off – could be subject to any final rule or to principles drawn from that rule. We have heard concerns from our members, however, that the Bureau may have laid the groundwork for subsequent regulatory pressure to conform servicing activities to principles purportedly drawn from any final rule. We would ask that the Bureau guard against any implication that routine servicing activities are in any way in scope for this rulemaking, whether directly or indirectly.
[39] The Bureau states in a footnote: "Where the Bureau proposes requirements pursuant only to its authority to implement and interpret sections 806 through 808 of the FDCPA, the 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." Proposal, 84 Fed. Reg. at 23282, n.69.
[40] The Proposal cryptically states: "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." Proposal, 84 Fed. Reg. at 23317 n.331. This creates substantial uncertainty for creditors and invites state attorneys general to try to make such a determination. (The same is true of similar language elsewhere in the proposal. *See id.* at 23282, n.69; 23314, n.314). The Bureau instead should make clear that nothing in any final rule should be read to support such a determination.

policy. The Bureau consequently should leave no suggestion that the rules it creates for third-party debt collectors somehow can be imported into the context of collections by creditors.

- *The Bureau will create enormous uncertainty for creditors if it fails to clarify that any final rule does not articulate principles that can be applied in the first-party collections context.* Because the rules cannot be directly transferred into the first-party context, a creditor would have to make an informed guess about which supposed "principles" it is required to comply with under the Bureau's UDAAP authority. This inevitably will result in widely varying approaches by creditors and general confusion in the marketplace (as well as varying approaches to enforcement by state attorneys general). Creditors are likely to cut back on collections activities, with the ultimate consequence of creditors reaching fewer constructive outcomes with consumers and more debts being sent to third-party collections. The Bureau should not create uncertainty that will generate entirely unnecessary compliance risks for creditors that are trying to save their ongoing customer relationships with consumers.

- *The Bureau always should follow sound rulemaking processes.* The Bureau never should create standards for regulated entities without providing them notice and a meaningful opportunity to comment. Dropping hints that some portions of a rule may apply to parties not subject to the rule does not provide regulated entities with such an opportunity.[41] Rather, it is rulemaking by implication, and plainly in conflict with the policies underpinning the Administrative Procedure Act.

We do not ask the Bureau to disclaim its existing authorities over creditors. We also recognize—and accept—that creditors are likely to have substantial new burdens under any final rule as they work to provide debt collectors with information sufficient to support compliance. Moreover, we think that the Bureau can clarify the Proposal in ways that would be helpful for all parties—including, for example, by defining "original creditor."[42] However, we believe that the Bureau should undertake an appropriate notice-and-comment rulemaking should it wish to announce new

[41] *See id.* at 23282, n.69; 23314, n.314; 23317 n.331.
[42] We have heard concerns from our members that the failure to define "original creditor" is problematic given the ambiguity of the term and the compliance actions that depend on it. We would urge the Bureau to consider adopting the definition used under New York law. *See* 23 CRR-NY 1.1(f) ("'Original creditor' means any person or such person's successor in interest by way of merger, acquisition, or otherwise, who extends credit creating a debt.").

policies governing creditors' collections practices. Alternatively, we would welcome any follow up dialogue with the Bureau about how to approach the standards that apply to collections by creditors. Creditors would welcome regulatory certainty in this field as in any other. But that is a separate conversation. Rules for collections by creditors should not be promulgated by hint or implication in this rulemaking. Rather, creditors should be afforded the opportunity to understand and comment on the rules to which they will be subject.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Tom Quaadman