consumer relations consortium
connect | collaborate | advance

June 19, 2020

Kathleen Kraninger, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
RE: Request For Information To Assist the Taskforce on Federal Consumer Financial Law—Docket No. CFPB-2020-0013

Dear Director Kraninger:

The Consumer Relations Consortium (CRC) is an organization comprised of national companies representing the diverse ecosystem of debt collection including creditors, data/technology providers and compliance-oriented debt collectors that are larger market participants. Established in 2013, CRC is evolving the debt collection paradigm by engaging stakeholders—including consumer advocates, Federal and State regulators, academic and industry thought leaders, creditors and debt collectors—and challenging them to move beyond talking points and focus on fashioning real world solutions that actually improve the consumer experience. CRC's collaborative and candid approach is unique in the market.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, utilities and other creditors. CRC members engage in millions of compliant and consumer-centric interactions every month.[1] Our members subscribe to the following core principle:

"Collect the Right Debt, from the Right Person, in the Right Way."

We appreciate the opportunity to participate in this process and to provide these responses to the Request For Information To Assist the Taskforce on Federal Consumer Financial Law.

Sincerely,

Stephanie Eidelman
Executive Director, Consumer Relations Consortium

[1] The roster of current CRC members is available at https://www.crconsortium.org/. These comments generally reflect the positions of the CRC collection agency members.

Response To
Request for Information to Assist Taskforce
on Federal Consumer Financial Law

#8. The FCRA requires consumer reporting agencies to "follow reasonable procedures to assure the maximum possible accuracy"; requires these agencies to disclose to a consumer the contents of the consumer's file; contains procedures for consumers to dispute the accuracy of information in these agencies' files; and requires notifications when information from these agencies' files has contributed to a user's adverse action. In addition, the FCRA's implementing Regulation V requires that data furnishers implement and maintain reasonable written policies and procedures concerning the accuracy of the data they furnish. Are these provisions designed to ensure accuracy sufficient? Why or why not? If not, what further protections should the Bureau or Congress consider? Are there obligations in these laws that impose a burden not justified by the commensurate consumer benefit?

CRC agrees that consumer reporting agencies (CRAs) should strive for accuracy with respect to the contents of a consumer's credit report as that term is defined by Regulation V, 12 CFR § 1022.41(a):

> Accuracy means that information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer correctly:
>
> (1) Reflects the terms of and liability for the account or other relationship;
>
> (2) Reflects the consumer's performance and other conduct with respect to the account or other relationship; and
>
> (3) Identifies the appropriate consumer.

"Maximum possible accuracy" can only be achieved by relying on objective measures of accuracy. It is important to distinguish between objective accuracy based on available documents and records[2] and subjective accuracy based on a consumer's belief about what they should be responsible for paying. For example, a consumer might "feel" that they should not be liable for paying a debt because they were not satisfied with the quality of service they received, because they failed to read or misunderstood the terms of the underlying agreement, because they mistakenly believe someone promised to waive a charge, etc. Thus, a consumer may disagree with objectively accurate information based on their own subjective belief about what *should* be

[2] Regulation V defines data "integrity" as "information that a furnisher provides to a consumer reporting agency about an account" which "[i]s substantiated by the furnisher's records at the time it is furnished" and "[i]ncludes the information in the furnisher's possession about the account[.]" *See* 12 CFR § 1022.41(d).

true rather than what *is* true. Whether a consumer *should* be liable under a given set of circumstances is a question of law to be decided by courts. CRAs and data furnishers should not be responsible for making moral or legal determinations. For the purposes of credit reporting, the standard must be objective accuracy based on information and records available at the time the report is made.

Additionally, while the FCRA, like many consumer protection statutes, acts as a floor with respect to credit reporting, states may have different requirements which could hinder the ultimate goal of "maximum possible accuracy."

Furthermore, the fact that a credit report may contain inaccurate information should not, by itself, be a *per se* determination that either a CRA's or a furnisher's policies and procedures are not reasonable. Reasonable policies and procedures can only guarantee reports accurately reflect information known to data furnishers at the time the report is made. Inaccuracies could be caused by any number of situations that may be outside the control of the data furnisher. Perhaps the creditor made a clerical error and transposed two numbers before providing the data to a debt collector who later furnished the information; perhaps the credit reporting agency missed an item that was being reported; perhaps the information reported was accurate based on records available at the time but new information reveals the consumer was the victim of identity theft. Based on the bevy of sensitive information being dealt with, it is only reasonable to expect a modicum of "inaccuracy" will exist until data furnishers and CRAs receive information needed to re-evaluate and update. After all, Regulation V requires "reasonable" policies and procedures, not perfect policies and procedures.

To this end, the Bureau has an opportunity to standardize the data points and requirements for credit reporting. For instance, California[3] and Utah[4] have codified disclosures that must be given to consumers regarding credit reporting on collection accounts; there is no reason the Bureau could not create a similar national standard.

Data furnishers want to provide the most accurate data to the CRA, whose reputation is based upon providing the most accurate data. Thus, when a consumer triggers a dispute under the FCRA, the consumer should want to provide relevant information to resolve the dispute rather than simply be allowed to say, "I dispute the ABC Bank item." In fact, Regulation V, 12 CFR § 1022.43 (c) and (d) state a "furnisher is required to investigate a direct dispute <u>only if</u> a consumer

---

[3] *See* Cal. Civ. Code §§ 1785.25 – 1785.26, requiring a creditor to provide notice in writing prior to or within thirty days of furnishing data to the credit bureaus. The safe harbor notice language is as follows: "As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency, if you fail to fulfill the terms of your credit obligations."

[4] *See* Utah Code § 70C-7-107. Like the California provision in the immediately preceding footnote, Utah requires a creditor to provide written notice prior to or within thirty (30) days of furnishing data to the credit bureaus. The safe harbor notice is as follows: "As required by Utah law, you are hereby notified that a negative credit report reflect on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations."

submits a dispute notice to the furnisher" at the furnisher's address and the dispute contains specific information. 12 CFR § 1022.43 (d) lists information consumers are required to provide.[5]

> A dispute notice must include:
>
> (1) Sufficient information to identify the account or other relationship that is in dispute, such as an account number and the name, address, and telephone number of the consumer, if applicable;
>
> (2) The specific information that the consumer is disputing and an explanation of the basis for the dispute; and
>
> (3) All supporting documentation or other information reasonably required by the furnisher to substantiate the basis of the dispute. This documentation may include, for example: a copy of the relevant portion of the consumer report that contains the allegedly inaccurate information; a police report; a fraud or identity theft affidavit; a court order; or account statements.

The Bureau should confirm CRAs or data furnishers are not responsible for investigating disputes that fail to meet Regulation V's requirements. This would free up substantial resources currently devoted to investigating thousands of vague "one-liner" disputes and boilerplate disputes without any details specific to the individual consumer's situation, many of which are automatically generated by third parties and submitted over and over in duplicate without input from the consumer. For example, in 2019 a jury found a credit repair organization and a consumer protection law firm were guilty of fraud for inundating collection agencies with auto-generated mass dispute letters made to look like they were coming from consumers. *See The CBE Group, Inc. and RGS Financial, Inc. v. Lexington Law Firm and Progrexion ASG, Inc.,* No. 3:17-cv-02594-L (N.D. Tex. July 3, 2019)). *See also Taylor-Burns v. AR Resources, Inc.,* No. 16-CV-01259 (S.D. N.Y. July 17, 2017).

#9. Most States have enacted laws that afford consumers certain protections in the event of a data breach. There is considerable variation among these laws, including the triggering events for coverage by the law and the requirements and remedies relating to a breach. Would Federal legislation, regulation, or guidance addressing data breaches be desirable? Why or why not? Would it be desirable to have a uniform national standard for data breach obligations? Why or why not?

The United States made a significant misstep by not enacting legislation or regulation similar to the General Data Protection Regulation (GDPR) at the national level. This has resulted in disparities among the states as to base-line priorities for data breach notifications, confusing

[5] Similarly, the Fair Credit Billing Act, 15 U.S.C. § 1666, sets forth the timeframe in which a consumer must dispute a billing item with a credit card company as well as the specific information the consumer must provide to the card issuer.

expectations for consumers and an enormous and unnecessary cost burden for industry. What has been learned from the development and ultimate passage of the California Consumer Privacy Act (CCPA) is how little control consumers have over their personal data. However, leaving it to each state to develop its own data protection regime is a disadvantage to consumers who will have no idea, or more importantly, who lack the understanding and comprehension as to whether each state is meeting a consumer's expectation of privacy.

From an industry perspective, it's extremely costly to navigate each state's requirements for data breach and data privacy. For one, how do you know where consumers live? Just because a consumer may provide an address in one state may not necessarily mean they are a resident of that same state. College students are one such example.

A national data standard reduces compliance costs with no harmful effect upon the consumer. Think of the most publicized data breaches in the last decade: Equifax, Home Depot, Target, and most recently Marriot/Bonvoy. In all those instances there was no national notification system to inform consumers of the breach. Instead, consumers had to rely on the news media or—even worse—on social media for information. Some but not all states have requirements for data breach notification, but the standards are hardly consistent. Therefore, customers of Home Depot, Target, or Marriot in some states received breach notification while many others did not. The lack of harmonization around the states' specific breach notification serves absolutely no benefit to consumers.

CRC encourages the Taskforce to recommend and support a federal data privacy law. On December 4, 2019, the Senate Commerce, Science, and Transportation Committee held a hearing titled "Legislative Proposals to Protect Consumer Data Privacy." Committee members and witnesses focused on several issues including a framework for consumers to exercise control over the data that companies collect by providing them with access, deletion and portability rights and the extent to which a federal law should preempt state privacy laws such as the CCPA. With regard to pre-emptive rights, there is little bi-partisan agreement; all the while states continue to take up privacy legislation. Many states will look to replicate the CCPA but may look to go farther, seeking private rights of action not only for data breaches but for improper data access and use. Each state's nuance makes nationwide compliance next to impossible.

Finally, in the wake of the COVID-19 crisis, consumers are more at risk due to the lack of a federal standard. Now more than ever consumers are relying on digital channels to access everything from financial services to food. Their data will be exposed like never before with little opportunity to ensure their information is protected. While many cash-strapped states may abandon privacy legislation for the remainder of the legislative session, Congress should consider that in light of this pandemic, national federal privacy laws may be the protection consumers need.

#11. Are there gaps in consumer financial protections that should be filled by strengthening the Bureau's regulations? What type of protections are needed

(e.g., additional disclosures, substantive requirements)? How should the costs and benefits of the proposed changes be evaluated?

At the federal level, the debt collections industry has been regulated by case law and enforcement actions. This results in a gross lapse in consumer protection. Although the CFPB has been working on rules to interpret the Fair Debt Collection Practices Act (FDCPA) for the past six (6) years, CRC cannot stress enough how important it is to get these rules over the finish line. Consumers deserve to know and recognize who are the good—as opposed to the bad—players in the industry, and debt collectors deserve to have a clear understanding of their regulatory expectations.

For decades, CRC members have been subject to inconsistent interpretations of the FDCPA. Guidance around standard practice and procedure under the FDCPA has been left to the courts, resulting in a patchwork of inconsistent opinions which has resulted in a constant state of flux and uncertainty in compliance expectations for industry members. The intent and purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not completely disadvantaged."[6] The lack of clarity in court interpretations and decisions has resulted in confusion.

Legitimate industry participants who devote significant resources to ensure a robust and effective compliance infrastructure as well as sophisticated compliance management systems still suffer from extensive risk exposure both from private claims and regulatory supervision and examination. Rather than protect consumers from the egregious conduct of unscrupulous debt collectors, the FDCPA has become nothing more than a breeding ground for a cottage industry of attorneys looking to benefit themselves rather than the consumers whose interests they are supposedly representing.[7]

---

[6] 15 U.S.C. §1692(e).

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

The CFPB's current Notice of Proposed Rulemaking for Debt Collection, Regulation F,[8] (NPRM) addresses many of the common uncertainties surrounding the FDCPA that have developed over the past forty (40) years. However, three areas of uncertainty remain, and CRC asks the Task Force to consider this lack of guidance in its recommendations to the CFPB.

1. A Lack of a Workable Dispute Process

The initiation of the collection process begins with providing the consumer with a validation notice that sets forth information about the debt and the consumer's rights to receive "verification of the debt" from the debt collector upon dispute of the "debt, or any portion thereof".[9] The validation notice has been the source of much litigation over the years. The Bureau, to its credit, has proposed a model validation notice in the NPRM with the intent of eliminating much of the uncertainty surrounding the content of the information that must be supplied to the consumer. However, the FDCPA does not define the term "verification of the debt" and the NPRM is silent on what threshold amount of information a debt collector must provide to a consumer in order to satisfy the statutory requirement to verify the debt.

Furthermore, the NPRM in some respects encourages a nebulous dispute process. As stated in CRC's Comment to the NPRM, the proposed Model Validation Notice [10] and § 1006.34(c)(4) fail to encourage consumers to provide relevant information about the dispute. As proposed, consumers are invited to provide additional information about their dispute only if they choose

---

DiCristo v. Nat'l Recovery Sols. LLC, No. 19-cv-2470 at *9, n.3 (E.D. N.Y. May 4, 2020) ("Plaintiff's attempt to contort the language of the Letter to fit within Carlin's forward-looking "Payoff Statement" analysis infuses confusion, rather than clarity, into the "least sophisticated consumer" analysis. As previously noted in this district, many FDCPA cases appear to be lawyers' cases, alleging 'defect[s] of which only a sophisticated lawyer, not the least sophisticated consumer, would conceive") (internal citations omitted); *Campagna v. Client Servs.*, No. 18-cv-3039, at *21-22 (E.D.N.Y. Dec. 3, 2019)(citing *Ocampo* decision about this being a "lawyer's case" that "alleges a defect which only a sophisticated lawyer, not the least sophisticated consumer, would conceive."); *Richardson v. Diversified Consultants, Inc.*, No. 17-cv-4047 (N.D. Ill. July 17, 2019)(court noting that some FDCPA cases are filed as "lawyer-driven vehicles that have more to do with efforts to obtain attorney's fees than they do with providing relief to the plaintiff-consumer.")(internal citation omitted); *Donaeva v. Client Servs., Inc.*, No. 18-cv-6595 (E.D. N.Y. July 11, 2019) (court calling this a "lawyer's case"); *Saraci v. Convergent Outsourcing, Inc.*, No. 18-cv-6505 (E.D. N.Y. Mar. 6, 2019)("This case is one of a number on the Court's docket that has strayed far afield from the goal of the FDCPA. . .Only a consumer's attorney, not the consumer himself, could come up with the kind of bizarre or idiosyncratic interpretation.")(internal citation omitted); *Koehn v. Delta Outsourcing Group, Inc.*, No. 18cv-1084 (E.D. Wisc. Dec. 14, 2018)(court found that Plaintiff's theory was idiosyncratic and "much more likely to be arrived at by an enterprising Plaintiff's lawyer than by a least sophisticated consumer.").

8 https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

9 15 U.S.C. § 1692g

10 Model Form B-3, NPR

the "Other" response category.[11] This creates a negative implication that consumers should share as little details about their dispute as possible with the debt collector.[12] Neither the FDCPA nor the NPRM encourages a dialogue (or, at a minimum, a designated process) between the debt collector and the consumer in order to resolve the dispute. This seems odd considering the FCRA has a statutorily mandated dispute process[13] as does the Fair Credit Billing Act,[14] both discussed above.

Many debt collectors have developed an electronic process for consumers to dispute debts that allows the consumer to provide relevant and necessary information to the debt collector in order to resolve the debt. However, without a statutory framework, debt collectors do this at their peril. The costs upon industry to have such an infrastructure is minimal and some would say well worth the investment. Consumers benefit by having their disputes resolved and reducing their sense of frustration and confusion. Furthermore, the burden required upon a consumer to provide a small amount of additional information is negligible and nothing more than what a consumer would have to provide if claiming identity theft under the FACT Act.[15]

CRC encourages the Task Force to consider amendments to the FDCPA that would include a mandated dispute process which would require consumers to set forth a minimum but specific amount of information about their dispute.

2. A Right to Cure

In its comment to the NPRM, CRC suggested that the CFPB consider rules that would allow debt collectors a right to cure harmless errors.[16] Since the FDCPA is a proscriptive statute that only says what you cannot do, allowing the opportunity to cure innocent mistakes is equitable.

A right to cure is found in two state's debt collection statutes. California provides a reasonable "right to cure" provision that allows debt collectors to correct errors before being susceptible to civil liability. Under the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Title 1.6C of the California Civil Code, if, "within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the

[11] CRC Comment at p. 57.
[12] *Id.*
[13] 15 U.S.C. § 1681s-2.
[14] 15 U.S.C. § 1666.

[15] Fair and Accurate Credit Transaction Act of 2003; Sections 114 & 315
[16] CRC Comment at pp. 11-12.

debtor of the violation, and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor."[17] West Virginia similarly has a right to cure provision.[18] Similarly, most creditors must give consumers a right to cure before they can bring an action to enforce a finance contract or a mortgage. Even the federal Electronic Fund Transfer Act (EFTA) provides a safe harbor for companies who cure violations before a consumer files suit.[19]

The FDCPA is a strict liability statute and the penalty for self-identifying and correcting good faith, harmless errors are severe for debt collectors. The fear of class action liability dissuades debt collectors from correcting simple mistakes, such as typographical errors because they amount to an admission of liability. A right to cure provision promotes correction of curable errors and allows the consumer to be "made whole" (e.g., receiving a corrected letter).

The CRC proposed the addition of the following into the final rule:

> A debt collector shall have no civil liability under this title if, within 30 days after discovering a violation, or after receipt of notice of an alleged violation and the factual basis for the violation, by certified mail, return receipt requested, the debt collector makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor.

If the CFPB does not adopt this recommendation, CRC urges the Task Force to consider amendments to the FDCPA that apply fair and balanced opportunities for debt collectors to fix harmless, ministerial and technical errors in debt collection communications that bring no harm to the consumer.

3. Recognizing the Relationship between First-Party and Third-Party Debt Collectors

There is no dispute that the FDCPA applies to third-party debt collectors and not original creditors (or as they are often called, first-parties). The FDCPA defines a "debt collector" as follows:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be

[17] See California Civil Code § 1788.30(d).

[18] See WV Code §46A-5-108 (West Virginia law requires that a consumer provide notice of right to cure to the debt collector).

[19] "A person has no liability under this section for any failure to comply with any requirement under this subchapter if, prior to the institution of an action under this section, the person notifies the consumer concerned of the failure, complies with the requirements of this subchapter, and makes an appropriate adjustment to the consumer's account and pays actual damages or, where applicable, damages in accordance with section 1693h of this title." 15 U.S.C. § 1693m(e).

> owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.[20]

A creditor is defined under the FDCPA as "any person who offers to extends credit creating a debt or to whom a debt is owed, but the terms does not include any person to the extent that he receives assignment of the debt or transfer of the debt in default solely for the purpose of facilitating collection of a debt for another."[21]

When the FDCPA was enacted in 1977, the relationship between creditors and debt collectors was not inter-related. In its comment to the NPRM, the CRC reminded the Bureau that any pending rules requiring debt collectors to provide information to consumers must recognize that the information comes from their creditor clients. The Task Force must also recognize that debt collection is part of the larger credit ecosystem. Debt collectors' compliance with the FDCPA depends on creditors maintaining their information so that it can flow down to third-party debt collectors when the time comes to collect.

For instance, many creditors do not maintain records of prior disputes from consumers or records which confirm that a dispute was investigated. Further, creditors do not maintain information from the activities of prior debt collectors when they send accounts to a subsequent debt collector. The FDCPA would be better served if there was specific and uniform information required within the statue in order for creditors to better understand what information is required of them prior to assigning an account to debt collector.

#14. Some stakeholders favor regulations with specific requirements, which draw bright lines for a company's compliance obligations but can apply a one-size-fit-all approach. Others favor "principle-based" regulations, which can provide a company with flexibility but can create compliance uncertainty. Federal regulations currently employ both approaches (e.g., Regulation Z's highly specific disclosure rules, and Regulation V's requirement that data furnishers implement and maintain reasonable written policies and procedures concerning the accuracy of the data they furnish). Which approach is preferable, and does this depend on the industry, the statute, or other considerations? Please explain

CRC believes that establishing clear expectations and guardrails for all stakeholders affected by a statute of regulation benefits everyone. However, the level of specificity (i.e., specific requirements versus "principle-based" regulations) will depend largely on the statutes, regulations, and stakeholders involved. For instance, a one-size-fits all approach would not

[20] 15 U.S.C. §1692a(6).
[21] 15 U.S.C. §1692a(4).

necessarily work for all FDCPA provisions nor would a one-size-fits all approach work for all debt collection companies.

That being said, CRC favors specificity regarding safe harbor disclosure language and safe harbor procedures, in addition to clearly defined deadlines and time-frames to which both consumers and companies must adhere. Specifically, in terms of the FDCPA, these safe harbors should function to protect companies that choose to use them but should not be mandated as the sole compliance method. Many creditors, restricted by their own panoply of statutory and regulatory standards, dictate their own strategies to their outside debt collectors. Standardization of safe harbors (for those who chose to utilize them) create opportunities for setting expectation and providing consumer education around predictable forms, disclosures and practices.

Additionally, the Bureau should consider different standards for different types of products and debts. For instance, the NPRM attempts to dictate regulations for use across all types of debt, not just debt incurred as the result of a consumer financial product or service. The majority of all consumer debts in collection are actually the result of healthcare bills, utilities, cable, and telephone services.[22] Thus, the CRC urges the Bureau to consider flexibility in the debt collection market since not all debts are of the same type.

Furthermore, specific requirements will cut down on judicial interpretations that cause grey areas and different requirements in different parts of the nation as a result of circuit splits. For instance, prior to the recent Third Circuit opinion, *Riccio v. Sentry Credit*, 954 F.3d 582 (3d Cir. 2020), many debt collectors felt compelled to provide a "Third Circuit" specific validation notice as a result of case law from 1991.[23] The Bureau has an opportunity to create a national standard that will allow debt collectors to safely follow the law while reducing their own risk of a lawsuit alleging confusion for hyper technical violations based on the placement of commas or word choice.

CRC believes a balance of strict overarching requirements, but flexibility with how to comply with those requirements, may accomplish not only the Bureau's goal, but also provide greater avenues for compliance. For instance, the "limited-content message" proposed at § 1006.2(j) of the NPRM is a requirement that will not only benefit debt collectors, but also consumers. The

---

[22] *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2016*, ACA International, November 2017, p.7.

[23] The Third Circuit held in *Graziano v. Harrison*, 920 F.2d 107 (3d Cir 1991), that a letter stating that a writing is required to dispute a debt under 15 U.S.C. § 1692g(a)(3) *does not* violate the FDCPA, despite the fact that no writing requirement is present in that section of the FDCPA. As a result, for nearly thirty (30) years, debt collectors within the Third Circuit were victim to hundreds of lawsuits claiming their validation notice violated the FDCPA even though it tracked the statutory language almost verbatim (and the notice was fine to use in every other part of the United States). *Graziano* was finally overturned earlier this year in *Riccio*.

limited-content message will also honor the FDCPA's prohibition against third-party disclosure. However, within that limited content message, the Bureau could provide flexibility.

CRC recommends that the limited-content message definition should be amended so that a debt collector may include a "generic statement that the message relates to an account" and, optionally, the legal or commonly known name of the original creditor. This additional language does not increase risk to the consumer and instead provides the consumer with helpful information.

Alternatively, there are areas of the NPRM that could include stricter requirements. For instance, in § 1006.6(b)(2)(i), a debt collector is permitted to contact a consumer if, after an unspecified "reasonable period of time," her attorney has not responded to the debt collector's communication. Under these circumstances, CRC believes it would be beneficial to define the "reasonable period of time." Specifically, CRC recommends that § 1006.6(b)(2)(i) clarify that twenty-one (21) days is presumed to be a reasonable period of time. Twenty-one days is more than sufficient to account for an attorney's professional schedule.

Furthermore, defining a "reasonable period of time" benefits the consumer because it will allow the consumer to know that her attorney is not properly responding. In those instances, she can protect herself by either prompting her attorney, seeking other representation, or taking matters into her own hands. Thus, this is an example where stricter requirements would be beneficial and provide clarity to both consumer and debt collectors.

#19. Which markets for consumer financial products or services are functioning well—that is, which markets are fair, transparent, and competitive? Which markets might benefit from regulatory changes that could facilitate competition and materially increase consumer welfare?

As mentioned throughout CRC's response to this RFI, the debt collection market has not been functioning well since the enactment of the FDCPA. While CRC supports the CFPB's authority to write rules for the FDCPA, 21st century rules cannot improve a 20th century statute. The FDCPA suffers from an outdated and pedestrian way of approaching debt collection in a modern world where more consumer choice and a greater expectation from consumers for heightened customer service is paramount. The FDCPA is proscriptive and discourages communication, which is the necessary component of debt resolution for the consumer.

Any final debt collection rule will be limited by the FDCPA's current deficiencies, including the failure of the statute to recognize new mediums of communication and various payment methods by which a consumer can pay down debts.

The debt collection market and other consumer financial services markets would benefit from regulatory flexibility especially when it comes to innovation. Harmonization of regulations across different statues would bring clarity and better consumer protection. Here are some examples:

1. Record Retention

All financial services statutes must be governed by the same record retention standard. This would include retaining all records from origination until final payment or some other disposition like a discharge in bankruptcy as well as all communications with the consumer plus an additional three (3) years. There are no longer warehouses of documents. Documents now and going forward will all be electronic and financial services institutions have moved away from paper. Now there must be consistency on the data and information that is being stored.

Currently, the Truth-in-Lending Act (TILA) and Regulation Z (Reg. Z), only require creditors to maintain financial records for loans, generally, that show compliance with TILA for two years and three years for mortgage loans.[24] With the electronic storage of records and cloud computing, financial institutions and creditors have been able to maintain adequate records to support and substantiate a debt owed. However, the information they do keep does not in many instances align with the information that a debt collector is required to provide under the FDCPA and state debt collection laws and regulations.

Conversely, the FCRA has no record retention requirement for data furnishers especially as it relates to adverse action notices or even direct disputes. The Equal Credit Opportunity Act (ECOA) requires that a copy of a credit application be kept for 25 months after notifying a consumer about the action taken on the application. Proposed § 1006.100 of the NPRM suggests a three (3) year record retention policy after: (1) the debt collector's last or attempted communication in connection with the collection of debt; or (2) the debt is settled, discharged in bankruptcy or transferred back to the debt owner or another debt collector. Assuming the NPRM is finalized to include this record retention requirement under the FDCPA, any credit reporting information or disputes regarding prior credit reporting would not even be included in the records that are passed from one debt collector to another. The compounds a significant problem faced by the debt collection industry and that is consistency of information.

2. The FDCPA and FCRA

Many debt collectors are also data furnishers. The FDCPA does not define a CRA within the text of the statute but otherwise mandates that a debt collector may not "communicat[e] or threaten to communicat[e] any personal credit information which is known or which should be known to be false, including the failure to communicate that the disputed debt is disputed."[25] Debt collectors who receive consumer dispute verifications (CDVs) or automated consumer dispute

---

[24] 12 CFR § 1026.25.

[25] 15 U.S.C. §1692e(8).

verifications (ACDVs) from the CRAs investigate those disputes pursuant to their duties and responsibilities under the FCRA.[26] Although debt collector/data furnishers comply with the FCRA by conducting a reasonable investigation upon receipt of a CDV and reporting their findings back to the CRAs, they would otherwise be in violation of the FDCPA if they failed to mark the account as disputed. This was the cause of significant litigation in the late 2000s even though the Federal Trade Commission's (FTC) Staff Commentary in 1988 directly addressed the issue when it found no requirement to report a debt as disputed if it has already been reported to the CRA prior to receipt of the dispute.[27]

More recently, litigation has been fueled by a lack of clear guidance on how debt collectors should update tradelines to reflect dispute status. The Metro 2 guidelines indicate the dispute-related Compliance Condition Codes (XB, XC, and XH) are for direct disputes only. Relying on this, CRAs have instructed some data furnishers not to submit these codes in response to ACDVs which are indirect disputes. There is also disagreement within the industry on when each code should be used. This uncertainty has caused FCRA claims to rise year after year while the volume of FDCPA claims steadily declines.

The CFPB has attempted to address the interplay between in the FDCPA and the FCRA in the NPRM with two proposals. Section 1006.30(a) would prohibit a debt collector from furnishing information about a debt to a CRA unless it first communicates with the consumer about the debt. What that communication would be and whether the consumer must receive that notification is unclear. The second proposal, § 1006.30(b), would prohibit the sale, transfer or placement of the debt if the debt collector knows, or should know that an identity theft report was filed pursuant to the FCRA.[28] These provisions would not apply to first parties or any other person who was not a debt collector. Further, nothing in the FDCPA prohibits a debt collector from credit reporting unless that debt collector complies with §1692e(8) and does not falsely represent that it operates or is employed by a CRA.[29] The FDCPA and FCRA should work in tandem to ensure that both statutes are achieving their intended purpose. Clear guidance should be provided regarding disputes on credit reported accounts including whether a previously reported tradeline must be updated to reflect a new dispute and how the status of the dispute should be reported (*e.g.,* while the dispute investigation is pending, after the dispute response is sent, after a consumer sends a duplicate dispute, etc.).

---

[26] 15 U.S.C. §1691s-2(b).

[27] 53 Fed. Reg. 50097-50110:

> Section 807(8) prohibits "Communicating or threatening to communicate to any person (false) credit information * * *, including the failure to communicate that a disputed debt is disputed."
>
> > 1. <u>Disputed debt</u>. If a debt collector knows that a debt is disputed by the consumer, either from receipt of written notice (section 809) or other means, and reports it to a credit bureau, he must report it as disputed.
> > 2. <u>Post-report dispute</u>. When a debt collector learns of a dispute after reporting the debt to a credit bureau, the dispute need not also be reported.

[28] 15 U.S.C. §1681a(q)(4).

[29] 15 U.S.C. § 1692e(16).

3. FDCPA and Bankruptcy

There has been much interplay between the FDCPA and the Bankruptcy Code, with the Supreme Court having to weigh in on the issue.[30]

The FDCPA recognizes that "abusive debt collection practices contribute to a number of personal bankruptcies."[31] Upon the filing of a bankruptcy petition, the Bankruptcy Code requires an automatic stay, or cease of certain activities, including debt collection.[32] This stay applies to Chapter 7 and Chapter 13 petitions. Debt collectors, who may also be bankruptcy practitioners on behalf of their creditor clients, have faced conflicting interpretations of the FDCPA, namely whether the Bankruptcy Code pre-empts the FDCPA.

Several circuits have found that the Bankruptcy Code does not preempt the FDCPA and both are enforceable because the FDCPA does not raise a direct, irreconcilable conflict with the code. In *Simon v. FIA Card Ser., N.A.*, 732 F.3d 259 (3d Cir. 2013), a law firm sent a Rule 2004 Examination Notice to debtor. The certification of service on the subpoena indicated service both directly on the plaintiffs and on their attorney but only the attorney was served. At issue was whether the defendants engaged in false, misleading or deceptive conduct under the FDCPA in connection with their service of the subpoena. In addition, the location provided for the examination was improper under the Bankruptcy Rules of Procedure. The Third Circuit, adopting the Seventh Circuit standard,[33] found that courts should examine whether the FDCPA claim raises a direct conflict with the Bankruptcy Code, or whether it is possible to enforce both the Bankruptcy Code and the FDCPA at the same time. In *Simon*, the court found under that circumstance, both statutes could co-exist. Therefore, only debt collectors can be subject to violations of the FDCPA while at the same time engaging in bankruptcy process and procedure. Similar conduct by creditors and other attorneys, who would not be considered debt collectors, have no such liability.

The next wave of cases involved whether a debt collector who files a proof of claim on a time-barred debt violates the FDCPA. In *Crawford v. LVNV Funding, LLC*, 758 F.3d. 1254 (11th Cir. 2014), the Eleventh Circuit reversed a district court ruling and found that the filing of a proof of claim was similar to filing a lawsuit and because the filing of a lawsuit on a debt that was beyond the statute of limitations violated the FDCPA, so too would the filing of a proof of claim on that same debt. Shortly thereafter the Supreme Court decided *Johnson*. Like *Crawford* before it, the bankruptcy court and district court held that the filing of the proof of claim on a time-barred debt did not violate the FDCPA, but the Eleventh Circuit reversed. An important issue before the Supreme Court in *Johnson* was whether there was an irreconcilable conflict between the FDCPA and the Bankruptcy Code's claim-filing process. The Supreme Court majority held that "filing . . .

---

[30] *See Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).

[31] 15 U.S.C. § 1692(a).

[32] 11 U.S.C. § 362.

[33] *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004).

a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the [FDCPA]."[34] Although the opinion restores order among the circuits when it comes to the application of the FDCPA to proofs of claim, the holding does did not endorse holdings in several circuits which suggest that the FDCPA simply does not apply to bankruptcy cases at all.[35] Unless and until the FDCPA or the Bankruptcy Code further clarifies this overlap, debt collectors will still be scrutinized and subject to dual penalties under the FDCPA and the Bankruptcy Code.

4. FDCPA and TCPA

The FDCPA and the Telephone Consumer Protection Act[36] (TCPA) present a variety of conflicting issues for debt collectors who over the last decade have used enhanced technology to reach consumers for non-marketing and informational purposes. Attempting to comply with both statutes has created numerous pitfalls for debt collectors as well as increased liability and risk exposure in private rights of action.[37]

A debt collector needs no consent to reach a consumer to communicate about a debt. The text of the FDCPA is silent on that issue and ironically it is only the consumer who must affirmatively advise a debt collector in writing to cease all communications. [38] Industry standards over the years have been modified to accept and abide by a consumer's oral request to cease communications. However, if a debt collector intends to use an automatic telephone dialing system (ATDS) or an artificial or pre-recorded voice, to contact a consumer a debt collector must have prior express consent from the consumer.[39] Depending on the jurisdiction and the circumstances, consent from the creditor can pass-through to the debt collector. Unlike the FDCPA, the TCPA allows a consumer to revoke or opt-out of being contacted by a debt collector using an ATDS by any reasonable means, that does not necessarily have to be in writing.

---

[34] *Johnson*, 137 S. Ct. at 1415-16.

[35] *See, e.g.*, *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) ("The FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself."); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2001) (FDCPA claim based upon an alleged violation of section 524 of the Bankruptcy Code was precluded by the Code itself because "while the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code.").

[36] 47 U.S.C. § 227.

[37] In the last decade, the yearly average of TCPA lawsuits filed has been over 2,700.00. For the first 4 months of 2020, TCPA lawsuits have increased by 160% from last year's average for the same 4 months. https://webrecon.com/

[38] 15 U.S.C. § 1692c(c).

[39] 47 U.S.C. §227(b)(1)(A).

The CFPB proposes in the NPRM to add another layer of consent to reach consumers if using email or text, namely that the consent to email or text must come directly from the consumer and cannot pass thru from the creditor. This will result in further compliance challenges and confusion among consumers. As communication with consumers is moving towards digital channels, CRC recommends one consistent consent standard. That will enable debt collectors to contact consumers as needed as well as provide consumers with available and sufficient opt-out mechanisms to ensure they have control over their privacy and their desire to be contacted.

#20. What types of disclosures regarding consumer financial products or services are effective and what types are not? Could the content, timing, or other aspects of disclosures be improved and, if so, how?

CRC understands the importance of providing consumers with clear disclosures so that a consumer can make an informed decision with respect to the particular financial product of service. However, clear disclosures are only beneficial to the extent a consumer can fully understand those disclosures. Many disclosures provide information to a consumer about her particular rights with respect to a particular financial product or service. In order for these types of disclosures to be effective, the disclosure must effectively convey both the consumer's rights and how she can enforce those rights.

Information overload as a result of the litany of disclosures required by federal, state, and local laws can actually impede the consumer's ability to understand the various disclosures and rights. While each notice or disclosure may provide important information and be required for a rightful purpose, the level of sophistication required to digest the entire communication increases significantly. To minimize consumer confusion, frustration and potential harm, CRC urges the CFPB to balance the need for meaningful notice with the need for consumers to understand such notices and disclosures.

Focusing again on the FDCPA, the statute requires that debt collectors provide various notices and disclosures to consumer about a range of topics surrounding the collection of the consumer's debt, but the FDCPA fails to prescribe the language a debt collector must (or should) use. As a result, debt collectors are faced with hundreds, if not thousands, of interpretations and variations of these notices as a result of client requirements as well as attorney and compliance officer interpretation. Adding to the confusion, numerous lawsuits against debt collectors alleging consumer confusion result in judicial interpretations that can vary widely based on jurisdiction.

In addition to a lack of standardization that existed as to the validation notice, another example comes from the Second Circuit regarding whether debt collectors are required to provide consumers with a disclosure regarding whether interest continues to accrue on their account. In *Avila v. Riexinger & Assoc., LLC*, 817 F.3d 72 (2d Cir. 2016), the Second Circuit held that:

CFPB-0026291

> [A] debt collector will not be subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date.[40]

While it was hoped that the *Avila* ruling would result in clarity, the opposite occurred as consumers, through their attorneys, filed over 300 lawsuits in the year following the *Avila* decision. As a result, the Second Circuit was required in *Taylor v. Fin. Recovery Servs.*, 886 F.3d 212 (2d Cir. 2018), to address the "reverse-*Avila*" theory being propounded:

> Contrary to Taylor and Klein's objection, our decision today reads Sections 1692e and 1692g in harmony. That is, if a collection notice correctly states a consumer's balance without mentioning interest or fees, and no such interest or fees are accruing, then the notice will neither be misleading within the meaning of Section 1692e, nor fail to state accurately the amount of the debt under Section 1692g. If instead the notice contains no mention of interest or fees, and they are accruing, then the notice will run afoul of the requirements of both Section 1692e and Section 1692g.[41]

This practice of endlessly litigating and relitigating the hyper-technical minutia of collection letters is a clear area where the Bureau could provide specific language for debt collectors.

CRC urges the Bureau to take advantage of the opportunity to craft clear and meaningful disclosures that take into consideration both the consumer as well as the debt collector.

In addition to the interest disclosure, there are countless other examples where the Bureau could provide clear language. CRC applauds the Bureau's attempt to provide clear language with the respect with the statute of limitations disclosures proposed by the Supplemental Notice of Proposed Rulemaking (SNPR), but believes that since the issue of statutes of limitation is an area of strictly state law, the Bureau would be better served to focus on the federal notices and requirements such as:

---

[40] *Avila*, 817 F.3d at 77.

[41] *Taylor*, 886 F.3d at 215.

- The type of information needed to properly convey the "creditor" name and whether a debt collector should be able to use a branded credit card name rather than the underlying bank which may not be familiar to the consumer.
- Specific language for opt-out language when a debt collector employs either e-mail or text messaging in communication with consumers. CRC agrees with the list of terms the Bureau provided in the FDCPA NPR and urges the Bureau to adopt them in the final rule. Clear guidance and examples from the CFPB will assist debt collectors in deciding whether to make use of new technology and to contact consumers using the consumers preferred method. In addition to prescribing certain language to be used, CRC urges the Bureau to adopt requirements around a specific disclosure. This would reduce consumer confusion who may be contacted by more than one debt collector and be faced with more than form of opt-out disclosures.