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NACA
National Association of Consumer Advocates

December 18, 2014

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On December 17, 2014, I, along with Keith Keogh, an attorney from Chicago who is a member of the National Association of Consumer Advocates (NACA), and Ellen Taverna, Legislative Director of NACA, met with Maria Kirby, Chairman Wheeler's legal advisor, to discuss the issues surrounding autodialed calls to reassigned numbers.

Specifically, we urged that the Commission not relax its interpretation of the definition of Autodialer contained in the TCPA. We pointed out that callers using lists of consumers are likely to be using autodialers to make such calls. A key consumer problem is receiving multiple unwanted calls, which is made easier by autodialers. We urged the Commission to consider these consumer concerns when considering the autodialer definition

We urged the Commission to consider the consumer harm from calls to reassigned numbers. Consumers with reassigned numbers are often subject to many unwanted calls. The Commission should consider requiring that callers check to see if a number has been reassigned with third-party databases, require an easy means for consumers to opt-out of future calls, and require that callers manually dial after a specified period has elapsed since the previous call. There is existing technology which can assist callers in determining whether a number has been reassigned through, for example, hearing the consumer's greeting and identifying that it is not the consumer who gave consent.

Additionally, there are solutions in the marketplace to check if a number has been reassigned. For example, Neustar will soon be able to check 95% of cell phone market to determine if a number has been reassigned. Please see the attached excerpt from a Neustar presentation.

Stopping unwanted robocalls is of great importance to consumers. In 2013 testimony to the Senate, the FTC noted that consumer complaints regarding unauthorized robocalls had increased from 63,000 per month in the fourth quarter of 2009 to 200,000 per month in the fourth quarter of

2012.[1] Clearly, consumers do not desire a reduction in consumer protections for autodialed calls, they want more.

We urged the Commission to require that callers maintain a robust record-keeping system in place to record consumer opt-out requests. Such record keeping would provide important protections to consumers.

Consumers often do not know who the caller represents and that it is difficult or impossible for consumers to know if they have consented to the call, or to revoke consent, if they do not know who is calling them.

Today, the day after our meeting, we are sending Ms. Kirby a copy of our *ex parte* comments filed June 6, 2014 with the Commission.

We very much appreciate the time and attention involved in considering our comments. If you have any questions, or would like any follow-up, please do not hesitate to contact me at 202 452-6252, extension 104, or msaunders@nclc.org.

Sincerely,

s/

Margot Saunders
Counsel
National Consumer Law Center

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[1] Testimony of Lois Greisman, Associate Director of the Division of Marketing Practices, FTC Bureau of Consumer Protection, before the Senate Committee on Commerce, Science and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance, July 10, 2013, on "Stopping Fraudulent Robocall Scams: Can More Be Done?," page 9, available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf

NEUSTAR VERIFICATION SOLUTION

Phone Type & Owner and Dialer Efficiency

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Verify Ownership & Phone Type with Neustar

Neustar's Authoritative Registry and Data Solutions Protect Your Business

VERIFICATION

Is the phone number associated with a given consumer?

- Neustar authoritative identity data & telco relationships
- Unmatched coverage and accuracy
- Millions of real-time updates every day

PHONE TYPE & ATTRIBUTES

What are the attributes of a specific number?

- Best-of-breed combination of carrier and network level data
- Attributes include:
  - ✓ Landline or Mobile?
  - ✓ Phone activity
  - ✓ Prepaid Flag

LINE PORTING

Has the phone been ported?

- Neustar manages over 600 Million telephone numbers in the US
- Unique real-time view of landline vs. mobile
- Number portability discovery services for mobile solution providers

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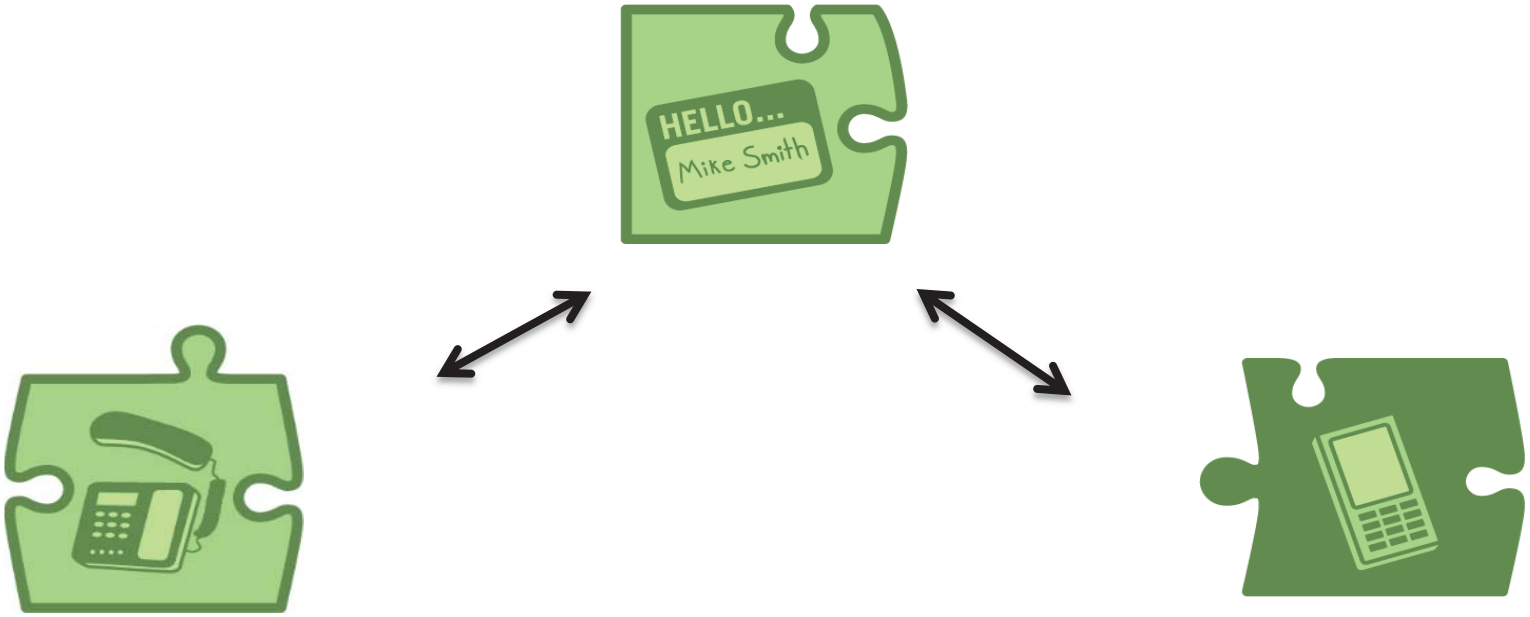
Neustar Verification Solution

One query evaluates consumer's contact information



Is this phone a landline or wireless?
Is this person linked to this phone number?
Does the contact still own the phone?
Is the contact information current?
Is this phone number active?

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How It Works

Input
- **First Name:** Mark
- **Last Name:** Moser
- **Phone Number:** 940-781-5687
- **Consent Date**: 02/11/2014

Output
- Result Code =Verification Score
- Phone Validation =1
- Phone Type =W
- Phone Activity =A3
- Prepaid Phone =N

» Inputs are:
  - » Name
  - » Phone Number
  - » Consent Date

» Key Output for TCPA & Operational effectiveness:
  1. Phone Validation & Type
  2. Mobile Phone to Name Verification Code
  3. Phone Attributes Status
     - » Activity
     - » Inactivity
     - » Prepaid

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Enhanced with Service Discontinued

- ***What it is***

  The subscriber has given up the phone number, so that it can be reassigned to another subscriber

- ***What it covers… wireless phone numbers***
  - Covers about 40 million numbers
  - Grows about 3 million numbers per month
  - Moving forward – covers about ~95% of the mobile phone market

- ***How it works***
  - Include Consent Date with Name and Phone Query
  - Checks for service discontinued after consent date

CBE companies

COLLECTION AND CREDIT RISK WEBINAR

Prepared for

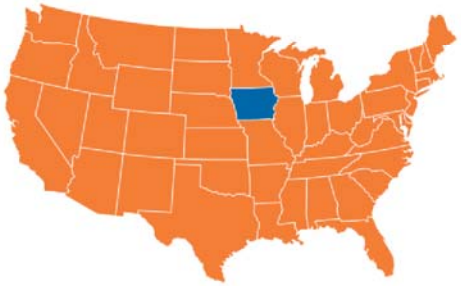
Neustar

10/22/14

neustar®

CBE companies

Headquartered in Iowa



GLOBAL FOOTPRINT

7 LOCATIONS

GLOBAL BPO { Business Process Outsourcing Organization

Founded in 1933

1,250 employees worldwide

SERVICES INCLUDE

- Fraud
- Contact Center
- Collections
- Recoveries

Consistently recognized as an Employer of Choice

Learn more at CBECompanies.com

CBE Approach to TCPA

- Manual vs. Auto-Dial Strategy
  - Neustar's cell phone scrub technology allows CBE to differentiate between phone types
  - CBE then sends appropriate phones to a proprietary, patent-pending application
- Reason for this approach
  - Compliance
  - Maximize inventory

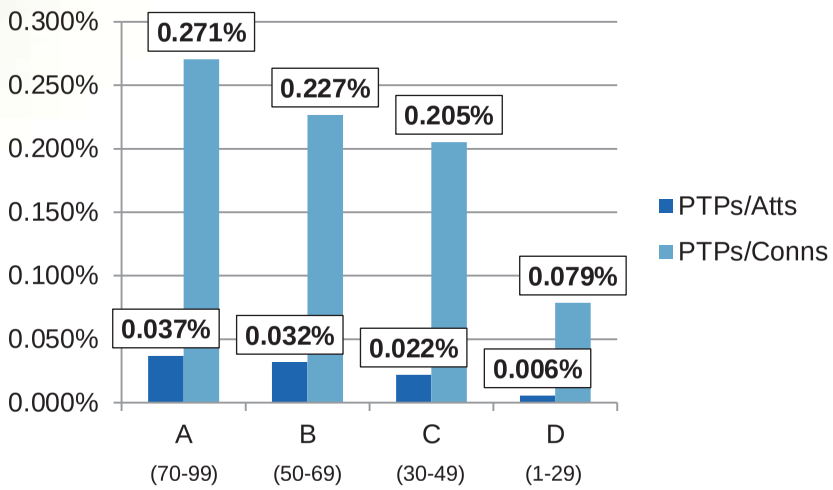
> "According to the Consumer Financial Protection Bureau's (CFPB) quarterly report, 24.1% of their complaints in quarter two of 2014 stemmed from continued attempts to collect on debts not owed, including wrong numbers."

Neustar Solutions in CBE Process

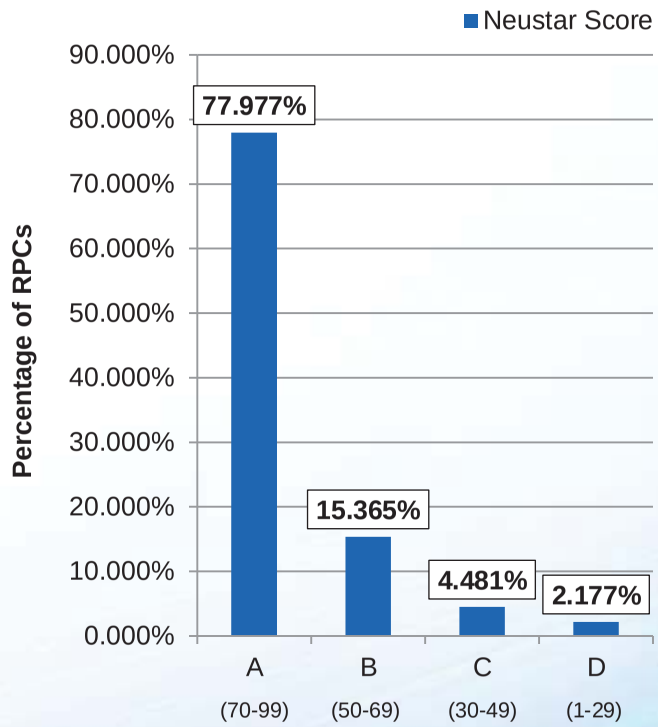
- Why Neustar?
  - TCPA compliance and consumer complaint risk mitigation
    - Ability to pre-qualify phones prior to dialing
  - Trusted partner with a credible product
- Outbound calling strategies
  - Scoring grades are used for determining what phones are placed on the dialer
  - Cell phone scrub is used to separate phones appropriately
- Improve operational efficiencies
  - Reduce overhead for manual dialing (higher quality phones)
  - Increase right party contact (RPC) rates
    - Through data analytics, CBE is able to verify the positive correlation between Neustar scoring and RPC rates

Neustar Score Early Results

Promise to Pay (PTP) Metrics by Neustar Score



RPC % Comparison by Neustar Score



- 4X more likely to have a PTP connect on “A” number vs. “D” number
- “A” numbers get top priority
- Stopped dialing “D” numbers

Questions or Additional Discussion?

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QUESTIONS?

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TCPA LAWSUITS UP 33% OVER LAST YEAR

IS YOUR COMPANY AT RISK?

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Collections&CreditRisk
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June 6, 2014

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On June 4, 2014, Margot Saunders an attorney with the National Consumer Law Center[1] ("NCLC"), and Keith J. Keogh, an attorney member of the National Association of Consumer Advocates ("NACA") from Chicago, had meetings with staff of the FCC, as detailed below. In the last meeting, Ellen Taverna, Legislative Director of NACA, joined us.

1. Consumer Policy Division, Consumer and Governmental Affairs Bureau: Kristi Lemoine, John B. Adams, Kurt Schroeder, Aaron Garza, and Kris Monteith.
2. Commissioner Pai's advisor Nicholas Degani
3. Commissioner O'Rielly's advisor Amy Bender
4. Commissioner Clyburn's Chief of Staff Adonis Hoffman
5. Commissioner Rosenworcel's advisor Valery Galasso

All of these meetings covered essentially the same topics. These topics were:

A. Predictive dialers cause harm to wireless customers.
B. The current definition of autodialer is still relevant and appropriate.
C. Dealing with the "sky is falling" premise from Petitioners: the fictional nature of the "threat" of spurious litigation for TCPA claims.
D. Consumers need to be protected from debt collectors, including student loan servicers. .
E. The impact on consumers and cellphone usage from *changing* the definition of autodialer.

[1] The **National Consumer Law Center (NCLC)** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commission and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*.

F. Reassigned numbers should not lead to unlimited to calls to consumers who have not provided consent.
G. The FCC should coordinate with the CFPB on the number of calls permitted to cell phones, even with consent.
H. Revocation of consent to call cell phones should always be permitted.

A. Predictive dialers cause harm to wireless customers

There is a false impression in the Communications Innovators' petition, which claims the use of predictive dialers for non-telemarketing purposes creates no additional costs for wireless consumers because callers can already contact the same consumers on their wireless telephone numbers through manual dialing.

This ignores many undesirable side effects of predictive dialers, such as abandoned calls. While Communications Innovators claims "they have no incentive to place unnecessary informational calls" that is exactly what abandoned calls are. Manual calling does not create millions of (costly, obnoxious, and despised) hang-up abandoned calls every day. Predictive calling makes three times as many calls for the same number of human agents as preview-mode dialing. In other words, it drops 3 calls for every 1 that is ultimately connected. The number of these drop calls is staggering. For example, the debt collector NCO Financial produced an affidavit that it had 33 dialers, and that each dialer made 300,000 to 400,000 calls per month. That is 9.9 million to 13.2 million calls per month or 118,800,000 to 158,400,000 calls per year. *See Exhibit 1* at paragraph 7. This number of unavoidable abandoned calls is staggering for just one debt collector.

The notion that predictive mode calling to cell phones should be considered no differently from other forms of dialing to cell phones is also incorrect. The amount of calls and the correlating harassment are exponentially increased with predictive dialing. As noted by petitioners, it is too expensive to make too many manual calls, but it is cheap to make millions of autodialed calls. It follows then that the number of manual calls to a consumer would be less than the number of calls to the same consumer in a predictive mode.

B. The current definition of autodialer is still relevant and appropriate.

A number of petitions pending before the Commission seek a complete reversal of the Commission's policy regarding the meaning of "automated telephone dialing system" ("ATDS") and a change in the interpretation of the term "capacity" in the definition of ATDS. These petitions appear to ignore that capacity to dial numbers randomly or sequentially is not required in order for a dialing system to meet the definition of ATDS.

Much of the discussion in these petitions is based on the argument that the current definition covers too many instruments – supposedly making the distinction meaningless. The implication is that because so many people have smart phones, each of which could be an ATDS, that all of those people could be sued under the TCPA – a danger that should be avoided by changing the definition of ATDS to exclude all of the technology that is actually being used by commercial entities to call consumers. Yet, as explained in section A, above, the threats of these nefarious lawsuits against innocent consumers is grossly exaggerated.

In 2003, the FCC clearly recognized the need to prevent callers from circumventing the TCPA. It held:

> It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies. n436 In the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective. n437 The basic function of such equipment, however, has not changed--the capacity to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.[2]

The FCC concluded that automated dialers provided with a list of numbers to call were *more likely to harass* consumers than those which were used to dial numbers completely at random, because the "robocalls" would be concentrated and "autodialers can dial thousands of numbers in a short period of time." [3] The Commission then held that a dialing system is an ATDS if:

> The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, *or from a database of numbers. . .* [4]

The industry chooses to ignore the fact that calling from a database counts as an ATDS, as the Commission clearly held the last time this issue was argued:

> In this Declaratory Ruling, we affirm that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers. In its Supplemental Submission, ACA argues that the Commission erred in concluding that the term "automatic telephone dialing system" includes a predictive dialer. ACA states that debt collectors use predictive dialers to call specific numbers provided by established customers, and that a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, *not when it dials numbers from customer telephone lists.*
>
> …Most importantly, the Commission said that, to find that calls to emergency numbers, health care facilities, and wireless numbers are permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists, *would be inconsistent with the avowed purpose of the TCPA and the intent of Congress in protecting consumers from such calls.*[5]

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[2] *See* 2003 TCPA Order, 18 FCC Rcd at 14092, para. 131 (emphasis added).

[3] 2003 TCPA Order, 18 FCC Rcd at 14092, ¶133

[4] *See* 2003 TCPA Order, 18 FCC Rcd at 14091, para. 131 (emphasis added).

[5] FCC TCPA Order, Jan. 4, 2008, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-232A1.pdf (emphasis added).

There is no ambiguity that auto dialing from a database of numbers is prohibited. Yet in an attempt to end run this result, the current petitioners repeatedly attempt to ignore this portion of the 2003 and 2008 Orders.

However, nothing has happened since 2003 (or 2008 for that matter) that might suggest that the Commission's sound reasoning is now invalid, or that the policies behind the TCPA or the intent of Congress in protecting consumers have changed. In fact, the opposite is true.

An illustration that the Commission's' polices are still valid is the fact that a substantively similar request to "clarify" capacity was proposed in September 2011 as HR 3035, which was introduced into the House of Representatives. Because, like here, HR 3035 sought to limit the definition of an ATDS to only systems that dial numbers randomly or sequentially, it was opposed by fifty-four attorneys general who submitted the opposition letter, attached as *Exhibit 2* at p.3, which states that industry efforts to:

> revise the definition of 'automatic telephone dialing system' to include only equipment that uses random or sequential number generators. *Most modern automatic dialers, however, already use preprogrammed lists.* As a result, H.R. 3035 would effectively allow telemarketers to robo-dial consumers just by avoiding already antiquated technology.[6]

The public opposition was so overwhelming[7] against any relaxation of the TCPA that the bill was completely withdrawn. *See* letter from the bill's sponsor attached as *Exhibit 4*. Americans are overwhelmingly and vehemently objecting to opening up cell phones to auto dialers because they already feel abused and harassed by the robocalls illegally made to their cell phones and their home phones. Current protections are clearly not sufficient to protect consumers from abusive calling; it is understandable why the public fears open the floodgates to even more calls to their cell phones.

Having failed in Congress, the industry is repeatedly asking the FCC to do what Congress refused to do when Congress learned of the massive opposition to relaxing the TCPA. In order to do so, the Commission would need to throw out over 20 years of guidance on the TCPA, which would mean that the TCPA would only apply to some hypothetical system and that virtually every business would be free to robocall with impunity regardless of consent. This would defeat the very purpose of the TCPA[8] and leave consumers without the tools to protect their privacy.[9] It would also

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[6] *Exhibit 2* at p.3 (emphasis added).

[7] A similar letter opposing the bill (*Exhibit 3*) was sent by was sent by a consumer & privacy coalition consisting of the undersigned and the Americans for Financial Reform; Center for Media and Democracy; Citizens for Civil Discourse (The National Political Do Not Contact Registry); Consumer Action Consumer Federation of America; Consumer Watchdog; National Consumer Law Center (on behalf of its low income clients); Privacy Activism Privacy Rights Now Coalition; Evan Hendricks, Publisher, Privacy Times; U.S. Public Interest Research Group.

[8] The TCPA was passed as a direct response to the explosion of abuses of telephone and facsimile technology in the 1980s and 90s. These abuses included the use of autodialers to clog telephone lines with unwanted calls, "robocalls" that leave unsolicited or unwanted, prerecorded messages, and "junk faxes" that consume the recipients' paper and ink and interfere with the transmission of legitimate messages. As the Supreme Court explained it: "[v]oluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA."

[9] "Few rights are so fundamental as the right to privacy in our daily lives, yet few are under such frontal assault. Our dinners are disrupted by unwanted phone calls. Our computer accounts are besieged with bothersome spam. Our mailboxes are swollen with advertisements for products, goods and services. We conduct our whole lives against the

mean that the FCC' drop call regulations would not apply to the vast majority of callers as they would not be using what the petitioners deem an ATDS and would therefore not be subject to being regulated by the TCPA.

C. Dealing with the "sky is falling" premise from Petitioners: the fictional nature of the "threat" of spurious litigation for TCPA claims.

The petitioners in these filings are not actually concerned with clarification. Instead, they seek rule changes 1) to allow them to shift the risks of mistaken calls to consumers, without any liability, and 2) to call consumers on their cell phones using automated dialing systems without consent. The petitioners seek an exemption to allow them to call cell phones even though they have had no connections with the owners of these cell phones, and no consent from these consumers.

It is not surprising that the number of lawsuits under the Telephone Consumer Protection Act ("TCPA") have increased because – as the FCC's own data shows – the number of complaints relating to robocalling have increased at a much greater rate. According to the FCC's testimony before Congress, the number of complaints to the FCC relating to robocalls doubled to over 100,000 in 2012 alone.[10] Yet according to the U.S. Chamber of Commerce's comments, there were only 1,862 TCPA lawsuits filed in 2013. In other words, the number of lawsuits was less than 2% of the total complaints to the FCC.

The ratio of number of complaints to lawsuits actually filed would be even higher if one also considered complaints to other governmental agencies regarding abusive robocalls.[11] The relatively small number of lawsuits nationwide, many of which are individual lawsuits and not class actions, show a) that most business are in compliance with the TCPA and b) do not need clarification of the law. Instead, a handful of bad actors seek a competitive advantage in marketing and debt collecting over their compliant competitors who now seek exemptions from the straightforward rules of the TCPA. The undersigned submit that there is no need for clarifications, especially those sought, which would render the TCPA meaningless. If anything, the number of complaints the FCC itself has received shows the need to strengthen and not weaken the TCPA.

Moreover, there is really little threat to consumers from using their smart phones – which might be called in certain circumstances automated telephone dialing systems ("ATDS"). Although the industry has raised the specter of consumers being subject to the "litigation-friendly" TCPA,

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white noise of commercial solicitation. These intrusions exhaust us, irritate us and threaten our cherished right to be left alone."

….

"The TCPA is about tools. It gives consumers the tools they need to build a high and strong fence around their homes to protect them from unsolicited telephone calls and faxes. It also allows other consumers to have a lower fence or no fence at all, if they wish to take advantage of these commercial messages." Separate statements of: *Commissioner Michael Copps and Chairman Michael K. Powell, Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 18 FCC Rcd. 14,014, 14,176; 14,174 (July 3, 2003).

[10] *See* http://www.gpo.gov/fdsys/pkg/CHRG-113shrg85765/html/CHRG-113shrg85765.htm.

[11] In addition to the complaints the FCC received, state Attorney Generals data shows that third party consumers frequently complain that they are receiving multiple calls after they have informed the collector it has a wrong number or that they are not connected with the account. Other complaints concern calls that continue long after the third-party has told the collector that they do not know the debtor's location or do not wish to give it to the collector. The Attorneys General believe that these calls are often made for the sole purpose of embarrassing debtors rather than determining their location. *See* Attorneys General Letter attached hereto as *Exhibit 5* at 18-19.

they cannot point to any real cases in which individuals have been sued when they were used their cell phones for non-commercial purposes to call lists of people using their smart phone without consent. Indeed, when you look at the financial realities of the situation, lawsuits like this would be impossible in almost situations.

The TCPA does not shift costs – this means that an attorney's time investigating, filing and litigating a lawsuit under it needs to be paid for from the proceeds of the lawsuit. No attorney fees are recoverable for TCPA violations. The recovery is limited to $500 per impermissible call. This means that there must be at least a high volume of calls made by the individual to other people's cell phones to make the litigation at least potentially fruitful. It is hard to imagine a set of circumstances in which an individual would be using his or her cell phone to make so many calls to the cell phones of others, for which there was no consent. Unless, these calls were made for a commercial purpose – in which case the calls would be illegal, and should be illegal, under the TCPA.

D. Consumers need to be protected from debt collectors, including student loan servicers.

Much of the current tension about the limits on autodialers calling cell phones arises from debt collectors and creditors seeking to call consumers to push them into paying debts. Because of this, some background information about consumers facing debt collection efforts against them is relevant.

Outstanding consumer debt in the United States exceeded $2.5 trillion in 2009, having more than doubled in less than twelve years. As consumer debt has grown, collection and speculation on consumer obligations have become big businesses in their own right, as has the business of extending unaffordable, fee-laden credit products to the unsophisticated and unwary.

Delinquency and charge off rates generally follow unemployment rates and fraudulent and imprudent lending practices, and as a result vary greatly among credit extenders. In 2005, before the full onset of the recent financial crisis, the aggregate charge-off rate for consumer credit was 2.05%, rising to 5.87% in 2010, and the charge-off rate for residential loans was 1.49%, rising to 10.84% in 2010.[12] While the proportion of debt that is delinquent at any point in time is small, the amount of consumer debt is so large that billions of dollars are delinquent at any given time.[13]

Financially Distressed Consumers. Studies have shown – and executives in the credit industry have repeatedly admitted -- that the major causes of serious consumer delinquency are unemployment, illness, and marital problems. Moreover, the credit industry's overextension of credit, particularly high-cost credit, greatly inhibits debtors' ability to repay.

When Congress wrote the federal Fair Debt Collection Practices Act ("FDCPA") it explicitly recognized that most delinquency is not intentional. Just the opposite is the case. Most overdue debts are not the fault of the consumer:

> One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt

[12] U.S. Census Bureau, Table 1195. Delinquency Rates and Charge-Off Rates on Loans at Insured Commercial Banks: 1990 to 2010, http://www.census.gov/compendia/statab/2012/tables/12s1195.pdf.
[13] *See* Federal Reserve Bank of N.Y., Quarterly Report on Household Debt and Credit.

> collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of "deadbeat." This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.
>
> The Commission's findings are echoed in all major studies: *the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.*[14]

The FDCPA, as well as other laws protecting debtors from abuse and harassment, is based on this recognition, rather than on the myth that draconian collection tactics are justified by the existence of substantial numbers of debtors who sought out credit without the intention or wherewithal to repay.[15]

There are clear, objective, widely recognized causes of delinquency and default on consumer debt. Unemployment is widely recognized as the leading cause of the failure to pay credit card debt.[16] Excessive medical debt is also widely seen as cause for the non-payment of other bills.[17]

Abusive Debt Collection Calls. These basic facts should undergird the FCC's continued protection of consumers from unwanted and abusive debt collection calls to their cell phones. Collectors are *not* generally dealing with people who are choosing not to pay something they can pay. Rather they are dealing with people who are already struggling to pay their debts, for whom choosing to pay one debt will often mean other debts or necessities will go unmet. This is why both debt collection regulation and cell phone regulation should not permit abuse, harassment or unfair or deceptive practices.

Causing one's cell phone to ring repeatedly is even more abusive for consumers than causing one's home phone to ring. Debt collection often begins with a series of form letters and then graduates to phone calls from collection employees. The industry's technological capabilities, along with the perverse incentives it provides its employees, ensure that these calls are frequent and often abusive. In particular, the collection employee is often eligible for salary incentives based on the amount he or she collects. Collectors use automated dialing systems that will place a million calls per day.

One Example – CashCall. A recent opinion from the West Virginia Supreme Court, about the Attorney General's case brought against CashCall, an Internet-based high-cost installment loan

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[14] Senate Report No. 95-382 on the Fair Debt Collection Practices Act, Report of the Committee on Banking, Housing and Urban Affairs U.S. Senate Aug. 2, 1977 (emphasis added).

[15] Caplovitz, *Consumers in Trouble* , Chapter 11 (1974). *See also* As We Forgive Our Debtors. Bankruptcy and Consumer Credit in America. Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook. Oxford University Press, New York, 1989).

[16] Sumit Agarwal and Chunlin Liu, *Determinants of Credit Card Delinquency and Bankruptcy: Macroeconomic Factors*, 27 Journal of Economics and Finance, 1, Spring 2003.

[17] *See* e.g. Theresa Tamkins, *Medical Bills Prompt More than 60% of Bankruptcies*," CNN Original Series, June 5, 2009.

lender, illustrates the profitable and abusive nature of creditors' collection tactics.[18] The Supreme Court found that there were 292 CashCall borrowers in West Virginia – some of whom were never in default on their loans. Yet CashCall made 84,371 calls to these borrowers over a period of less than two years.[19] Some of CashCall's calls to consumers include:

- CashCall contacted consumers repeatedly and continuously at home, at work, on their cell phones, and at times or places that CashCall knew, or should have known, were inconvenient; and quite often after they unequivocally asked CashCall to stop.[20]
- CashCall admitted that 10-20 calls per day, and 1,000 calls over several months, were not unusual or unreasonable.[21]

Typical of Many Other Cases. As is indicated by the voluminous complaints about multiple calls as a collection tactic, people find it enormously stressful to receive numerous collection calls every day.[22] The calls are highly intrusive. They cause great distress and trigger difficulties in marriages. Multiple collection calls interfere with daily life. The calls themselves, the dread of future calls, and the fear of the dissemination of personal, embarrassing information to friends, neighbors, co-workers and employers permeate the lives of consumers. Indeed, in some cases, aggressive collection efforts have caused such significant emotional distress as to cause physical illness.[23]

A Third Circuit decision describes the appalling debt collections tactics of a medical debt collection attorney:

> [W]hen (defendant) could not locate a bank account, he often engaged in a phone "survey" in which he called the debtor, offered him or her a free gift for completing his survey, and then asked questions until he obtained enough information to identify the account . . . One former employee stated that he quit in disgust after [defendant] and his sister celebrated how they saved up a list of debtors until just before Christmas so that they could freeze their bank accounts in time for the holidays . . . Two examples illustrate [defendant's] practices. [A consumer] had a disputed $6,000 debt with the physician treating his terminally ill wife. The physician explicitly instructed [defendant] not to pursue the money, but nonetheless seized

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[18] *See,* State of West Virginia *ex rel.* Darrell V. McGraw, Jr., Attorney General v. CashCall, Inc. and J. Paul Reddam, in his capacity as president and CEO of CashCall, Inc.). Memorandum Decision, May 30, 2014. http://www.courtswv.gov/supreme-court/memo-decisions/spring2014/12-1274memo.pdf

[19] *Id.* at 4.

[20] *Id.*

[21] *Id.*

[22] Courts have found that even fewer calls than those admitted by CashCall can state a claim for harassment. See, e.g., Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230 (11th Cir. 2011) (200-300 calls); Rucker v. Nationwide Credit, Inc., 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (approximately 80 phone calls in one year); Krapf v. Nationwide Credit, Inc., 2010 WL 2025323 (C.D. Cal. May 21, 2010) (four to eight calls daily for two months); Turman v. Central Billing Bureau, Inc., 568 P.2d 1382 (Or. 1977) (at least four calls over nine days).

[23] *See, e.g.,* Margita v. Diamond Mortgage Corp., 406 N.W.2d 268 (Mich. Ct. App. 1987) (stress from telephone collection efforts including phone calls aggravated paroxysmal atrial tachycardia); Turman v. Central Billing Bureau, Inc., 568 P.2d 1382 (Or. 1977) (affirming tort verdict; blind consumer rehospitalized with anxiety and glaucoma complications after repeated collection calls); GreenPoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming jury verdict of $5 million in compensatory damages against debt collector; elderly consumer suffered severe shingles-related sores, anxiety, nausea, and elevated blood pressure due to repeated telephone and in-person harassment over a debt she did not owe).

> $6,000 from [the consumer's] account. [The consumer] called to beg for the money. He explained that his wife was dying, his son had recently died, and he had no money to pay for food or funeral expenses. [Defendant] laughed at him, kept the money, and never turned it over to the doctor. [Another consumer] was two days late on a payment to her dentist for a procedure that she said she never authorized. [Defendant] filed a judgment, used his phone "survey" to trick her into divulging the location of her bank account, and then froze the account. When she called to explain that her husband was sick and that she could not afford the payment, he informed her that he "had high hopes that she had life insurance on her husband." Distraught, she agreed to make the payment.[24]

Complaints on Debt Collection – Wrong People Called Routinely. The Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called.[25] Over a fifth of all the debt collector complaints related to communication tactics.[26]

Similarly, a 2009 survey conducted by the Scripps Survey Research Center at Ohio University shows 30% of respondents were being called regarding debt that is not their debt.[27] And according to statistics from the Federal Reserve, one in seven people in the United States is being pursued by a debt collector, a substantial percentage of whom report being hounded for debts they do not owe.[28]

Student loan collectors violate regulations and the law repeatedly – no exemption is appropriate for them. Student loan collectors are not simply innocent servicers of loans reaching out to hapless consumers who need their services to avoid defaulting. They have been notorious violators of laws and regulations designed to protect consumers from their over-reaching and their abusive and harassing activities.

For example, consider the recent settlement between the FDIC, along with the Department of Justice and the student loan servicer Navient. On May 13, Navient reached an agreement with the FDIC and Department of Justice related to violations of the Servicemembers Civil Relief Act (SCRA) and of federal laws that prohibit unfair and deceptive practices related to student loans. Specifically, Navient agreed to pay a total of $139 million to cover issues related to the SCRA and late fees/restitution for borrowers who were affected by certain payment allocation procedures that the company has argued are open to interpretation the way the rules are written.[29]

Moreover, in recent testimony to Congress about problems with student loans, the head of the section on student loans at the CFPB stated:

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[24] United States v. Zats, 298 F.3d 182, 184 (3d Cir. 2002).
[25] CFPB Consumer Response Annual Report (January 1 – December 31, 2013) at p. 16. http://files.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf
[26] *Id.*
[27] http://www.creditcards.com/credit-card-news/debt-collectors-become-more-aggressive-break-law-1276.php.
[28] http://www.newrepublic.com/article/117213/debt-collector-malpractice-someone-elses-debt-could-ruin-your-credit.
[29] *See,* https://compasspoint.bluematrix.com/sellside/EmailDocViewer?encrypt=a22f442d-fa91-48b5-8da1-a54417b5b5ac&mime=pdf&co=Compasspoint&id=mtarkan@compasspointllc.com&source=mail&distribution=library.

> Loan servicers are the primary point of contact on student loans for more than 40 million Americans. High-quality servicing can contribute to an individual borrower's ability to successfully repay their debt, especially through enrollment into affordable repayment plans.
>
> As the recession decimated the job market for young graduates, a growing share of student loan borrowers reached out to their servicers for help. But the problems they have encountered bear an uncanny resemblance to the problems faced by struggling homeowners when dealing with their mortgage servicers. Like many of the improper and unnecessary foreclosures experienced by many homeowners, I am concerned that inadequate servicing has contributed to America's growing student loan default problem, now topping 7 million Americans in default on over $100 billion in balances.
>
> The Bureau has received thousands of complaints from borrowers describing the difficulties they face with their student loan servicers. Borrowers have told the Bureau about a range of problems, from payment processing errors to servicing transfer surprises to loan modification challenges. To ensure that we do not see a repeat of the breakdowns and chaos in the mortgage servicing market, it will be critical to ensure that student loan servicers are providing adequate customer service and following the law. (Emphasis added.)[30]

Until the servicers of student loans begin complying with the rules and regulations to which they are currently subject, there should be no consideration of providing special dispensation for them to harass consumers on their cell phones, when they have no consent.

E. The impact on consumers and cellphone usage from *changing* the definition of autodialer.

If the definition of autodialer is changed so as to effectively exclude all technology that is currently being used to make multiple calls to consumers by debt collectors, the effect on consumers will be catastrophic. There will be no longer any limit on calls to cell phones – no consent will be required, no one will be able to revoke consent. Prerecorded calls to cell phones would run rampant. No limits would be applicable to calls to cell phones on which there is a hang-up because the callers would not be subject to the TCPA, including the regulations on dropped calls. Cell phones – which people bring with them everywhere, which they desperately need to answer to ensure that their loved ones are not in danger, or to operate their business – would be completely open targets for unlimited robocalling and pre-recorded calls. Such a result was clearly not intended by Congress, as it gave the FCC rulemaking authority to interpret and enforce the TCPA to protect consumers. As noted above, the FCC has specifically noted that calling from lists is more harassing then random calling and repeatedly reaffirmed the need to insure the definition of an ATDS need be broad to prevent business' from circumventing the TCPA. Despite the repeated FCC Rulings that predictive dialers and dialers calling from list are covered under the TCPA, the industry again seeks a more narrow definition. Yet, the industry has not been able to demonstrate any abuse based on the current

[30] Testimony of Rohit Chopra, Assistant Director & Student Loan Ombudsman at the Consumer Financial Protection Bureau, Before the United States Senate Committee on the Budget, June 4, 2014.

definition, but has only put forth hypotheticals that have yet to become a reality even though the current definition of an ATDS has been in place for over a decade.

F. Reassigned numbers should not lead to unlimited to calls to consumers who have not provided consent

Businesses can take simple and cost effective steps to avoid making calls to cellular telephone numbers that have been reassigned. As recognized by the FCC[31] in 2004 and by the Seventh Circuit, they can use a reverse-look up service to verify that the cellular telephone numbers they robocall actually do belong to their customers.[32] For example, Neustar, Inc. has a service that allows businesses to determine if a number has been reassigned in real time.[33] Businesses also have the simple option to manually call the cellular telephone number first to verify that it is still assigned to the person who it contends consented to the calls. This would be especially appropriate when the caller has not been contacted at the number in question recently.

Any argument that its too expensive to make a single manual telephone call illustrates the problem with unfettered auto dialing. As it is cheaper for a business to call the wrong number dozens or hundreds of times with prerecorded messages than making a single manual call to confirm consent, the consumers receiving those calls will suffer the consequences. Yet the TCPA was designed to protect the public and especially so-called "wrong numbers" that subject innocent consumers to unasked for and unstoppable harassment.

Petitioners seek to avoid the small expense to comply with the TCPA. Unfortunately for the recipients, many pre-recorded calls do not contain any method to opt out and even when consumers call back to be connected to a real person, the requests to stop calling are often ignored. This scenario adversely impacts the people who can least afford it--the low-income consumers who have prepaid phones.

G. The FCC should coordinate with the CFPB on the number of calls permitted to cell phones, even with consent.

As explained in Section D of this *ex parte* letter, above, debt collectors and others routinely abuse consumers with multiple phone calls in attempts to harass consumers into paying their debts first. These consumers have rarely affirmatively chosen to not pay a debt that they truly owe. Rather, they have suffered an economic – or life – catastrophe, which has diminished their income, making it difficult, if not impossible to repay all of their debts. Multiple calls from debt collectors are designed to be the squeaky wheel – the debt that is paid first, even before other, more important obligations are addressed.

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[31] The Commission previously rejected this same proposal to create a good faith exception for inadvertent calls to wireless numbers finding that there are adequate solutions in the marketplace to allow business to identify reassigned wireless numbers. 2004 Safe Harbor Order, 19 FCC Rcd. 19215 at 4 (citing 2003 TCPA Order, 18 FCC Rcd at 14117-18, at 172).

[32] *See* Soppet v. Enhanced Recovery Co., 679 F.3d 637, 642 (7th Cir. 2012) (explaining that bill collectors can "use a reverse lookup to identify the current subscriber to Cell Number").

[33] According to Neustar, it instantly provides organizations with accurate phone data intelligence through proprietary relationships with telecommunications providers. *4Automated On-Demand Identity Verification for TCPA, http://www.neustar.biz/services/risk-management/mitigate-tcpa-risk (last visited Feb. 9, 2014) (emphasis added).*

It is not good public policy to allow debt collectors to harass consumers into paying debts. That is why the Fair Debt Collection Protection Act ("FDCPA") explicitly prohibits harassing consumers.[34] However, this restriction against harassment has failed to stop the multiplicity of phone calls.

The Consumer Financial Protection Bureau is currently engaged in a rulemaking in which it has asked for ideas on how further implementation of the FDCPA.[35] We have responded and recommended that the CFPB impose strict limits all telephone contacts.[36] Our recommendations are that both creditors and collectors should be subject to specific and strict limits on telephone communications, as follows:

- The collector should not be permitted to call the consumer (i.e. let the telephone ring) more than three times per week (subject to additional limits below). Consumers often do not answer the phone because they do not want to talk to the collector. Even hearing the phone ring constantly is stressful, and it can be a special problem when collectors call cell phones that consumers have in their cars and workplaces.
- Voicemail messages, if otherwise permissible, should be left no more than once per week.
- Unless the consumer consents, collectors should not be permitted to call back within seven days of actually speaking with the consumer.

Although these standards have been suggested to the CFPB, there should not be any assumption that the CFPB will adopt them. Further, the Fair Debt Collection Practices Act only covers debt collectors collecting the debts of others, not creditors collecting their own debts – such as CashCall, who collects its own debts. The FCC should not rely on the CFPB either a) adopting these limitations, or b) making them applicable to all collectors – as they could only be applicable only to debt collectors.

Recommendations to the FCC. The FCC should use its express authority under the TCPA to protect the privacy of consumers receiving calls to their cell phones to place restrictions on the frequency, time and place of cell phone calls. The FCC should limit collection calls to three calls per week, voicemail messages to one per week, and call-backs to once per week unless the consumer gives specific consent at the time of the call. Additionally, every commercial call to a cell phone – whether manually dialed, or autodialed and with consent – should begin with a question along the lines of – "Is this a convenient time to discuss with you _X?" If the answer is no, and the call is autodialed, the consumer should have the option of pressing a button indicating this fact, which should go on record with the caller.

These protections should apply whether or not the consumer has provided consent to receive autodialed or artificial voice cell phone calls. Even when a consumer has provided consent,

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[34] 15 U.S.C. § 1692d.

[35] http://files.consumerfinance.gov/f/201311_cfpb_anpr_debtcollection.pdf.

[36] Comments to the Bureau of Consumer Financial Protection, 12 CFR Part 1006, Advance Notice of Proposed Rulemaking Regarding Debt Collection, Submitted by the National Consumer Law Center on behalf of its low-income clients and the following national advocates for consumers: Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, New Economy Project, U.S. Public Interest Research Group in response to Question 92, at page 112. Available at https://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf.

that consent is not consent to be harassed. The Commission should treat the definition of consent is infused with the understanding that the number and time of the calls will be reasonable.

The FCC has the authority to issue specific rules limiting the number of calls to consumers on cell phones, and prescribing other protections for consumers receiving cell phone calls, under its general authority to protect the privacy of telephone subscribers in 47 U.S.C. § 227(c).

H. Revocation of Consent Should Be Simple and Available on Every Cell Phone Call.

We explained that some language in consumer agreements has been circulating that purports to have the consumer consent to faxes, text messages, or ATDS/prerecorded calls *and to waive the right to withdraw that express consent in the future*. To remove any lingering ambiguity, we urge the Commission to clarify that a consumer has the right to withdraw consent in all contexts (telephone calls, faxes, and text messages)and that this right is not subject to waiver or a condition of doing business. Any contractual consent should disclose in the document providing consent that the consumer has a right to revoke any such consent. In short, express consent cannot be consent to a lifetime of harassment.

This position is squarely in line with the Commission's Ruling *In re Soundbite*, which allows revocation of consent even where the consumer voluntarily opted into receive text messages. *In re Soundbite* also required an opt out notice to revoke consent in each text. Like text messages that provide a notice to opt out, prerecorded messages should affirmatively state that the recipient has a right to opt out and provide a mechanism to opt out in that same call. For example – "Press 2 now if you are not the intended caller, and press 3 now if you wish to revoke consent to receive prerecorded or autodialed calls." Similarly, a call connected to an operator can have a recording prior to connection that the consumer has a right to revoke consent.

The Commission should also clarify that consumers cannot waive their right to these or other disclosures. Further, lack of the proper notice of such should preclude any claim of consent.

The Commission has consistently held that the caller has the affirmative obligation to have records of consent. *See* 2008 ACA Order and 2013 Order requiring written consent for telemarketing calls. Yet, many callers do not have evidence of consent except to state that they may have consent. It should be the burden of the caller to confirm consent prior to any calls being made.

Other federal laws enforced by other federal agencies (such as the Truth in Lending[37] and the Fair Debt Collection Practices Act,[38]) do not permit contracts to purport to allow waivers of consumers' rights under those contracts, except under very limited circumstances.

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[37] Waiver is permitted in very limited circumstances, Consumers may only exercise a waiver or modification in the event of a "bona fide personal emergency." 15 U.S.C. § 1638(b)(2)(F); Reg. Z § 1026.19(a)(3) [§ 226.19(a)(3)].
[38] *See* Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1171 n.5 (9th Cir. 2006); Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001).

We very much appreciate the time and attention involved in considering our comments. If you have any questions, or would like any follow-up, please do not hesitate to contact Margot Saunders, counsel at the National Consumer Law Center, at msaunders@nclc.org, or 202 452-6253, extension 104.

This disclosure is made pursuant to 47 C.F.R. §1.1206.

Sincerely,

Margot Saunders
Keith Keogh
Ellen Taverna

Table of Appendices

1. NCO Financial Systems Affidavit of Greg Stevens, October 27, 2009.

2. National Association of Attorneys General Letter to Members of Congress regarding the Mobile Informational Call Act of 2011, December 7, 2011.

3. Consumer Rights Organization's Letter to Congressmen Upton and Waxman regarding the Mobile Informational Call Act of 2011, November 3, 2011.

4. Congressmen Terry and Towns' Letter to Congressman Upton regarding the Mobile Informational Call Act of 2011, December 12, 2011.

5. Attorneys General Letter to Bureau of Consumer Financial Protection Bureau regarding Rules Implementing the Fair Debt Collection Practices Act, February 28, 2014.

APPENDIX 1

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALAN DONNELLY, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Judge Guzman
-vs-	)	Case No.: 09 C 2264
NCO FINANCIAL SYSTEMS, INC.,	)	Magistrate Judge Nolan
Defendant.	)	

AFFIDAVIT OF GREG STEVENS

NOW COMES the affiant, Greg Stevens, being first duly sworn upon oath under the penalty of perjury under the laws of the State of Florida, and testifies that the following is true and correct to the best of his knowledge and belief:

1. I am the Vice President for Customer Contact Management for NCO Financial Systems, Inc. ("NCO"). I am competent and authorized to testify to the matters set forth herein.

2. I have reviewed the complaint filed by the plaintiff, Alan Donnelly, in the above-referenced matter.

3. NCO does ***not*** knowingly call consumers on cellular telephones, unless the consumer has provided consent for the call to either NCO or the creditor.

4. In this case, the telephone number that NCO called to reach plaintiff was the number provided to NCO by the original creditor, Acute Care Specialists, Inc. When

a number is placed with NCO by a creditor, NCO reasonably relies on the information from the creditor that the consumer has authorized calls to that number.

5. In plaintiff's revised discovery requests, plaintiff seeks the name, telephone number and address for all persons in area codes (312), (773), (630), (815) and (847) "(a) to whom NCO either on its own or through a person authorized by NCO; (b) made a call to the person's cellular telephone; (c) through use of an automatic telephone dialing system, and/or using an artificial or pre-recorded voice; (d) where the recipient had not placed his/her cellular telephone number on an application with the creditor; (e) and the call was made at any time after August 19, 2008."

6. NCO does ***not*** have the information plaintiff has requested. Nor is the information readily available to NCO. In order to provide the requested information, NCO would need to create programs specific to plaintiff's request and build unique databases. The compilation and production of the requested list would require extensive research, review, and evaluation and would require several hundred man hours to complete.

7. To provide the requested data, NCO would be required to first pull the call records for each of the 33 dialers that operate within NCO's CRS system. Each dialer makes approximately 300,000 to 400,000 calls per month. There have been approximately 128 million calls made through NCO's CRS system since August 2008. That total would include *all calls* made, including landline and cell calls. From that pool, NCO would then need to filter the 128 million calls to determine which were made to the requested area codes. This would require building multiple files, probably 500 or more

based on size limitations. The files would then need to be merged and filtered for duplicate phone numbers.

8. After limiting the list geographically, NCO would then need to upload the numbers into a program to identify which of the numbers are ***currently*** cellular numbers. The query would ***not*** be able to identify whether any number was ported within the class defined period (since August 19, 2008) from a landline to a cellular line. Again, the query would only identify the ***current*** status of the phone number, ***not*** the status of the phone number ***at the time NCO called***.

9. Assuming then that NCO can relate the numbers that have been called and identified as cell numbers (at the time the query was completed) to NCO accounts, and assuming that NCO, after identifying the related NCO accounts, can determine whether any dialer calls were made on the NCO accounts, it will be impossible to determine which NCO accounts relate to persons who have ***not*** placed the called cellular number "on an application with the creditor" absent an individual review of each related NCO account. In other words, a manual review would need to be completed for each related NCO account, involving review of all supporting documentation in NCO's system and in the creditor's possession.

10. To illustrate the scope of the data that must be analyzed to attempt to provide the requested information, if NCO were to produce paper copies of the related documents, I estimate the stack would be at least as high as a 10-story building.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Greg Stevens

STATE OF Florida)
) ss.
COUNTY OF Hillsborough)

I certify that I know or have satisfactory evidence that Greg Stevens is the individual who personally appeared before me, and said individual acknowledged that he signed this instrument as his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: 9/25/09

PARIS L. DAVIS, JR.
Comm# DD0777366
Expires 4/9/2012
Florida Notary Asan., Inc

Print Name: Paris Davis
NOTARY PUBLIC

N:\NCO\Donnelly, Alan (CLASS) (6947-09-24283)\Discovery\Final Draft Stevens Affidavit 09.24.09.doc

APPENDIX 2

National Association of Attorneys General

PRESIDENT
Rob McKenna
Washington Attorney General

PRESIDENT-ELECT
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Maryland Attorney General

VICE PRESIDENT
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December 7, 2011

Dear Members of Congress:

sent via fax

We, the undersigned Attorneys General, write to urge you to reject the Mobile Informational Call Act of 2011 (H.R. 3035), which seeks to amend the Telephone Consumer Protection Act ("TCPA").

Our offices protect consumers by enforcing the TCPA and state laws concerning telephone solicitations, automated calls, junk faxes and text messages. Over at least the last 22 years, Congress and the states have enacted strong laws to protect consumers from unwanted and instrusive robocalls. Currently, federal law bans robocalls to cell phones unless the consumer gives prior express consent. H.R. 3035 would change the law and undermine federal and state efforts to shield consumers from a flood of solicitation, marketing, debt collection and other unwanted calls and texts to their cell phones. In the process, H.R. 3035 also would shift the cost of these calls – such as debt collection and marketing calls – to consumers, placing a significant burden on low income consumers. Furthermore, H.R. 3035 will create obstacles to effective enforcement of state consumer protection laws. H.R. 3035 goes far beyond the stated goal of giving debt collectors a new avenue to contact debtors and unnecessarily allows businesses to robocall or text consumers without the consumers' prior express consent.

We urge you to reject H.R. 3035 as harmful to consumers.

We propose instead that Congress make two small but significant changes to the TCPA to better protect consumers: (1) protect consumers' privacy by clarifying that prior express consent to robocalls must be obtained in writing; and (2) eliminate any suggestion from the TCPA that state statutes regulating interstate telephone and fax harassment are preempted

H.R. 3035 Shifts Costs to Consumers

Autodialed, pre-recorded calls specifically have been recognized as a residential intrusion "on a different order of magnitude" from mere annoyances such as door-to-door solicitors. *Bland v. Fessler*, 88 F.3d 729, 732-33 (9th Cir. 1996). When the calls are made to cell phones, the annoyance is compounded because the recipient must pay for them. While it is estimated that twenty-five percent of American households have given up their landlines and rely on their cell phones for contact, it is erroneous to assume that all consumers pay a flat rate for service. By the end of 2011, it is

estimated that 25% of U.S. consumers will use prepaid wireless phones.[1] In addition, prepaid users tend to belong to lower income households.[2] Therefore, H.R. 3035 proposes to shift the cost of debt collection to the consumers and, in particular, to those who can least afford to pay it.

Wireless customers leave their carriers at an average rate of 2% per month.[3] The rate is higher for prepaid customers who are not bound by a contract.[4] In 2010, approximately 30% of complaints Indiana received about debt collectors involved autodialer calls to the wrong parties. A disturbing result of H.R. 3035 would be an increase in the number of automated calls to wireless subscribers who do not owe the debt that the caller is trying to collect. This would unfairly shift the cost of debt collection to innocent third parties.

In addition to debt collection calls, H.R. 3035 would give businesses carte blanche to contact wireless subscribers with calls for marketing research and, again, would shift the costs of those calls to non-consenting consumers. Moreover, just as H.R. 3035 would open the door for robocalls to cell phones for a commercial purpose, under the First Amendment, it would also open the doors to unlimited solicitations and other calls from charities. If H.R. 3035 is passed, it will not be long until cell phones are flooded with automated calls of all sorts.

H.R. 3035 Poses Dangers to Public Safety

Allowing robocalls to cell phones endangers public safety because of the inevitable increase in calls to wireless phones. Few can resist answering the "shrill and imperious ring"[5] of the wireless telephone while driving. A 2009 study by the National Highway Traffic Safety Administration found that cell phone use was involved in 995 (or 18%) of fatalities in distraction-related crashes.[6] More calls will likely mean more distracted drivers and, inevitably, more accidents.

H.R. 3035 Would Make Any Disclosure of a Wireless Telephone Number Consent To Be Robo-Called

H.R. 3035 proposes that disclosing one's telephone number—during a transaction or at any time—equals consent to be robo-called on one's wireless telephone. This means that a wireless subscriber could be subjected to any number of robotic "informational" follow-up calls just because he or she visited a store or a website. Consumers will not even be able to opt-out of receiving these robo-calls under the proposed legislation.

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[1] New Millennium Research Council press release, July 28, 2011.
[2] Nicholas P. Sullivan, *Cell Phones Provide Significant Economic Gains for Low-Income American Households*, April, 2008.
[3] Dave Mock, *Wireless Smackdown: Comparing Carrier Churn*, The Motley Fool, June 15, 2007
[4] Dejan Radosavljevik, et al., *The Impact of Experimental Setup in Prepaid Churn Prediction for Mobile Telecommunications: What to Predict, for Whom and Does the Customer Experience Matter?* Transactions on Machine Learning and Data Mining, 2010.
[5] Quoting *Humphrey v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 491 N.W.2d at 898-99 (Minn. 1992).
[6] http://distraction.gov/stats-and-facts/index.html.

We strongly recommend that Congress require that any consent to receive a prerecorded call on a wireless telephone be in writing and only after clear and conspicuous disclosures, just as is required in the Telemarketing Sales Rule, 16 C.F.R. § 310.4 (b) (1)(v) and proposed by the FCC in its 2010 Notice of Proposed Rule Making, 75 FR 13471-01. Furthermore, the law should clearly allow consumers to easily revoke their consent if they no longer want to receive and pay for intrusive robocalls on their cell phones.

H.R. 3035 Exempts Most Modern Dialing Systems

H.R. 3035 would revise the definition of "automatic telephone dialing system" to include only equipment that uses random or sequential number generators. Most modern automatic dialers, however, already use preprogrammed lists. As a result, H.R. 3035 would effectively allow telemarketers to robo-dial consumers just by avoiding already antiquated technology.

H.R. 3035 Would Preempt State Consumer Protection Laws

The language as written would eliminate the savings clause in 47 U.S.C. § 227(f) that emphatically does *not* preempt state statutes concerning telemarketing, junk faxes and prerecorded calls. The proposed language of H.R. 3035 states: "No requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under this section, except for telephone solicitations." This language would preempt all state laws concerning junk faxes, unwanted text messages and automated calls. In addition, it would preempt any state Do Not Call law that imposes any requirements on charities, or contains any provision on telephone solicitations different from or stronger than those in the TCPA, such as state telemarketing holiday provisions.

Just how far this language goes to override State law is unclear. What, exactly, is the "subject matter regulated under this section"? Does it include, for example, calls conveying political messages, which the TCPA expressly disclaims as a subject of regulation? And how far does the purported exception "for telephone solicitations" extend? Does it include fax or text message solicitations? Does it permit states to regulate solicitation calls by charities, when state law defines such calls to be "telephone solicitations"? And does this exception preclude arguments that state laws regulating telephone solicitations are preempted by other components of the Federal Communications Act? Does it prevent states from imposing fines or bringing actions in state courts? There is no doubt that such loose language could easily be twisted in ways Congress does not intend.

H.R. 3035 not only undermines the principles of federalism that have worked for so long; it also ignores the decades of practical experience with a dual system of regulation in many areas of consumer protection. Consumer protection has long been within the states' traditional police powers where federal preemption is rarely justified. As the chief law enforcement officers of our states, we regard the protection of our consumers from unfair and deceptive trade practices as one of our top law enforcement priorities. States have always been on the front line in enacting and enforcing laws to address new forms of fraud and deception affecting consumers. The states have traditionally served as laboratories for the development of effective laws and regulations to protect consumers and promote fair competition. For instance, the states led the way in

addressing identity theft and do not call laws, and our efforts were subsequently complemented through later federal enactments. Traditionally, States are enforcement partners with—not adversaries of—federal agencies like the FCC and FTC.

To understand what a radical change H.R. 3035 proposes, one must first understand the history of both the Federal Communications Act of 1934 and the TCPA. The FCA is concerned with regulation of telephone *services* and *facilities*. Federal regulation is necessary to ensure that a nation-wide and world-wide system of communication *transmission* works properly. However, prohibiting telephone abuses, such as harassing, obscene or fraudulent calls, even if they crossed state lines, has always been the terrain of the States. Congress enacted the TCPA in 1991 to complement--not replace--the States' enforcement laws. Hence, Congress included the non-preemption language found in 47 U.S.C. §227(f)(1).

Previous efforts to preempt States under the TCPA have been unsuccessful. At the direction of Congress, the FCC created the national Do Not Call program in 2003. At that time, the FCC speculated that state laws that imposed greater restrictions on interstate calls might be preempted, and it invited petitions seeking preemption of state laws. After receiving several petitions and thousands of comments, the FCC never ruled on this issue. After nearly seven years, it is reasonable to infer that the FCC has concluded that the TCPA does *not* preempt State laws prohibiting interstate telephone harassment.

Rather than gutting state regulation concerning harassing calls and faxes, Congress should strengthen it. Efforts like H.R. 3035 show that States cannot take their residential privacy protections for granted any longer. The best way for Congress to eliminate uncertainty concerning preemption of state telephone and fax harassment laws is to remove the word "intrastate" from 47 U.S.C. § 227(f)(1). This modification would eliminate any distinction between interstate and intrastate laws, and thereby clarify that *no* state laws are preempted by the TCPA, even as applied to interstate calls. This slight modification should convince telemarketers and courts that States have every right to stop the invasion of residential privacy, and the imposition of costs on consumers by means of telephones and fax machines.

Conclusion

We urge you to protect consumers from robocalls to their wireless phones by rejecting H.R. 3035. Instead we ask you to revise the TCPA to make it clear that the TCPA does not preempt state laws, and that prior express consent for robocalls to wireless phones must be obtained in writing.

Lisa Madigan
Attorney General of Illinois

Greg Zoeller
Attorney General of Indiana

Wayne Stenehjem
North Dakota Attorney General

Luther Strange
Alabama Attorney General

John J. Burns
Alaska Attorney General

Tom Horne
Arizona Attorney General

Kamala Harris
California Attorney General

George Jepsen
Connecticut Attorney General

Irvin Nathan
Washington DC Attorney General

Sam Olens
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David Louie
Hawaii Attorney General

Tom Miller
Iowa Attorney General

Jack Conway
Kentucky Attorney General

William J. Schneider
Maine Attorney General

Martha Coakley
Massachusetts Attorney General

Arthur Ripley, Jr.
American Samoa Attorney General

Dustin McDaniel
Arkansas Attorney General

John W. Suthers
Colorado Attorney General

Joseph R. "Beau" Biden III
Delaware Attorney General

Pam Bondi
Florida Attorney General

Lenny Rapadas
Guam Attorney General

Lawrence Wasden
Idaho Attorney General

Derek Schmidt
Kansas Attorney General

James "Buddy" Caldwell
Louisiana Attorney General

Douglas F. Gansler
Maryland Attorney General

Bill Schuette
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Lori Swanson
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Catherine Cortez Masto
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Edward T. Buckingham
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Scott Pruitt
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Linda L. Kelly
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Peter Kilmartin
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Marty J. Jackley
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Greg Abbott
Texas Attorney General

Jim Hood
Mississippi Attorney General

Steve Bullock
Montana Attorney General

Michael Delaney
New Hampshire Attorney General

Gary King
New Mexico Attorney General

Roy Cooper
North Carolina Attorney General

Mike Dewine
Ohio Attorney General

John Kroger
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Guillermo Somoza-Colombani
Puerto Rico Attorney General

Alan Wilson
South Carolina Attorney General

Robert E. Cooper, JR.
Tennessee Attorney General

Mark Shurtleff
Utah Attorney General

William H. Sorrell
Vermont Attorney General

Vincent Frazer
Virgin Islands Attorney General

Rob McKenna
Washington Attorney General

Darrell V. McGraw, JR.
West Virginia Attorney General

J.B. Van Hollen
Wisconsin Attorney General

Greg Phillips
Wyoming Attorney General

APPENDIX 3

November 3, 2011

The Honorable Fred Upton
Chairman
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry Waxman
Ranking Minority Member
House Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515

Re: H.R. 3035 (Terry), Mobile Informational Call Act of 2011 (oppose)

Dear Chairman Upton and Ranking Minority Member Waxman:

The undersigned consumer, civil rights, poverty and privacy organizations write to express our strong opposition to H.R. 3035, the Mobile Informational Call Act of 2011. The bill purports to make common sense updates to the Telephone Consumer Protection Act (TCPA) to ensure that consumers know about data breaches, fraud alerts, flight and service appointment cancellations, drug recalls and late payments. But the bill is a wolf in sheep's clothing.

The real purpose of H.R. 3035 is to open up *everyone's* cell phones, land lines, and business phone numbers, without their consent, to a flood of commercial, marketing and debt collection calls (to not only the debtor but everyone else). The bill would effectively gut the TCPA, a widely popular statute that protects Americans from the proliferation of intrusive, nuisance calls from telemarketers and others whose use of technology "may be abusive or harassment."[1] In 1991 Congress found that unwanted automated calls were a "nuisance and an invasion of privacy, regardless of the type of call" and that banning such calls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion."[2]

Automated predictive dialers would be exempt from the TCPA, permitting repetitive "phantom" calls to cell phones, doctor's offices, hospital rooms and pagers. Predictive dialers use a computer to call telephones based on predictions of when someone will answer and when a human caller will be available. They are the source of calls that begin with a long pause and of calls with no one on the other end (if the prediction of the human caller's availability is wrong.) Since the purpose of predictive dialers is to get someone to answer, computers often call a number repeatedly throughout the day. The TCPA currently prohibits the use of automatic telephone dialing systems to make calls, with certain exceptions, to (1) any emergency telephone line (including 911, hospitals, medical offices, health care facilities, poison control centers, fire protection or law enforcement agencies), (2)

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[1] 47 U.S.C. § 227 note.
[2] Pub. L. No. 102-243, §§ 2(10-13), (Dec. 20, 1991), *codified at* 47 U.S.C. § 227.

guest or patient room of hospital, health care facility, elderly home, (3) pagers or (4) cell phones. H.R. 3035 would revise the definition of "automatic telephone dialing system" so that modern predictive dialers, which do not use random or sequential number generators, would be outside of the TCPA's protections. Calls could even be made for solicitation purposes unless the telephone number is a residential one on the Do Not Call list.

Businesses could make prerecorded robo-calls to anyone's personal or business cell phone for any commercial purpose that is not a solicitation, including debt collection, surveys, "how did you like your recent shopping experience," and "we've enhanced our service" – even if you are on the Do-Not-Call list. TCPA currently prohibits robo-calls to cell phones unless the consumer has provided prior express consent. H.R. 3035 would add a new exception permitting robo-calls to cell phones for any commercial call that is not a solicitation. The possibilities are endless. The Do Not Call list protects people only from telemarketing calls, not these other calls. Debt collection calls would be made to the cell phones of friends, family, neighbors, employers, or strangers with similar names or numbers. Families struggling in the current economy will be hounded on their cell phones, even if they have a landline that the collector could call, and even if the call uses up precious cell phone minutes or incurs per-minute charges for those with prepay phones. Commercial calls for debt collection or other commercial purposes could be made even if the consumer never gave out his or her cell phone number—the business could call if it found the consumer's cell phone number on Google or by purchasing a list from entities that collect that information.

The bill redefines "prior express consent" to make that requirement meaningless. The TCPA's restrictions on robo-calls have an exemption for calls made with the consumer's "prior express consent." The bill would define that phrase to find "prior express consent" any time a person provides a telephone number "as a means of contact" at time of purchase or "any other point." Thus, even if the telephone number was provided for a limited, one-time purpose, the business or consumer would be deemed to have consented to robo-calls into the future.

Consumers can already receive cell phone calls (and landline calls) for emergency or informational purposes. The TCPA has existing exceptions from its prohibitions for emergency calls and for calls made with the consumer's prior express consent. Any consumer who wants to get cell phone or landline calls about public service announcements, flight cancellations, or anything else is welcome to give their consent. But consumers often prefer to receive such information other ways, such as through email. The purpose of H.R. 3035 is to permit calls to cell phones without the consumer's consent.

Nuisance calls and collection calls on cell phones endanger public safety. Unlike land lines, people carry cell phones with them. They have them while driving and operating machinery. Many people use their cell phones primarily for emergency purposes and rush to answer them when they ring. Opening the floodgates to robo-calls to cell phones endangers public safety. Driving while distracted is always dangerous, but is especially so if the driver

becomes agitated by fears that their child is in trouble or by a debt collector calling to harass them.

H.R. 3035 is not only unnecessary, it will effectively gut the Telephone Consumer Protection Act's essential protections against invasion of privacy, nuisance and harassing calls. We urge you to withdraw the bill. For further information please contact Delicia Reynolds at the National Association of Consumer Advocates, 202 452-1989, extension 103, Delicia@naca.net or Margot Saunders at the National Consumer Law Center, 202 452 6252, extension 104, msaunders@nclc.org.

Sincerely,

Americans for Financial Reform

Center for Media and Democracy

Citizens for Civil Discourse (The National Political Do Not Contact Registry)

Consumer Action

Consumer Federation of America

Consumer Watchdog

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low income clients)

Privacy Activism

Privacy Rights Now Coalition

Evan Hendricks, Publisher, Privacy Times

U.S. Public Interest Research Group

cc: Members of the House Committee on Energy and Commerce

APPENDIX 4

Congress of the United States
House of Representatives
Washington, DC 20515

December 12, 2011

Hon. Fred Upton, Chairman
House Energy and Commerce Committee
Washington, DC 20515

Dear Chairman Upton:

We would like to take this opportunity to thank you and Chairman Walden, for allowing the hearing to occur on the merits of HR 3035. The hearing really helped to bring to our attention the issue of out of date telecommunications policy and how we need to begin to modernize current law.

However, what he have learned is that there is no hope for this legislation. We have heard from our constituents. They are concerned about what they believe will happen should this legislation become law. We have convened meetings with numerous consumer groups, as well as other organizations who have an interest in this legislation, but we have been unable to reach any kind of consensus on language that bans unwanted cell phone calls, while allowing calls that are consented to.

In an attempt to thread the needle and address the issues that have been brought before us, it is clear that this bill cannot be improved in a manner that will address the concerns of those involved. Therefore, we ask that HR 3035 not be advanced by the committee.

Thank you in advance for your consideration.

Sincerely,

Lee Terry
Member of Congress

Edolphus "Ed" Towns
Member of Congress

Cc: Hon. Greg Walden, Chairman,
Subcommittee on Communications and Technology

APPENDIX 5

February 28, 2014

Richard Cordray
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Bureau of Consumer Financial Protection Rules Implementing the Fair Debt Collection Practices Act and/or Pursuant to Authority under the Dodd-Frank Act (Docket No. CFPB-2013-0033)

Submitted Electronically

Dear Director Cordray:

The Attorneys General of Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Washington (the "Attorneys General") write in response to the Advanced Notice of Proposed Rulemaking concerning "Debt Collection (Regulation F)" issued by the Bureau of Consumer Financial Protection (the "CFPB").

I. INTRODUCTION

On November 12, 2013, the CFPB published in the Federal Register its Advanced Notice of Proposed Rulemaking about debt collection practices. The Attorneys General appreciate the CFPB's thorough review of an area of law that has, as detailed below, caused consumers a great deal of harm. Indeed, the National Association of Attorneys General ("NAAG") annually conducts an informal survey of the top ten areas of consumer complaints that states receive, and for many years debt collection has been either the first or second highest category of consumer complaints.[1]

In addition to receiving and responding to volumes of debt collection complaints, the Attorneys General have conducted numerous enforcement actions individually and through larger multi-state efforts.[2] The Attorneys General have formed a debt collection working group to keep

1 NAAG Informal Complaint Statistics, 2007-2013. Debt collection was the number one consumer complaint for the years 2007, 2008, and 2013. It was the number two complaint for 2012. Data for the informal surveys conducted between 2009 and 2011 is currently missing.

2 *See e.g., Colorado ex rel. John W. Suthers and Julie Ann Meade v. United Credit Recovery, LLC at. al.*, 13 CV 35182 (District Court, City and County of Denver Colorado November 25, 2013); *In re Sunshine Financial Group, LLC*, CFR-FY2011-135, CFR-FY2012-019 (Md. Collection Agency Lic. Bd. Sept. 9, 2011); *Minnesota ex rel. Lori Swanson v. Midland Funding, LLC*, 27-CV-11-1151 (District Court Hennepin County May 19, 2011); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces $165k Settlement With Debt Collector In Buffalo (Nov. 21, 2013), available at http://www.ag.ny.gov/press-release/ag-schneiderman-announces-165k-settlement-debt-collector-buffalo (last visited Feb. 25, 2014); Press Release, Iowa Part of Multistate Settlement with Debt Collector NCO Financial Systems (Feb. 6, 2012), available at http://www.state.ia.us/government/ag/latest_news/feb_2012/NCO.html (last visited Feb. 25, 2014).

abreast of all the issues and spot potential problems early. The Attorneys General have been active participants in enacting new legislation and administrative rules.[3] The Attorneys General have also monitored class actions and submitted amicus briefs.[4] Over the years, the Attorneys General have participated in debt collection roundtables with both the Federal Trade Commission and CFPB.

All of this activity in the area of debt collection has given the Attorneys General an in-depth knowledge and understanding of debt collection. It is with this experience and knowledge that the Attorneys General submit these comments. The Attorneys General have not attempted to answer every single question posed in the Notice of Proposed Rulemaking, but have addressed those questions that have the greatest impact on consumers. Overall, the Attorneys General strongly believe that the CFPB should adopt well-tailored, comprehensive, and balanced rules that apply to all persons engaged in the collection of consumer debts and that require robust protections for consumers. Such rules will better enable collectors to abide by the law, create a more even playing field for consumers, provide greater consumer protections, and assist consumers in better understanding their rights. Rules such as the ones suggested below will ultimately balance the rights of consumers with the legitimate need to collect consumer debts.

II. ENFORCEMENT AND SCOPE OF THE CFPB'S RULES

The Attorneys General strongly believe that the CFPB's rulemaking should cover as much of the debt collection industry as possible and work in concert with state law. The rules should act as a floor, not a ceiling, to state action.

A. Enforcement Authority

To the maximum extent possible, the CFPB should address concerns related to debt collection by using its authority under Section 1031 of the Dodd-Frank Act to prescribe regulations concerning "unfair, deceptive, and abusive acts or practices."[5] Although the CFPB could prescribe rules solely under the FDCPA[6], issuing debt collection rules pursuant to its authority under Section 1031 will result in significant advantages for consumers and improvements to the performance of the debt collection market.

The Attorneys General can play a vital role in protecting consumers from problematic debt collection practices. The Dodd-Frank Act empowers state Attorneys General to enforce rules issued by the CFPB under Section 1031 that concern "unfair, deceptive, and abusive acts or

3 State of Md. Collection Agency Licensing Bd. and Office of the Attorney Gen, of Md., Report to Sen. Judic. Proceedings Comm., Sen. Fin. Comm., House Judic. Comm., and House Econ. Matters Comm., at 1 (2011); Patrick Lunsford, *Debt Buyer Bills Backed by AG Swanson Introduced in Minnesota*, January 15, 2013, Insidearm.com, http://www.insidearm.com/daily/debt-buying-topics/debt-buying/debt-buyer-bills-backed-by-ag-swanson-introduced-in-minnesota; N.C. Consumer Economic Protection Act of 2009, S.B. 974, S.L. 2009-573 (2009).

4 Brief *Amicus Curiae* of the Attorneys General of 38 States in Opposition to the Proposed Settlement, *Vassalle v. Midland Funding LLC, et al.*, No. 3:11-cv-0096 (N.D. Ohio June 1, 2011), 2011 WL 3557045, *rev'd* 708 F.3d 747 (6th Cir. 2013).

5 Section 1031(b) of the Dodd-Frank Act, 12 U.S.C. 5532(a).

6 Section 814(d) of the FDCPA, 15 U.S.C. 16921(d), as amended by section 1089 of the Dodd-Frank Act.

practices." Accordingly, in order to fully realize the congressional intent embodied in the Dodd-Frank Act for a concurrent federal-state enforcement regime, the CFPB should issue debt collection rules under Section 1031 so that state Attorneys General will have co-enforcement authority.

The knowledge that state Attorneys General possess regarding local debt collectors and debt collection practices will complement the CFPB's national reach and multiply the effectiveness of the debt collection rules. State enforcement authority will also increase opportunities for resource sharing, coordinated investigations, and joint enforcement with the CFPB. More cops on the beat will provide consumers greater protection from unfair, deceptive, and abusive debt collection practices and help improve the overall performance of the debt collection market.

B. Application of Rules To First-Party Creditors

The CFPB should make the debt collection rules applicable to first-party creditors as well as third-party debt collectors. The Attorneys General see no reason to create a tiered system of regulation. Although creditors were excluded from coverage under the FDCPA, the Dodd-Frank Act authorizes the CFPB to make debt collection rules applicable to such creditors. From a consumer harm standpoint, it makes little difference whether first-party creditors or third-party debt collectors are the cause of problematic debt collection practices. Experience has shown that both groups have engaged in unfair, deceptive, and abusive debt collection practices. While debts held by original creditors or collected by loan servicers are more likely to be valid, no original creditor, loan servicer, contingency creditor, or debt buyer should be allowed to harm consumers through unfair, deceptive, or abusive debt collection practices. Moreover, the risk of reputational harm to original creditors has proven to be an insufficient deterrent for such practices. Therefore, the CFPB should propose debt collection rules that apply equally to the collection activities of first-party creditors and those of third-party debt collectors.

III. STATE DEBT COLLECTION LITIGATION EVIDENCES SERIOUS AND DETRIMENTAL DEFICIENCES TO CONSUMERS

State debt collection litigation has surged in the past decade.[7] In Cook County, Illinois, for example, since 2000 debt collection cases have doubled to an estimated 130,000, and in 2007 nearly 119,000 lawsuits were pending against alleged debtors.[8] Similarly, the New York City Civil Court handled nearly 457,000 lawsuits filed by 26 debt buyers from January 2006 through July 2008,[9] and debt buyers filed more than 200,000 cases in New York State in 2011 alone.[10] In

7 Marla Aspan, *'Rocket Dockets' Favor Debt Collectors: Local Courts Give Banks an Edge in Collections Lawsuits*, American Banker, Feb. 12, 2014, at 1.

8 Ameet Sachdev, *Debt Collectors Pushing to Get Their Day in Court: More Aggressive Strategies Fill Court Dockets, Result in Mistaken Identities*, Chi. Trib., June 8, 2008.

9 The Legal Aid Society et al., *The Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (May 2010) [hereinafter *Debt Deception*].

10 Susan Shin and Claudia Wilner, New Economy Project, *The Debt Collection Racket: How the Industry Violates Due Process and Perpetuates Economic Inequality* 1 (June 2013), http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf [hereinafter *Debt Collection Racket*].

Massachusetts, the Boston Globe concluded that professional collectors filed roughly 575,000 lawsuits between 2000 and 2005.[11]

In addition to the sheer volume of lawsuits, evidence suggests that debt collection actions occupy a large overall portion of the many dockets in the respective jurisdictions. In the Dallas County Courts-at-Law in Texas, for instance, the suits filed by third-parties to collect delinquent credit card debt filed by a party accounted for nearly a third of all cases filed in 2007.[12] In Boston, approximately 60 percent of all small claims cases were filed by debt collectors.[13]

This surge in collection litigation has been accompanied by an extremely high rate of default judgments. In one New York study, 81 percent of third-party collection cases resulted in default judgments in favor of debt buyers.[14] In another review, in New York City, 38 percent of all debt collection cases resulted in default judgments.[15] In Illinois' Cook County, the default judgment rate for debt collection cases in 2007 was estimated at 45 percent.[16] And in the Texas' Dallas County Court, the number of debt collection case default judgments was roughly 39 percent.[17] The high number of default judgments raises concerns about representation of consumers and access to justice in collection cases. In debt collection cases legal representation appears minimal. It has been estimated that only slightly over 8 percent of defendants retain counsel, approximately 11 percent choose to represent themselves pro se.[18]

A. <u>Information Accompanying Debt Collection Pleadings Tends to be Minimal and Boilerplate.</u>

The Attorneys General are concerned with the rising numbers of debt collection lawsuits that are commenced with boilerplate complaints, contain virtually identical allegations, and provide minimal evidentiary support.[19] This problem has been exacerbated by the proliferation of debt buyers, who rarely receive more than summaries of the creditor's original records containing nothing more than the names and addresses of consumers, their account numbers, and the amounts that are owed.[20] Nevertheless, courts routinely enter judgments by default or otherwise based on this summary information and evidence.[21]

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11 Michael Rezendes and Francie Latour, Spotlight, *Debtor's Hell: Parts I-IV*, http://www.boston.com/news/specials/debt/.

12 Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 279 (Fall 2011).

13 Rezendes and Latour, *supra* note 11.

14 *Debt Deception*, *supra* note 9, at 8.

15 *Debt Collection Racket*, *supra* note 10, 14 n.5.

16 Government Accountability Office, Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology 41 (Sept. 2009).

17 Spector, *supra* note 12, at 296.

18 Spector, *supra* note 12, at 289-90.

19 Complaint at 6, *Texas ex rel. Greg Abbott v. Midland Funding LLC, et al.*, 2011-40626 (District Court Harris County Texas July 8, 2011)("Defendants' debt collection lawsuit includes a boilerplate form petition with Midland funding as named plaintiff, for breach of contract and makes demand for principal, interest, costs, and attorneys' fees.")

20 Federal Trade Comm'n, Collecting Consumer Debts: The Challenges of Change, A Workshop Report 13 (Feb. 2009).

21 Spector, *supra* note 12, 259-60 & n.5, *citing* Federal Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 6, 15-16 (July 2010).

An examination of a major debt buyer's pleadings filed between 2007 and 2013 in Sangamon County Illinois revealed that debt collection complaints routinely only identified an original creditor and a debt in default without including other important information, such as the date of the original charge-off, default, or a breakdown of interest, principal, and fees. Other than an affidavit, the vast majority lacked accompanying documentation or evidentiary support either at the time of filing or at the entry of a default judgment. These findings align with the FTC's finding in its 2010 report, *Repairing a Broken System*, that many debt collection complaints do not convey essential information about the origin of the debt, the date, amount of any charge-off, the current owner of the debt, the total amount due, and a breakdown of principal, interest, and fees.[22] In 2012, the FTC further observed "[a]lthough buyers received the data file and some other information about the debt . . . they obtained very few documents related to the purchased debts at the time of sale or after purchase."[23] In fact, according to the FTC, debt buyers receive documentation of the debts they collect in less than 1/8 of the accounts they seek to collect.[24]

B. Lack of Credible Documentation at the Threshold of Filing is Augmented by other Problematic Acts and Practices in Litigation

Collectors have attempted to surmount their lack of debt documentation through business practices such as robo-signing affidavits and through legal theories aimed at relaxing certain evidentiary standards. Collectors routinely file affidavits in support of their lawsuits that have either been robo-signed or are signed by persons who lack personal knowledge of the debt that is being collected.

In the past few years Attorneys General have brought a number of cases involving robo-signed affidavits used in debt collection litigation. Robo-signing allegations were the basis for three independent state law enforcement actions filed against debt buyer Midland Funding by the Attorneys General of Minnesota, Texas, and West Virginia against Midland.[25] In 2009, Midland's affiants admitted in private litigation that they mass-executed up to four hundred computer-generated affidavits a day without verifying the underlying information or having any personal knowledge of the affidavits' contents.[26] Similarly, the Attorneys General of Colorado and Minnesota recently alleged that United Credit Recovery (UCR) violated state consumer protection laws by using robo-signed affidavits and fabricated documentation purportedly from

22 Federal Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 17 (July 2010); see also Spector, *supra* note 12, at 290-295 (identifying pleading deficiencies in line with the FTC's conclusions).

23 Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry iii (2013) [hereinafter *Debt Buyer Report*].

24 *Debt Buyer Report*, *supra* note 23, at iii & 35.

25 *Texas ex rel. Greg Abbott. v. Midland Funding LLC, et. al.*, 2011-40626 (District Court Harris County Texas July 8, 2011); *Minnesota ex rel. Lori Swanson v. Midland Funding, LLC*, 27-CV-11-1151 (District Court Hennepin County May 19, 2011); *West Virginia ex rel. Darrell V. McGraw, Jr. v. Midland Funding LLC, and Midland Credit Management Inc.*, No. 11-C-2231, (Circuit Court of Kanawha County December 15, 2011); see also Jessica Silver-Greenberg, *Dead Soul Is a Debt Collector: Deceased Woman's Name was Robo-Signed on Thousands of Affidavits*, Wall St. J., December 31, 2010, http://online.wsj.com/news/articles/SB10001424052970204204004576049902142690400 (raising allegations about using the name of a dead woman on affidavits.).

26 *Midland Funding, LLC. v. Brent*, 644 F. Supp. 2d 961, 966-70 (N.D. Ohio 2009)(finding the affidavit as a whole was both false and misleading).

the sellers of the debt.[27] And in 2013, the Attorney General of Mississippi alleged that Chase Bank "knowingly and willfully made false and misleading demands for debt, filed complaints in collections litigation that were unverified and lacked evidence, and sold debt for collection that was unreliable and undocumented."[28]

The mass utilization of robo-signed documents results in misrepresentations under state consumer fraud statutes when those documents represent to both consumers and courts that there is knowledge of facts related to the debt when, in fact, there is not any such knowledge. These instances are in addition to any account-level inaccuracies that may have followed from the failure to properly validate the amount or right to collect.

Furthermore, harm caused by robo-signing extends beyond individual consumers to financial institutions themselves, where debt collection, document execution practices, and management of third-party debt collectors and debt buyers, can present a risk and have been treated as a matter of safety and soundness by the OCC.[29]

Collectors have also attempted to improperly use the business records hearsay exception to permit them to testify about documents for which they lack personal knowledge. When debt is sold, certain categories of information, such as a consumer's identity, balance, and date of default, are transferred.[30] Relying solely on this limited information, affiants of collectors swear to the validity of the balance, default, and other important attributes of the debt without having any firsthand knowledge of this information or how it was created. To sidestep their of lack of knowledge, collectors argue that they can integrate the business records into their systems so that they can be claimed as their own, and purportedly give collectors the basis to make first-hand assertions about information about the debt such as default and balance. As the Missouri Supreme Court recently observed, however, "a document that is prepared by one business cannot qualify for the business records exception merely based on another business's records custodian testifying that it appears in the files of the business that did not create the record . . . . A

27 *Colorado ex rel. John W. Suthers and Julie Ann Meade v. United Credit Recovery, LLC et al.*, 13 CV 35182 (District Court, City and County of Denver Colorado November 25, 2013). The complaint alleges, "[i]n order to maximize the profits that it obtained as a result of its purchases of charged-off debt from US Bank and Wells Fargo, UCR engaged in a routine and pervasive scheme to fabricate documents that would aid in efforts to collect on that debt."; *Minnesota ex rel. Lori Swanson v. United Credit Recovery, LLC* 27-CV-13-19300(District Court Hennepin County, October 30, 2013).

28 Complaint *Mississippi ex re. Jim Hood v. JPMorgan Chase & Co., et al.*, 25CH1:13-cv-001939, at 2 (Chancery Court of the Fist Judicial District of Hinds County December 17, 2013); Press Release, Office of the California Attorney General, Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt-Collection Practices (May 9, 2013), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase.

29 *Shining a Light on the Consumer Debt Industry: Hearing Before the Subcommittee on Financial Institutions and Consumer Protection of the Senate Committee on Banking, Housing, and Consumer Protection*, 113th Cong. 36 (2013) [hereinafter *Collection Hearing*](statement of the Office of the Comptroller of the Currency). Because fraud on the tribunal has been rejected by some courts as a viable theory under the FDCPA, it is imperative that states are able to pursue tribunal deception cases under Dodd-Frank and appropriate FDCPA rulemaking. *O'Rurke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011); *contra Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012).

30 The Attorneys General recognize the authority relied on to lay the foundation for such records. While some federal cases provide for a limited use of incorporated records under the Federal Rules of Evidence, *United States v. Childs*, 5 F.3d 1328, 1333-34 (9th Cir. 1993), others do not, *Webb v. Midland Credit Mgmt., Inc.*, No. 11-C-5111, 2012 WL 2022013 (N.D. Ill. May 31, 2012); see also *Debt Buyer Report*, *supra* note 24 (articulating the categories of information that are transferred upon sale.

custodian of records cannot meet the foundational affidavit requirements by simply serving as 'conduit to the flow of records' and not testifying to how the records in question were created."[31]

There has also been an increase in debt collectors attempting to rely on the antiquated Doctrine of Account Stated, arguing that by making payments and not disputing the balance, the a defendant assented to the outstanding balance.[32] The use of a theory of an implied account stated is unfair because inappropriate fictions related to consent to the amount due are inferred from silence. These implied admissions are then used to bind consumers to debts that the pleading party cannot otherwise properly demonstrate through competent evidence.[33] Problems with using the accounts stated theory often appear in conjunction with boilerplate and robo-signed affidavits. The Attorneys General have seen other troubling evidentiary practices in debt collection litigation, including: submitting "exemplar" agreements or terms and conditions in lieu of the specific agreement or terms and conditions that apply to the account in question; and misrepresenting the principal, interest, and other fees associated with an account.[34]

Structured and properly executed sworn documents used in connection with the collection of debt would ensure that collectors target the right person for the correct amount of debt. Additionally, properly executed affidavits will help prevent violations of state and federal consumer protection laws, promote accuracy, and help restore consumer trust in the wake of the 2008 financial crisis.

C. State Laws, Rules, and How CFPB can Complement Existing State-Based Protections

States have enacted new laws and procedural rules in an effort to curtail abusive litigation practices in debt collection litigation. Examples include North Carolina's collection statute, court rules in Maryland, California's Fair Debt Buyers Practices Act, and default judgment prerequisites in Minnesota. Other valuable protections have been added by court rule or directive in Connecticut, Delaware, Virginia, and New York.

North Carolina

In 2009, North Carolina amended its debt collection statute to combat the growing trend of debt buyers aggressively seeking to collect stale debts. The statutory amendment clarified that debt buyers are included in the definition of "collection agency" and therefore must obtain a license to

31 *CACH, LLC v. Askew*, 358 S.W.3d 58 (Mo. Sup. Ct. 2012).

32 Turnbull; ("The real resurrection of account stated, however, took place within the past thirteen years, with over 1,900 reported cases mentioning account stated from 2000 to 2010.").

33 National Consumer Law Center, *Collection Actions*, 86 ("Avoiding such proof is especially attractive for a debt buyer that may have little documentation of the credit contract or of individual charges.").

34 In re LVNV Funding, LLC et al., DFR-FY2012-012 (2011)(Summary Order to Cease and Desist and Summary Suspension of Collection Agency Licenses Before the Md. State Collection Agency Licensing. Bd. in the Office of the Comm'r of Fin. Regulation); *Minnesota ex rel. Lori Swanson v. Bradstreet & Associates, LLC*, 27-CV-14-302 (District Court Hennepin County Jan. 8, 2014).

operate in North Carolina.[35] Debt buyer plaintiffs filing a collection suit must attach a copy of the signed contract evidencing the debt, and for credit card debts where no signed writing evidencing the debt exists, they must include copies of documents generated when the card was used.[36] Debt buyers must also include documentation establishing that the plaintiff is the true owner of the debt and, if the debt has been assigned more than once, establishing an unbroken chain of ownership.[37] Each assignment must include the original account number and must also clearly show the name of the debtor associated with the account number.[38]

Before a default judgment or summary judgment can be entered in an action initiated brought debt buyer, the plaintiff must file evidence establishing the amount and nature of the debt.[39] Evidence used for this requirement must comply with the N.C. Rules of Evidence for properly authenticated business records, and must include:

1. the original account number;
2. the original creditor;
3. the amount of the original debt;
4. an itemization of the charges and fees that are owed;
5. the original charge-off balance, or if the balance has not been charged off, an explanation of how the balance was calculated;
6. an itemization of post charge-off additions;
7. the date of last payment; and
8. the amount of interest claimed and the basis for the interest charged.[40]

North Carolina now prohibits debt buyers from attempting to bring suit or an arbitration proceeding against a debtor, or otherwise attempting to collect on the debt, if the entity knows or reasonably should know that the collection is barred by the statute of limitations.[41] Debt buyers may not collect debts unless they possess valid documentation showing the debt buyer owns and can reasonably verify the debt at issue.[42] The verification required includes: the name of the original creditor, the name and address of the debtor, the original consumer account number, copies of the contract or other document evidencing the debt, and an itemized accounting of the amount owed, which includes all fees and charges.[43]

Debt buyers in North Carolina are also prohibited from bringing suit or an arbitration proceeding against a debtor without providing 30 days advance notice in writing of the intent to file the action, including the name, address, and contact information of the debt buyer; the name of the

35 N.C. Gen. Stat. § 58-70-15(b), § 58-70-1.

36 N.C. Gen. Stat. § 58-70-150(1).

37 N.C. Gen. Stat. § 58-70-150(2).

38 *Id*.

39 N.C. Gen. Stat. § 58-70-155(a).

40 N.C. Gen. Stat. § 58-70-155(b).

41 N.C. Gen. Stat. § 58-70-115(4).

42 N.C. Gen. Stat. § 58-70-115(5).

43 *Id*.

original creditor; the debtor's original account number; a copy of the contract or other document evidencing the debt; and an itemized accounting of all amounts claimed to be owed.[44]

Since 2009, North Carolina has experienced a significant reduction in cases filed by debt buyers. Some debt buyers have continued to purchase and collect North Carolina debts; however, based on reviews of court filings by the Attorney General of North Carolina and consumer advocates, there is evidence that, at the time of filing, debt buyers are providing greater documentation of the existence of the debt and the debt buyer's ownership of the debt, and are therefore taking steps to comply with North Carolina's law.

Maryland

Maryland also recently adopted several rule changes aimed at (1) providing courts with sufficient information to determine whether judgment is warranted, and if so, the amount of the award; and (2) giving consumer defendants sufficient information to understand the charges filed against them and to file any appropriate defenses.[45] For example, the revised Md. Rule 3-306, which governs judgments on affidavits, imposes enhanced documentation requirements on plaintiffs in assigned consumer debt cases, including: (1) proof of the existence of the debt based on the original signed contract or other documents from the original creditor; (2) any existing documents proving the terms of the contract (with certain exceptions); (3) proof of the plaintiff's ownership of the debt; and (4) specific information identifying the original consumer debt or account.[46] The Maryland Rule also requires, where applicable, documentation of certain information related to future services contracts; charged-off accounts; for non-charged-off accounts, specific transactional and account information; and collection agency licensing information.[47] Maryland also clarified that pursuant to Md. Rule 3-508, plaintiffs in assigned debt cases must prove that they actually own the debt at issue and that the defendant entered into a written contract.[48] Finally, the revised Md. Rule 3-509 provides separate procedures for default proceedings to ensure that plaintiffs in assigned debt cases cannot obtain default judgments unless they prove the defendant's liability.[49]

Massachusetts

In Massachusetts a collector cannot obtain a default judgment unless it provides a sworn statement that it consulted reliable sources in an effort to locate the defendant.[50] Massachusetts'

44 N.C. Gen. Stat. § 58-70-115(6).

45 State of Md. Collection Agency Licensing Bd. and Office of the Attorney Gen, of Md., Report to Sen. Judic. Proceedings Comm., Sen. Fin. Comm., House Judic. Comm., and House Econ. Matters Comm., at 1 (2011) .

46 *See* Md. Rule 3-306.

47 *Id.*

48 State of Md. Collection Agency Licensing Bd. and Office of the Attorney Gen, of Md., Report to Sen. Judic. Proceedings Comm., Sen. Fin. Comm., House Judic. Comm., and House Econ. Matters Comm., at 4 (2011).

49 *Id.* at 5.

50 Mass. Ann. Laws. Unif. Small Claims Rules, Rule 2(b).

regulations[51] also limit contacts with an alleged debtor to two unsolicited contacts per week, and permit less frequent contact with third parties.[52] Massachusetts' regulations further prohibit contact with the debtor if a debtor has disputed a debt and the collector cannot provide validating information.[53]

Importantly, the Massachusetts regulations recognize the potential harm when a collector contacts a consumer at his or her place of employment. Such communications may threaten the consumer's employment tenure, resulting in the consumer's termination. Therefore, in Massachusetts, collectors are prohibited from visiting a consumer at his place of employment unless requested by the consumer,[54] and collectors may not call an alleged debtor at his place of employment if the consumer has requested that such communications cease.[55]

California

The recently enacted California Fair Debt Buyers Practices Act regulates buyers of charged-off debt and sets forth "documentation and process standards [that] will protect consumers, provide needed clarity to courts, and establish clearer criteria for debt buyers in the collection industry."[56] The law requires documentation sufficient to show that the collector is attempting to collect the correct amount from the appropriate person. It also prohibits debt buyers from making any written statement to a debtor in an attempt to collect unless it possesses information showing ownership, a breakdown of the balance, the date of default or last payment, the creditor at the time of charge off, the debtor's last known name, and the identities of every party who is an intervening buyer of the debt. The collector must also have access to proof of the debt. Similar categories of information must be alleged in any subsequent lawsuit and a contract or writing evidencing the debt must be produced.

Minnesota

Minnesota also recently expanded pleading requirements for obtaining a default judgment against consumer debtors.[57] In addition to a pre-default notice requiring information about

51 *See Massachusetts Office of the Attorney General, Debt Collection Regulation, 940 C.M.R. 7.04-7.06 and Massachusetts Division of Banks and Loan Agencies, Conduct of the Business of Debt Collectors and Loan Servicers, 209 C.M.R. 18.14.* In Massachusetts, the collection practices of original creditors and debt buyers are regulated under 940 C.M.R. 7.00. Under 209 C.M.R. 18.00, the Massachusetts Division of Banks regulates the collection practices of debt collectors (including debt buyers). For purposes of this comment section, the general term "debt collector" or "collector" is used to encompass original creditors, debt collectors, and debt buyers, with citation to both regulatory sections.

52 52 *See* 940 C.M.R. 7.04(1)(f) and 7.05-6; *see also* 209 C.M.R.18.14(1)(d).

53 940 C.M.R. 7. 08(2); *see also* 209 C.M.R. 18.18(2).

54 S*ee 940* C.M.R. 7.04(1)(k) and 7.05(3)(f); see also 209 C.M.R. 18.15(7).

55 *See* 940 C.M.R. 7.04(1)(h); 209 C.M.R. 18.14(1)(c).

56 Cal. Civ. Code § 1788.50, *et seq.*

57 Patrick Lunsford, *Debt Buyer Bills Backed by AG Swanson Introduced in Minnesota*, January 15, 2013, Insidearm.com, http://www.insidearm.com/daily/debt-buying-topics/debt-buying/debt-buyer-bills-backed-by-ag-swanson-introduced-in-minnesota/http://www.insidearm.com/daily/debt-buying-topics/debt-buying/debt-buyer-bills-backed-by-ag-swanson-introduced-in-minnesota/ .

attributes of debt, such as original creditor, amount, and date of charge off, the law also requires plaintiffs to submit admissible proof of the debt, chain of title, and proof of proper service.[58]

New York

Directives of the New York City civil courts require debt buyers that are seeking a default judgment to submit supplemental affidavits with their default judgment applications, including an affidavit of sale of the account completed by the original lender, an affidavit of sale completed by any intervening debt buyers, and an affidavit from the plaintiff debt buyer setting forth the complete chain of title.[59] However, a 2013 study of the New Economy Project found that 97 percent of default judgments failed to comply with applicable New York legal requirements because it was unclear who was attesting to the information and the affiants often signed on the basis of "information and belief" rather than personal knowledge.[60] In recent comments in response to a proposal to extend the New York City court directives statewide, both the New York Attorney General and the Superintendent of the New York State Department of Financial Services urged New York's Office of Court Administration to go further than the directives by implementing statewide enhanced procedural requirements for debt collection litigation, such as requiring greater documentation evidencing the debt and the plaintiff's right to collect upon it.[61] In addition, the Department of Financial Services has proposed new statewide regulations addressing various aspects of pre-litigation debt collection activity, including, among other things, increasing the verification obligations of debt collectors in response to consumers' disputes of their debts and requiring collectors to disclose when the subject debts are outside of the applicable statutes of limitations.[62]

The aforementioned state legal developments can serve as models for the CFPB as it considers national rules to enhance consumer protection in the debt collection context. CFPB rulemaking should support and bolster existing state debt collection laws by requiring that the proper documentation is in the hands of those seeking to enforce a debt at the time of collection, whether or not the information is required in the course of litigation by law.

In order to best complement the States' legal rules and avoid conflicts with state pleading requirements, collectors should have a minimal amount of information in their possession to know and prove the debt is valid before initiating litigation or other collection activity. If support is to come from an affidavit, the affiant must have personal knowledge of the debt and the facts that support its collection.

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58 Minn. Stat. § 548.101 (2013).

59 DRP-182 of the Directives of the New York City Civil Courts.

60 *Debt Collection Racket*, *supra* note 10, at. 14 n.4.

61 Letter from Jane M. Azia, Bureau Chief of New York Attorney General's Consumer Frauds and Protection Bureau, to John W. McConnell, Counsel to New York Office of Court Administration (Dec. 4, 2013); Letter from Benjamin M. Lawsky, Superintendent of New York State Department of Financial Services, to Hon. Gail A. Prudenti, Chief Administrative Judge of the Courts (Oct. 18, 2013).

62 Proposed Regulation of New York State Department of Financial Services on "Debt Collection," *available at* http://www.dfs.ny.gov/legal/regulations/proposed/debt-collection.pdf.

D. The Attorneys General Support Strong Documentation Standards that Require Collectors to be in Possession and Review Credible Account-Level Media

While debt buyers and collectors frequently have some post-sale access to media, studies indicate that it is doubtful that much media is in the actual possession of the collector at the time of suit.[63] Nevertheless, having credible documentation and reliable categories of information to support the factual basis of the validity of the debt and allow collectors to demonstrate facts about the debt to the consumer or a court as needed.

Robust, complete, and reliable account-level documentation, such as original agreements, account statements, and dispute history, should accompany the debt, without additional charge, through the life of a debt. Collectors should also always have sufficient information in their possession to show they own the debt or have the right to enforce it. There appears to be a strong consensus among regulators and consumer advocates for the enactment of robust national documentation and accuracy standards related to the information used to verify and collect debts.[64] The Attorneys General urge the same, and in addition to the previously articulated enforcement and litigation experience, echo the pronouncements and findings of the Federal Trade Commission and the Office of the Comptroller of the Currency about the need to enhance the quantity and quality of the information that accompanies the sale and transmission of debts.

IV. TRANSFER OF AND ACCESS TO INFORMATION UPON THE SALE OR PLACMENT OF DEBTS

The Attorneys General also believe that the integrity of the debt collection system will be significantly enhanced by requiring creditors and debt buyers to maintain account records for at least as long as they sell, collect, or attempt to collect debts.[65] CFPB should also require robust documentation to travel with the debt.

A. Document Retention Requirements are Needed to Ensure That Information is Available to Creditors, Downstream Buyers, and Consumers

The CFPB should require that certain documents be included with any account sold. Sales agreements typically allow (but do not require) the buyer to request, for free, original account documents for 10% to 25% of the accounts purchased.[66] After that, the buyer may request additional documents for a fee of about five to ten dollars (or more) per document.[67] Some sales

63 *See Debt Buyer Report*, *supra* note 23.

64 *Collection Hearing*, *supra* note 29 at 3 (testimony of Corey Stone, Assistant Director, Office of Deposits, Cash, Collections, and Reporting Markets, Consumer Financial Protection Bureau).

65 See *Collection Hearing*, *supra* note 29 at 11; Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty, In re American Experss Centurion Bank, FDIC-12-315b, FDIC-12-316k, 2012-FFPB-000, at 7 ("The Bank shall maintain accurate and complete information on each consumer debt that the Bank collects or attempts to collect.")

66 *Debt Buyer Report*, *supra* note 23, at 26 n.109.

67 *Debt Buyer Report*, *supra* note 23, at 26 n.109.

agreements do not guarantee the availability of original documents.[68] Sales agreements also generally limit or eliminate the original creditor's obligation to provide supporting documentation if the debt buyer sells the account to a downstream debt purchaser.[69]

The Attorneys General recommend that the CFPB require minimal information be included with each account sold, including the underlying contract, charge-off statement, certain account statements, an itemization of all charges pre-charge-off, all charges incurred post-charge-off, whether the debtor disputed any of the charges (and should consider banning sales of accounts actively in dispute).[70] Such strengthened record-keeping requirements will facilitate greater accuracy and transparency in debt-collection actions.

B. Privacy and Security Concerns Regarding the Transfer of Information in a Debt Sale

While it is critical to increase the integrity and flow of information within the debt collection industry, increased access to debt information that includes personal consumer information should be accompanied by safeguards to ensure the security of that information. Protecting consumers' personal information, including social security numbers, credit and financial account numbers, and other personal identifiers, is becoming an increasing concern for consumers. It is estimated that in 2013, at least 57,868,922 records were put at risk in 619 reported data breaches.[71] Although large-scale data breaches at retail giants Target and Neiman Marcus affected millions of consumers,[72] small businesses are frequently targeted by cybercriminals as well.[73] Such breaches can lead to increased incidents of identity theft, large financial losses, and other types of fraud, with devastating consequences for individual consumers, the economy, and even national security.[74]

Recent incidents in the debt collection context further illustrate the risks involved in the transfer and storage of personal consumer information. For example, the FTC and Minnesota both

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68 *See Debt Buyer Report*, *supra* note 23, at iii.

69 *Id*. at iii-iv; see also Letter from ACA Int'l to Md. Ct. of App. Standing Comm. on Rules of Practice and Procedure District Ct. Subcomm. (Jan. 19, 2011) (acknowledging that certain documentation establishing the existence of a consumer debt is often unavailable because the original creditor no longer has the information or did not have it when selling or turning the account over for collection).

70The States also note that there is no legal basis for the position that original creditors may add interest, fees, and other charges to the outstanding balance as "principal;" rather, the interest, fees, and other charges are collectively considered "interest" under the National Bank Act. As such, debt buyers do not have the right to consider the "charge-off" balance to be principal. This has significant implications, because if debt buyers attempt to charge prejudgment interest on the total charge-off value of the account in a collections lawsuit, they are effectively asking for illegal compound interest on that portion of the charge-off amount that is something other than principal. See, e.g., Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion, FTC Matter No. P094806 (2009)(November 19, 2009 submissions of Judge Lorraine Nordlund), *available at* http://www.ftc.gov/policy/public-comments/initiative-312; *See also* Md. Rule 306(a) (defining charge-off balance and principal).

71 Kristin Finklea, Cong. Research Serv. R4059, *Identity Theft: Trends and Issues* 22 (2014).

72 The data breach at Target alone is believed to have exposed the personal data of as many as 110 million consumers, "more than a third of the population of the United States." Hilary Stout, *Target Vows to Speed Anti-Fraud Technology*, N.Y. Times, Feb. 5, 2014, at B1. The breach at Neiman Marcus is believed to have affected 1.1 million consumers, and reports of smaller breaches have emerged at Nordstrom, Michaels Stores, and Easton-Bell Sports. *See id.*

73 For example, 72% of the data breaches analyzed by Verizon Communication's forensic analysis unit occurred at companies with fewer than 1,000 employees. *See* Verizon, 2013 Data Breach Investigations Report at 12 (2013), *http://www.verizonenterprise.com/resources/reports/rp_data-breach-investigations-report-2013_en_xg.pdf.*

74 *See* Finklea, *supra* note 72, at 22 ("Identity theft is often committed to facilitate other crimes such as credit card fraud, document fraud, or employment fraud, which in turn affect not only the nation's economy but its security.").

entered into settlement agreements with one of the nation's largest medical debt collection companies, Accretive Health, following revelations that an employee's unencrypted company laptop, which contained data regarding 23,500 consumers, had been stolen from a rental car.[75] Similarly, in 2012, the FTC finalized a settlement with EPN, Inc., a Utah-based debt collector accused of illegally exposing the personal information of thousands of consumers by allowing the installation of peer-to-peer file-sharing software on its corporate computer system.[76]

The CFPB should issue rules regarding the sound and secure transfer and storage of certain consumer information by original creditors and downstream debt buyers. In particular, the CFPB should consider data security standards for the transfer and storage of consumer data. Two states currently mandate encryption of personal information in certain circumstances. Massachusetts enumerates eight specific computer system security requirements that covered entities must institute to the extent technically feasible, including encrypting personal information that will travel across public networks and/or be transmitted wirelessly and of personal information stored on laptops or other portable devices.[77] Nevada requires encryption in certain circumstances involving the transmission of personal information and also requires data collectors who accept payment cards in connection with the sale of goods or services to comply with specific data security standards.[78] And the Attorney General of California recently recommended that companies encrypt digital personal information when moving or sending it out of their secure networks. [79] This recommendation was included in a 2012 report on data breaches that also revealed that more than 1.4 million consumers in California would not have had their data put at risk if it had been encrypted.[80] California is also one of several other states, including Arkansas, Connecticut, Maryland, Oregon, Rhode Island, Texas and Utah that require reasonable measures to protect certain categories of personal information.[81] States have further addressed information

75 *See* Alejandra Matos, *Medical Billing Firm Settles Charges*, Star Tribune (Jan. 1, 2014), *http://www.startribune.com/local/238388521.html*.

76 Press Release, Federal Trade Commission, FTC Finalizes Settlements with Businesses that Exposed Consumers Sensitive Information by Installing Peer-to-Peer File-Sharing Software on Corporate Computer Systems (Oct. 26, 2012), *available at: http://www.ftc.gov/news-events/press-releases/2012/10/ftc-finalizes-settlements-businesses-exposed-consumers-sensitive).*

77 201 Mass. Code Regs. § 17.04.

78 *See* Nev. Rev. Stat. Ann. § 603A.215.

79 California Department of Justice, Data Breach Report 2012 iv (2012).

80 *Id.*

81 *See* Cal. Civ. Code § 1798.81.5(b) (requiring a business that owns or licenses personal information to implement and maintain reasonable security procedures and practices appropriate to the nature of the information); Ark. Code. Ann. § 4-110-104(b) (requiring a person or business that acquires, owns or licenses personal information to implement and maintain "reasonable security procedures and practices appropriate to the nature of the information . . ."); Conn Gen. Stat. 42-471(a) (requiring any person in possession of another person's personal information to safeguard the data, computer files and documents containing the information from misuse by third parties); Md. Code Ann., Comm. Law § 14-3503(a) (requiring a business that owns or licenses personal information to "implement and maintain reasonable security procedures and practices that are appropriate to the nature of the personal information owned or licensed and the nature and size of the business and its operations"); Or. Rev. Stat. § 646A.622(1) (requiring the development, implementation and maintenance of reasonable safeguards to protect personal information and identifying conduct deemed to comply with this requirement); R.I. Gen. Laws (requiring a business that owns or licenses computerized unencrypted personal information to "implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure"); Tex. Bus. & Com. Code § 521.052(a) (requiring a business to "implement and maintain reasonable procedures . . . to protect from unlawful use or disclosure any sensitive personal information collected or maintained by the business in the regular course of business."); Utah Code Ann. § 13-44-201(1) (requiring reasonable procedures to "prevent unlawful use and disclosure of personal information collected or maintained in the regular course of business").

security issues through laws requiring notification in the event of a breach and the secure disposal of personal identifying information.[82]

At the federal level, the Office of the Comptroller of the Currency ("OCC") has also identified several best practices for effective risk management in large banks with debt sales activities, including onsite inspections to assess the information, data, and physical security of a potential debt buyer and the inclusion of contractual language detailing that the debt buyer must comply with specific consumer laws and standards, among other things.[83] The OCC is also developing policy rules and guidance that might be more applicable to a broader range of institutions.[84]

The Attorneys General recommend that the CFPB impose rules that require robust protections for consumer data that is passed between debt sellers and buyers and that the state laws described above should be a starting point for those protections.

V. DEBT VALIDATION, DISPUTES, INVESTIGATIONS, AND VERIFICATIONS

The Attorneys General urge the adoption of uniform information and documentation standards for all stages of the collection process. All of the information that is passed between debt sellers and debt buyers should be designed to aid in debt verification. Debt validations mandated by the FDCPA are supposed to aid in the collection process by adding a level of review and giving consumers confidence that the debt they are paying is theirs. In practice, these processes are not being done in a uniform manner and are often misemployed in ways that injure consumers.

A. Content of Consumer Validation and Notices

Though debt collectors are required by 15 U.S.C. § 1692g to provide a written notice containing several pieces of important information within five days of communication with a consumer, the Attorneys General believe consumers are not receiving all the documentation they need in order to properly identify a debt. The Attorneys General routinely receive complaints from consumers who do not recognize a debt in question provided in the written notice. Consumers are routinely mis-identified by collectors seeking to collect calls from debtors with similar names. Requiring collectors to maintain and transmit better identifying information about the debtor and the debt will help prevent the types of confusing and sometimes harassing collection calls that lead to such complaints.

82 *See* Pamela Prah, *Target's Data Breach Highlights State Role in Privacy*, USA Today (Jan. 16, 2014), http://www.usatoday.com/story/news/nation/2014/01/16/target-data-breach-states-privacy/4509749/ (noting that 46 states have passed laws requiring businesses and/or public agencies to notify consumers of security breaches of personal information); National Conference of State Legislatures, *Data Disposal Laws*, http://www.ncsl.org/research/telecommunications-and-information-technology/data-disposal-laws.aspx (noting that at least 30 states have passed data disposal laws requiring entities to destroy, dispose, or otherwise make personal information unreadable or undecipherable) (last visited Feb. 4, 2014).

83 *Collection Hearing*, *supra* note 29, at 12–14 (statement of the Office of the Comptroller of the Currency).

84*Id.* at 6–7, 9.

In some cases, the creditor's name provided in the written notice may not be familiar to the consumer, or the debt may be from several years prior and the consumer does not realize that the debt is still owed to the creditor (e.g., old telecom debt[85]). In some instances, the original creditor never notified the consumer of the alleged delinquency, so the consumer may not believe money is owed and may ignore the notice. In other cases, the debt buyer may change the account number, and consumers are left unable to match the debt at issue with the original account. Whatever the source of misinformation or lack of information, consumers are still experiencing difficulty with validating a debt even when debt collectors provide the required written notices under § 1692g.

The Attorneys General recommend heightened information requirements for written validation notices. The more documentation included in the § 1692g notice, the more likely a consumer will receive complete, accurate information about the debt in question. FTC data has shown that debt buyers often receive information in debt sales, such as the original creditor's name and account number, as well as the debtor's social security number and date of charge-off.[86] However, this information is typically not provided to consumers in validation notices.[87] The Attorneys General support the FTC's recommendation that validation notices should include: (1) the name of the original creditor; (2) an itemization of principal, interest, and fees; and (3) two statements that notify consumers of rights they have under the FDCPA.[88]

Furthermore, as mentioned above, several states now require that specific information be provided when collectors contact debtors, including:

- the name of the original creditor;
- the original account number, or some portion thereof;
- the amount of the original debt;
- the date of last payment;
- the balance at charge-off;
- the date of charge-off;
- the address at charge-off;
- an itemization of principal, fees, and interest, with a basis for the interest charged; and
- contact information to inquire about the debt.

Including this information will help consumers more readily identify debts and help debt collectors avoid time-consuming and costly efforts to further validate debts. Accordingly, the

85 *AFNI Trying Again to Collect Old Debts*, New York Daily News, Jul. 24, 2008, *available at* http://www.nydailynews.com/life-style/afni-collect-old-debts-article-1.348552.

86 *Debt Buyer Report*, *supra* note 24, at 36.

87 *Id*.

88 *Debt Buyer Report*, *supra* note 24, at 31.

Attorneys General recommend that debt collectors include the above listed information in a §1692g written notice.

Additionally, more information should be included in the standard debt collector disclosures about a disputed debt. Namely, consumers should be informed that under 15 U.S.C. § 1692g (b), disputing a debt in writing suspends collection efforts until the debt is validated. While that provision requires collectors to notify consumers that they have the ability to dispute a debt and receive verification from the collector, collectors are not required to share that collection efforts must cease until a disputed debt is validated. In order to fully apprise consumers of their rights and the process governing debt validation, consumers should be provided with a concise and conspicuous statement alerting them of this requirement.

Consumers should also be made aware that, although they can request that the debt collector stop communicating with them, the collector still has the ability to sue if that collector believes it can prove the debtor owes the debt. Providing this information to consumers will help them to protect their rights and make better informed choices when dealing with debt collectors.

The Attorneys General also recommend that these consumer disclosures be made clearly and conspicuously, and that they be provided in a separate document or separate section included within the validation notice. Consumers should be alerted that the information contained therein is a summary of their rights under law. To ensure that the disclosures are likely to be understood by the general public, they should be developed by consumer research experts and tested on consumer focus groups for clarity and coherence.

B. Sufficient Debt Verification

Under 15 U.S.C. § 1692g(b), if a consumer disputes a debt within 30 days after receiving communication from a debt collector, the collector is required to cease collection activities until the collector verifies the debt and transmits the verification to the consumer via mail. However, in 2009, the FTC reported that debt collectors often verify a debt only by matching their records with the demand for payment that originated with the collector, and then mail the consumer confirmation of this check.[89] The FTC report further notes the likelihood of a debt buyer being able to verify a disputed debt is less than 60 percent. As such, the FTC has recommended that more extensive investigations by debt collectors should be required by the FDCPA so that consumers can be properly apprised of the identity and content of the debt in question.[90] CFPB consumer complaint reports have found that the Bureau received 9,814 complaints in 2012 stating that collectors did not verify a disputed debt at all.[91]

89 *Debt Buyer Report*, *supra* note 24, at 40-41

90 *Id*. at 31-32.

91 CFPB Fair Debt Collection Practices Act Annual Report 2013, 18.

The Attorneys General recommend that collectors be required to more thoroughly investigate the validity of disputed debt. Providing additional information in a debt verification case will ease consumer concerns about the legitimacy and identity of a debt. In order to standardize what constitutes acceptable proof and verification of a debt, debt collectors should be required to provide consumers the same information that a creditor would provide a debt collector under the Attorneys General' recommendations. Based on this principle and in accord with models used in states like North Carolina,[92] debts should, at minimum, be verified using several items:

- the name of the original creditor;
- the name and address of the debtor;
- the original consumer account number;
- copies of the contract or other document evidencing the debt;
- an itemized accounting of the amount owed, which includes all fees and charges; and
- if the debt has been assigned more than once, documents that establish an unbroken chain of ownership.

C. Consumer Account Number Consistency

Debt buyers can, either by carelessness or by design, alter consumer account numbers, causing consumer confusion over the origin and nature of an alleged debt. This often makes it difficult for the consumer to recognize and verify the debt. In other instances, an intentionally changed account number may allow a debt buyer to report an additional debt to a credit bureau, unfairly diminishing the consumer's credit score and pressuring the consumer into making a payment.

To help consumers avoid these difficulties, the Attorneys General recommend that all debt collectors be required to provide the last four digits of the original account numbers to the consumer before filing a suit against a debtor. This would encourage accurate recordkeeping, eliminate an unfair collection tactic, and help consumers recognize and verify the debt payments they are being asked to make.

VI. DEBT COLLECTION COMMUNICATIONS

The Attorneys General recommend that the CFPB's regulations governing debt collection communications apply to all communications in order to ensure that all such communications are private, secure, non-harassing, and do not disclose the alleged debt or other private information to third parties or unintended recipients. Further, the Attorneys General recommend that the traditional protections provided by the FDCPA against frequent or harassing calls also be extended to all communications. This would benefit both consumers and debt collectors by promoting a more meaningful dialogue when a consumer receives a debt collection call. Finally,

92 N.C. Gen. Stat. § 58-70-115(5) (2013).

consumers should always have the right to demand that the collector cease communications with the consumer.

A. Advances in Communications Technologies

The non-litigation collection practices employed by debt buyers have evolved with new communication technologies and changing consumer habits (i.e., use of predictive dialers, social media, mobile phones, text messaging, electronic mail, and decreased reliance on regular ground mail). The Attorneys General understand the need to balance today's technological challenges with legitimate business needs to contact consumers. In that regard, they urge limitations including, but not limited to: (1) communication through new technology should require that the consumer first opt-in to its use; (2) consumers should be able to put any limitations on the use of new technology that they desire; (3) because consumers already have an absolute right to demand that debt collection communication cease, they should have the right to place any lesser limitations on this communication, such as limitations on medium, frequency, or time of communication; (4) communication using newer technologies must be kept private in keeping with an overriding goal of the FDCPA to ensure that consumers are not embarrassed from communications regarding their debts with third parties.

New technologies can be a valuable communication tool between collectors and consumers, but these technologies bring privacy and cost risks. Mobile phones impose a cost on the consumer, and open the collector up to the possibility of calling at inconvenient times and places. Text messaging also imposes a per text cost on consumers. Email may be read off the computer screen by third parties, and can potentially be hacked or targeted for personal information. To mitigate these concerns while still allowing new technology to be used, the Attorneys General recommend that use of any communication medium other than by landline telephone, mobile phone, or mail require opt-in by the consumer. If consumers want to use a particular communication medium, they can opt-in, but if they have privacy or cost concerns they do not have to. The opt-in should be in written form and only be allowed after the first debt collection contact has been made and should not be made at the time of the extension of the original credit. The opt-in should also be revocable. For mobile phones, the Attorneys General recommend that the CFPB prohibit debt collectors from contacting consumers on their mobile phones. Alternatively, the CFPB should prohibit debt collectors from contacting consumers on their mobile phones unless consumers provide prior express written consent, which may be revoked.

While consumers should be allowed to opt-in to receive email or text messaging from debt collectors, debt collectors should be prohibited from using social media to contact a consumer. The use of social media for debt collection communications presents significant privacy concerns. Most social media (such as Facebook walls or Twitter newsfeeds) is public, and even private use of social media (such as Facebook or Twitter direct messaging) is prone to error and is often accessible or harvested for ads by the social media company itself. In addition, identifying a particular consumer can be problematic as most individuals on social media are

only identified by a name or screen-name, creating a strong potential for misidentification of a consumer. The Attorneys General recommend that communication by public social media (e.g., can be publicly viewed) be prohibited. If consumers agree to communicate with others via social media for commercial purposes, including addressing outstanding debts, they must first expressly consent to such communications. Initial communication with a debtor by private social media should be prohibited due to misidentification concerns. An additional concern with social media is the practice of "friending" someone to collect a debt, which raises the possibility of deception. In addition, consumers may not access social media with sufficient frequency as to make it an appropriate medium for such important communications.

If debt collectors are permitted to collect debts via social media, the Attorneys General recommend that all such collection communication be preceded by or commence with a clear and conspicuous notification to the consumer that the purpose of the communication is to collect a debt. [93]

Further, the Attorneys General recommend that the FDCPA's limitation on permissible hours of communications be extended to communications via new technologies, including, but not limited to, email, text messaging, and communications via social media. A guiding general principle on extending the FDCPA designated hour presumption could be that it applies to "disruptive" technologies. Disruptive should be defined as any communication that makes a noise, such as a phone or text messaging alerts on a cell phone.

B. Communications with Consumers

The Attorneys General have received complaints from consumers concerning the manner and frequency in which debt collectors call them. With regard to telephone calls, the current rules applicable to unsolicited telemarketing calls do not provide sufficient protections for consumers receiving debt collection communications. Debt collection calls involve a much higher level of stress and potential for unfairness and abuse. In the age of caller identification systems, any call, answered or not, should be considered received for purposes of determining whether a debt collector has repeatedly called a consumer, regardless of whether the call is dropped by the collector or its predictive dialer technology. In Missouri, a telemarketer is subject to liability if it "cause[s] the telephone to ring" in an "annoying, abusive, or harassing" manner.[94]

Moreover, unlike consumers receiving telemarketing calls who can register on state and federal "Do Not Call" lists, consumers and third parties have no preemptive means to prevent unsolicited calls from debt collectors. Bright line rules, similar to those in place in

93 The Attorneys General do not, however, recommend that such warnings be included in collection communications to third-parties, such as friends, relatives or spouses, otherwise such warnings could be used to harass or embarrass the debtor.

94 Section 407.1076(3), RSMo (2010) (It is unlawful for a telemarketer to "cause the telephone to ring or engage any consumer in telephone conversation repeatedly or continuously in a manner a reasonable consumer would deem to be annoying, abusive, or harassing").

Massachusetts[95] that cover all modes of communication, including electronic mail and social media messaging, are necessary to assist consumers and collectors to determine when unsolicited communications become repetitive and harassing, unfair conduct.

When collectors contact consumers, the Attorneys General recommend that blocking or altering the collector's phone number should be prohibited. The only purpose for blocking or altering such information is to deceive the consumer and it should not be allowed. The Attorneys General believe that placing the name of the debt collector on caller-ID should be prohibited because this information can often be overseen by third parties and is potentially embarrassing to the consumer.

C. Contact with a Consumer's Employer

Collection calls to a place of employment are inconvenient, and often harassing, if the calls are made to a general or main line, rather than a consumer's direct line. Such communications may threaten the consumer's employment tenure, resulting in the consumer's termination. The Attorneys General recommend that all collections calls to a place of employment be barred where the collector reliably learns, in any way, that an employer prohibits collection calls.[96]

Further, the Attorneys General are concerned that electronic communications to a work related email address or phone number can infringe upon a consumer's privacy and threaten employment. Work related accounts are often monitored by employers. The Attorneys General recommend that electronic communications to a work email address or phone number be barred absent the consumer's consent.

D. Communications with Third Parties other than Employers

The Attorneys General receive numerous complaints from consumers concerning multiple, harassing calls from collectors, the purported purpose of which is to locate a debtor. Third-party consumers frequently complain that they are receiving multiple calls after they have informed the collector it has a wrong number or that they are not connected with the account. Other complaints concern calls that continue long after the third-party has told the collector that they do not know the debtor's location or do not wish to give it to the collector. The Attorneys General believe that these calls are often made for the sole purpose of embarrassing debtors rather than determining their location. The Attorneys General recommend that this form of communication be closely regulated and include the right for third-parties to demand that such communications cease.

95 *See* 940 C.M.R. 7.04-6; *see also* 209 C.M.R. 18.14-15.

96 In Massachusetts, collectors are prohibited from visiting a consumer at his place of employment unless requested by the consumer and collectors may not call an alleged debtor at his place of employment if the consumer has requested that such communications cease. *See* 940 C.M.R. 7.04(1)(k) and 7.05(3)(f)*; see also* 209 C.M.R. 18.15(7) 940 C.M.R. 7.04(1)(h);and 209 C.M.R. 18.14(1)(c).

The Attorneys General further recommend extending the prohibition contained in FDCPA section 804 against using any language or symbol on an envelope or elsewhere in a written communication seeking location information if the language or symbol indicates that the collector is in the debt collection business or that the communication relates to the collection of the debts, to any type of communication. Identifying a third-party communication as coming from a debt collector may embarrass the consumer, and this risk is the same with email, text message, fax, or other medium.

E. Issues Involving Deceased Consumers and Communication with Third Parties

The FDCPA is silent as to whether a debt collector can contact the surviving spouse of a deceased debtor. The Attorneys General recommend that collectors not be allowed to contact a surviving spouse if they have reason to believe the debtor has died and the spouse is not legally obligated to pay the debt. If the spouse is not legally obligated on the debt, there is no reason that the spouse should be pressured to pay.

If a debtor disputed his debt prior to his death, the Attorneys General recommend that collectors contacting the executor of the debtor's estate be required to inform the executor of that dispute. The debtor may have been the only person to know the circumstances of the underlying debt, and the executor should be told if the debtor disputed the debt.

F. Debt Collector Contact Information

The Attorneys General believe that all communications from a debt collector to a consumer should include accurate contact information for the collector, including a mailing address, email address, and a telephone number. Additionally, the Attorneys General believe it would benefit consumers if collectors provided access to a person familiar with the debt during regular business hours rather than an often impenetrable automated phone system that may not be equipped to respond to consumer concerns. Although the Attorneys General recognize that cost and feasibility might be an issue, access to knowledgeable representatives would help both collectors and consumers. The debt collection dialogue can only be continued if a person working for the collector answers the phone, and requiring a person to answer inbound calls ensures that collection communications can be held at a time convenient for the consumer.

G. Hard Copy Mailings

The Attorneys General are concerned that consumers often do not open important communications from debt collectors if they do not recognize the source of the information. In order to address this issue, the Attorneys General recommend that the CFPB adopt rules or guideline that promote disclosures on envelopes used to mail collection notices stating that the mailing concerns an important communication that could affect legal rights, without the sender revealing the existence of a debt to a third-party in violation of the FDCPA. Such a notification

would help ensure that consumers read the collection notices they receive, which would benefit both collectors and debtors.

VII. UNFAIR, DECEPTIVE, and ABUSIVE ACTS and PRACTICES

The CFPB Advanced Notice of Proposed Rulemaking raises a number of issues concerning unfair, deceptive, and abusive acts under the Dodd-Frank Act and how such acts can be addressed and regulated. The Attorneys General separately address each of these types of conduct below.

A. "Deceptive" Conduct Under The FDCPA Is "Unfair" Under Dodd-Frank

The CFPB asks whether "deceptive" conduct as defined under the FDCPA should also be recognized as patently "unfair" within the term's meaning under Dodd-Frank. The Attorneys General agree that such conduct should be incorporated. FDCPA § 807 prohibits a debt collector from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt" and then provides a non-exclusive list of prohibited conduct. Such conduct should also be considered unfair because it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by the consumer [and] such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[97]

Misrepresenting that a collector is operating under color of law, obstructing the legal process, or misrepresenting the amount of a debt – all acts prohibited as "deceptive" conduct under FDCPA § 807 – is prejudicial to legitimate debt collectors who do not resort to such devious tactics in their efforts to validate and collect on debts and harms consumers. The use of such unfair and deceptive tactics may mislead consumers about the nature of the debt collector's authority and cause consumers to forego their right to contest debts they do not believe they owe. Maintaining the list of false and deceptive conduct delineated in FDCPA § 807 and including those examples as "unfair" conduct within the meaning of Dodd-Frank will prevent substantial injury to consumers that cannot reasonably be avoided. Consumers cannot choose the contingency collector or debt buyer who is likely to be collecting on the alleged debt. These protections benefit consumers and legitimate debt collectors by promoting fairness and competition.

B. "Abusive" Conduct Under The FDCPA Is "Unfair" Under Dodd-Frank

The CFPB also asks whether examples of abusive or harassing conduct outlined in § 806 of the FDCPA should be recognized as "unfair" acts or practices under Dodd-Frank. Again, the Attorneys General agree that such incorporation would be proper. FDCPA § 806 attempts to protect consumers from coercive and harassing conduct without overly burdening collectors engaged in legitimate efforts to recoup alleged debts. The majority of debt collection complaints appear to involve alleged conduct that directly violates provisions of FDCPA § 806, including:

97 *CFPB ANPR*, quoting 12 U.S.C. 5531(c)(1)(A)-(B); *see also F.T.C v. LoanPointe, LLC*, 525 Fed. Appx. 696, 700 (10th Cir. 2013)(false statements in wage garnishment letters to employers were unfair under the FTC Act and deceptive under the FDCPA).

repetitive or continuous calls, use of obscene or profane language, and threatening violence if a consumer does not pay an alleged debt.[98] Such tactics cannot serve a legitimate business purpose, and can exert unlawful coercive power over consumers, who may respond by paying alleged debts that are not owed or that include improperly charged interest or fees.[99]

In addition to including violations of FDCPA § 806 as "unfair" conduct under Dodd-Frank, the Bureau should provide examples of deceptive conduct in order to address the significant changes that have taken place in collection strategies. However, the Bureau should take care to note that these specified "unfair" practices are not an exhaustive list of what should be considered "unfair" under the Act.

C. "Unfair" Conduct Under The FDCPA Is "Unfair" Under Dodd-Frank

The examples of "unfair" conduct described in FDCPA § 808 and any violation of the rule on payment application in FDCPA § 810 should also constitute "unfair" conduct under Dodd-Frank. Further, the Bureau should provide additional, non-exhaustive, examples of unfair conduct as it occurs in the current and evolving debt collection industry.

D. Increases in Debt Collection Actions Involving Unfair, Deceptive Acts and Practices

The debt buying industry has grown rapidly in recent decades.[100] In many states there are few, if any, barriers to buyer entry, with debts available for sale to anyone through online sales sites.[101] Consumers do not control to whom their debts are sold. Nor do they exercise any control over what information is provided when their debts are transferred.

As is more fully set forth above, the Attorneys General are concerned that debt collectors often purchase debt with little, no, or defective documentation, and then file suit on those debts with the intention of obtaining default judgments or consent judgments from unrepresented consumers. Compounding this problem are collectors who engage in "sewer" service, to further guarantee that the consumer does not show up and a default judgment is entered.[102] Still other Attorneys General have noticed a disturbing trend of collectors scheduling debtor's exams then engaging in "sewer" service, so that a consumer does not show up for the exam resulting in a

98 *See* Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act (March 2011) at 6-10 & Appendix B, *available at http://www.ftc.gov/reports/federal-trade-commission-annual-report-2011-fair-debt-collection-practices-actht*tp://www.ftc.gov/reports/federal-trade-commission-annual-report-2011-fair-debt-collection-practices-act.

99 *Polanco v. NCO Portfolio Management, Inc.*, 930 F. Supp. 2d 547, 551 (S.D.N.Y. 2013)(abusive and unfair where debt collector fraudulently obtained a default judgment and then failed to comply with two Court Orders to return those improperly obtained funds, "Here Defendant's alleged actions of fraudulently using the Court's power to secure a default judgment and subsequent garnishment and then refusing to obey promptly that same Court's Orders falls within the FDCPA's broad purpose to protect consumers from such alleged abusive and unfair acts.")

100 *Debt Buyer Report, supra* note 24, at 14; *see also* Spector, *supra* note 12, at 257, 265-267.

101 *Debt Buyer Report, supra* note 24, at 20.

102 *See e.g.*Press Release, New York State Office of the Attorney General, Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation (July 22, 2009), *http://www.ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new*.

contempt finding that could lead to incarceration. Such a reemergence of essentially "debtor's prisons" is an extremely troubling trend.[103]

VIII. DEBT PAYMENT SYSTEMS

As noted above, the CFPB should draft rules requiring all collectors to obtain evidence of the debt before initiating any collection efforts. Further, the Bureau should promulgate regulations to ensure consumer payments are fairly applied to the debt. The CFPB's recent amendments to 12 C.F.R. §1026.36 and §1026.41, New York City Admin. Code § 2-192, and the Credit CARD Act of 2009 are useful in determining fair payment application to consumer debts. To promote transparency and better record keeping, the CFPB should require collectors to: (1) affirmatively explain to a consumer how a payment will be applied; (2) inform a consumer that he has the right to dictate how a payment is applied; (3) explain whether a payment is in full satisfaction or merely a partial payment on a debt; (4) provide a written agreement if a partial payment is promised to be deemed in full satisfaction of an outstanding debt; and (5) provide an itemized receipt for all payments that includes the name of the original creditor and the balance at the time of charge-off.

The Attorneys General further recommend that the CFPB provide regulatory guidance to banks and collectors regarding the use of the Automated Clearing House ("ACH") to debit consumers' accounts for payments. When considering this issue, the CFPB should be cognizant of consumers' concerns that banks may process such debits from funds that would be exempt from wage garnishment or when a consumer has specifically requested that the bank cease automatic debits.[104] A collectors' ability to make multiple requests for payment and to collect such payments despite the consumer's clear instruction to block a debit circumvents the consumer's right to withhold payment on disputed debts or protect exempted assets from being garnished in repayment of a debt. Such payment manipulation is not only "unfair" under Dodd-Frank, but is also "abusive."[105]

Comprehensive regulation of these types of payment abuses would promote important state policies. Nearly all states have extensive rules that prescribe the proper manner in which garnishment of a debtor's depository account may be sought with judicial oversight. Most states specify priorities between competing garnishment actions, giving priority to debts such as child support payments and alimony. Abuse of pre- and post-judgment collection remedies can often function in the hands of an unscrupulous judgment creditor as a form of "extra judicial" garnishment of a debtor's account jeopardizing protected or otherwise exempt funds. Strong

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103 Lea Shepard, *Creditors' Contempt*, B.Y.U. L. Rev. 1509 (2011); Jessica Silver-Greenberg, *Debtor Arrests Criticized*, Wall St. J., November 22, 2011, available at, http://online.wsj.com/news/articles/SB10001424052970203710704577052373900992432

104 *See, generally*, National Consumer Law Center & National Association of Consumer Advocates Comment to the Office of Thrift Supervision in Docket No. OTS-2007-0015, November 6, 2007, 52-61, available at http://www.nclc.org/images/pdf/banking_and_payment_systems/banking_comments_november6_2007.pdf; *see also Baptiste v. JPMorgan Chase Bank, NA*, No. 12-CV-04889 (E.D.N.Y Oct. 1, 2012).

105 *See* 12 USC 5531(d)(1)-(2).

federal regulation by the CFPB will help to deter this circumvention of the state judicial garnishment process, and thus further important state specific interests embodied by each state's respective garnishment process.

IX. TIME-BARRED DEBT

The Attorneys General would like to address the implications of collecting time-barred debt, consumer awareness of it, revival of statutes of limitation, and potential disclosures to consumers and their frequency.

A. Consumer Awareness Related to Time-Barred Debt

Consumers often have a limited understanding of time barred-debt and the impact that paying such debts can have on their rights. While consumer complaints suggest that consumers generally understand the possibility of adverse credit consequences for not paying a debt, they do not fully understand how a statute of limitation can affect the collectability of a debt. Compounding this problem is the fact that for smaller debts, consumers often do not seek legal assistance. The Attorneys General believe, and research confirms, however, that consumers want to know if a debt is time-barred and they want information about how to respond when they receive collection requests for time-barred debt.

Consumers are generally unaware that paying part of a debt may actually revive a statute of limitations and subject them to a lawsuit. Debt collectors are increasingly using litigation to collect time-barred debts in an attempt to revive such debts and to collect on time-barred debts that have been revived.

The Attorneys General recommend banning the collection of debt that is beyond the statute of limitations. At a minimum, debt collectors should be required to investigate, or otherwise engage in due diligence, to determine whether a debt is time-barred prior to engaging in collection activity. Any such rule should not be limited to instances in which the debt collector knows or should have known that the debt is time-barred.

Another alternative to a total bar would be a requirement that collectors affirmatively disclose in a validation notice or other communication provided to the consumer within a reasonable amount of time after the expiration of the limitations period information about the debt being time barred, the limits on the collector's right to sue, the right of the consumer to assert the affirmative defense of statute of limitations, and the effect of making partial payment. Such a disclosure must be made prior to any attempt to collect or solicit any payment in connection with a time barred debt. Consumers who receive such disclosures will be better able to make informed decisions about whether to make a partial payment in exchange for potentially giving up a substantive right to assert an affirmative defense or otherwise challenge a lawsuit. Because consumers may not be aware that making a payment on a time-barred debt can result in the

limitation period starting anew, it is critical that they be given adequate information about the possibility of re-aging time-barred debt.

B. State Regulation on Time-Barred Debt Disclosures

The Attorneys General recommend that the CFPB consider collection laws from New York, New Mexico, and California, in developing proposed rules concerning disclosure and revival of time-barred debts.

In 2010, the New York City Department of Consumer Affairs proposed rules implementing Local Law No. 15. The proposed rules added a new subchapter S, regulating Debt Collection Agencies, to Chapter 2 of Title 6 of the Rules of the City of New York. Section 2-191, requires disclosure of consumers' legal rights regarding the effect of the statute of limitations on debt payment and providing a notice that prominently states:

> "WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT. The legal time limit (statute of limitations) for suing you to collect this debt has expired. However, if somebody sues you anyway to try to make you pay this debt, court rules REQUIRE YOU to tell the court that the statute of limitations has expired to prevent the creditor from obtaining a judgment. Even though the statute of limitations has expired, you may CHOOSE to make payments. However, BE AWARE: if you make a payment, the creditor's right to sue you to make you pay the entire debt may START AGAIN."

The New Mexico Attorney General's Office recently concluded there was "substantial evidence," including a study commenced through the University of New Mexico, to adopt administrative rules regulating the collection of time-barred debt and requiring disclosure of time-barred debt [106] New Mexico Rule 12.2.12.9 requires disclosures and provides for a plain language safe harbor provision deeming a collector in compliance with the rule when it gives the following notice:

> We are required by New Mexico Attorney General rule to notify you of the following information. This information is not legal advice: This debt may be too old for you to be sued on it in court. If it is too old, you can't be required to pay it through a lawsuit. You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you admit that you owe the debt or in which you make a new promise to pay; sign a paper in which you give up ("waive") your right to stop the debt collector from suing you in court to collect the debt.

106 N.M. Admin. Code tit. 12 § 2.12.1 - 12 § 2.12.11 (2014).

Most recently, in 2013, the California legislature adopted the Fair Debt Buying Practices Act.[107] The disclosures required are identical to those in the Consent Decree that the FTC entered into with debt collector Asset Acceptance. Specifically, the order required Asset Acceptance to clearly and prominently disclose to consumers that, when a debt is beyond the statute of limitations, "the law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it."[108] Asset Acceptance must also tell consumers if those debts can be still be reported to a credit bureau and placed on their credit report. The Attorneys General believe these state laws, as well as the FTC's Consent Decree in *Asset Acceptance* contain strong, understandable, and effective language that can be used for guidance in promulgating any rule or regulation concerning how collectors should communicate to debtors when seeking to collect time barred debt. The disclosures required by these state laws and the FTC's Asset Acceptance Order require collectors to prominently inform consumers about whether they will be sued, if the debt can be placed on their credit report, and the effects paying a time barred debt may have on their substantive rights.

X. SERVICEMEMBERS and DEBT COLLECTION

Finally, the Attorneys General would like to specifically address how abusive, deceptive or unfair debt collection practices can adversely impact servicemembers. [109] Servicemembers are particularly vulnerable to abusive, deceptive, and unfair debt collection practices due to circumstances unique to their military service, and predatory debt collectors are aware of and regularly exploit these vulnerabilities.

Servicemembers fear that a call from a debt collector will affect their ability to obtain a security clearance, favorable evaluation, a desired duty assignment, or training or educational opportunity, or that it will otherwise harm their military career. These fears are sometimes unwarranted.[110] However, the Attorneys General have seen many instances where servicemembers have been coerced by their commands into paying a questionable debt after they receive a call from a debt collector.

Servicemembers are also subject to the Uniform Code of Military Justice ("UCMJ"), which makes unpaid debts not just a personal issue, but an issue that could result in disciplinary action that can affect or even end their military careers.[111] A servicemember's dishonorable failure to pay a debt may, under some circumstances, be punishable under Article 134 of the UCMJ. If a commanding officer becomes aware of a servicemember's debt collection issue, there may be harsh consequences to the servicemember. Currently, even if a debt collector contacts a

107 Cal. Civ. Code § 1788.52.

108 Consent Decree *United States v. Asset Acceptance LLC*, No. 8:12-cv-182-T-27, at 13 (M.D. Fla. 2012).

109 These comments are intended to encompass members of both the active and the reserve components of the United States Armed Forces, including members of the National Guard in a Title 10, Title 32, or state active duty status.

110 We are grateful to the many commanders who work collaboratively with JAG legal assistance attorneys, financial counselors, chaplains and other professionals to support those servicemembers under their command who have consumer debt issues.

111 10 U.S.C. Chapter 47.

commanding officer for the ostensibly proper purpose of locating the servicemember, that contact may trigger negative consequences for the servicemember. Even worse, some debt collectors may threaten to contact commanding officers, enlisted supervisors, or others to gain leverage in a debt dispute with a servicemember. As a result, servicemembers may be pressured to pay the debt just to prevent disclosure of the debt collection issue to superiors.

The Servicemembers Civil Relief Act ("SCRA")[112] and counterpart state statutes offer important protections to servicemembers that may affect the terms of certain debts and the legal process by which debt collectors can pursue debts. These protections are "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). It is important that these protections are furthered, rather than hindered, through complementary rules in the debt collection context. Thus, the Attorneys General encourage the CFPB to implement debt collection rules that protect servicemembers from negative consequences unique to their service. Given the sacrifices they make for our country, they greatly deserve these protections.

A. Servicemember Information Transferred Between Debt Owners and Debt Buyers or Third-Party Collectors

The Attorneys General believe it is important that purchasers of debt be made aware of a consumer's status as a servicemember to the fullest extent possible. Servicemembers on active duty have rights under the SCRA and counterpart state statutes that may change the terms of their obligations. For example the SCRA caps interest rates and provides procedural protections with respect to foreclosures, default judgments, stays of proceedings, and other aspects of debt collection. Servicemembers who have been called to active duty may be stationed far from home, so it is critically important to ensure that they receive actual notice that an obligation has been transferred to a debt buyer or third party collector. With proper notice, servicemembers may be more likely to recognize future communications from the third-party collector and be in a better position to assess the legitimacy of the debt collector's claims.

The Attorneys General strongly recommend that debt collection rules require a consumer's status as a servicemember be communicated to debt buyers or third-party collectors prior to the transfer of a servicemember's debt. Any benefit or protection that the servicemember was receiving based on military status should be recognized by the new debt collector, and the transferor should provide the purchaser or debt collector with any information in the transferor's possession that suggests that the consumer is or may be in the active or reserve components of the armed forces. Notice of any transfer of debt must be provided to the servicemember by mail to both a servicemember's home and the servicemember's current location, if on active duty but not in combat, and no action should be taken in connection with collecting on a transferred debt within 90 days after such notice is initially provided.

112 50 U.S.C. App. §§501-597b.

B. Servicemember Debt Collection Communications

To the extent that debt collectors communicate with commanding officers, enlisted leaders, or other members of the command regarding debts of servicemembers, there are great risks to servicemembers. As previously stated, these communications can have a significant negative impact on a servicemember's status and security clearance.

Unscrupulous lenders and debt collectors are aware of the UCMJ's requirement that servicemembers honor their debts, repay their debts and maintain respectable finances, and unscrupulous lenders may use this to gain leverage over a servicemember in a debt dispute. For example, the underlying debt may not even be accurate, but the servicemember may be pressured to resolve the debt in order to avoid being prosecuted under the UCMJ, or to avoid further contact between the debt collector and the commanding officer. Unscrupulous lenders may also contact military spouses to collect on debts that may not be accurate or even be owed knowing that such spouses will feel pressure to settle the debt because of the UCMJ. While only the military can revoke a security clearance or initiate a prosecution under the UCMJ, debt collectors have invoked the UCMJ as a high-pressure tactic, threatening to tell the servicemembers' superiors about a debt, to have their security clearance revoked under the UCMJ, or even to initiate a prosecution. Thus, additional regulation in this area with respect to servicemembers is more than just useful, it is necessary.

New rules should be promulgated that specifically address debt collectors' ability to use the UCMJ as a debt collection tool. Debt collectors should be prohibited from communicating to a servicemember that information about his or her debt will be disclosed to a commanding officer. Debt collectors should further be prohibited from invoking the UCMJ or threatening a servicemember's security clearance in order to obtain payment. Any such threat made by a debt collector to a servicemember should be a violation of the new Rules. To prevent the risk that contact with commanding officers will affect a servicemember's employment, and to lessen the likelihood that debt collectors would even threaten such contact to create leverage in a debt dispute, debt collectors should be prohibited from contacting commanding officers, even for the purpose of acquiring location information of a servicemember. Thus, creditors should be prohibited from requesting commanding officer contact information in credit applications, and credit applications should disclose to servicemember-borrowers that any attempt to collect such contact information from servicemembers is a violation of federal law.

C. Communications with Servicemembers at Unusual or Inconvenient Places

Currently, debt collectors are allowed to contact servicemembers in combat zones and qualified hazardous duty areas. When creditors contact servicemembers in these dangerous locations it distracts them from their duties.

The Attorneys General propose that combat zones and hazardous duty areas be designated as unusual and inconvenient areas. Any debt collector that contacts a third party in connection with a servicemember's debt shall be required to inquire as to whether that servicemember is in a combat zone or a qualified hazardous duty area. Where a debt collector has knowledge that a servicemember is in a combat zone or qualified hazardous duty area, the debt collector shall be required to treat these areas as unusual or inconvenient. The cost of designating combat zones and qualified hazardous duty areas as unusual or inconvenient is that a debt collector may be barred from contacting a servicemember-debtor for a period of months or years. However, any cost to the debt collector is outweighed by the benefit to the servicemember, the armed services, and the country as a whole, when servicemembers in dangerous locations are able to focus on their duties without interruption from creditors. Another potential cost is that debt collectors prohibited from contacting servicemember-debtors may become more aggressive in contacting the debtor's spouse or commanding officer. However, contacts with spouses and commanding officers are governed elsewhere in the rules, and the benefits of permitting servicemembers to perform their jobs uninterrupted outweigh these costs.

D. The Servicemembers Civil Relief Act

There are many benefits to requiring debt collectors to disclose information about rights related to debts subject to the SCRA and counterpart state laws to a consumer, the consumer's spouse, and their dependents. Obviously, to the extent consumers or their families are unaware that they have rights under the SCRA or counterpart state laws, such disclosure has the benefit of making them aware and may lead them to seek legal assistance in connection with guaranteeing the protection of those rights. Also, requiring such disclosures ensures that the information playing field is even as between servicemembers and debt collectors and thus promotes fairness.

The Attorneys General propose that credit applications for servicemembers and debt collection written communications should disclose that the SCRA and counterpart state statutes apply to certain debts. Further, statements made by debt collectors to servicemembers, their spouses, or their dependents should not misstate a servicemember's rights under the SCRA, or be misleading as to a servicemember's rights under the SCRA. To the extent debt collectors misinform servicemembers or their families about their rights under the SCRA, such practices should be deemed false or misleading representations under Section 807 of the FDCPA.

XI. CONCLUSION

The Attorneys General thank the CFPB for providing an opportunity to comment in this incredibly important and pertinent area. As detailed above, the Attorneys General strongly support the creation of comprehensive and balanced debt collection rules that provide robust protections for consumers.

Respectfully Submitted,

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