TESTIMONY OF
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BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
UNITES STATES HOUSE OF R E P R E S E N T A T I V E S

AT A HEARING ENTITLED,
"EXAMINING LEGISLATION TO PROTECT CONSUMER AND SMALL BUSINESS OWNERS FROM ABUSIVE DEBT COLLECTION PRACTICES"

SEPTEMBER 26, 2019

Testimony of Sarah J. Auchterlonie
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Before the

Committee on Financial Services
United States House of Representatives

at a hearing entitled,

"Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices"

September 26, 2019

Chairwoman Waters, Ranking Member McHenry, and Committee Members:

Thank you for the opportunity today to discuss the work of the accounts receivable management ("ARM Industry") in the consumer and small business marketplaces. The time is ripe for this august body to consider the need to modernize the statutory landscape concerning accounts receivable management. New communication technologies, the increasing amount of unpaid consumer debt, and the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau") pending Regulation F rulemaking to implement the Fair Debt Collection Practices Act ("FDCPA") provide the opportunity for you to consider the important balance of policies concerning debt collection in the U.S.

The Bureau's proposed Regulation F will be the first of its kind since the FDCPA was enacted in 1977. Accordingly, the CFPB's proposal will shape the future of the industry and the larger economy. Members of the ARM industry have long sought clarity surrounding the use of new technologies, including several that are now decades old—like voicemail, that have altered how consumers communicate. Consumers have also indicated preferences for being contacted in more convenient ways, through newer communication channels such as email. Small businesses and creditors also need clarity on their rights for payment as they continue to serve their communities across the country by providing goods and services and employ millions of Americans.

I am a regulatory relations advisor to the Association of Credit and Collection Professionals ("ACA International" or "ACA") and a shareholder in the Denver office of the law firm Brownstein Hyatt Farber Schreck. I was previously an attorney with the U.S. Department of the Treasury's Office of Thrift Supervision (OTS) and later was a founding employee and Acting Deputy Enforcement Director with the Bureau of Consumer Financial Protection's Office of Enforcement. In that capacity, I led a team of enforcement attorneys in the investigation and litigation of matters involving the federal consumer financial protection laws. My notable work includes handling the CFPB's first administrative proceeding and appeal to the bureau director, *In the Matter of PHH Corp*., as well as Equal Credit Opportunity Act (ECOA) settlements with mortgage lenders, Fair Credit Reporting Act (FCRA) investigations of lenders and credit reporting agencies, and FDCPA matters with debt collection firms.

After leaving the Bureau to move to Denver, Colorado in 2015, I co-authored the legal treatise, *Consumer Finance Law and Compliance* (bna 2017). Two governors of the state of Colorado have appointed me to represent the citizens of the state at-large on the Colorado Banking Board, the policy and rulemaking body governing the state's banking system. In addition, I have advised the start-up or acquisition of dozens of financial technology companies, each with unique regulatory, compliance, and licensing requirements. I represent both consumers and companies in litigation involving consumer finance issues. Finally, I have helped several American Indian tribal governments to build and expand their consumer financial protection regulation, supervision, and enforcement regulatory agencies.

Most saliently for today's purposes, I consulted with ACA to draft its 154-page comment letter and criticisms of the CFPB's Proposed Regulation F concerning debt collection.[1]

EXECUTIVE SUMMARY

Overall, the Bureau's efforts in Proposed Regulation F will resolve ambiguities in the FDCPA and help create uniform national standards. After more than seven years of work on this rule, throughout two Administrations, the Bureau's proposal

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[1] Comments of ACA International on CFPB Proposed Regulation F, available at https://www.acainternational.org/assets/advocacy-resources/aca-comment-cfpb-reg-f-9.17.19.pdf (Sep. 17, 2019).

addresses both consumer and industry concerns by providing transparency to consumers seeking to understand their rights under the law, and provides guidance to help avoid benign technical errors that can lead to frivolous litigation. The limited content message in the proposal is a common-sense solution for both consumers and industry to address a statutory catch-22, which has harmed the ability to leave voicemail messages, increased call volumes, and has warranted regulatory guidance for several decades. The Bureau's efforts also provide clarity to the practice of sending electronic communications. Furthermore, the proposal for a model validation notice to address the plethora of ambiguities in FDCPA §809 concerning the validation of debts is also a step in the right direction toward providing some important clarifications.

Efforts to delay or eliminate conversations between consumers and creditors' collection agents do not help consumers. Rather, preventing communication about collection options will enhance consumer harm by increasing incentives for creditors to file collection suits because they are stymied in their ability to settle debts outside of court.

- **Clear and Plain Language Communication is Best for Consumers and Industry.** Despite the offensive rhetoric of certain interest groups, the accounts receivable management industry is a "caring" profession. The industry is majority female—27 percent of collection agencies are woman-owned, and women comprise 70 percent of the total collections workforce. Further, the ARM industry represents a diverse segment of the United States across a broad range of sociodemographic groups.[2]

  The individuals who contact consumers about debts want to help consumers find the best possible solution to their debt that allows those consumers to continue to access credit and services in the future. Empathy and understanding are key components of these conversations. But fear of plaintiff's litigation and the "overshadowing" doctrine force collection agencies to use stiff and confusing statutory language that consumers deem intimidating. Any efforts to update debt collection should allow (and protect from vexation litigation) collection firms

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[2] ACA, SMALL BUSINESS IN THE COLLECTIONS INDUSTRY IN 2019, (ACA International White Paper April 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-wp-smallbusiness-2019-002.pdf

to use clear and plain language so they can provide better customer service to consumers.

- **The U.S. economy depends on collected debt**. Debt collection returned $67.6 billion of funds in 2016 to US businesses—that's an average savings of $579 for every American household. Laws and regulations should not incentivize consumers to shirk legal and valid debts at the expense of honest businesses and other consumers seeking affordable credit. Small and medium-sized business owners and their employees will stop providing services in advance of payment if collections become less certain.

- **To have a functioning credit-based economy in the United States, consumers have some responsibility to pay their debts and to participate in the discussions about how to pay them.** Consumers benefit when they take part in the process of resolving debt. Through open communications, they can obtain the best results by working out payment plans, fee waivers, identify other parties responsible for paying the debt, or even defer payments if they are facing a hardship or are truly unable to afford to repay the debt. The ability to collect on unpaid debt is an important part of a functioning economy and a safe and sound banking system. The work of the ARM Industry has proven to keep the price of credit more affordable for consumers and has allowed creditors to continue to lend.

- **The CFPB's Complaint Database Data Paints an Inaccurate Portrait of the Accounts Receivable Management industry.** The Bureau and organizations connected to plaintiffs' litigation refer to complaint data about the accounts receivable management industry to justify new interventions. However, the Bureau's complaint data is not designed to be irrefutable or read without context. The most troubling aspects of using the complaint database to make broad or generalized conclusions are: (1) the Bureau has a broad definition of a complaint, (2) the Bureau does not verify the accuracy of the complaints it receives, and (3) that the number of complaints versus the number of overall contacts are not standardized. Notably, debt collection complaints account for only 0.005% of all consumer contacts made in a given year by the accounts receivable management industry.

ABOUT THE ARM INDUSTRY

The ARM industry includes the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of debt collection companies, however, are small businesses. According to a recent survey, 44 percent of polled organizations (831 companies) have fewer than nine employees. About 85 percent (1,624 companies) have 49 or fewer employees and 93 percent (1,784) have 99 or fewer employees.

As part of the process of attempting to recover outstanding payments, collection firms are an extension of every community's businesses. they work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of the ARM industry has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

> In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the

> price and reduce the supply of lending to all consumers, especially higher-risk borrowers.[3]

In short, consumer harm can result in several ways when unpaid debt is not addressed, and the ARM industry works to help consumers understand their financial situation and what can be done to address it and improve it.

The debt collection market is extremely varied in the types of debts being collected and the nature and size of the accounts receivable management industry encompasses a broad scope. Although the credit and collections industry comprises a relatively small space in the entire consumer financial services arena, the client base serviced by industry members is highly diverse, from large corporations to local Main Street service providers — all of whom have a vested interest in customer retention, particularly in the case of small business creditors.

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[3] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, MERCATUS WORKING PAPER, MERCATUS CTR AT GEORGE MASON UNIV., at 47 (Sep. 2015), *available at* https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf.

I. INTRODUCTION

Congress enacted the FDCPA in 1977 to protect consumers from abusive, threatening, and unfair collection practices. At the time, abuses that needed to be curbed included: intimidation by individuals claiming to be part of the debt collection profession, threats of imprisonment, publication of debtor lists in local newspapers, repeated harassment, the placement of hundreds of telephone calls to consumers (often at work or in the middle of the night), as well as blatant misrepresentations to consumers regarding their debt and the creditor's legal recourses.

The most outrageous actions referenced above are extreme exceptions. Dialing technology, creditor's increased focus on the customer-service aspects of collections, and the professionalization of the collections industry has made these situations extremely rare. In today's world with a severely outdated FDCPA, despite some bad actors that are present in every industry and every profession, rarely does a case involve actual damages or serious harm to a consumer. Egregious violations are increasingly rare, and the industry has worked with the Bureau to identify bad actors and has applauded its enforcement actions against them.[4]

Although the legislative history of the FDCPA included a call for it to be revisited and modernized as appropriate, the law has not been significantly updated or modernized since that time more than 40 years ago. As a result, where regulatory uncertainty exists within the statute, the judicial arm, charged with interpreting and applying the FDCPA, has rendered a legal patchwork of federal and state case law that is highly inconsistent among jurisdictions.

A. Significant Ambiguities in the FDCPA cause Unnecessary Litigation.

There are nearly 12,000 annual plaintiff litigation filings under the FDCPA. Also, the threat of FDCPA filings imposes significant costs for the accounts receivable management industry (see, 84 FR at 23370). Most notably, given the mechanical language and requirements under the FDCPA, self-described "consumer protection"

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[4] ACA International, *CFPB Alleges Large Credit Repair Companies Violated Consumer Laws* (May 2, 2019), available at https://www.acainternational.org/news/cfpb-alleges-large-credit-repair-companies-violated-consumer-laws.

attorneys have generated unnecessary litigation based on technical, inconsequential, non-abusive violations.[5] Many consumer attorneys throughout the country coordinate with their clients to call collectors with the intent of eliciting a response that will form the basis of an FDCPA suit.

These attorneys burden collection agencies (which as noted are often small businesses)[6] with demands for tens of thousands of dollars to resolve claims arising from hyper-technical violations of the law. Moreover, they and their clients openly invoke the FDCPA as a pretext for avoiding the repayment of lawful debt. Some attorneys even use the FDCPA to drive their bankruptcy law practices. Many go so far as to search public court databases for newly filed collection actions to recruit new clients. Most importantly, these attorneys thrive on the mere threat of litigation, knowing that most agencies will pay $5,000 to settle a frivolous case instead of spending $50,000 to successfully defend one.

Notably, the FDCPA does not require consumers to show that a debt collector's misconduct was intentional. *See, e.g., Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct to be entitled to damages."); *Beuter v. Canyon State Prof 'l Servs., Inc.*, 261 F. App'x 14, 15 (9th Cir. 2007) (holding that the FDCPA imposes strict liability on debt collectors and that they "are liable for even unintentional violations of the FDCPA"). Likewise, the FDCPA incentivizes consumers and their attorneys to diligently monitor the accounts receivable management industry's behavior by allowing the recovery of "any actual damage," statutory damages up to $1,000, as well as the consumers' attorney's fees and costs. 15 U.S.C. § 1692k.

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[5] *See, e.g.*, *Anenkova*, 201 F.Supp.3d at 636-39 (granting summary judgment against plaintiff who sued a debt collector because a barcode was visible on the envelope); *McShann v. v. Northland Grp., Inc.*, Case No. 15-00314-CV-W-GAF, 2015 WL 8097650 (W.D. Mo. Dec. 1, 2015) (granting a motion to dismiss where a plaintiff sued because a demand letter with a "window" displayed the plaintiff's name, address, and account number); *Simmons v. Med-I-Claims*, No. 06-1155, 2007 WL 486879, at *9 (C.D. Ill. Feb. 9, 2007) (granting summary judgment where plaintiff sued because the return address listed in the envelope was listed for "Med-I-Claims" instead of "Med-I-Claims Services Inc."); *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1466 (C.D. Ca. 1991) (rejecting plaintiff's argument that debt collector violated FDCPA by including in an envelope language like "PERSONAL & CONFIDENTIAL" and "Forwarding and Address Correction Requested.").

[6] ACA, SMALL BUSINESS IN THE COLLECTIONS INDUSTRY IN 2019 (ACA International White Paper April 2019), available at https://www.acainternational.org/assets/advocacy-resources/aca-wp-smallbusiness-2019-002.pdf.

B. Courts have developed FDCPA "Policy" without the Benefit of Regulatory Tools

Courts have created their own unintended consequences with their interpretations of the FDCPA over the last 40 years of litigation. Judicial constructs like the least sophisticated consumer are nowhere in the FDCPA text.[7] Likewise, courts made up the doctrine of "overshadowing," which is now being used to attack anything that deviates from mechanical statutory language and that might be considered "congenial."[8] And, even when agencies utilize the FDCPA's statutory language, such as by including in their letters the validation notice language found in Section 1692g(a), they get penalized by courts. Indeed, courts have muddied the waters about how to describe "in writing" dispute requirements in *g notices (*despite the fact that the required language is spelled out in the FDCPA) and whether a collector can encourage a telephone call to dispute or ask questions.[9] These and other judicial rewrites to the FDCPA have effectively promulgated rules and regulations with no notice, no opportunity to comment, and no coherent public policy to balance the costs and benefits of the rulings.

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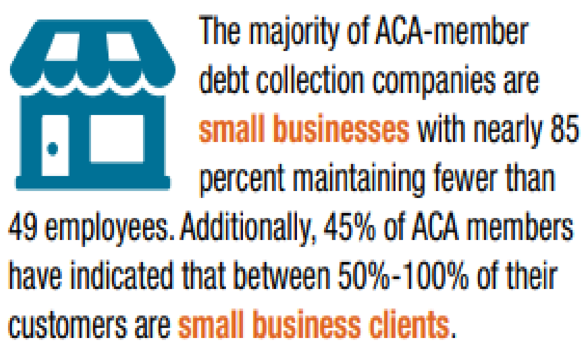
[7] *See Lait v. Medical Data Systems, Inc.*, No. 18-12255, 2018 WL 5881522, at *1-2 (11th Cir. Nov. 9, 2018) (noting the decisions of different courts on whether to apply the least sophisticated debtor standard in different provisions of the FDCPA).

[8] *See, e.g.*, *Gruber v. Creditors' Prot. Servs., Inc.*, 742 F.3d 271 (7th Cir. 2014) (affirming dismissal of the claim that the statement immediately preceding the § 1692g(a) disclosure that "[w]e believe you want to pay your just debt" overshadowed and was otherwise inconsistent with the verification disclosure because the statement does not contradict any of the required disclosure and instead is merely "a congenial introduction to the verification notice and is best characterized as 'puffing'.")

[9] *Hooks v. Forman Holt Eliades & Ravin L.L.C.*, 717 F.3d 282 (2d Cir. 2013) (holding that a verification notice violated the FDCPA by stating that the consumer must dispute the debt in writing); *Riggs v. Prober & Raphael*, 681 F.3d 1097 (9th Cir. 2012) (stating that "[w]e have previously held that a collection letter, called a 'validation notice' or 'Dunning letter,' violates § 1692g(a)(3) of the FDCPA 'insofar as it state[s] that [the consumer's] disputes must be made in writing.'") c*ompared to Caprio v. Healthcare Revenue Recovery Group*, L.L.C., 709 F.3d 142 (3d Cir. 2013) (letter containing the § 1692g verification notice was deceptive in that it urged the consumer to telephone the debt collector if the consumer felt he did not owe the amount claimed by the collector, when telephoning would not entitle the consumer to the verification of the debt if the consumer disputed the debt in writing. "More is required than the mere inclusion of the statutory debt validation notice in the debt collection letter—the required notice must also be conveyed effectively to the debtor. . . . More importantly for present purposes, the notice must not be overshadowed or contradicted by accompanying messages from the debt collector.")

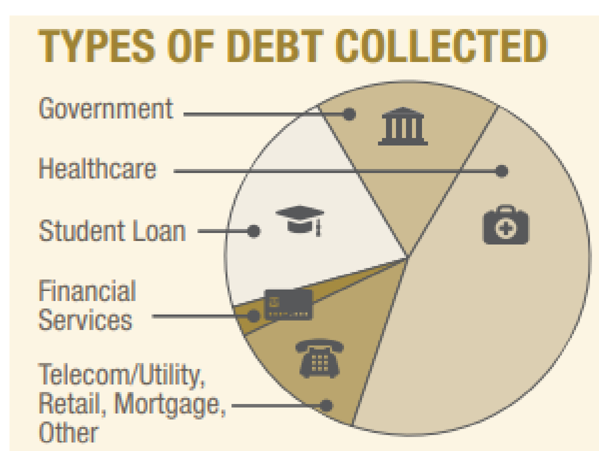
Lawmaking should provide clarity and safe harbors that allow collectors to use plain language and interpretations where ambiguity has created differences between courts and circuits. Stifling communication and allowing outdated precedent to continue to govern the marketplace is not the answer to consumer protection, and alternatively has led to consumer harm.

II. REGULATORY OVERREACH PARTICULARLY HARMS MEDICAL CARE PROVIDERS, GOVERNMENT AND SMALL BUSINESSES



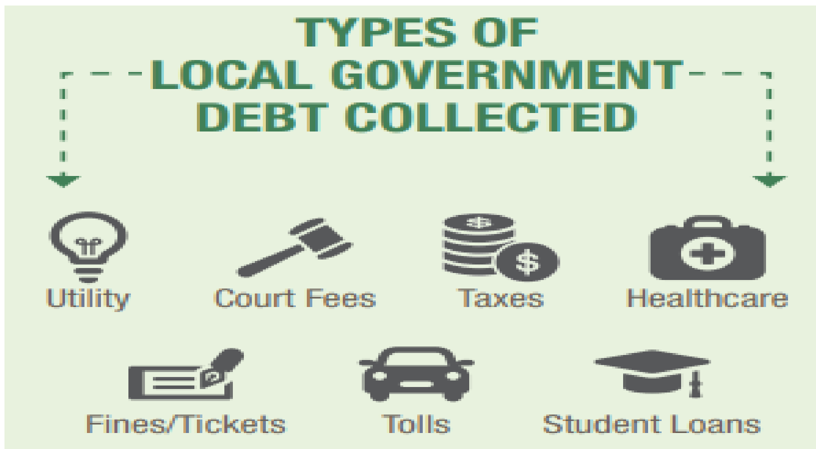
Raising barriers for essential service providers—like healthcare providers, pest control companies, or car mechanics—to collect past due accounts has serious consequences to society.

There is a collective "speed bump" effect when regulations slow or impede contacts with consumers. These impossible speed bumps will decrease meaningful consumer communication, which will drive creditors to litigation and ultimately harm the ability of consumers to access credit and services.



Most of the accounts receivable management industry collects debt owed to medical providers or small and mid-sized companies. Financial services firms make up only about 10% of total debt collections activities. Health care related debt (from hospitals and non-hospitals) is the leading debt category collected by debt collection professionals, accounting for nearly 47% of all debt collected in the industry, followed by student loan debt, which makes up 21% of all debt collected. Government-related debt makes up 16% of all debt collected, while credit card, retail, telecom, utility, mortgage, and other debt each make up less than 10% all of debt collected.[10]

Government-related debt collection (16% of all debt collected) fuels American communities. This includes local government utility services, court fees, traffic tickets, tolls, and state-issued student loans.

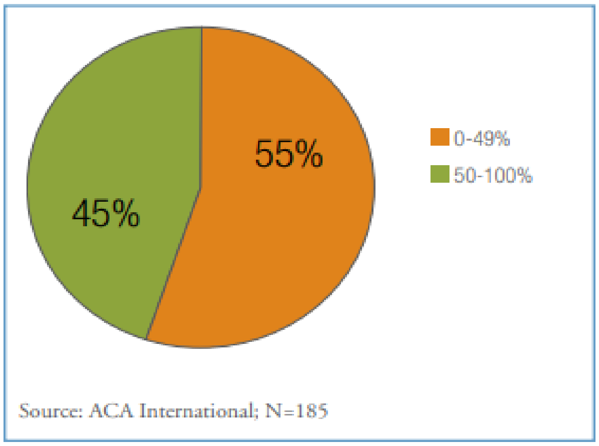


A significant majority of small businesses that rely on collection agencies (e.g., dentists, plumbers, lawn care, pest control, or heating/cooling repair companies) are not financial services businesses. They have trades or professions that require their personal time and attention. As such, hiring an ARM company to manage their uncollected receivables is necessary to keep their business operating, pay their employees, and continue to provide services.

Over 45% of ACA members indicated that between 50%-100% of their customers are small business clients.

[10] *Cf.* CONSUMER FINANCIAL PROTECTION BUREAU, MARKET SNAPSHOT: THIRD-PARTY DEBT COLLECTIONS TRADELINE REPORTING 5 (July 2019) (stating that "[m]edical debt accounted for 58 percent of total third-party collections tradelines in Q2 2018" and "[m]ore than three out of four (78 percent) total third-party debt collections tradelines were for medical, telecommunications, or utilities debt in Q2 2018]," available at: https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.

Figure 3. Percentage of Member Responses to the Question "What percentage of your business serves small business clients?"



Notably, laws and regulations that impact how much and how quickly debt is collected directly impacts the services provided by these medical, government, and small business creditors. Any policy discussions must consistently keep the important work of these economic participants in mind.

III. RELIANCE ON CFPB COMPLAINT DATA OFTEN LACKS RIGOR

We caution this Committee and its staff to probe with skepticism statements and conclusions based only on counts of consumer complaints in the CFPB database. For the reasons below, fully described in an industry White Paper, [11] neither Congress nor the CFPB should not be relying on its complaint data as an accurate portrayal of the industry when formulating rules and laws.

- Debt collection complaints account for only 0.005% of all consumer contacts made in a given year by the accounts receivable management industry.
- 84% of debt collection complaints are closed "with explanation."
- The Bureau's broad definition of a complaint sweeps in mere inquiries or unhappiness that a debt is owed.
- The Bureau fails to verify the accuracy of the complaints it receives before including the complaint in its counts.
- The Bureau does not differentiate between contacts vs. complaints.
- Many complaints address issues that are not fundamentally about the collection firm. For example, a consumer may submit a complaint that his or her insurance company should have paid a medical bill or that the debt was a result of identity theft.

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[11] ACA, A REVIEW OF DEBT COLLECTION COMPLAINTS SUBMITTED TO THE BUREAU OF CONSUMER FINANCIAL PROTECTION'S COMPLAINT DATABASE IN THE FIRST HALF OF 2018, 2-7 (ACA International White Paper November 2018), available at https://www.acainternational.org/news/aca-releases-new-white-paper-reviewing-debt-collection-complaints.

A. Legitimate Disputes Comprise Less than ½ Percent of All Accounts

ACA conducted a macro analysis of its members' dispute data and determined that only 0.15% of disputed accounts have a basis in fact. These legitimate disputes comprise less than 4.5% of all disputes submitted. And, of those legitimate disputes, 69% were valid because the borrower paid the debt in full prior to the collection agency making its initial contact. This is a time-lag problem, not a compliance issue.

					"Legitimate" Disputes		
	Total Accts.	Total Disputes	Duplicative Dispute	Validated Acct. or Duplicative Dispute	Error/No media	Acct. Paid in Full	TOTAL
Total	2,263,845.	77,124	15,463	74,487	1,049	2,343	3,392
OF Total Disputes		3.41%	20.05%	96.58%	1.36%	3.04%	4.40%
OF Total Accts.	.	3.41%	0.683%	99.850%	0.046%	0.103%	0.150%
Of "Legit." Disputes					30.9%	69.1%	100.0%

* Duplicative disputes are defined somewhat consistent with NPRM §1006.38(a)(1) as: a dispute submitted by the consumer in writing that is substantially the same as a dispute previously submitted by the consumer in writing for which debt collectors already has satisfied the requirements of paragraph (d)(2)(i). Many collection agencies record and respond to disputes outside the validation period for customer service purposes.

Conclusion

In fact, from a 2018 and 2019 sample set of over 2.2 million accounts, ACA determined that the data supporting collections on those accounts is accurate over 99.85 percent of the time.

This study provides three key takeaways:

- **Anecdotes that indicates malfeasance by the ARM industry are dramatically inflated when compared to actual data.**

- **Concerns about consumers not exercising their right to dispute debts are unfounded, as invalid accounts are very rare.**

- **Duplicate disputes comprise over 20 percent of all disputes.**

IV. DATA FROM STATE REGULATION ADVISES EXTREME LAWMAKING CAUTION

The Bureau must carefully balance new collections requirements with market incentives. For creditors, the alternative to debt collection is litigation. For many reasons, consumers who have breached credit contracts are much better off communicating privately with debt collectors than being sued by creditors in state or local courts:

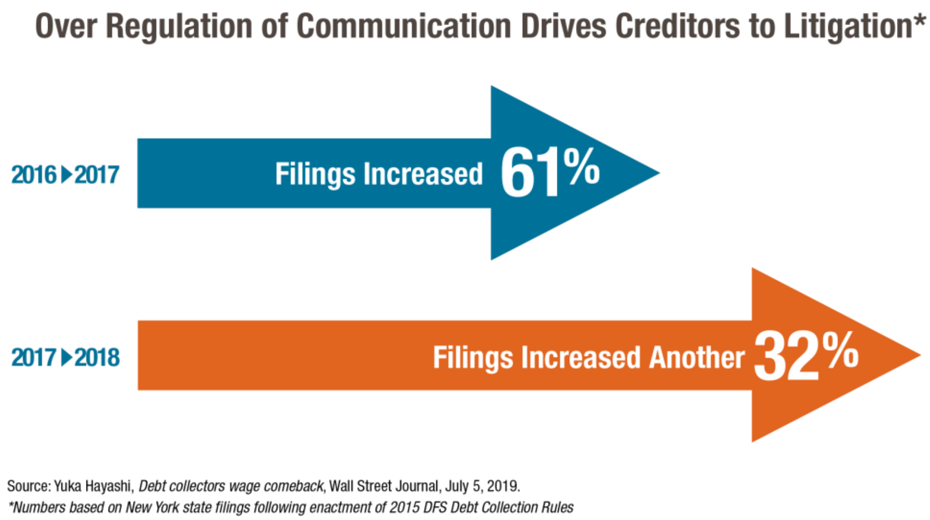
- Consumers must often pay attorneys' fees and costs of collections litigations,
- Consumers may lose chances to settle debt for less than face value, and
- When a lawsuit is filed in state or county court, the lawsuit filing, and defaulted debt becomes a matter of public record with all the attendant reputational harm.

Too much regulatory burden or frivolous plaintiffs' class action risk, however, negates the advantages of debt collection and will drive more creditors to elect litigation sooner or more frequently, particularly for certain riskier classes of debt.

Creditors prefer out-of-court resolution through debt collection because it usually is faster, predictable, is private, avoids attorney fees, and typically maintains the goodwill of the consumer. But where regulatory hurdles increase capital costs, on-going burdens, or regulatory risk, creditors and collection agencies may choose to file collections actions where notice pleading rules and medical information privacy rules are clear and a 100 percent recovery is more likely.

A. The 2015 New York DFS Debt Collection Rules Increased Collection Litigation by 93%

Following the enactment of new debt collection regulations in 2015, in New York State, collections lawsuit filings rose 32% in 2018 and 61% in 2017 from pre-2015 levels.[12] ACA believes that this is an overall bad outcome for consumers, and advises the Bureau to avoid tipping the trend toward litigation at a national level.



The New York Department of Financial Services issued regulations that took effect on March 3, 2015, except for certain provisions relating to itemization of the debt to be provided in initial disclosures and relating to substantiation of consumer debts, which were effective Aug. 3, 2015.

1. Itemization on Validation Notices

The DFS' regulations require that the validation notice or "g notice" contain a written notification that includes: (1) disclosure that debt collectors are prohibited from engaging in abusive, deceptive and unfair debt collection; (2) notice of the types of income that may not be taken to satisfy a debt; and (3) itemization similar to that proposed by the Bureau, *i.e.*, detailed account-level information, including the name of the original creditor and an itemization of the amount of the debt. That itemization must include the debt due as of charge-off, total amount of interest

[12] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019 (crediting New Economy Project, a consumer advocacy group).

accrued since charge-off, total amount of noninterest fees or charges accrued since charge-off and total amount of payments made since charge-off.[13]

2. Disclosures About Debts for Which the Statutes of Limitations May be Expired

The DFS rules also require certain disclosures about statutes of limitations if the debt collector "knows or has reason to know" that the statute of limitations has expired. This section also mandates that collection firms maintain "reasonable procedures" for determining whether the statute of limitations has expired.

3. Increased Substantiation of Consumer Debts

If a consumer disputes a debt, collection firms may treat the dispute as a request for substantiation or must provide instructions as to how to make a written request for substantiation of the debt. Collection firms must provide substantiation within 60 days of receiving a consumer's request and must cease collection efforts during that time.

DFS defined documentation required for substantiation as including either a copy of a judgment against the consumer or: (1) the signed contract or some other document provided to the alleged consumer while the account was active demonstrating that the debt was incurred by the consumer; (2) the charge-off account statement (or equivalent document) issued by the original creditor; (3) a description of the complete chain of title, including the date of each assignment, sale and transfer; and (4) records reflecting any prior settlement agreement reached under the regulations. Collection firms must retain all evidence of the request, including all documents provided in response, until the debt is discharged, sold or transferred.[14]

4. Debt Payment Procedures

If an agreement to a debt payment schedule or settlement is reached, the collection firm must provide written confirmation of the agreement and notice of exempt income. The collection firm must also provide a quarterly accounting statement while the consumer is making scheduled payments.

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[13] 23 NYCRR § 1.2(b)(2).

[14] 23 NYCRR § 1.4

5. Communication through Email Restricted

After mailing the initial required disclosures, debt collectors may communicate with a consumer through email upon receipt of consumer consent, provided the email account is not owned or provided by the consumer's employer.

B. Over-Regulation of Communications Drives Creditors to Litigation

In New York City courts, account collection filings in year 2017 rose 61% from 2016 levels. In 2018, account collection filings rose another 32% from 2017 levels.[15] Prior to the New York DFS rules, lawsuit filings to collect debts had declined for nearly a decade due to tougher court requirements imposed on collectors.[16]

ACA members explain the reasons for this:

- Creditors did not want to invest the money to update systems in order to provide the data required to meet the itemization requirements (Rule 1); lawsuit filings shift the document preparation burden to attorneys;

- The new substantiation requirements (Rule 3) were as burdensome as litigation document preparation, so debt collection and non-litigation based communications lost an advantage.

- Collectors who formerly used email in New York stopped because the risk was too high.

- Collectors who adopted email strategies across the U.S. did not adopt them in New York.

- Most debt collection agencies give consumers a discount on the debt. In contrast, the added cost of litigation discourages creditors from agreeing to the amount of discounts offered by a collection agency. In addition, creditors know they usually win judgments for the full amount further dissuading them from offering debt reductions or payment plans as favorable as accepted

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[15] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019.

[16] Yuka Hayashi, *Debt collectors wage comeback*, WALL STREET JOURNAL, July 5, 2019.

by collection agencies. As the conveniences of non-litigation-based debt collection decline, the recovery advantage of litigation will prevail.

V. ARM INDUSTRY VIEWS ON KEY ASPECTS OF THE BUREAU'S PROPOSED REGULATION F

A. The "Limited-Content Message" is an Essential Modernization of the FDCPA

ACA applauds the Bureau's proposed new term as it believes that the proposed limited-content message provides a uniform interpretation of the FDCPA that alleviates the need for collectors to decide between different circuit court opinions.

The Bureau has proposed to include, in § 1006.2(j), a new term, "limited-content message."

> (j) *Limited-content message* means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.
>
> (1) *Required content*. A limited-content message is a message for a consumer that includes all of the following: (i) The consumer's name; (ii) A request that the consumer reply to the message; (iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; (iv) A telephone number that the consumer can use to reply to the debt collector, and (v) If applicable, the disclosure required by § 1006.6(e).
>
> (2) *Optional content*. In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following: (i) A salutation; (ii) The date and time of the message; (iii) A generic statement that the message relates to an account; and (iv) Suggested dates and times for the consumer to reply to the message.

1. *When it comes to leaving messages, the FDCPA lacks clarity and is in desperate need of interpretation.*

The FDCPA was drafted before voicemail existed and is ambiguous about how one can simultaneously comply with its provisions when leaving a voice message. As currently defined in the FDCPA, a communication "means the conveying of information regarding a debt directly or indirectly to any person through any medium."[17] The FDCPA is clear in Section 805(b) that a debt collector may not communicate with a person other than the consumer in connection with the collection of any debt, with certain exceptions. Yet, in Section 807(11) the FDCPA requires that a debt collector identify itself as a debt collector, inform the consumer that the debt collector is attempting to collect a debt, and that any information obtained will be used for that purpose. Since the passage of the FDCPA there has been uncertainty surrounding the intersection of these two provisions in the FDCPA because if a debt collector leaves such disclosures on a voicemail or other message system, they risk violating the prohibition against revealing information about a debt owed by a consumer to a third party. This has led to some debt collectors deciding not to leave messages at all and instead hanging up when reaching a voicemail.

In the NPRM, the CFPB has identified that consumers are frustrated when a collector calls and doesn't leave a voicemail. The CFPB's proposed definition of a limited content message attempts to resolve both sides of this equation. It provides a method whereby debt collectors may leave a message for a consumer and not risk violating the statute, which would reduce the number of calls a debt collector would need to make to reach the consumer and resolve the outstanding debt.

There currently is a split among circuits about how collectors should leave recorded or live messages.[18] Additionally, as noted in the NPRM, the FTC and the U.S. Government Accountability Office have previously identified the need to clarify a

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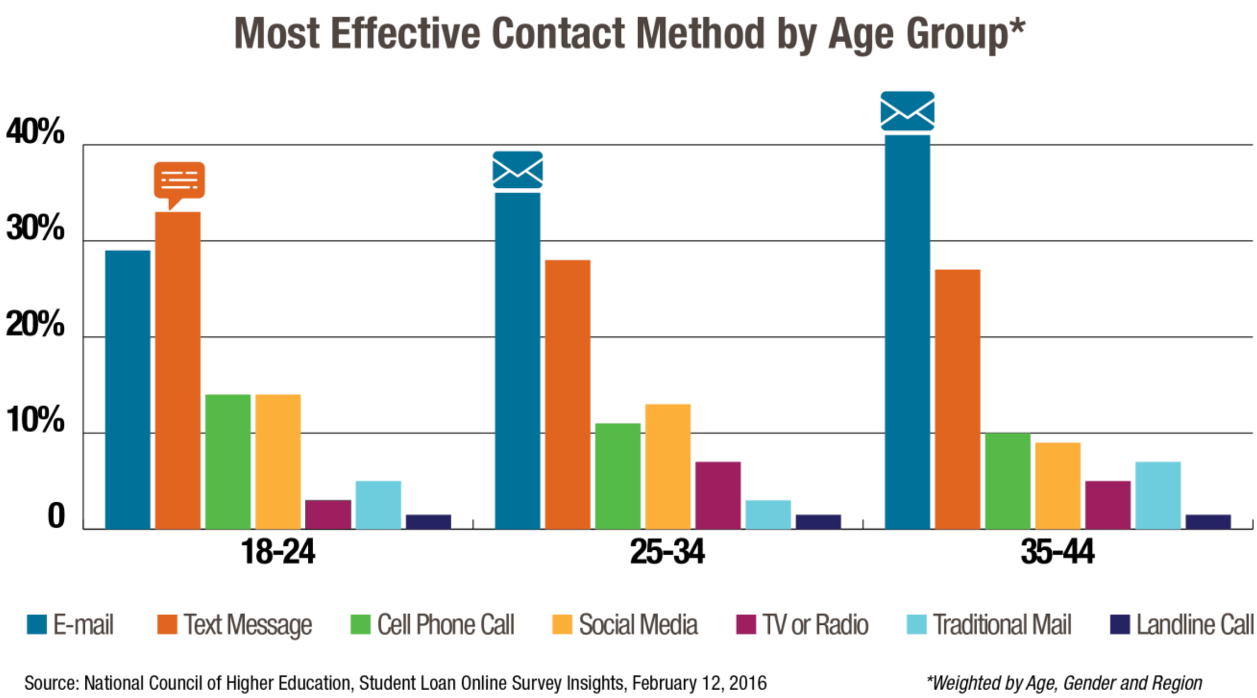
[17] 15 U.S.C. § 1692b(2)

[18] *Compare Foti v. NCO Fin'l Sys's, Inc.*, 424 F.Supp.2d 643 (S.D.N.Y. 2006) (holding that a pre-recorded message stating "calling . . . regarding a personal business matter" was a "communication" under the FDCPA) *with Zortman v. J.C. Christensen & Associates, Inc.*, 870 F.Supp.2d 694 (D. Minn. 2012) (holding that voicemail stating "[t]his is a call from a debt collector" was not a third-party communication violating the FDCPA).

debt collectors' ability to leave voicemail messages for consumers.[19] Moreover, the CFPB noted that the SBREFA process demonstrated overwhelming support from small business representatives for a rule that clarified a debt collector's ability to leave a message for a consumer.[20]Reasonable minds differ on how to interpret the FDCPA. This area is ripe for agency rulemaking under the *Chevron* factors.[21]

B. Consumers prefer Email and Text Message Communications

Abundant evidence supports the benefits of increased email use in debt collection communications. Consumers prefer email. Borrowers in all age groups, 18-24, 25-34 and 35-44, indicate that email is one of the most desired and effective method of communication.[22]



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[19] *See* NPRM, at 61; *see id.* at 61, fns. 176 & 177.

[20] *See id.* at 67, fn. 179.

[21] *See* Infra Section IV.B.

[22] NATIONAL COUNCIL OF HIGHER EDUCATION LOAN RESOURCES (NCHER), STUDENT LOAN ONLINE SURVEY RESULTS (February 12, 2016), available at https://cdn.ymaws.com/www.ncher.us/resource/resmgr/NCHER_Poll/01_NCHER_Survey_Insights.pdf

In a study by Katabat Digital Collections platform worldwide, collection firms deploying its digital collections platform saw a 33% increase in customer satisfaction measured by net promoter score. Email reduces telephone calls and costs to agencies. In that same study, digital self-service and reduced outbound calls cut telephone-related charges 7%.

These results make intuitive sense. Email is more likely to be read than U.S. mail, which means consumers are more likely to be informed of their rights. Email is passive and non-intrusive. Email is less likely to be opened by someone other than the addressee. Email moves with consumers when they change residences, thus avoiding "location" calls that increase third-party contacts. Email is superior to regular U.S. mail in many respects.

Approximately 15% of ACA's membership surveyed in 2017 communicated through email. The relatively low percentage of email use is primarily due to concerns about liability. However, according to one debt collection firm that specializes in electronic collections, "Email response rates in the debt collection process are better than the industry average for any email communication," finding that up to 68% of consumers will open an email, ultimately leading to 55% clicking the link provided, and over 32% initiating payment.[23] Email significantly expands the potential for the debt to get resolved prior to initiating more time-consuming means of collection and credit reporting.

In Proposed Regulation F, the consumer retains control of communication methods. Both proposed §1006.6(e) and §1006.6(c)(1)(ii) permit the consumer to electronically notify the collector to cease communications through a particular media. The consumer may ensure that the collector does not use a non-preferred address or phone number for further communications through opting out of communications using the email address or phone number after receiving the notice in proposed §1006.6(d)(3)(i)(B)(1), or through opting out of further electronic communications per proposed §1006.6(e). Moreover, the consumer can effectively prevent use of a work email or phone number for debt communications by simply not providing that information to the original creditor.[24] The Bureau itself recognizes, the consumer

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[23] True Accord, *Debt Collection The new frontier in financial services digitization,* available at www.trueaccord.com/resources/downloads.

[24] ACA recognizes that this may entail requiring original creditors to clearly and conspicuously disclose that contact information may be used to communicate regarding payment.

has better information about the risk of third party disclosure with a particular email address or phone number. [25] Contact information on credit applications is obviously provided so the consumer can be contacted about the account. Interfering in that basic understanding will cause more harm than good.

C. Numerical Call Frequency Limitations do not Help Consumers

The FDCPA §806(5) limits repetitive calls made with the "intent" to harass, annoy, or abuse. However, limiting contact between consumers and collectors turns "early out" debt into "bad debt" and increases the potential for litigation. Nearly 1/3 of collection contacts resolve the debt within 90 days. Once an account ages past 90 days, it is more likely to be considered for legal collections. As discussed above, collection lawsuits are the least desirable outcome for the consumer. Lawmaking must consider the risk and likelihood that limiting constructive communications to resolve debts will increase litigation[26]—a result that causes harms the FDCPA meant to prevent and is therefore manifestly contrary to the statute.[27]

<u>Frequency limits increase the cost and length of time to resolve debts</u>

The Bureau must consider the economic effects of a proposed rule.[28] A decrease in direct contact between consumers and collection firms will cause an increase in alternative contacts (letters, texts, emails, etc.), and ultimately increase costs and the length of time it takes to resolve a debt. Professionals in the field and common sense predict increased costs to the industry and reduced effectiveness in reaching

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[25] NPRM at 100. Similarly, the consumer will have better information about whether his or her employer permits debt communications at work. *See* proposed §1006.6(b)(3).

[26] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 164, at 449 (5th ed. 2012); *See* AMERICAN BAR ASS'N, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 34 (2d ed. 2013).

[27] *Chevron*, 467 U.S. at 844 ("A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute.")

[28] *See* Exec. Order 12,866 § 3(f), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (stating that agencies must consider economic effects of proposed rule); *see also* LUBBERS, *supra* note 26, at 223, 476.

consumers due to the call limits. Moreover, the Bureau's own Calling Data study predicted the same impacts.[29]

2. The Prospect of "Unlimited Email and Text Messages" is a Chimera

The call-frequency limitation has been justified by the thought that the Bureau is now widening the doors to unlimited email and text messaging use. That is nonsense. Less than 15% of collectors use email now. It will be new to most, and it is expensive to implement, particularly for small businesses in the accounts receivable management industry.

Digital collection software needs to integrate with existing systems and strategies. Not every collector has the right setup, or the budget to switch technology. Implementing fully-functional software that operates with legacy systems and meets security requirements can be daunting. Deployments consume financial and human capital, tying up resources that small businesses may need elsewhere. Tasking a strategist and compliance officer to rebuild agent workflows from scratch for a digital debt collection solution may not be an option. In addition, this assumes that existing call center workforces can be trained to execute a digital strategy.

The cost for an email collections system is high and may exceed $80,000 in some cases. Since most accounts receivable management agencies are small (roughly 98 percent are small businesses as defined by the Small Business Administration), the estimated cost to small businesses just to invest in the technology (not training, lawyers, or compliance personnel) to create an email collections campaign is in the millions. Thus, lawmaking should not stifle certain modes of communication with consumers based on a hunch rather than known facts. It is also important to note that the CFPB's proposal includes an opt-out mechanism for email. This in conjunction with the time and resources spent to create a compliance program to send emails, make it unlikely that industry participants will use email in such a manner that pushes consumers to the point that they want to exercise their right to opt-out.

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[29] *See generally* CONSUMER FINANCIAL PROTECTION BUREAU, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS (July 2016), available at https://www.consumerfinance.gov/documents/755/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf; *see also* NPRM, at 370 (noting that "the proposed frequency limits could affect when and if [debt collectors] establish communication with consumers).

Similarly, the rhetoric about costly unlimited text messages likely being sent to consumers as a result of the CFPB's proposal is not based on fact and does not account for the complex compliance programs that must be created to even send a text message in the first place. Furthermore, the notion that text messages would come at a significant cost to consumers is not based on the reality of today's marketplace for telecommunications. With the widespread availability of unlimited call and text plans, the number of consumers who continue to pay for individual text messages is a very small segment of the marketplace and becoming even smaller each year. Notably, virtually all postpaid plans include unlimited texting.

D. Comments on §1006.34(C)(3)- Form Validation Notice.

The Bureau has proposed in Regulation F section 34 to create a standard form for the validation of debts as prescribed under the FDCPA Section 809 (15 U.S.C. 1692g), a form known colloquially as the "*g notice*" or "validation notice".[30] A single national standard is necessary to resolve the many inconsistent holdings across federal district and circuit courts regarding the contents and emphasis of disclosures on the *g notice*.

The Bureau's proposed model validation notice is a single page and is written in plain English. Further, the model validation notice was crafted after focus group copy testing, which found that the focus group understood and trusted sample validation forms that were written in "plain language" rather than those that used "statutory language" from the FDCPA.

Decades of inconsistent rulings, circuit splits, and court-created doctrines like "overshadowing" evidence the ambiguous construction of FDCPA §809.[31]

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[30] *See* NPRM, at 474 Proposed §1006.34(d)(2) ("*Safe harbor*. A debt collector who uses Model Form B–3 in appendix B of this part complies with the requirements of paragraphs (a)(1)(i) and (d)(1) of this section.")

[31] *See, e.g.*, *Caceres v. McCalla Raymer, L.L.C.*, 755 F.3d 1299, 1304, fn.5 (11th Cir. 2014) (recommending that debt collectors include the substance of § 1692g(c) (failure to dispute validity) in their validation notice).

VI. CONGRESS AND THE BUREAU MUST URGE THE FCC TO PROVIDE CLARITY ON THE DEFINITION OF WHAT IS CONSIDERED AN AUTODIALER

Congress provided the CFPB, not the FCC, with rulemaking and supervisory authority over the accounts receivable management industry. Yet the FCC is making policy decisions impacting the financial services industry without consulting with or working closely with the CFPB. The FCC's refusal to clarify onerous interpretations under the TCPA has a direct impact on whether agencies can develop compliance programs for sending text messages. The FCC's refusal to act is despite the fact that the D.C. Circuit recently struck down the FCC's 2015 Order and remanded key questions to it including asking it to define what is considered an autodialer.[32]

CONCLUSION

Congress, in the Dodd Frank Wall Street Reform and Consumer Protection Act charged the CFPB with considering "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from [rulemaking.]"[33] This wise direction should be a guiding light for any consideration of policies and law concerning debt collection.

The ARM Industry is an essential component of our consumer and small business credit system. A change to ARM requirements will impact creditors, consumers, and the availability of credit or essential services.

I appreciate the opportunity to provide you this testimony, which outlines the views of ACA, and look forward to continue working with you in future endeavors.

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[32] Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018).

[33] 12 U.S.C. § 5512(b)(2)(A)(i).