MAXINE WATERS, CA
CHAIRWOMAN

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

PATRICK MCHENRY, NC
RANKING MEMBER

November 7, 2019

Memorandum

To: Members of the Committee on Financial Services

From: FSC Majority Staff

Subject: November 13, 2019 Full Committee Markup

The Committee on Financial Services will meet to mark up the following measures, in an order to be determined by the Chairwoman, at 2:00 p.m. on Wednesday, November 13, 2019, and subsequent days if necessary, in room 2128 of the Rayburn House Office Building:

Amendment in the Nature of a Substitute to H.R. 2398, to amend the United States Housing Act of 1937 and title 38, United States Code, to expand eligibility for the HUD–VASH program, to direct the Secretary of Veterans Affairs to submit annual reports to the Committees on Veterans' Affairs of the Senate and House of Representatives regarding homeless veterans, and for other purposes . (Peters)

Summary: H.R. 2398 would expand eligibility for the Housing and Urban Development-Veterans Affairs Supportive Housing (HUD-VASH) program to homeless veterans who have received an "other than honorable" discharge. The Amendment in the Nature of a Substitute would make technical changes to the bill

Background: The HUD-VASH program serves veterans who are experiencing homelessness by combining case management services provided through a VA medical center with a HUD Housing Choice Voucher. Current law requires veterans to be eligible for VA medical benefits, including case management, to qualify for a HUD-VASH voucher. This requirement precludes veterans who received an "other than honorable" (OTH) discharge from receiving HUD-VASH benefits, since they do not qualify for VA medical benefits. An OTH discharge is not the same as a dishonorable discharge, which is a punitive discharge that is only handed down after a conviction at a general court-martial for serious offenses (e.g. desertion, murder, sexual assault, etc.). A servicemember can receive an OTH discharge for failing a drug test, lapses in military good order and discipline. With recent military conflicts in Iraq and Afghanistan, where service members have been repeatedly deployed overseas, more attention is being paid to the connection between OTH discharges and mental health disorders, that are the invisible wounds of war. In 2017, a Government Accountability Office report found that 62% of veterans separated from the military for misconduct had been diagnosed with a mental health disorder, including post-traumatic stress or traumatic brain injury.[1] Of those, 23% (or 13,283 service members) received an OTH discharge.

[1] Government Accountability Office, Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations (2017).

Studies have shown that veterans with OTH discharges are significantly more likely to experience homelessness than other veterans.[2] Specifically, roughly 5% of service members separating from the military receive an OTH discharge, but they comprise 25% of the total population of veterans experiencing homelessness.[3] H.R. 2398 would make homeless veterans who received an OTH discharge eligible to participate in the HUD-VASH program by amending current law to allow them to qualify for VA case management and HUD voucher assistance.

H.R. 2398 is supported by the National Alliance to End Homelessness, American Legion, Paralyzed Veterans of America, Veterans of Foreign Wars, AMVETS, National Coalition for Homeless Veterans, Community Solutions, and National Housing Law Project.

Amendment in the Nature of a Substitute (ANS) to H.R. 2445, the "Self-Employed Mortgage Access Act of 2019" (Foster)

Summary: H.R. 2445 would require the Consumer Financial Protection Bureau (CFPB) to amend its Ability-to-Repay/Qualified Mortgage (ATR/QM) regulations with regard to verifying a consumer's income and debt such that lenders could either continue to utilize the standards in Appendix Q, or utilize standards put forth by the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), or the Department of Agriculture's (USDA) Rural Housing Service. Lenders would also have the option to utilize the standards put forth by Fannie Mae, Freddie Mac, or a Federal Home Loan Bank (FHLB), subject to the approval of the Federal Housing Finance Agency (FHFA). The ANS adds language that requires the CFPB to consult with the relevant entity that issues such standards when issuing its own clarifications on the application of a particular guide or handbook for purposes of a creditor satisfying CFPB's ATR/QM rule.

Background: The Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Truth in Lending Act (TILA) to require lenders to determine that mortgage borrowers have a reasonable ability to repay the mortgages they receive. "Qualified mortgages" (QM) that meet certain requirements are presumed to meet such ability-to-repay requirements through either a safe harbor or, for certain higher-priced mortgages, a rebuttable presumption, meaning that if a creditor is challenged in court, the plaintiff would have to prove that one or more of the QM requirements was not met. Lenders have shown a preference for originating QM loans in order to obtain this presumption of compliance. CFPB regulations implement the statutory provisions governing QM loans, including Appendix Q, which provides standards for verifying monthly debt and income. Loans eligible for sale to Fannie Mae, Freddie Mac, or insurance from FHA, VA, or USDA are currently considered QM through what is known as the "QM Patch."[4]

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[2] Holliday & Pederson, The Association between Discharge Status, Mental Health, and Substance Misuse among Young Adult Veterans. Psychiatry Research (2018).

[3] Gundlapalli et al., Military Misconduct and Homelessness Among US Veterans Separated From Active Duty, 2001-2012. Journal of the American Medical Association (2015).

[4] According to CFPB regulations implementing the ATR/QM rule, the QM patch will expire in January 2021. The CFPB issued an Advance Notice of Proposed Rulemaking in July 2019 seeking feedback on the expiration of the QM patch and potential reforms, including with respect to Appendix Q. *See* CFPB, "Consumer Financial Protection Bureau Releases Qualified Mortgage ANPR," (Jul. 25, 2019), available at: https://www.consumerfinance.gov/about-us/newsroom/bureau-releases-qualified-mortgage-anpr/.

This bill responds to concerns that borrowers with non-traditional sources of income face barriers to homeownership under the current Appendix Q standards, including those who are self-employed, work in the gig economy, have rental income, or retiree income. Fannie Mae, Freddie Mac, FHA and other federal agencies have established more flexible standards to verify these nontraditional sources of income. For example, Appendix Q requires documentation of individual retirement account (IRA) income to be confirmed via tax return, requiring borrowers to wait until they can claim such income in their next tax return; by contrast, Fannie Mae and Freddie Mac allow such income to be verified by a former employer, copies of a retirement award letter, W2s, 1099s, or proof of current receipt. By allowing lenders to use these alternative methods to verify income, this bill is intended to provide flexibility to verify nontraditional sources of income in a way that leverages existing standards already in use that is authorized by other federal government agencies.

This bill is supported by the National Consumer Law Center and the Mortgage Bankers Association.

Amendment in the Nature of a Substitute to H.R. 3490, Small Business Lending Fairness Act (Velázquez)

Summary: The amendment in the nature of a substitute to H.R. 3490 would amend the Truth in Lending Act (TILA) to restrict the use of confessions of judgment for small business owners.

Background: A "confession of judgment" is defined as "a person's agreeing to the entry of judgment upon the occurrence or non-occurrence of an event, such as making a payment."[5] It is essentially an agreement by which a borrower agrees to an eventual judgment of liability against them, without normal due process protections such as notice, a hearing, and judicial review. For instance, merchant cash advance companies may require borrowers to sign a confession of judgment as a condition of receiving the cash advance. Oftentimes, these cash advances can cost the equivalent of 400 percent or more in annualized interest.[6] Once a borrower misses a payment or some other dispute arises between the borrower and lender, the lender sends the signed confession of judgment to a county clerk, who enters judgment against the borrower.[7] The lender then takes the judgment to the local marshal, who demands the money allegedly owed to the lender from the borrower's bank.[8] The lender then takes the money from the borrower's bank, with interest and fees added.[9] At this point, a borrower's account will usually be frozen, and in some cases despite a borrower's compliance with daily debt payments.

Some states outlawed these instruments in the middle of the 20th century, and the Federal Trade Commission (FTC) banned them for consumer loans in 1985 as part of a regulation known as the

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[5] Confession of judgment, Black's Law Dictionary 361 (Bryan A. Garner ed., 10th ed. 2014).

[6] Zachary R. Mider & Zeke Faux, New York Weighs Law to Crack Down on Predatory Loans With 400% Rates, Washington Post, June 18, 2019, https://www.washingtonpost.com/business/on-small-business/new-york-weighs- law-to-crack-down-on-predatory-loans-with-400percent-rates/2019/06/17/d08bf442-90e6-11e9-956a- 88c291ab5c38_story.html.

[7] Zachary R. Mider & Zeke Faux, Sign Here to Lose Everything - Part 1: "I Hereby Confess Judgment", Bloomberg, 2018, https://www.bloomberg.com/graphics/2018-confessions-of-judgment.

[8] *Id*.

[9] *Id*.

"Credit Practices Rule."[10] However, courts in numerous states, including New York, continue to recognize them for commercial loans.[11] This has effectively turned New York into a hub of processing confessions of judgment – in the first five months of 2019, merchant cash advance companies obtained more than 5,500 New York court judgments against borrowers, about the same monthly pace as in 2018.[12]

As discussed at a September 2019 Committee hearing,[13] small business loan borrowers do not enjoy the same protections individual consumers have under federal law. Furthermore, some small business loan terms include a confession of judgment. As a result of these agreements, the debt holder may collect on such a contract, plus damages, immediately after the borrower falls behind in their payments. Confessions of judgment often force a borrower to relinquish defenses that could be used in court, allowing the debt holders to receive a court order to force the financial institution of the debtor to withdraw funds, access the debtor's wages, or seize goods or property, all without the debtor's knowledge or consent.[14]

Amendment in the Nature of a Substitute to H.R. 3948, Debt Collection Practices Harmonization Act (Meeks)

Summary: The amendment in the nature of a substitute (ANS) to H.R. 3948 would expand the definition of debt covered under the FDCPA to include money owed to a state or local government, clarifying that private debt collectors who pursue debts such as municipal utility bills, tolls, traffic tickets, and court debts are subject to the FDCPA. It would also adjust monetary penalties for inflation and clarify that courts can award injunctive relief, as well as add protections to consumers affected by national disasters.

Background: Enacted in 1977, Congress passed the FDCPA to protect consumers from unfair, deceptive, and abusive practices conducted by debt collectors. However, as discussed at a September 2019 Committee hearing on abusive debt collection practices,[15] the FDCPA currently does not apply to debt collectors hired by state or local government entities. Furthermore, state and local governments faced with widening budget shortfalls are increasingly outsourcing the collection of fines and penalties to private debt collection firms. Private debt collection firms have been found to charge consumers large fees, including interest and penalties, which also includes

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[10] *Id*. The Credit Practices Rule declares it a violation of Section 5 of the Federal Trade Commission Act "for a lender or retail installment seller directly or indirectly to take or receive from a consumer an obligation that... [c]onstitutes or contains a cognovit or confession of judgment." By its plain terms, however, the Rule only applies "in connection with the extension of credit to consumers in or affecting commerce." The Rule defines "consumer" as "a natural person who seeks or acquires goods, services, or money for personal, family, or household use." Thus, by its terms, the Rule does not protect corporations, limited liability companies, or other business entities from the adverse consequences of confessions of judgment.

[11] *Id*.

[12] *See supra* note 19.

[13] Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," Sep. 26, 2019.

[14] House Small Business Committee hearing, "Crushed by Confessions of Judgement: The Small Business Story," Jun. 26, 2019, https://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=2681.

[15] Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," Sep. 26, 2019.

the original debt owed.[16] This legislation would ensure robust consumer protections still apply, even if the debt is owed to a state or local government agency.

Additionally, the ANS would prohibit the Treasury Department from hiring a third-party debt collector to recoup any Federal Emergency Management Agency (FEMA) assistance awarded to victims of devastating natural disasters like Hurricanes Irma and Maria because of an overpayment, unless the overpayment occurred because of fraud or deceit and the recipient of such assistance knew or should have known about such fraud or deceit.

The National Consumer Law Center, Center for Responsible Lending, NAACP, and the National Urban League have endorsed this bill.

Amendment in the Nature of a Substitute to H.R. 4403, Stop Debt Collection Abuse Act (Cleaver)

Summary: The amendment in the nature of a substitute (ANS) to H.R. 4403 would extend the Fair Debt Collection Practices Act's (FDCPA) protections as it relates to debt owed to a federal agency, and it would limit the fees debt collectors can charge. The legislation clarifies that debt buyers are subject to FDCPA, and it would require a GAO study on the use of debt collectors by state and local government agencies.

Background: Currently, the FDCPA makes it illegal for debt collectors to use abusive, unfair, or deceptive practices when collecting debts from consumers. As discussed at a September 2019 Committee hearing on debt collection practices,[17] the FDCPA currently does not apply to debt collectors hired federal government entities. At the hearing, April Kuehnhoff from the National Consumer Law Center testified that extending FDCPA to debt collectors hired by federal government entities is especially important because, "collection by, or on behalf of, the government is already unusually coercive as a result of the government's police power and other means of seizing citizen's assets."[18] Therefore, this legislation would close that loophole by amending the FDCPA to make clear that protections from certain debt collection practices also apply to debt collection agents hired by the federal government.

Specifically, the bill makes clear that overpayment, fines, penalties, and fees owed by private individuals to federal government entities would be considered "consumer debts" that fall under the FDCPA's protections. This legislation would also prevent private debt collectors from charging exorbitant and unfair fees, and it would ensure that fees from debt collectors working on behalf of the federal government cannot be greater than 10% of the amount collected and must be reasonable. This legislation would also confirm that debt buyers are debt collectors for the purposes of the FDCPA, and it sets forth requirements that would prevent debt collectors from

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[16] *See* Testimony of April Kuehnhoff, National Consumer Law Center before Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," at 35, Sep. 26, 2019.

[17] Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," Sep. 26, 2019.

[18] *See* Testimony of April Kuehnhoff, National Consumer Law Center before Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," at 38, Sep. 26, 2019.

taking aggressive action unnecessarily quickly after a debt has allegedly gone unpaid. Finally, the bill would require the Government Accountability Office (GAO) to conduct a study into the use of third-party debt collectors by state and local government agencies.

The legislation is similar to a bipartisan bill from the 115th Congress, H.R. 864, that was sponsored by former Reps. Mia Love and Keith Ellison as well as Reps. Cleaver and Hill.

Amendment in the Nature of a Substitute to H.R. 5001, Non-Judicial Foreclosure Debt Collection Clarification Act (Clay)

Summary: This legislation would reverse the recent Supreme Court decision in *Obduskey v. McCarthy and Holthus LLP* by amending FDCPA to clarify that entities in non-judicial foreclosure proceedings are covered by the law.

Background: In March 2019, the Supreme Court held in *Obduskey v. McCarthy & Holthus LLP* that businesses engaged in non-judicial foreclosure do not qualify as debt collectors under the FDCPA.[19] In that case, a homeowner in Colorado, which is a non-judicial foreclosure state, went through foreclosure proceedings, but the mortgage servicer's law firm refused to follow the FDCPA as it disputed that it was covered as a "debt collector" under the FDCPA. In its decision, although the Supreme Court acknowledged that non-judicial foreclosure would otherwise fit within the law's primary definition of "debt collector," it held that the secondary definition of "debt collector," which applies to the collection of a security interest, suggested that Congress intended for non-judicial foreclosure to be excluded from the broader definition.

However, in a concurrence, Justice Sotomayor noted that it was "too close a case for [her] to feel certain that Congress recognized that this complex statute would be interpreted the way that the Court does today" and that Congress could clarify the statute if the Court got it wrong. Justice Sotomayor also highlighted the majority's acknowledgement that nothing in the Court's opinion "suggest[s] that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act."[20]

This legislation would clarify the FDCPA to clearly state that parties bringing proceedings against consumers in non-judicial foreclosure are covered by FDCPA as debt collectors.

Amendment in the Nature of a Substitute to H.R. 5003, the Fair Debt Collection Practices for Servicemembers Act (Dean)

Summary: This legislation would amend the FDCPA to prohibit debt collectors from threatening a servicemember with reducing their rank, having their security clearance revoked, prosecuting them under the Uniform Code of Military Justice, or otherwise communicating with the commanding officer or any other senior officer in the chain of command above a servicemember regarding an outstanding debt. The bill would cover active-duty servicemembers, as well as servicemembers recently separated or discharged in the previous year.

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[19] https://www.supremecourt.gov/opinions/18pdf/17-1307_7lho.pdf
[20] *Id*.

Background: Enlisted servicemembers have been targeted by debt collectors who contact commanding officers in their efforts to collect on a debt, leading to negative professional repercussions. As discussed at a September 2019 Committee hearing on abusive debt collection practices,[21] consumer debt can have an especially negative impact on the careers of military servicemembers. Abusive collection tactics include: contacting the servicemember's chain of command, threatening punishment under the military's justice system, threatening reductions in rank, and threatening revocation of security clearance.[22]

Furthermore, approximately two out of every five complaints filed by servicemembers with the CFPB were about debt collection, and servicemembers were more likely to complain about debt collection than all consumers filing complaints at the CFPB.[23]

The legislation is intended to address those concerns by enhancing FDCPA to, among other things, explicitly prohibit debt collectors from communicating in connection with the collection of any debt, with the commanding officer or officer in charge of any covered member, including for the purpose of acquiring location information about the covered member. This bill is similar to S. 3334, the Military Lending Improvement Act from the 115th Congress, sponsored by former Sen. Bill Nelson.[24]

Amendment in the Nature of a Substitute to H.R. 5013, Small Business Fair Debt Collection Protection Act (Lawson)

Summary: The legislation expands FDCPA's protections to cover small business loans, as determined by CFPB in consultation with the Small Business Administration.

Background: In 1977, Congress enacted Fair Debt Collection Practices Act (FDCPA) in order to help curb abusive debt collection practices.[25] CFPB has authority to write regulations implementing the FDCPA. The agency also enforces the law, along with the Federal Trade Commission (FTC).[26] The FDCPA defines a debt collector as a third-party entity whose primary business is in collection or pursing debts owed to a creditor. However, entities pursing business debts (including small business debts) are not covered by FDCPA.

Small business loan borrowers do not enjoy the same protections individual consumers have under federal law. Some stakeholders have argued that small business borrowers should be treated fairly

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[21] Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," Sep. 26, 2019.

[22] NCLC Digital Library, "Servicemembers, Veterans and Debt Collection," https://library.nclc.org/fdc/01030107

[23] See Testimony of April Kuehnhoff, National Consumer Law Center before Subcommittee on Consumer Protection and Financial Institutions hearing, "Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices," Sep. 26, 2019.

[24] S.3334 (115th Congress), Military Lending Improvement Act of 2018, *available at* https://www.congress.gov/bill/115th-congress/senate-bill/3334.

[25] 15 USC §1692. Also see Congressional Research Service (CRS), "The Fair Debt Collection Practices Act: Legal Framework," (June 10, 2019), https://www.crs.gov/Reports/IF11247.

[26] CFPB and FTC, "Fair Debt Collection Practices Act – CFPB Annual Report 2019," (March 2019), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf.

and respectfully throughout a collections process and have similar protections afforded to consumers under the FDCPA.[27]

Recently, the *New York Times* investigated how this practice has harmed taxi drivers with overvalued taxi medallion loans that have left thousands of drivers bankrupt.[28] Some consumers looking to earn a living as taxi medallion operators were offered and signed contracts amounting up to $1 million dollars. These lenders loosened standards and encouraged borrowers to refinance and take out more money when medallion prices rose. As was discussed in testimony by Bhairavi Desai, Executive Director of the New York Taxi Workers Alliance,[29] some lenders included confession of judgement provisions in the contracts. As taxi revenue fell, some lenders refinanced terms while others exercised confessions of judgments to garnish wages, seize medallions or other assets, and employed private debt collectors who reportedly harassed affected borrowers after they had defaulted.[20]

This legislation would amend FDCPA to expand the definition of debt to include debt incurred from small business loans. It would restrict the means and methods by which collectors can contact small business debtors, as well as the time of day and number of times contact can be made. Furthermore, it would limit actions of third-party debt collectors who are attempting to collect debts from small businesses on behalf of another person or entity.

Amendment in the Nature of a Substitute to H.R. 5021, Ending Debt Collection Harassment Act (Pressley)

Summary: This legislation would amend FDCPA to prohibit a debt collector from contacting a consumer by email or text message without a consumer's consent to be contacted electronically. It would also prohibit the CFPB from issuing any rules implementing FDCPA that allows a debt collector to send unlimited email and text messages to a consumer. Furthermore, the bill would require the CFPB to analyze and annually report on the impact of electronic communications utilized by debt collectors, as well include in CFPB's Semi-Annual Report to Congress an analysis of consumer complaints, including a state-by-state breakdown of such complaints, and a list of recent enforcement actions taken against debt collectors.

Background: As discussed at a September 2019 Committee hearing on debt collection, nearly one in three Americans with a credit record indicated in a Consumer Financial Protection Bureau (CFPB or Consumer Bureau) survey that they were contacted by at least one creditor or collector trying to collect one or more debts during the previous year.[30] Many lenders or institutions contract with third-party debt collectors, who will work with or pursue consumers to settle the debt. The third-party debt collectors either purchase the debt, or contract with the lender to receive a portion

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[27] For example, see the Small Business Borrowers' Bill of Rights as proposed by the Responsible Business Lending Coalition, available at: http://www.borrowersbillofrights.org/.

[28] Brian Rosenthal, "'They Were Conned': How Reckless Loans Devastated a Generation of Taxi Drivers," New York Times (May 19, 2019), https://www.nytimes.com/2019/05/19/nyregion/nyc-taxis-medallions-suicides.html.

[29] https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-desaib-20190926.pdf

[30] Consumer Financial Protection Bureau, "Consumer Experiences with Debt Collection," (2017) at 5, *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf#page=[5]. Also see Hanna Hassani and Signe-Mary McKernan, "71 Million US adults have debt in collections," Urban Institute (2018), *available at* https://www.urban.org/urban-wire/71-million-us-adults-have-debt-collections.

of the paid debt. When a consumer is not able to settle a debt, the owner of the debt may seize collateral associated with the loan, such as a home for mortgage defaults, or a vehicle for auto-loan defaults. For non-collateral loans, a debt owner may garnish a consumer's wages via a court order.

In May 2019, the Consumer Bureau released a notice of proposed rulemaking[31] to establish guidelines on how communication may take place between debt collectors and consumers. This proposal would prohibit debt collectors from providing information to credit score furnishers without informing the debtor first. The proposal also permits up to 7 collection calls a week, per debt. Under this proposal, debt collectors would have to wait at least one week after making phone contact with the debtor consumer. The CFPB's proposal would also allow debt collectors to use other methods of communication to contact consumers, including unlimited email or text messages. Consumer groups have argued that the rule does not go far enough to protect consumers against predatory debt collection practices.[32] This legislation would prohibit the CFPB from issuing any rule that allows debt collectors to send unlimited emails and text messages to consumers.

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[31] CFPB Proposed Rule *available at* https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

[32] See National Consumer Law Center, https://www.nclc.org/media-center/consumer-watchdogs-proposed-debt-collection-rule-bites-consumers-authorizes-harassment-by-debt-collectors.html. See also Center for Responsible Lending, https://www.responsiblelending.org/media/cfpb-proposed-debt-collection-rule-shortchanges-consumers.