Via electronic submission

September 18, 2019

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Proposed Amendment to Regulation F, Implementing the Fair Debt Collection Practices Act [Docket No. CFPB-2019-0022; RIN 3170-AA41]

Dear Ms. Jackson:

The Independent Community Bankers of America ("ICBA")[1] welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposal to amend Regulation F, 12 CFR part 1006,[2] which implements the Fair Debt Collection Practices Act ("FDCPA" or "Act").[3] Overall, ICBA supports the Bureau's effort to revise the rule to account for new technology and to provide greater clarity. However, ICBA is concerned that provisions of the proposed rule might unintentionally ensnare first-party debt collectors, such as community banks, which would stymie Congress's intent to tailor application of the Act to third-party debt collectors. In particular, ICBA strongly recommends that the Bureau rely solely upon its wide-sweeping authority granted under FDCPA and exclude references to authority granted under section 1031 of the Dodd-Frank Act ("Dodd-Frank" or "DFA").

---

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.
[2] 84 Fed. Reg.23274 (May 21, 2019), ("Proposed Rule").
[3] 15 U.S.C. § 1692 –1692p.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

ICBA contends that Congress gave the Bureau sufficient authority under FDCPA to eliminate abuses made by third-party debt collectors, and that seeking authority in other statutes is unnecessary and may result in unintended consequences.

Background

The FDCPA is designed to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses.[4] Until the creation of the Bureau, no federal agency was authorized to issue regulations to implement the substantive provisions of the FDCPA. Courts have issued opinions providing differing interpretations of various FDCPA provisions, and there is considerable uncertainty with respect to how the FDCPA applies to communication technologies that did not exist in 1977.

Given that the FDCPA was enacted in 1977, before current technology, the Bureau is proposing how debt collectors may employ such newer communication technologies in compliance with the FDCPA, and to address other communications-related practices that may pose a risk of harm to consumers and create legal uncertainty for the industry. The Bureau is also using this opportunity to interpret the FDCPA's consumer disclosure requirements. The Bureau's proposed rule would, among other things, address communications in connection with debt collection, interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection, and clarify requirements for certain consumer-facing debt collection disclosures.

In addition to the authority granted under FDCPA, the CFPB is invoking its authority under the Dodd-Frank Act to promulgate portions of this proposal, such as repeated or continuous telephone calls, to address and prohibit unfair, deceptive, or abusive conduct of those who collect debt related to a consumer financial product or service. However, while creditors and other first-party debt collectors are not "covered persons" under FDCPA, they are covered persons under section 1031 of the Dodd-Frank Act, and therefore the potential exists for their coverage in this rule.

[4] 15 USC 1692a.

ICBA Comments

Executive Summary

Community banks are integral pillars of their communities. Because their success and good fortunes are intertwined, community banks strive to provide financial services and products that will positively affect their customers' lives. Community banks spend considerable time and effort to build close relationships with their customers so that they can find the right products that can help them achieve their goals. A fair and practical regulatory system can provide an environment that enables community banks to provide these responsible services and products to customers, and simultaneously curbs the practices of bad actors that offer predatory products. Too often, though, regulations do not properly account for the characteristics and activity of differing parties, such as large banks vs small banks, or depository institutions vs non-depository institutions. Ultimately, well-tailored regulations take account for these different characteristics.

While many aspects of the Bureau's proposed rule will provide useful clarifications and certainty, ICBA makes the observations and recommendations noted below.

- Due largely to community banks focus on maintaining positive relationships with consumers, consumers prefer interacting with their community bank rather than with a third-party debt collector.
    - If provisions of this proposal are applied to first-party debt collectors, then it will likely become too onerous for community banks to collect their own debts, resulting in increased third-party debt collections.
    - The Bureau should facilitate this relationship-based banking by tailoring its rule as not to discourage community banks from keeping this relationship with consumers.
- The Bureau should eliminate its reliance on Dodd-Frank authorization in promulgating portions of this rule.
    - The same ends can be met simply by relying on authority conferred by FDCPA.
- ICBA appreciates that the proposed rule accounts for recent court decisions, which establish that banks may collect defaulted debt purchased from others, without being classified as a FDCPA-covered debt collector.
    - ICBA recommends that the final rule include staff commentary that further expands this interpretation.
- ICBA supports the Bureau's proposal to allow additional and newer mediums of communication are permissible under the Act.
- The Bureau's newly proposed term, "limited-content message," will facilitate helpful lines of communication.

  - Excluding limited content messages from coverage as “communication” under the FDCPA should facilitate the eventual connection with a consumer.
  - ICBA recommends that the Bureau consider allowing parties to send limited contact messages through email.
- The Bureau’s “should reasonably know” standard, prohibiting calls made at unusual or inconvenient time or place, leaves too much room for interpretation.
  - Requiring constructive knowledge of a consumer’s location based proxies that are difficult to determine or prove create unreasonable burden.
- Regarding cessation of communications, the Bureau should give covered persons five days, within receipt of the request, to accept and acknowledge the request.
- The Bureau should produce a model “opt out” form that debt collectors can use to be assured of compliance with regulatory requirements.
- Calls that are made for the benefit of the consumer that should not be subject to the call limitation, such as loss mitigation, disaster relief calls, adverse credit reporting, and avoidance of late charge accruals.
  - ICBA recommends that the Bureau accommodate or exempt such consumer-benefit calls from the limitations
- While ICBA supports the per-debt frequency limitation, the Bureau should provide illustrative examples of how to handle scenarios where the consumer raises debts that were not the target of the call.

Consumers Want to Retain Relationships with their Community Banks

As explained by the Bureau’s own research, consumers prefer to communicate with their community banks about debt rather than third-party debt collectors. For example, consumers contacted by debt collectors were more likely than those contacted by creditors to report negative experiences, such as being treated impolitely or being threatened.[5] Also explained in the Bureau’s report, third-party debt collection generally creates the potential for market failures.[6] Consumers do not choose their debt collectors; and as a result, debt collectors do not have the same incentives that creditors have to treat consumers fairly. In sum, it is sound public policy to maintain that balance of incentives that creditors treat consumers fairly. However, this rule potentially disrupts that incentive.

Arguments Against Unfair, Deceptive or Abusive Acts or Practices (UDAAP) Authority

Of concern to ICBA, the proposed rule contains a footnote, which indicates that the Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(ii) by creditors and others not covered by the FDCPA would

[5] Proposed Rule, *supra* note 2, at 23280.
[6] *Id*.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

constitute an unfair act or practice under Dodd-Frank Act 1031(c) if engaged in by those persons, rather than by an FDCPA-covered debt collector.

The proposal explains that to identify an act or practice as unfair under the Dodd-Frank Act, the Bureau must have a reasonable basis to conclude that: (1) the act or practice causes or is likely to cause substantial injury to consumers, which consumers cannot reasonably avoid; and (2) such substantial injury is not outweighed by countervailing benefits to consumers or to competition. Here, the Bureau proposes to set the frequency limit at seven telephone calls within seven consecutive days about a particular debt because such a limit appears to bear a reasonable relationship to preventing the unfair practice. However, the Bureau does not provide sufficient evidence to tie the bright-line limit of seven consecutive calls to the two-pronged requirement discussed above.

Regardless of whether the Bureau is even able to demonstrate how the seven day bright-line meets DFA 1031(c) requirements, ICBA contends that the Bureau can achieve the goals of the statute without reliance or reference to its authority under the DFA. For example, section 808 of the FDCPA prohibits "unfair" conduct, section 806 proscribes engaging in "conduct the natural consequence of which is to harass, oppress, or abuse any person," and section 807 prohibits debt collectors from using "any false, deceptive, or misleading representation or means" in collecting debt. These prohibitions are sufficient to meet the intent behind the rulemaking, including placing call limits on third-party debt collectors.

ICBA is concerned that the CFPB's reliance on DFA authority will serve as a hook upon which the Bureau could push third-party debt collector standards onto first-party debt collectors. Or alternatively, allow state attorneys general to enforce such standards under their DFA 1042 authority.

FDCPA section 806 generally prohibits a debt collector from "engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Similarly, FDCPA section 807 generally prohibits a debt collector from "using any false, deceptive, or misleading representation or means in connection with the collection of any debt." Then, section 807 lists 16 examples of conduct that would violate the Act. Finally, FDCPA section 808 prohibits a debt collector from "using unfair or unconscionable means to collect or attempt to collect any debt. These provisions should be more than sufficient to give the Bureau the ability to curb the bad practices of third-party debt collectors without requiring the invocation of UDAAP authority.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Accommodations for Creditors that Purchase Debt

ICBA appreciates that the proposed rule accounts for the recent decision in Henson v. Santander Consumer USA, Inc, where the court found that a bank may collect defaulted debt that it has purchased from another company without being classified as a FDCPA-covered debt collector.[7] The proposed definition could include a debt buyer collecting debts that it purchased and owned, if the debt buyer either met the "principal purpose" prong of the definition or regularly collected or attempted to collect debts owned by others, in addition to collecting debts that it purchased and owned.

While it is unlikely that community banks would meet either prong of FDCPA section 803(6)'s definition of debt collector, ICBA would appreciate the inclusion of illustrative examples in staff commentary, more fully describing why banks that happen to acquire debt from other banks will not be classified as debt collectors. This would provide helpful assurance to smaller community banks that are wary of being classified as a debt collector, and thus, covered under this rule.

Communications in Connection with Debt Collection

Use of media

The proposed rule clarifies the times and places at which a debt collector may communicate with a consumer and clarifies that a consumer may restrict the media through which a debt collector communicates by designating a particular medium.

ICBA appreciates that the Bureau has made clear that additional and newer mediums of communication are permissible under the Act. This should provide greater clarity in what is permissible and resolve legal uncertainties created by split circuit court decisions.

Use of Limited Content Messages

ICBA supports the Bureau's newly proposed term, "limited-content message," which means a message for a consumer that only contains: (1) the consumer's name; (2) a request that the consumer reply to the message; (3) the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; (4) a telephone number that the consumer can use to reply to the debt collector; and (5) certain other disclosures required with electronic communications, as well as certain optional language.

---

[7] *Henson v. Santander Consumer USA, Inc*., 137 S. Ct. 1718 (2017).

This clarification creates the ability to leave voicemails and facilitate helpful lines of communication. Excluding limited content messages from coverage as “communication” under the FDCPA should facilitate the eventual connection with a consumer. To further the usefulness of the new term, ICBA recommends that the Bureau consider additional channels for limited content messages, such as allowing parties to send limited contact messages through email.

Unusual or Inconvenient Times or Places

The proposal prohibits debt collectors from communicating with consumers at unusual or inconvenient times or places, where an unusual or inconvenient time or place generally means a time before 8:00 a.m. and after 9:00 p.m. local time, or any place that the debt collector should reasonably know is inconvenient to the consumer. While this proposal seems reasonable on its face, there are potential issues with the “should reasonably know” standard.

As has court decisions have made painfully clear, “should reasonably know” leaves too much room for interpretation. Instead, the Bureau should limit the constraint to the borrower’s known, latest address. Requiring constructive knowledge of a consumer’s location based on a cell phone area code, or some other proxies, create unreasonable burden that a creative plaintiff’s attorney could unfairly leverage.

Cessation of Communications

The proposed rule prohibits a debt collector from communicating or attempting to communicate further with a consumer with respect to a debt if the consumer notifies the debt collector in writing that the consumer refuses to pay the debt and the consumer wants the debt collector to cease further communication with the consumer.

The Bureau’s proposal requests comment on how long a covered party should have to update its systems to reflect a consumer’s cessation request. ICBA recommends that the Bureau give covered persons five days, within receipt of the request, to accept and acknowledge the request. This is that same amount of time as an information or error resolution request.

Reasonable measures for email and text message communications

The proposal requires debt collectors to use reasonable measures when communicating via text message or email. Such reasonable measures include using an email address or telephone number that the consumer recently used to contact the debt collector. Each text or email must contain a disclosure, informing the consumer of the ability to opt out of that contact method.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

In consideration of this requirement, ICBA recommends that the Bureau produce a model "opt out" form that debt collectors can use to be assured of compliance with regulatory requirements.

Prohibition on Harassing

<u>Call Limitations</u>
The proposal stipulates that a debt collector must not engage in any conduct that would harass, oppress, or abuse any person in connection with the collection of any debt. This includes repeated or continuous telephone calls, or by placing a telephone call to a particular person in connection with the collection of a particular debt either: (1) more than seven times within seven consecutive days or (2) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

Although establishing a bright-line threshold could be helpful in staving-off litigation risk, ICBA is concerned that this bright-line test of number of phone calls, especially when invoking UDAAP authority, is setting up first-party debt collectors to be held to the same standard, which is not what the FDCPA envisioned, nor Congress intended when transferring rulemaking authority to the Bureau.

Additionally, the Bureau does not provide enough substantive evidence to explain why a debt collector should not be able to have a conversation with a consumer within 7 days after having a conversation. Activity should not presumptively be deemed harassment if a debt collector wants to follow-up with a consumer about some new development, for instance, within a few days after a conversation. Without providing contextual allowance, such as time-sensitive communication, the Bureau's rule will impede legitimate efforts to aid the consumer.

For example, the Real Estate Settlement Procedures Act ("RESPA"), section 1024.39(a) requires servicers to establish or make good faith efforts to establish live contact with a delinquent borrower within 36 days the delinquency, then every 36 days thereafter, in order to provide loss mitigation options to borrowers. Clearly, loss mitigation is a preferable alternative to foreclosure, and the Bureau should not impede efforts to establish connections for such a beneficial outcome.

There are other calls that are made for the benefit of the consumer that should not be subject to the call limitation, such as disaster relief calls, adverse credit reporting, and avoidance of late charge accruals. ICBA recommends that the Bureau accommodate or exempt such consumer-benefit calls from the limitations set forth in proposed section 1006.14(b)(2).

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Call Limitations Based Per-Debt

ICBA supports the Bureau proposal to set call limits and criteria based per-debt, rather than based per-customer. Each instance of debt has its own unique situation and attempting to comingle each instance of debt would potentially cause confusion. Additionally, and as the proposal helpfully illustrates, back-office systems reference and categorize debt based on instance and contract, not based on consumer.

While ICBA supports the per-debt frequency limitation, the Bureau could provide additional examples of how to handle particular scenarios. For example, how should a covered person account for a call placed to a consumer about debt X, only to find that the consumer prefers to discuss debt Y? ICBA believes that it would be useful for the Bureau to address hypothetical situations like this in staff commentary.

Once again, ICBA appreciates the Bureau's attempt to clarify provisions of the Fair Debt Collection Practices Act, but we stress our apprehension of the rule's potential to unintentionally cover first-party debt collectors. Coverage of first-party debt collectors is not contemplated under FDCPA, nor would it be sound public policy, as it would disincentivize community banks from retaining their debt in-house. As the Bureau considers these comments, please do not hesitate to contact me at Michael.Emancipator@icba.org or 800-422-8439 with any questions.

Sincerely,

/s/

Michael Emancipator
Vice President, Regulatory Counsel

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org