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COMMENT

THE FAILURE OF PROPOSED REGULATION F: HOW THE CONSUMER FINANCIAL PROTECTION BUREAU LEAVES CONSUMERS VULNERABLE TO ABUSIVE DEBT COLLECTION PRACTICES[*]

ALLISON COLE

I. BACKGROUND

A. Debt Collection

In the first quarter of 2019, consumer debt in the U.S. reached $14 trillion.[1] Consumer debt is the consumer's obligation to pay personal debts that arise from household or individual consumption.[2] The debt can arise out of many different forms of credit: a closed-end loan, a student loan, a mortgage, a car loan, a payday loan, a credit card, or purchase of any goods with a payment due after.[3] Consumers at times struggle to pay off their debts or they refuse to do so. As the amount of consumer debt in the U.S. has increased, the role of debt collection has become a doubled-edged sword for consumers: The money needs to be recovered, but the practices used to recover the money can be harmful to consumers.[4]

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[*] Regulation F has now been signed into law. 12 C.F.R. pt. 1006.

[1] Mark DeCambre, *U.S. Consumer Debt is Now Above Levels Hit During the 2008 Financial Crisis*, MARKETWATCH (June 25, 2019, 9:12PM), https://www.marketwatch.com/story/us-consumer-debt-is-now-breaching-levels-last-reached-during-the-2008-financial-crisis-2019-06-19.

[2] Julia Kagan, *Consumer Debt*, INVESTOPEDIA (Oct. 29, 2021), https://www.investopedia.com/terms/c/consumer-debt.asp.

[3] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,274, 23,276 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

[4] Matthew R. Brenner, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1553–54 (2011), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1182&context=blr, ("Reports complied by regulators and major news outlets reveal that abusive debt collectors still exploit financially distressed consumers with repetitive profanity-filled telephone calls, intentional harassment at work, threats of arrest, and threats of physical violence. These tactics are predatory and have caused some

Debt collection agencies play an important role in our society. When collection agencies are able to recover the amounts due for goods, they benefit retailers, manufacturers, and most importantly consumers. This is important because it helps keep the cost of goods down and keeps consumer credit available. Collection payment plans or debt restructuring actually can allow consumers to repay their debts in more manageable ways.

There are multiple types of debt collectors in the U.S.; creditors, third-party debt collectors, debt buyers, and debt collection law firms. Each of these are used for different reasons and collect debt in many different ways. However, each debt-collecting entity uses different debt collection methods. It is common for a consumer to be contacted by a debt collector at some point in time.[5]

Debt collection efforts begin with the debt collector trying to contact the consumer. Typically, this includes identifying a phone number, mailing address, or other contact information so they can establish contact with the consumer.[6] Debt collectors look to the information that is included in the account file, public records, and other places where the consumer's contact information may be located.[7] This includes gathering information of family members, work colleagues, or other acquaintances of the debtor.[8]

Debt collectors use a variety of strategies to collect the debt from the consumer. These strategies include reporting the debts to consumer reporting agencies and waiting for the debtor to see the debt show up on their credit report. The collection strategy also can change based on the type of debt (e.g. federal student loans or medical bills). The issue with the different methods of debt collection practices is that new debt collectors take over the account periodically. This opens the consumer up to multiple communications from different debt collectors. It is difficult for the consumer to interact with multiple debt collectors because they are not notified when the account moves to a new collector. It takes longer to settle the debt and the consumer

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consumers to flee their homes in fear, sign over their property to debt collectors in desperation, and even commit suicide.").

[5] *CFPB Survey Finds Over One-In-Four Consumers Contacted by Debt Collectors Feels Threatened*, CFPB (Jan. 12, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/ (explaining that seventy million Americans were contacted by a debt collector about a debt in the last twelve months. That is one third of the population of the U.S.).

[6] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,277.

[7] *Id.*

[8] *Id.*

may make payments to multiple debt collectors and never know the progress they are making on paying off the debt.[9] The consumer also receives communications at many different times from many different debt collectors. Additionally, these communications occur at irregular and unpredictable intervals and times.[10]

Many Americans experience abusive debt collection practices. This is because many credit issuers are not successful in collecting the debt. The credit issuer will attempt to collect the debt during a period of time. After the debtor has become delinquent in their account the issuer will charge off the account, label the debt as a bad debt, and place it with a third-party collector.[11] A charge-off occurs when the consumer does not pay the full minimum payment on a debt for a period of time.[12] The credit issuer closes the consumer's account and sells the bad debt to a collection agency, debt buyer, or collection law firm.[13] The collection agency will enter into a contract with the credit issuer. That contract will specify a period of time in which the collection agency (or other debt collector who has taken the account) has to collect the debt. If the collection agency is successful in collecting the debt, they will be compensated with a portion of the amount collected.[14]

Intimidation, harassment, verbal attacks, threats and more have become an industry standard.[15] Debt collectors face incentives to use

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[9] *Id.*

[10] *Id.*

[11] CONSUMER LAW CASES AND MATERIALS 752 (John A. Spanogle et al. eds., 4th ed. 2013) (usually the charge-off occurs between six months and a year, but this varies by the type of debt and the policy of the credit issuer).

[12] Lacey Langford, *What Does Charged Off as Bad Debt Mean?*, CREDIT.COM (Aug. 6, 2019), https://www.credit.com/blog/my-debt-was-charged-off-what-does-that-mean-120856/.

[13] *Id.; see also* CONSUMER LAW CASES AND MATERIALS, *supra* note 11, at 752 (stating that charge-offs typically occur after 180 days (six months) after non-payment).

[14] CONSUMER LAW CASES AND MATERIALS, *supra* note 11, at 752 (in 2005 the fee for the debt collector was 28%).

[15] *Id.* at 749–50 (testimony from a debt collector describing that the abusive practices by the debt collectors were encouraged by managers. The most abusive debt collectors made the most money and were tasked with training the new debt collectors to use the same tactics); *see also* Brenner, *supra* note 4, at 1553–54.

inappropriate and abusive practices and tactics to collect from consumers.[16] The more money a debt collector is able to collect, the larger the percentage they are able to keep.[17] This is part of what has led to the abusive and harassing practices towards consumers being the norm of debt collection.

B. History, Fair Debt Collection Practices Act and the Dodd-Frank Act

Historically, the Federal Trade Commission (FTC) was tasked with bringing enforcement actions against debt collectors engaging in unfair or deceptive practices in violation of 15 U.S.C. § 45.[18] Overtime though, it became clear that this was not enough to protect the consumers from the "abuse, deceptive, and unfair debt collection practices."[19] Abusive debt collection practices are incredibly harmful to consumers. They cause bankruptcies, instability in families and marriages, job loss, and a significant invasion of privacy.[20]

C. The CFPB's Legal Authority

In 1977 Congress passed the Fair Debt Collection Practices Act (FDCPA) which was codified as Title VIII of the Consumer Credit Protection Act (CCPA).[21] The FDCPA was passed to eliminate abusive debt collection practices[22] as well as to ensure that debt collectors who do not engage in abusive debt collection practices are not competitively disadvantaged.[23] The

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[16] Brenner, *supra* note 4, at 1553–54 (arguing, "In order to reclaim the FDCPA as an effective vanguard of consumer protection, regulators must give it the power to fundamentally reshape the debt collection market by eliminating the profit motive of egregious debt collection abuses. It must be retooled to destroy the competitive advantage that unethical debt collectors gain through abusive tactics, while allowing ethical debt collectors to profit through compliance.").

[17] Aaron Crowe, *How Collection Agencies Work*, BETTERCREDITBLOG.ORG (July 27, 2021),
https://bettercreditblog.org/collection-agencies/ (debt collectors can receive 25–45% of the amount collected with the rest going to the creditor).

[18] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,2787; *see also* Brenner, *supra* note 4, at 1553–54.

[19] 15 U.S.C. § 1692(a).

[20] 15 U.S.C. § 1692(a); Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274.

[21] 15 U.S.C. §§ 1692–1692p.

[22] 15 U.S.C. § 1692(e), *see also* Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274.

[23] 15 U.S.C. § 1692(e); Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274.

FDCPA prohibits debt collectors from engaging in harassment or abuse, making false or misleading representations and engaging in unfair practices; restricts debt collectors communications with consumers; and requires debt collectors to provide consumers with disclosures concerning the debts they owe.[24]

The Dodd-Frank Wall Street Reform and Consumer Protection Act[25] was passed in 2010 in response to the financial crisis that led to the Great Recession of 2008.[26] The Dodd-Frank Act established multiple government agencies, including the Consumer Financial Protection Bureau (CFPB). The CFPB governs various types of consumer lending and handles consumer complaints.[27] Until 2011 the FTC was the principal agency tasked with enforcing the FDCPA.[28] Today, the CFPB shares the enforcement of the FDCPA with the FTC. The CFPB also has the power to issue FDCPA regulations.[29] Prior to the creation of the CFPB none of the federal agencies had the authority to issue regulations to implement the provisions of the FDCPA. Confusion about the implementation of the FDCPA led to different courts interpreting the statute differently. This created uncertainty, especially regarding how the FDCPA was to be applied to the newer methods of technology.

The CFPB's power to create rules regarding debt collection comes from the Dodd-Frank Act.[30] The Dodd-Frank Act authorizes the CFPB to dictate rules that identify what is an unfair, unlawful, or deceptive debt collection practice. These practices can be related to any type of transaction or financial service with a consumer. The Dodd-Frank Act covers individuals who provide consumer financial products or services. This includes those who collect debts related to a consumer financial product or service.[31]

The Dodd-Frank Act amended the FDCPA to give the CFPB power to issue rules that govern the collection of debts by debt collectors.[32] "The

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[24] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,278.

[25] Pub. L. No. 11-203, 124 Stat. 1376 (2010) (codified in scattered sections of predominately 12 & 15 U.S.C.).

[26] Adam Hayes, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, INVESTOPEDIA (last updated Sept. 12, 2021), https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp.

[27] *Id*.

[28] CONSUMER LAW CASES AND MATERIALS, *supra* note 11, at 757.

[29] *Id*.

[30] Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 53 (2018).

[31] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274 n.7.

[32] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,281.

[CFPB] is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law."[33]

II. SCOPE OF PROPOSED REGULATION F

The Fair Debt Collection Practices Act imposes several restrictions on debt collectors. These restrictions include "harassing, oppressive and abusive conduct," it also prohibits "false, deceptive, or misleading representation in debt collection," and it forbids unfair and unconscionable means to collect debts. It also requires debt collectors to offer to validate the debt and it limits debt collection communications. Each of these restrictions and limitations are outlined in different sections of the FDCPA. The CFPB has proposed new rules to modify and clarify the FDCPA.[34]

The FDCPA primarily applies to third-party debt collectors and only governs debt collection by original creditors in a few situations. Abusive tactics by original creditors are not covered, and this protects approximately 10% all collection activity.[35] However, 10% is a deceptively small number. That 10% accounts for a significant amount of collection activity. Third-party debt collectors attempt to collect billions of dollars in debt.[36] They also contact consumers at an exponential rate. In 2007, debt collectors contacted consumers more than 1 billion times.[37] The 10% of collection activity that is protected by the FDCPA is far more substantial that the percentage would suggest.

On May 7, 2019 the CFPB released a proposed rule that would amend Debt Collection Practices (Regulation F),[38] which implements the FDCPA.[39] It prescribes the rules that govern debt collectors subject to the FDCPA.[40] The proposed rule limits the number of phone calls that a debt

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[33] 12 U.S.C. § 5512(a); Debt Collection Practices (Reg. F), 84 Fed. Reg. at 22281.

[34] Mark Huffman, *Trump Administration Proposes Changes to Debt Collection Rules*, CONSUMER AFF. (May 8, 2019), https://www.consumeraffairs.com/news/trump-administration-proposes-changes-to-debt-collection-rules-050819.html.

[35] CONSUMER LAW CASES AND MATERIALS, *supra* note 11, at 757.

[36] *Id.* at 758.

[37] *Id.*

[38] 12 C.F.R. pt. 1006; Ross Speier, *A Closer Look at the CFPB's Proposed Debt Collection Rules – Part Two: Communications*, JDSUPRA (Aug. 26, 2019), https://www.jdsupra.com/legalnews/a-closer-look-at-the-cfpb-s-proposed-34527/.

[39] Speier, *supra* note 38.

[40] *Id.*

collector can place to a consumer, but also allows for an unlimited number of emails and text messages to consumers.[41] The FDCPA is the rulebook for how debt collectors may engage a consumer.[42]

The CFPB received over 12,000 comments on proposed Regulation F.[43] There are four parts to the proposed rule; the generally applicable provisions and definitions, proposed rules for the FDCPA-covered debt collectors, rule makings, and miscellaneous provisions. The main purpose of the proposed rule is to focus on debt collection practices and debt communications to protect consumers against abusive and harassing conduct by debt collectors. The proposed rule clarifies how debt collectors may use modern technology to communicate with consumers.[44] It also requires debt collectors to provide more information about the debt to the consumer when they contact the consumer.[45]

As stated above, the original purpose of the FDCPA was to "[respond] to [the] abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[46] The practices are very harmful to people's lives, including contributing to bankruptcies, marital instability, job loss, and invasions of individual privacy.[47] The consumer protections that have been implemented by the FDCPA have helped protect consumers, however they have not completely mitigated the abuses that consumers are open to and have continued to endure.

With the development of new technology for debt collection, many questions of interpretation have arisen. Since 1977, when the FDCPA was passed, methods of communication have drastically changed. We now have a variety of communication methods including text messaging, cell phones, email, social media, and more. The changes in technology have led to litigation that has created inconsistent judicial rulings which has created legal uncertainty that ultimately leads to greater risk for consumers.[48]

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[41] Huffman, *supra* note 34.

[42] *Id.*

[43] Mark Rooney, *CFPB's Proposed Debt Collection Rule: Perspectives from the Comment Period*, INSIDE ARM (Oct. 17, 2019), https://www.insidearm.com/news/00045578-cfpbs-proposed-debt-collection-rule-persp/.

[44] Huffman, *supra* note 34.

[45] *Id.*

[46] 15 U.S.C. § 1692(a); Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274.

[47] 15 U.S.C. § 1692(a); Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274.

[48] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,274.

The CFPB is the first federal agency that has authority under the FDCPA to prescribe substantive rules regarding debt collection practices. The proposed rule is meant to clarify how debt collectors can use the newer technologies and address other communication practices that are a risk to consumers.[49] Subpart B of the proposed rule has the new proposed rules for the FDCPA-covered debt collectors.[50] This includes methods of communication and the number of times a consumer can be contacted.

A. Definition Changes: Who and What is Covered

The proposed rule will restate the FDCPA'S definition of a "debt collector" without any substantive changes to the definition. The definition of "consumer" will also remain the same, but there is one addition.[51] The CFPB's proposal is to interpret "consumer" to include a deceased natural person that is obligated to pay a debt. This would include a successor-in-interest and the personal representative of a decedent's estate.[52]

The definition of "debt" remains the same other than the fact that parts of the proposed rule only apply when a debt collector who is covered by the FDCPA is collecting a debt that is related to a "consumer financial product or service," which is defined in the Dodd-Frank Act. This is done in order to clarify who is a covered debt collector under the rule. Any changes to the definition are organizational and include some word changes.[53]

B. The Key Changes to the Rule

1. Communications

Communicating with a debt collector is not always detrimental to the consumers. When a debt collector contacts a consumer, the consumer is able to resolve debts that they owe or inform the debt collector that they are not the person who actually owes the debt the collector is looking for. However,

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[49] *Id.*

[50] *Id.* at 23,275.

[51] Anoush Garakani, *A Closer Look at the CFPB's Proposed Debt Collection Rules-Part One*, JDSUPRA (Aug. 2, 2019), https://www.jdsupra.com/legalnews/a-closer-look-at-the-cfpb-s-proposed-45171/.

[52] *Id.*

[53] *Id.*

it is common for debt collection to be an abusive and stressful experience for many consumers.[54]

As technology continues to advance and change, consumers and debt collectors have the opportunity to use the newer methods of communication to converse with each other. In fact, consumers may prefer email, text messages, or social media because they are more efficient, convenient, and private.[55] The new methods of communication also allow consumers to have greater control over the timing, frequency, and the duration of communications with debt collectors.[56] They benefit debt collectors as well because they are more efficient and in some cases more effective ways of communicating with consumers.[57]

The proposed rule seeks to clarify how the FDCPA applies to modern methods of communication. The communication between debt collectors and consumers that the rule addresses are electronic communications. The rule also addresses safe-harbor, opt-out notice requirements, time and place restrictions, workplace email addresses, social media communications, communication media restrictions, "limited-content" messages; and phone call frequency limits.[58] The methods the CFPB is suggesting include:

- Implementing limited-content messages. This new term would state the information that a debt collector must include in a communication, and the information that the debt collector may include when leaving a message for a consumer. This term would be crucial for the debt collector to ensure that leaving that message would not be considered a communication. Additionally, this term allows a debt collector to leave a message for a consumer (under the FDCPA) with a third-party that is not the consumer.[59]

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[54] A member of my family had a horrific experience with a debt collector. She had co-signed a loan for her daughter who was a college student at the time. The daughter had not paid her loan, so the debt collector contacted my family member. She was contacted in the middle of her workday and was screamed at and berated by the debt collector. The debt collector screamed at her using profanities and attacked her parenting choices among other things. It was very traumatic for my family member and scared her into paying the bill. To this day she still experiences stress and trauma from the abusive call on a loan that she co-signed. This personal experience is minor compared to the other traumatic experiences that many Americans have with debt collectors.

[55] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,275.

[56] *Id.*

[57] *Id.*

[58] Speier, *supra* note 38.

[59] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,275.

- Clarifying the places and times a debt collector may communicate with a consumer. This includes clarifying that a consumer does not have to use specific words to demonstrate that a specific time is not convenient.[60]
- Clarifying that the consumer has the power to restrict the medium the debt collector may use to communicate with them. For example, designating a particular email address or phone number that is not to be used for debt collection communication.[61]
- A debt collector is not allowed to call a consumer on the phone more than seven times within a seven-day period or call within seven days after having a phone conversation with a consumer.[62]
- Email and text messages may be used in debt collection with limitations to protect privacy and prevent harassment, abuse, false or misleading representation, and unfair practices. The debt collector would be required to provide opt out instructors to the consumer if they would not like to receive emails and text messages.[63]

In addition to the proposals regarding communications with consumers, the proposed rule seeks to clarify the disclosures that must be provided to the consumer. The FDCPA requires debt collectors to send a written notice to the consumer within five days of the initial communication.[64] This notice must include information about the debt and the actions the consumer can take in response to it.[65] The CFPB is seeking to clarify the information that the notice must include. The proposals include:

- Specifying that debt collectors must provide particular information about the debt and the consumer's rights. Debt collectors must also provide prompts that a consumer can use to dispute the debt, request information about the original creditor, or take other actions in relation to the debt.[66]
- Including a model validation notice that a debt collector can use to ensure compliance with the FDCPA and the disclosure requirements.[67]

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,275.
[66] *Id.*
[67] *Id.*

- Clarifying the steps that a debt collector must take to provide a validation notice and other electronic disclosures.[68]
- Implementing a safe harbor, that if a debt collector complies with the steps when delivering the validation notice within the body of an email that is the debt collector's initial communication with the consumer.[69]
- Prohibiting a debt collector from suing or threatening to sue a consumer to collect a time-barred debt.[70]

As a general matter, debt collectors may not communicate about the collection of any debt with any individual other than the consumer, unless they have the prior consent of the consumer.[71] However, a debt collector can avoid liability by showing that the violation was not intentional and it was a "bona fide error" which occurred despite the debt collector maintaining reasonable procedures to avoid such an error.[72] The proposed rule would apply this safe-harbor to all electronic communications. There is an additional protection for third-party communications which introduces procedures to avoid liability when a debt collector unintentionally communicates with an unauthorized third party about a consumer's debt by communicating with the consumer via email or text message.[73]

The safe harbor is only triggered when there are procedures in place that are reasonably adapted to avoid a communication via email or text message that will violate the FDCPA.[74] In particular, the procedures require the debt collector "to reasonably confirm and document" the method used to electronically communicate with the consumer.[75] However, the method used can be one of three types of contact:

1. An email address or phone number recently used by the consumer to contact the debt collector. That email address cannot be used if the consumer called to opt out of the electronic communications.[76]

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] 15 U.S.C. § 1692(c); Speier, *supra* note 38.
[72] Speier, *supra* note 38 (this exception is prescribed in FDCPA § 813(c)).
[73] 12 C.F.R. § 1006.6(d)(3); Speier, *supra* note 38.
[74] Speier, *supra* note 38.
[75] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,300.
[76] Speier, *supra* note 38.

2. A non-work email address or phone number if the debt collector notified the consumer that it would use it for debt collection communications.[77]
3. A non-work email address or phone number that a creditor or prior debt collector obtained from the consumer to communicate about the debt before it was placed with the current collector trying to collect the debt. The non-work email address or phone number was recently used to contact the consumer, and the consumer did not opt-out of the use of that email address or phone number.[78]

Additionally, the debt collector must have tried to prevent communications that the debt collector knows to have led to an unauthorized disclosure to a third party using the email address or phone number.[79]

In order to be protected from liability under the safe harbor, the debt collector has the burden of proving that the disclosure to the third party was not intentional and the debt collector maintained the required procedures in place to prevent the disclosure.[80] The standard for proving compliance with the FDCPA is a preponderance of the evidence.[81] It is unclear whether the proposed rule's guideline regarding electronic communications would supersede other communication regulations, in particular the Telephone Consumer Protection Act.[82]

2. Opt-Out

One of the requirements under the proposed rule is that there must be an "opt-out notice."[83] This requires emails, text messages, and any other electronic communications sent to the consumer have a clear and conspicuous notice that the consumer can opt-out of receiving communications. [84] This rule specifically regards electronic communications and not phone calls from debt collectors (there is a separate limit in the proposed rule that address phone call frequency).[85] It was also implemented to limit the costs associated with those types of communications that are

[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Speier, *supra* note 38.
[83] 12 C.F.R. § 1006.6(e); Speier, *supra* note 38.
[84] Speier, *supra* note 38.
[85] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,274; 12 C.F.R. § 1006.14(b).

placed on consumers.[86] This rule forbids debt collectors from placing any conditions on the opt-out on the payment of a fee or requiring the consumer to provide any additional information other than the email or phone number they are opting-out.[87]

The rule makes clear that the procedure for opting out must be described in the electronic communication. The consumer "should be able to, 'with minimal effort and cost, stop the debt collector from sending further written electronic communication" according the CFPB.[88] However, despite this requirement there is no specific standard for what the opt-out procedure must look like or include or what steps the consumer has to take in order to opt-out.[89] It is unclear how the opt out procedure should be furnished to the consumer or how it will make opting-out easy for the consumer.

3. Time and Place Restrictions

As it is currently written, the FDCPA does not allow debt collectors to attempt to communicate or communicate with a consumer at a time or place that is inconvenient. The debt collector must know or should know that the time is inconvenient for the consumer in order for the restriction to apply.[90] If the debt collector does not know that it is an inconvenient time for the consumer, the debt collector is protected by the safe harbor. The proposed rule clarifies that the phone calls to cell phones, text messages, and emails are all subject to the time and place restrictions.[91] According to the CFPB a time before 8:00 am and after 9:00 pm is considered inconvenient, unless the debt collector has prior knowledge that it is not.[92]

According to the rule, the time at which a communication occurs is when the debt collector initiates or sends the communication to the consumer.[93] It does not occur when the consumer receives it.[94] This has been a point of ambiguity that has left many consumers vulnerable to multiple phone calls at all times of day from debt collectors. The safe harbor for this rule is when the debt collector has ambiguous information or conflicting

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[86] Speier, *supra* note 38.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Speier, *supra* note 38 (this time limit is currently prescribed in the FDCPA).
[93] *Id.*
[94] *Id.*

information about the consumer.[95] If the debt collector has two different phone numbers for a consumer that indicate the consumer is located in different time zones or if the phone number does not match where the listed physical address is, then the debt collector is protected by the safe harbor.[96] If the debt collector communicates with the consumer at a time that would be convenient based on the information that they already have that indicates that it would be convenient for the consumer even though it is not, they will not be liable.[97] The debt collectors information need not be accurate, it just needs to be likely.

The issue with the time and place clarification is that the standard is subjective.[98] Debt collectors would be tasked with interpreting from the consumer statements when and where they do not want to be contacted.[99] This becomes more complicated when debts are transferred. When the account is transferred to a new debt collector, the information on the account in addition to the details the consumer provided about where and when to contact them must be included as well. This places a substantial burden on debt collectors regarding where debts are assigned or transferred.[100] Furthermore, it leaves consumers more vulnerable because debt collectors can impose their own interpretation on what the consumer said to trigger the safe harbor in their favor.

4. Workplace Email Addresses

Under the proposed rule, workplace email addresses are not allowed to be used to contact a consumer. Debt collectors are barred from contacting a consumer at an email address that the debt collector knows or should know belongs to the consumer's employer.[101] The debt collector is allowed to use a workplace email address if they have prior consent, from the consumer, to use that email address or they have directly received an email from the

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[95] *Id.* (For example, if a consumer is originally from Illinois but moves to Santa Barbara and the debt collector does not know this, they will not be liable under the rule for calling the consumer at 5 a.m. because it would be 8 a.m. at their previous home).

[96] *Id.* (For example, if the phone number the debt collector is using has a New Jersey area code, but the consumer actually lives in Arizona, the debt collector will be protected by the safe harbor).

[97] *Id.*

[98] Speier, *supra* note 38.

[99] *Id.*

[100] *Id.*

[101] *Id.*; Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,387.

consumer at the workplace email address.[102] As a general matter, the workplace has access to the email of its employees and retains the right to read any email sent to the work email address. Workplace emails are prohibited because debt collectors are prohibited to send emails where it can be anticipated that a third party is likely to see the emails.[103]

There are still some questions with regard to the rule surrounding workplace email addresses. The circumstances under which a debt collector will be found to know that they are emailing the work address of a consumer, what exactly constitutes prior consent to use of the workplace email address, and whether the rule only applies to email contacts with the consumer who owes the debt or if their close family members would be considered a "consumer" under the rule.[104]

5. Social Media

Social media is a significant change to the areas that the proposed rule would cover. The proposed rule would apply to debt collector communications via social media. Under the proposed rule, a debt collector is prohibited from communicating with a consumer regarding a debt. The communication via social media is prohibited if it can be viewed by someone other than the consumer.[105]

The proposed rule leaves a significant ambiguity with regard to social media. The text of the proposed rule does not expressly state what type of social media post is prohibited. Under the rule, social media communications that are not visible to third parties, namely those sent through private messaging are permissible. However, there is still risk that those communications are visible to other parties.[106] This could be remedied by the "limited-content message," proscribed by the rule, but it is unclear if the limited-content message that is sent through social media would count as a communication under the social media communication restrictions or the general communication restrictions.

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[102] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,297; *see also* Speier, *supra* note 38 (stating that a consumer's prior consent to receive email at their work address does not transfer from a creditor to a debt collector).

[103] Speier, *supra* note 38.

[104] *Id.*

[105] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,402; *see also* Speier, *supra* note 38.

[106] Speier, *supra* note 38.

6. Medium of Communication

The proposed rule includes a "prohibited communication media."[107] The prohibited communication media prohibits debt collectors from communicating with the consumer in a manner that the consumer has requested the debt collector not use.[108] Once a consumer has informed a debt collector that they would not like to be contacted via a certain medium it is considered "harassment, oppression, or abuse" if the debt collector continues to use that medium.[109]

7. Limited-Content Message

The limited-content message is a new term under the proposed rule that solves a major issue for debt collectors regarding inadvertent third-party disclosure. The limited-content message[110] must have the consumer's name, request that the consumer reply to the message being left, the names of people the consumer can contact to reply to the message, a phone number to call back, and if it is delivered electronically, a disclosure giving the consumer the ability to opt-out of receiving future messages.[111] Additionally, the limited-content message may include; a greeting, the date and time of the message, a generic statement that the message is regarding an account, and suggested time the consumer respond to the message.[112] According to the CFPB none of the previously mentioned information would convey that a consumer owes a debt or any information related to that debt if it was heard by a third party.

The CFPB included this new term because of the confusion regarding the Miranda Warnings necessary for communications required by the FDCPA. Debt collectors are required to identify themselves as debt collectors when they communicate with a consumer. This Miranda Warning requirement becomes problematic when disclosing debt information to third parties. The limited-content message is meant to provide a safe harbor to debt

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[107] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,321; *see also* Speier, *supra* note 38.

[108] Speier, *supra* note 38.

[109] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,295; *see also* Speier, *supra* note 38.

[110] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,379.

[111] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,370; *see also* Speier, *supra* note 38.

[112] Speier, *supra* note 38.

collectors who are open to liability for trying to comply with the FDCPA.[113] Limited-content messages are not considered a communication under the rule. Furthermore, limited-content messages do not have a Miranda Warning requirement under the FDCPA.[114] If a third-party gains access to the message the limited-content message would not qualify as a third-party disclosure.[115]

The issue with the limited-content message is that consumers may not have enough information to be incentivized to respond to the call. The consumer may not know the nature of the phone call or the name of the company that is trying to contact them.[116] Additionally, a consumer may claim that they were misled by the nature of the phone call or even deceived when they discover that it was a debt collector call.[117]

It is important to note that limited-content messages are not permitted via email.[118] They are not allowed to use email because the sender's email address may disclose the identity of the debt collection firm. The question this leaves with the proposed rule is the caller ID function. A caller ID phone number is essentially the same thing as seeing the sender's email address, so this is an ambiguity in the proposed rule that the limited-content message does not solve.[119] And still harms consumers.

8. Phone Call Frequency Limits

The phone call frequency limits are one of the main highlights of the proposed rule. The proposed rule implements a rule that would limit the number of times a consumer can be contacted.[120] If a debt collector violates the number of phone calls allowed to be placed to a consumer in a single week, then it is considered a per se violation of the FDCPA.[121]

The limitation for communications only applies to telephone call frequency. The proposed rule limits the number of phone calls that can be placed in a seven-day period. The debt collectors can only call a consumer seven times in a seven-day period, and they cannot contact a consumer within a seven-day period after having a phone conversation.[122] Some conversations

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] Speier, *supra* note 38.
[118] *Id.*
[119] *Id.*
[120] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,309.
[121] Speier, *supra* note 38.
[122] *Id.*

are excluded from these frequency limits in the proposed rule.[123] The phone calls that are not included in the limit are calls that are in response to a request for information from the consumer, calls made with prior consent given directly to the debt collector, phone calls that are not connected to the dialed phone number, or calls with the consumer's attorney, a consumer reporting agency, the creditor, or creditor's attorney, or the debt collector's attorney.[124]

III. OPPOSITION TO THE PROPOSED RULE

Twenty-eight state Attorneys General oppose proposed regulation F, [125] though, they value the convenience that the new developments in technology have brought. The proposed rule provides opportunities to make debt collection more convenient and resolve the underlying ambiguities in the FDCPA, but the proposals do not provide adequate protection for the consumers. The Attorneys General have made multiple objections to the proposed rule because it does not adequately protect consumers.

A. Call Frequency Limit

According to a letter drafted by the Attorneys General, the call frequency limit is not sufficient to protect consumers from abusive and harassing phone calls from debt collectors. The frequency limit only applies per debt (student loans are an exception to this limit).[126] The frequency limit is a positive first step in protecting consumers from harassing and abusive phone calls from debt collectors. However, the frequency limit for phone calls is a limit per debt, not per consumer.[127] The vast majority of consumers who owe debt and are subject to abusive or harassing debt collection

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[123] *Id.*

[124] *Id.*

[125] Mich. Att'y Gen. et al., Comment Letter on Proposed Rule Concerning Debt Collection Practices (Reg. F) (Docket. No. CFPB-2019-0022) (Sept. 18, 2019), https://www.michigan.gov/documents/ag/Multistate_CFPB_Debt_Collection_Comment_Letter_666257_7.pdf.

(The states with Attorneys General who signed are; California, Colorado, Connecticut, Delaware, The District of Columbia, the Executive Director of the Hawaii office of Consumer Protection, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin).

[126] *Id.* at 3.

[127] *Id.*

practices, owe more than one debt.[128] This means that consumers who owe multiple debts will be subject to a plethora of phone calls from debt collectors. For example, if a single consumer owes seven debts at the same time, they can receive up to 49 calls in a single week. Ultimately, the proposed rule would subject a single consumer to an excessive number of contacts that are within the limits of the proposed rule.[129]

The proposed rule is contradictory regarding the call frequency limit. The CFPB and the FTC have stated during enforcement proceedings that it is a violation of the FDCPA to call a consumer multiple times per day or week for prolonged period of time.[130] The proposed rule allows debt collectors to contact consumers multiple times per debt and leaves them vulnerable to the same harassment that the current rule allows. Although, it would impose a significant burden on debt collectors to limit the number of call frequencies total, the debt collectors have an arsenal of tools to engage consumers and compel them to pay their debts.

Multiple states have already implemented laws that limit the rate at which consumers can be contacted. New York and Massachusetts have both issued regulations that limit the number of times consumers can be contacted. Both states limited the number of contacts to twice per week.[131] The states have requested that the CFPB limit debt collectors from calling consumers more than three times within a seven-day period (regardless of the number of debts owed), or within seven consecutive days after the debt collector has a conversation with a consumer.[132]

B. Electronic Communications and Affirmative Consent

The CFPB has attempted to limit the number of phone calls that debt collectors are allowed to place to consumers per week, but the Attorney Generals feel the CFPB has failed to provide an adequate limit on communications regarding electronic communications.[133] The proposed rule

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[128] *Id.* (citing Debt Collection Practices (Reg. F) 84 Fed. Reg. at 23,312, n.300 (citing another source, Bureau of Consumer Fin. Prot., *Consumer Experiences with Debt Collection* at 13, tbl. 1 (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (stating that 57% of consumers that have at minimum one debt in collection have reported to have between two and four debts in collection as well.))

[129] Mich. Att'y Gen. et al., *supra* note 125, at 3.

[130] *Id.*; *see supra* note 13.

[131] Mich. Att'y Gen. et al., *supra* note 125, at 4.

[132] *Id.* at 4.

[133] *Id.* at 4–5.

fails to place a limit on the number of electronic communications to be placed per consumer. The CFPB should provide a limit in the proposed rule because the FDCPA does not currently provide a limit or any commentary on electronic communications.

The call frequency limit leaves consumers vulnerable to electronic communications. The unlimited number of electronic communications subjects them to data and messaging fees that come with the continuing messages. To rectify this level of harassment, the CFPB should require that debt collectors obtain affirmative consent from consumers before they use any type of communication with a consumer.[134]

The reason this is problematic is that there is an assumption that every consumer has access to reliable internet, cellular device, access, and computers.[135] The number of people who are most likely to find themselves in debt collection are the people who have limited access to text messaging and data plans.[136] It is also discriminatory towards individuals who reside in rural areas, low-income populations, and the elderly.[137] Multiple calls and text messages from debt collectors to consumers that are already subject to debt collection will shift the cost of debt collection onto consumers because of the lack of reliable digital access.[138] Therefore, consumers should provide affirmative consent and decide for themselves if they should be the ones to incur the cost of debt collection.[139]

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[134] *Id.* at 4.

[135] Mich. Att'y Gen. et al., Comment Letter on Proposed Rule Concerning Debt Collection Practices (Reg. F) (Docket. No. CFPB-2019-0022) (Sept. 18, 2019), at 5, https://www.michigan.gov/documents/ag/Multistate_CFPB_Debt_Collection_Comment_Letter_666257_7.pdf (arguing that the CFPB assumes the consumers who have multiple debts are able to have reliable access plans because 90% of Americans have unlimited texting plans); *see supra* note 16.

[136] Mich. Att'y Gen. et al., *supra* note 125, at 5 (as a general matter, consumers who have more debts in collection are non-white, lower income, and under the age of 62).

[137] *Id.*

[138] *Id.* (stating that many low-income households only have internet access through pre-paid data plans from smart phones and rural areas still do not have the infrastructure for adequate broadband access).

[139] *Id.* ("Consumers are in the best position to evaluate whether they would incur such costs or whether the efficiency and ease of such electronic communications be prohibited unless and until the consumer affirmatively opts in.").

C. Opt-Out

The proposed rule does not provide any guidance on acceptable methods of obtaining a consumer's contact information for phone calls or electronic communication.[140] It is only addressed when there is the safe harbor from the liability to third parties.[141] The Proposed Rule permits debt collectors to obtain contact information through any means it chooses, accuracy does not matter.[142] The discretion allowed to debt collectors exposes them to a risk of third-party disclosure because there is no means to ensure accuracy of the information collected.[143]

The opt-out provision of the FDCPA is much less protective than other legislations. The proposed rule requires "a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number."[144] The Telephone Consumer Protection Act and CAN-SPAM Act both protect much more adequately than the FDCPA.[145] Under the TCPA, consumers can revoke consent in any way they see fit as long as it clearly expresses that they do not want to receive any further messages.[146] Email marketers are required to provide a way by internet or reply email to opt out of receiving messages via email under the CAN-SPAM Act.[147] Regulation F lacks the specificity the other two statutes provide. The debt collectors have the discretion to choose the means they choose for the consumer to opt-out of receiving communications.[148] Consumers should be able to opt-out of receiving communications by any

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[140] *Id.* at 2.

[141] Debt Collection Practices (Reg. F), 84 Fed. Reg. at 23,400; *see also* Mich. Att'y Gen. et al., *supra* note 125, at 5.

[142] Mich. Att'y Gen. et al., *supra* note 125, at 5.

[143] *Id.*

[144] Debt Collection Practices (Reg. F), 84 Fed. Reg. 23,401; *see also* Mich. Att'y Gen. et al., *supra* note 125, at 5.

[145] Mich. Att'y Gen. et al., *supra* note 125, at 6.

[146] *Id.* (*citing In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7691, 7996 ¶ 63 (TCPA allows consumers to revoke their consent in any way that is clear)).

[147] *CAN-SPAM Act: A Compliance Guide for Business*, FED. TRADE COMM'N (Sept. 2009), https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business; *see also* Mich. Att'y Gen. et al., *supra* note 125, at 6.

[148] Mich. Att'y Gen. et al., *supra* note 125, at 5.

reasonable means.[149] The rule should be clear and allowing consumers to opt out by any reasonable method provides an incentive for debt collectors to make the easy opt-out for consumers.[150]

D. Electronic Communication Frequency Limits

As stated above proposed Regulation F limits the number of phone calls that can be placed to a consumer. That limit does not apply to electronic communications. The CFPB's bright-line limit should extend beyond just phone calls to all methods of communication.[151] Proposed Regulation F will increase the number of electronic communications. This is problematic because there has already been a significant increase in the amount of electronic communications by debt collectors.[152] As a general matter, electronic communication, especially email, is more convenient for debt collectors because it is more cost effective and convenient. The lack of a bright-line rule is going to increase the number of electronic communications to consumers. Thus, consumers will still be subject to the same harassment from telephone calls but in a different medium that will ultimately cost them more.[153]

The CFPB assumes that electronic communications are less intrusive on consumers than phone calls.[154] Although, at first glance that may appear to be true, that is not the case when considering the advent of modern technology. Smartphones have become ubiquitous in our society and provide much more to consumers than just phone calls. When a debt collector contacts a consumer who has a smart phone by phone call, text message, email, or social media the consumer has no way to protect themselves from the number of communications they get from the debt collector.[155] Ten years ago, the idea that electronic communications are not intrusive on consumers or subject them to harassment would have been true. In addition to the reality

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[149] *Id.* at 6 (the State attorneys general that oppose that the rule "require the opt-out notice to be placed prominently in the body of the communication").

[150] *Id.* at 6 (*see supra* note 26, citing *ACA Int'l v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

[151] *Id.* at 4.

[152] *Id.*

[153] *Id.*

[154] Mich. Att'y Gen. et al., Comment Letter on Proposed Rule Concerning Debt Collection Practices (Reg. F) (Docket. No. CFPB-2019-0022) (Sept. 18, 2019), at 7, https://www.michigan.gov/documents/ag/Multistate_CFPB_Debt_Collection_Comment_Letter_666257_7.pdf.

[155] *Id.*

that these types of communications did not exist at the time the FDCPA was passed.

This is why limitations on the specific number of all communications not just certain types of communication is necessary to adequately protect consumers from intrusive and harmful practices by debt collectors. By creating the limitation for the number of phone calls that can be placed to a consumer the CFPB understands that there is an ambiguity in understanding how many communications rise to the level of harassment.[156] The prior ambiguity led to conflicting understandings of what constituted abuse and harassment. In *Fleming v. Associated Credit Serv., Inc.,* the court ruled that 15 or 16 calls over a three-month period was enough to be considered a violation of §1692d of the FDCPA.[157] In contrast, *Carman v. CBE Grp., Inc.,* stated that 149 calls over two months was not enough to be considered harassment.[158] It is difficult to apply the prohibition on intentional abuse and harassment because the CFPB has not provided any guidance as to the number of communications that rise to a level of harassment. This is why a bright-line rule is necessary, so consumers are protected from excessive phone calls and debt collectors are able to know when they have violated the rule.[159]

Beyond the opt-out provision the Attorneys General have stated that the CFPB should not allow for the electronic delivery of the validation notice without compliance with the E-SIGN act. The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§7001 requires the consumers to "affirmatively consent"[160] to receive communications through an electronic medium. The proposed rule exempts some communications from the consent process in the E-SIGN Act which includes the validation notice that is required by the FDCPA.[161]

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[156] *Id.*

[157] 342 F. Supp.3d 563, 581 (D.N.J. 2018); *see also* Mich. Att'y Gen. et al., *supra* note 125, at 7.

[158] 782 F. Supp.2d 1223, 1229 (D. Kan 2011);. Mich. Att'y Gen. et al, *supra* note 125, at 7.

[159] Mich. Att'y Gen. et al., *supra* note 125, at 7–8.

[160] *Id.* at 8.

[161] *Id.*

E. Social Media

The proposed rule does not allow debt collectors to use public social media pages to contact consumers.[162] Debt collectors are permitted to use the private messaging functions of the social media platforms, but they are still subject to the issues with third-party disclosure and other limitations. The states have taken the position that any communication via social media (including social media that are not "public-facing" i.e. private and direct messaging) should be prohibited by the FDCPA.[163] Social media is not a regular place where consumers tend to manage their financial affairs.[164] Additionally, social media is not always an accurate source of information. People use fake profile names, or do not provide enough information about who they are or flat out lie about who they are. This creates a greater probability that third-party disclosure will occur. The states have taken the position that all social media use be banned for communicating with consumers.[165] In addition to protecting consumers, it would also protect debt collectors. In fact, banning all social media functions would discourage consumers from using social media to manage debts that they owe and protect debt collectors from third-party disclosure.

F. Limited-Content Messages

Debt collectors make so many calls to consumers for reasons other than harassment. In fact, most debt collectors make such frequent calls to avoid third party disclosure.[166] This is why the CFPB introduced the limited-content messages. As stated earlier, the messages are designed to contain enough information that would prompt a consumer to respond to the message, but not enough information that would lead to a disclosure.[167] Limited-content messages do not meet the definition of a communication under the FDCPA because it does not reveal information that is regarding a debt. [168] Limited-content messages are not communications under the

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[162] *Id.* at 10.
[163] *Id.*
[164] *Id.*
[165] Mich. Att'y Gen. et al., Comment Letter on Proposed Rule Concerning Debt Collection Practices (Reg. F) (Docket. No. CFPB-2019-0022) (Sept. 18, 2019), at 10, https://www.michigan.gov/documents/ag/Multistate_CFPB_Debt_Collection_Comment_Letter_666257_7.pdf.
[166] *Id.*
[167] *Id.* at 11.
[168] *Id.*

FDCPA. Because they are not communications, they are not subject to the third-party disclosure prohibition.[169]

However, limited-content messages are considered attempts to communicate. This means that debt collectors will be covered by the prohibition on unfair or unconscionable practices, harassing or abusive conduct, and the call frequency limit.[170] There are a myriad of ways that debt collectors can use a limited-content message to contact a consumer: voicemail, text message, leaving a message with a third party, or sending a private message via social media.[171] Limited-content messages cannot be sent via email because the email address itself could reveal information regarding the debt and a consumer is not likely to respond.[172]

According to the state Attorneys General limited-content messages do not adequately protect consumer privacy. The limited-content messages are likely to become very generic when communicated to consumers. This means that the algorithms that control all of our devices and the ads we see may be able to pick up on the content of the messages that are sent. Then the consumer will start receiving ads about debt collection services, which others could see. It would then make it public knowledge that they owe certain kinds of debt.

Moreover, if the limited-content message is given to a third party orally it is very likely that the third party will obtain impermissible information about the consumer and their debt. And in person conversation would be very difficult. The same issue exists for limited-content messages that are sent via social media. The debt collector would need to have a profile or create a profile to contact the consumer which would be visible to others and can cause the same issue.[173]

Debt collection practices can be harmful to a large number of Americans. Although the deficiencies in the proposed rule do affect many Americans, older populations are particularly vulnerable.

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[169] *Id.*

[170] *Id.*

[171] Mich. Att'y Gen. et al., Comment Letter on Proposed Rule Concerning Debt Collection Practices (Reg. F) (Docket. No. CFPB-2019-0022) (Sept. 18, 2019), at 11, https://www.michigan.gov/documents/ag/Multistate_CFPB_Debt_Collection_Comment_Letter_666257_7.pdf.

[172] *Id.* at 13.

[173] *Id.* at 12.

IV. ANALYSIS AND CONCLUSION

The Proposed Rule attempts to bring the FDCPA into the twenty-first century. The FDCPA was passed over 40 years ago. As technology has advanced and times have changed the FDCPA as written has led to modern day struggle. Not understanding how the FDCPA was to apply to modern life creates a significant amount of confusion because e-mail, text messages, and social media did not exist at the time it was passed. The purpose of the proposed rule is to create bright-line rules that set clear boundaries for debt collectors in order to prevent abusive and harmful debt collection practices. Although the FDCPA provides number limits and protections for consumers the proposed rule does not provide enough. The CFPB has proposed a rule that does not quell the abusive debt collection practices and leave consumers vulnerable to even more harassment by debt collectors.

The rule provides many material benefits to debt collectors, but it fails to adequately protect consumers. The proposed rule prohibits debt collectors from giving information to credit reporting agencies without notifying the debtor. It also limits the sale and transfer of debt that has already been paid to prevent multiple attempts to collect.[174] These benefits are helping in protecting individuals, but it does not go far enough.

The new forms of technology have completely changed how we operate. They have even improved how many people manage their financial affairs. The proposed rule's limitations on phone calls, email, text messages, and more do not provide an adequate protection for many individuals. The safe harbor provisions in fact provide more protection for abuse debt collection practices as opposed to protecting vulnerable consumers. The limited-content messages help legitimate and illegitimate attempts to get consumer information and subject individuals to fraud.[175]

There is gap between many demographics of Americans that leave certain demographics more vulnerable to the failures of the proposed rule than others. For example, elderly individuals and their ability to access and

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[174] AARP, Comment Letter on Debt Collection Practices (Reg. F) Docket No. CFPB-2019-0022 (Sep. 18, 2019), at 1, https://www.aarp.org/content/dam/aarp/politics/advocacy/2019/09/090519-cfpb-debt-collection-letter.pdf.

[175] *Id.* at 2.

utilize technology. Although that gap is narrowing,[176] the unlimited number of electronic communications the rule permits create a particular issue for older individuals. Consumers that are not used to using text messages or email will have a greater difficulty in determining which one of the messages are legitimate.[177] One of the reasons the proposed rule should allow for individuals to opt-in (instead of merely opting out) to text message and email communications from debt collectors is to protect them from the vulnerability to imposter messages.[178] Older individuals will be able to know when a debt collection message is fraudulent because they will know if they opted into receiving those types of communications.

The limited-content message only protects debt collectors. Although it does have a place that allows debt collectors to communicate with consumers and settle the accounts, it creates more vulnerability. Fraudulent messages can emulate the limited-content messages, that induce the consumer to provide more information. Elderly individuals are more vulnerable to these types of practices. Cryptic limited-content messages may scare older individuals.

The proposed rule does not allow the consumer to revoke consent, especially because the unlimited number of electronic communications shifts the cost of debt collection to the consumers.[179] Many low-income families receive their internet access through pre-paid data plans as opposed to unlimited plans. The proposed rule fails to take into account the fact that many individuals who find themselves in debt collection cannot afford to have heavier burdens placed on them.

The rule does not adequately protect consumers from the tactics that are customary in the debt collection industry. The low-income, non-white, and elderly are among the groups of people who will remain subject to the abusive debt collection practices imposed by the proposed rule.

The proposed rule will result in more phone calls to consumers because the limit on the phone calls is per debt instead of per consumer.[180]

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[176] *Id.* at 3 (citing Brittne Nelson Kakulla, *Older Americans' Technology Usage Keeps Climbing: 2019 Tech Trends and the 50+*, AARP (Jan. 2019), *available at* https://www.aarp.org/content/dam/aarp/research/surveys_statistics/technology/2019/2019-technology-trends.doi.10.26419- 2Fres.00269.001.pdf (an AARP study in which the quarters of adults over the age of 50 have smart phones).

[177] AARP, *supra* note 174, at 4.

[178] *Id.*

[179] *Id.*

[180] Rooney, *supra* note 43.

The frequency limit is deceptive, in that the limit applies per debt as opposed to per consumer. In reality, the consumer is vulnerable for even more phone calls. This means that the abusive debt collection practices that so many consumers fall victim too will continue to rampage their lives.

The Attorneys' General objection and proposal are ideal regarding the proposed rule. The Attorneys' General suggestion provides the adequate protection that the consumer needs. The objections to the proposed rule shed light on the fact that the CFPB has grossly failed to adequately protect the millions of consumers who interact with debt collectors. Consumers who owe money on debts are already vulnerable to harassment by debt collectors and have been harmed by abusive debt collection practices. The telephone frequency limit does not limit consumer exposure, it increases it. The permission to use electronic communications leave consumers to be constantly inundated with emails, text messages, and direct/private messages on social media platforms.

The CFPB should require that all debt collectors affirmatively consent and opt-in to any messages they may receive from a debt collector. An opt-in provision in the proposed rule would give consumers more agency over their debts. They would know to whom they should pay their debts and what device they are calling from. Not all debt collectors are evil individuals who are out to harm consumers. The debt collector's job is to get the consumer to pay their debts. The safeguards and understanding provided by the Attorneys General along with the example of concern demonstrated through elderly Americans, which can be applied to rural Americans, non-white Americans, and low-income Americans will protect consumers and allow debt collectors to effectively collect on debts that are owed.

The process of debt collection is a guessing game for debt collectors. As years have passed, in order to win the game, debt collectors have adopted abuse, harassing, and harmful practices to induce consumers to pay. To put an end to the abusive debt collection practices that have become the norm in the industry the proposed rule must take a first step in protecting consumers. The proposed rule attempts to be a step in the right direction for the FDCPA. There are multiple interested parties to consider with is balancing the interest of an infinite number of parties. The steps the CFPB has taken do not adequately protect consumers. Ultimately, the bright-line rules the CFPB is

creating does not adequately protect consumers.[181] It weakens the consumer protections.[182] Although, the proposed rule creates bright-lines and addresses many ambiguities that have caused ambiguities regarding modern communication, it does not provide enough protection to consumers.[183] The proposed rule disproportionately favors debt collectors by putting a "blind faith" in industries that are notorious for abusing and harassing consumers.[184]

Unless the CFPB adopts the suggestions in the comments from both the Attorneys General and consumer interest groups, such as AARP, the bright-line rule will pave the way for more consumer abuse.

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[181] *28 State AGs Argue CFPB's Debt Collection Proposal "Falls Far Short"*, BUCKLEY: INFOBYTES BLOG (Sept. 25, 2019), https://buckleyfirm.com/blog/2019-09-25/28-state-ags-argue-cfpb's-debt-collection-proposal-"falls-far-short".

[182] Sarah D. Young, *More than Half the State Attorneys General Opposed Changes to Debt Collection Rule*, CONSUMER AFFAIRS: NEWS IN SEPTEMBER 2019 (Sept. 24, 2019), https://www.consumeraffairs.com/news/more-than-half-the-state-attorneys-general-oppose-changes-to-debt-collection-rule-092419.html.

[183] *See,* Brenner, *supra* note 4 (arguing, "In order to reclaim the FDCPA as an effective vanguard of consumer protection, regulators must give it the power to fundamentally reshape the debt collection market by eliminating the profit motive of egregious debt collection abuses. It must be retooled to destroy the competitive advantage that unethical debt collectors gain through abusive tactics, while allowing ethical debt collectors to profit through compliance." Further, "[t]he optimal FDCPA must meet the balanced goal of better protecting debtors by providing tougher regulation against egregious debt collection abuses, while benefiting ethical debt collectors by clarifying…statutory ambiguities and providing regulatory guidance needed to lawfully integrate emerging technologies into their business models…[C]ompliance must be made easier and more profitable than abuse in order to affect positive industry-wide reform.").

[184] Press Release, Letitia James NY Att'y Gen., Attorney General James Leads Coalition of 21 State Attorneys General to Urge the Consumer Financial Protection Bureau to Reject Anti-Consumer Protection Policies (Feb. 12, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-leads-coalition-21-state-attorneys-general-urge-consumer.