MORTGAGE BANKERS ASSOCIATION

September 18, 2019

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

Re: Notice of Proposed Rulemaking, Debt Collection Practices (Regulation F)
Docket No. CFPB-2019; RIN 3170-AA41

Dear Ms. Jackson:

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to offer comments on the Bureau of Consumer Financial Protection's ("CFPB" or "the Bureau") Notice of Proposed Rulemaking ("NPR") addressing proposed amendments to Regulation F,[2] which implements the Fair Debt Collection Practices Act ("FDCPA").[3] The FDCPA was passed in 1977 and previously enforced by the Federal Trade Commission ("FTC"). Rulemaking authority was then transferred to the Bureau in 2010 with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[4]

The Bureau notes that questions have arisen since the passage of the FDCPA. The Dodd-Frank Act did not alleviate those questions, especially in the area of residential mortgage loan servicing, but increased the frequency of inconsistent interpretations by courts and federal regulators. The NPR attempts to address some of this uncertainty, but falls short of establishing a bright line that recognizes the robust and unique borrower protections already established by the CFPB's Mortgage Servicing Rules for residential mortgage loan servicers. The CFPB's Mortgage Servicing Rules subject mortgage servicers to a comprehensive set of mortgage-specific requirements that go far beyond those generally imposed on non-mortgage debt collectors under the FDCPA.

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.
[2] CFPB, *Debt Collection Practices (Regulation F)*, 84 Fed. Reg. 23274 (May 21, 2019). ("NPR").
[3] 15 USC § 1692-1692p.
[4] Public Law 111-203, 124 Stat. 1376 (2010).

While the NPR has taken steps to update Regulation F to address the numerous changes in technology since 1977, the NPR fails to explicitly distinguish the role of first-party debt collectors and unnecessarily hinders the relationship between mortgage servicers and their customers.

I. Scope of Coverage

a. "debt collector"

In defining "debt collector," the Bureau generally restates section 803(6) of the FDCPA.[5] The NPR references the Supreme Court case *Henson v. Santander Consumers USA Inc.*, wherein the Court held that a company may collect defaulted debts that it has purchased from another without being an FDCPA-covered debt collector.[6] The Court's holding essentially focused on whether Santander had met the "regularly collects" prong of the introductory language in FDCPA section 803(6). The Bureau believes that the proposed definition remains consistent with *Henson* and could therefore 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."[7] This language leaves a cloud of uncertainty over the application of this definition to mortgage servicers and subservicers who do not own the whole loan but service the loan for another entity.

Mortgage servicers are already heavily regulated by a host of different entities, including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve, States, and the CFPB itself. In addition, servicers need to meet government-sponsored enterprise ("GSE") and other investor requirements, which place a premium on establishing a relationship of trust with the borrower. Collectively, these entities have the ability to directly affect policy and impose operating process changes today without the need for an additional overlay of the proposed FDCPA regulations.

When Congress passed the FDCPA, it "targeted situations where natural constraints would fail to inhibit debt collection practices."[8] These "natural constraints" exist for mortgage servicers who are inherently "restrained by the desire to protect their goodwill when collecting past due accounts."[9] Mortgage servicers specifically anticipate long-term contact with the borrower and provide services beyond simply collecting payments. Servicers provide tax information, establish and manage escrow accounts for the payment of taxes and insurance, and engage with delinquent borrowers to help those in dire straits avoid the effects of foreclosure. Plainly stated, mortgage servicing is a unique form of debt collection, governed by a comprehensive regulatory regime

[5] Proposed § 1006.2(i).
[6] 137 S. Ct. 1718 (2017). ("*Henson*").
[7] NPR at 23289
[8] *Harrison v. NBD Inc.*, 968 F. Supp. 837, 841 (E.D.N.Y. 1997) *citing* S. Rpt. No. 95-382, 95th Cong., 1st Sess., reprinted in 1977 U.S.Code Cong. & Admin. News 1695, 1696).
[9] *Id*.

under the CFPB's Mortgage Servicing Rules and should not be subject to the FDCPA.[10] Mortgage loan servicers, as defined in the Real Estate Settlement Procedures Act ("RESPA")[11] should be exempt from the definition of "debt collector" as used in proposed Regulation F when performing duties required under RESPA or the Truth in Lending Act ("TILA").

b. "in default"

The Bureau's proposed rule anticipates that "loan servicers would be covered by the proposed rule if they acquire servicing of loans already *in default*."[12] The definition of "debt collector" further excludes from its definition "any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity . . . concerns a debt that was *not in default* at the time such person obtained it."[13] In the preamble to the CFPB's Mortgage Servicing Rules, the Bureau recognized that servicers may distinguish loans that are delinquent from loans in default.[14] However, the phrase "in default" is not defined under the FDCPA and the NPR fails to provide clarification.

An FTC staff opinion letter in 2002 opined that, in absence of a contractual definition or conclusive state or federal law, a creditor's reasonable written guidelines may be used to determine when an account is "in default."[15] The Bureau should clarify that a mortgage loan servicer that acquires portfolios that are less than thirty-one days past due are not "debt collectors" under the FDCPA. This would be consistent with time frames for reporting delinquency under the Fair Credit Reporting Act ("FCRA") and is in line with industry practices.

II. Inappropriate use of UDAAP Rulemaking Authority

Primarily, the Bureau relies on its authority to issue rules under the FDCPA. However, several proposed provisions are promulgated under the Bureau's authority under DFA. The Bureau retains authority under the Dodd-Frank Act to issue rules to prevent unfair, deceptive, or abusive acts or practices ("UDAAP") by "covered persons." The term "covered persons" includes persons who are engaging in offering or providing a consumer financial product or service. As noted in the preamble to Regulation F, "[c]overed persons under the Dodd-Frank Act thus include many

[10] It is understood that mortgage servicers who are attempting to collect a deficiency judgment post-foreclosure requires a different set of protections for consumers, and therefore warrants the application of the FDCPA in this circumstance.
[11] 12 CFR 1024.2(b) "Servicer means a person responsible for the servicing of a federally related mortgage loan (including the person who makes or holds such loan if such person also services the loan)."
[12] NPR at 23372 (emphasis added).
[13] Proposed 1006.2(i)(2)(vi)(C) (*emphasis added*).
[14] "Servicers may use different definitions of 'delinquency' for operational purposes. Servicers may also use different or additional terminology when referring borrowers who are late or behind on their payments – for example, servicers may refer to borrowers as 'past due' or 'in default' and may distinguish between borrowers who are 'delinquent and seriously delinquent.'" 78 Fed. Reg. 10695, 78 Fed. Reg. 10901 (Feb. 14, 2013).
[15] Letter from Thomas E. Kane to Richard T. de Mayo, Esq., President and CEO, TSYS Total Debt Management, Inc., *Re: Section 803(6) of the Fair Debt Collection Practices Act* (May 23, 2002).

FDCPA-covered debt collectors, as well as many creditors and their servicers who are collecting debt related to a consumer financial product or service."[16]

As proposed, it is unclear how Regulation F might apply to first-party creditors. However, the CFPB has left open the potential for enforcement of certain provisions against first-party debt collectors under its UDAAP authority through footnotes. Footnote 69 states:

> "Where the Bureau proposes requirements pursuant only to its authority to implement and interpret sections 806 through 808 of the FDCPA, the Bureau does not take a position on whether such practices also would constitute an unfair, deceptive, or abusive act or practice under section 1031 of the Dodd-Frank Act. Where the Bureau proposes an intervention both pursuant to its authority to implement and interpret FDCPA section 806 through 808 and pursuant to its authority to identify and prevent unfair acts or practices under Dodd-Frank Act section 1031, the section-by-section analysis explains why the Bureau proposes to identify the act or practice as unfair under the Dodd-Frank Act."[17]

The Bureau also indicates in footnotes 313 and 331 that the call frequency limitations in proposed section 1006.14(b)(2) may be extended to first-party creditors.

> "The Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed section 1006.14(b)(2)(ii) by creditors and others not covered by the FDCPA would 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."[18]

This only serves to further confuse first-party creditors. The Bureau has the ability to promulgate rules or offer clear guidance materials to industry to proscribe behaviors. Such bright-line clarity has the benefit of creating clear expectations for consumers and better understanding of their responsibilities among regulated entities. Vague pronouncements or relying on fact-specific consent orders—also known as "regulation by enforcement"—does not serve either group.

III. Communications with borrowers

While the use of email or text messages is not prohibited under the FDCPA, concern over potential liability for inadvertent disclosure of communications to third parties has discouraged widespread use of newer communication media by debt collectors despite consumers' clear preference. The NPR addresses the application of the FDCPA to electronic communications and identifies procedures that debt collectors could use to reduce the risk of liability from communicating by text or email. The NPR also provides a framework for providing electronic disclosures. However, at the outset the NPR introduces a definition for the term "limited-content messages" raising issues of effective communication with borrowers.

a. Limited-Content Messages

The NPR defines "limited-content messages" to clarify how debt collectors can leave voicemails or messages for consumers without violating FDCPA section 807(11) disclosure requirements or

[16] NPR at 23278.
[17] NPR at 23282, n. 69.
[18] NPR at 23314, n. 313. *See also*, NPR *at* 23317, n. 331.

the section 805(b) prohibition against revealing debts to third parties.[19] The Bureau notes that uncertainty about whether a voicemail constitutes an FDCPA communication has led some collectors to err on the side of not leaving messages and instead increase the frequency of their call attempts to ensure right party contact.[20] In an attempt to resolve this uncertainty and reduce the need for repeated calls from collectors, the NPR sets forth specific content parameters to ensure that a debt collector does not convey information directly or indirectly to any person if he or she provides only a limited-content message.

As defined in the NPR, a limited-content message would not be considered an FDCPA "communication" and therefore would not be subject to the requirements for a debt collector to identify itself as such and provide the "mini-Miranda" disclosure.[21] However, it would be considered an "attempt to communicate" and thus subject to certain other restrictions such as the proposed call frequency limitation discussed below.

The NPR also allows debt collectors to transmit these messages by voicemail, text, or over the phone but not by email because the Bureau is concerned that additional information such as the sender's email address may convey information about a debt.[22] The Bureau also notes that consumers may be unlikely to respond to emails that contain solely the information included in a limited-content message as they may be viewed as spam or security risks.[23]

At the outset, mortgage servicing-related communications that are required by RESPA or the TILA should not be considered "attempts to communicate" nor "communications" as defined in the NPR.[24] Such communications are designed to meet purposes other than debt collection (i.e. loss mitigation) and, as a result, do not carry with them the dangers that the FDCPA was designed to avoid. Indeed, the Bureau requires these communications from mortgage servicers.

Additionally, the NPR contemplates that a "limited content message" will not include the identification of the company sending the message, but will only provide an individual's name. Rarely, if ever, would borrowers be able to make a connection between an individual employee's name and their mortgage servicer. If a mortgage servicer does not provide their company name or any context in a voicemail, borrowers will be discouraged from calling back because they will be unable to differentiate a voicemail from their mortgage servicer from other calls.

Given the importance of reaching delinquent borrowers early, mortgage servicers should be permitted to leave their company name in a voicemail. The ability to state that the caller wishes to discuss "an account" is insufficient to identify which account (e.g., credit card vs. mortgage) which is an important distinction for a borrower that would assist them in determining which phone calls

[19] Proposed § 1006.2(j).
[20] NPR at 23289.
[21] "Mini-Miranda" refers to the legal warning language required under section 807(11) of the FDCPA.
[22] NPR at 23287.
[23] NPR at 23291.
[24] For example, communications required by 12 CFR 1024, Sections 1024.39 (early intervention requirements); 1024.40 (continuity of contact); 1024. 41 (loss mitigation procedures); 12 CFR 1026, Sections 1026.39 (mortgage transfer disclosure), and 1026.41 (periodic statements for residential mortgage loans).

to return. Mortgage servicers routinely communicate with borrowers about a number of issues unrelated to debt collection. Providing the name of a debt collector or mortgage servicer does not typically otherwise imply the status of the account for which the call was placed.

With respect to emails, mortgage servicers should be permitted to transmit a limited-content message by email. Borrowers' email accounts are private and password protected while mobile device settings allow consumers to conceal previews of messages. Essentially, email has stronger privacy controls than any written correspondence sent to a residence where multiple individuals may reside. Even if an email was inadvertently viewed by a third party, it is unlikely that the third party would conclude that the communication was related to debt collection.

b. Email and text message procedures

The NPR clarifies how a debt collector can communicate via text and email and avail itself of "bona fide error" defense.[25] This provision arises from FDCPA section 813(c) which provides that a debt collector can avoid civil liability by showing, by a preponderance of the evidence, that the violation was not intentional, resulted from a bona fide error, and that it occurred even though the debt collector maintained reasonable procedures designed to avoid the error.

With respect to electronic communications, reasonable procedures would include taking steps to reasonably confirm and document that the debt collector communicated using a permissible email address or telephone number and that the debt collector has taken additional steps to prevent the use of email or text leading to a prohibited third party disclosure.

The Bureau has incorporated FDCPA statutory text throughout the NPR, and would be better served in adopting section 813(c) in whole, rather than by reference and piecemeal throughout the NPR. As it relates to text messages, character and cellular carrier limitations place significant difficulty in transmitting a message with sufficient content. In order for mini-Miranda disclosure language and opt-out information to be included, limitations on the amount of information in a single text message make it difficult to comply and deliver an informative message to the borrower. That is, to provide all the required information, outside a limited-content message, servicers would have to send multiple text messages for each communication. This would significantly degrade the effectiveness of the communication and likely result in increased opt-outs. Consumers would likely be irritated if they receive a string of text messages that includes potentially adversarial language which may also lead to more opt-outs. Conversely, it is common practice and consumer friendly to include simple opt-out messaging as part of the communication. Alternatively, the Bureau should consider allowing the inclusion of a webpage link that directs the borrower to the required disclosures.

The NPR further requires that debt collectors have recently communicated via a non-work email or non-work telephone text message in order to be considered a reasonable procedure.[26] Prior consent should be implied when a borrower provides an email address directly to a servicer to

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[25] Proposed § 1006.6(d)(3).
[26] Proposed § 1006.6(d)(3)(i)(c).

communicate about the debt regardless of whether a communication was recently sent to or received from such address. As the CFPB has acknowledged, while mobile phone numbers are frequently reassigned this is not the case with email addresses, and therefore the risk of unauthorized disclosure to a third party is significantly lower.

c. Work emails & social media platforms

The Bureau has proposed prohibiting debt collectors from attempting to communicate using a work email address that the collector knew or should have known was provided by the consumers' employer, unless the collector has received prior written consent directly from the consumer or an email from that address.[27] Additionally, the NPR also prohibits debt collectors from communicating or attempting to communicate about a debt through social media if the message is viewable by a third party.[28]

Providing a work email on a loan application or when setting up an online account should be considered consent to receive communications to that address. Typically, a consumer is asked to provide an email or phone number where a servicer can send account information and other communications. If the address or number was provided by a consumer (and not, for example, through skip trace efforts), consent should be implied regardless of whether the email is work-based or not. Servicers should be permitted to communicate using that address unless and until the consumer specifically opts-out.

Importantly, certain domain names (e.g., gmail, outlook, yahoo, etc.) should be presumed to be non-work emails, unless the customer indicates otherwise. This is similar to the information provided in comment 22(f)(3)-3 wherein examples of domains that are presumed work emails are contained. While the NPR itself contains examples of non-work emails,[29] the Bureau should endeavor to include a similar non-exhaustive list within the commentary.

Some servicers monitor adverse information posted to social media platforms and may reach out to request direct contact in order to resolve or discuss the issue. As the borrower specifically references his or her mortgage servicer in a publically viewable post, servicers should be able to provide a limited response in the same publically viewable forum to request that the borrower contact them directly in order to resolve the underlying issue. Such requests should be considered as either a type of limited-content message or as an exception to the prohibition against unauthorized disclosure.

d. Call frequency restrictions

The NPR identifies excess call frequency as an unfair practice under DFA section 1031 for those covered by the FDCPA. It establishes bright-line frequency limits to determine when a debt collector's calling frequency has violated the FDCPA's prohibition on harassment and the DFA's

[27] Proposed § 1006.22(f)(3).
[28] Proposed § 1006.22(f)(4).
[29] NPR at 23325.

prohibition on unfair acts or practices as it relates to telephone calls.[30] Specifically, the NPR prohibits a debt collector from attempting to call a consumer about a debt more than seven times within a seven-day-period unless the call is made to respond to a consumer request for information or the consumer has given prior consent directly to the debt collector.[31] The proposed rule also prohibits a debt collector from calling a consumer for seven consecutive days after having had a telephone conversation with the consumer regarding the debt, with certain exceptions, even if the consumer initiated the first call. The frequency limitation would apply only to telephone calls but would include calls placed to any person, not just the consumer that is alleged to owe the debt. Additionally, as discussed above, footnote 331 suggests that the proposed limitations on telephone calls to one call per week absent an exception could be extended to first-party creditors.

We urge the Bureau to exempt mortgage servicers from the proposed call frequency limitation with respect to calls made pursuant to Regulation X under RESPA[32] and for all telephone calls related to a loss mitigation application submitted by the consumer. We also oppose any frequency restrictions on other media, such as text or email. A one-size-fits-all approach to limiting call attempts across all debt types and consumer profiles will cause disproportionate impacts on certain areas of debt collection, particularly with respect to residential mortgage loans where the stakes are much greater than unsecured credit.

Effectively communicating with borrowers who are delinquent on their payment obligations is critical to keeping borrowers in their homes and protecting their credit histories. The consequences of foreclosure are profoundly negative for homeowners, neighborhoods, and communities.[33] As such, early and frequent outreach to delinquent borrowers by mortgage servicers is mandated by multiple federal and state laws, regulations, and requirements, including the CFPB's Mortgage Servicing Rules.

The Bureau has previously stated its belief that telephone calls were an effective method to discuss the availability of loss mitigation options in creating the live contact requirements under RESPA. Yet, the Bureau is now proposing to *restrict* the ability of the servicer to contact borrowers, effectively creating obstacles to a borrower getting a loan modification or keeping their home.

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[30] Proposed § 1006.14(b).
[31] Proposed § 1006.14(b)(2).
[32] *See* 12 CFR § 1024.38, 1024.41.
[33] "The financial losses associated with foreclosure are substantial. For homeowners, credit ratings are damaged, which affects their ability to move on to a new home and lessens their ability to get loans for other purchases. Poor credit ratings may also negatively influence terms and prices for services such as insurance and may impede efforts to get jobs, because some employers access credit ratings for new hires. The net worth for homeowners in foreclosure decreases, since they lose their home as an asset along with any accumulated equity and the tax advantages of homeownership. In the mid-1990s, the Family Housing Fund in Minneapolis estimated the average family lost $7,200 through foreclosure. Current estimates are most likely higher, as figures are adjusted for inflation and recent decreases in housing values further erode equity and negate previous financial investments in the foreclosed home. One observer noted, 'foreclosure can wipe out the homeowners' savings and leave them owing debt on homes they no longer own.'" G. Thomas Kingsley, Robin Smith, and David Price, Urban Institute, "The Impact of Foreclosures on Families and Communities." May 2009, pg. 14 (citations omitted).

Time is of the essence in loss mitigation efforts as research shows that borrowers have a lower re-default rate the earlier they are reached in delinquency.[34]

Calls from mortgage servicers go beyond traditional collection—such calls include those aimed at determining occupancy status, the reason for delinquency or default, the impact of a natural disaster and identifying related assistance, and opportunities for loss mitigation and home retention. These call frequency restrictions would hamper the ability of servicers to reach consumers which is directly at odds with the Bureau's intent of live contact and early intervention expectations as outlined in Regulation X. This is also at odds with state laws such as California's Homeowner Bill of Rights, and other agency/insurer requirements.

At a minimum, telephone calls related to an open loss mitigation application should be exempt from the call limit or express noted to fall within the exclusion found in proposed section 1006.14(b)(3)(1) for calls "[m]ade to respond to a request for information from such person." The CFPB has previously determined that such communications should continue, notwithstanding an effective cease-and-desist request from the consumer "because the borrower has specifically requested the communication at issue."[35] Thus, even in the face of a request that contacts stop completely, the Bureau determined that these types of contact were important and effectively consented to by the consumer. Stated simply, these calls are too important to be subject to an arbitrary call cap.

The call frequency restriction, if imposed on mortgage servicers with respect to loss mitigation-related calls, would unnecessarily lengthen the process from application to decision and could result in otherwise avoidable outcomes, including foreclosure. During the loss mitigation process, it is imperative for all channels of communication to be open in order to serve its ultimate purpose trying to keep consumers in their homes when possible. One member reported that in the first six months of 2019, it took an average of 7.048 telephone conversations between the mortgage servicer and borrower over an average time period of 28.69 days to get from receipt of a loss mitigation application to a final decision on that application. Most of the contacts (average of 4.78) were borrower-initiated compared to calls initiated by the servicer (2.275). Many of these contacts are discussions related to the items necessary to complete the loss mitigation application. If these contacts are disallowed, there is likely to be confusion as to the information required of the consumer and, ultimately, less success in completing the loss mitigation application process. Thus, the one conversation per-week limitation would have undoubtedly prolonged the average time required to complete the loss mitigation review and may result in the denials of pending loss mitigation applications as incomplete.

As the Bureau has noted, debt collectors typically must make multiple attempts before establishing actual contact with a consumer. The ability of a debt collector to establish right-party contact and resolve debts is in the best interests of both consumers and debt collectors – particularly in regards

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[34] Only the amount of payment reduction provided by the modification was more significant the length of the pre-modification delinquency. Scott, Walter. "Treatment Effects of Subprime Mortgage Modifications Under the Home Affordable Modification Program." Page 28, March 2015.
[35] CFPB Bulletin 2013-12, *Implementation Guidance for Certain Mortgage Servicing Rules* (October 15, 2013).

to secured loans where the collateral is at risk. While the restriction does not apply to texts and emails, the borrower has the option of opting out of those forms of communication further limiting the ability of a mortgage servicer to establish right-party contact. These delays in contacting a consumer can result in a multitude of long-term issues for the borrower. More frequent calls may be in the borrower's best interest right before foreclosure or after a natural disaster. If a borrower fails to make a payment after making a verbal promise, the servicer may need to call at least once more within the next seven days.

The Bureau should exempt all calls initiated by the consumer. It is both counter-productive and poor customer service for a collector to decline to engage a consumer in a telephone conversation that the consumer initiated, simply because the call limit had been reached for the relevant time period. These calls are not currently within the purview of the proposed exclusion for calls "[m]ade to respond to a request for information from such person." In practice, a mortgage servicer could have a conversation with a consumer on a particular day about what is needed to complete a loss mitigation application but, if that consumer calls back for clarification, the servicer would be unable to respond for seven days. This frustrates the goals underlying the Mortgage Servicing Rules. Further, consumers often call to make payments on their mortgage loan but, if they had a conversation with the servicer within the prior week, the servicer would be unable to complete the conversation and accept the related payment, potentially resulting in a late charge and negative credit reporting. These are just a few examples showing that it is illogical and counterproductive to limit the number of times that a consumer can reach out to their mortgage servicer.

Additionally, ringless voicemails that result in a collections message being left for the consumer should not count towards the limit. A consumer can retrieve and review a ringless voicemail at a time of his or her choosing, without hearing an intrusive ring when the message is transmitted. Ringless voicemails are more akin to the types of communications that the Bureau proposes to exclude from the contact frequency limitations (i.e., email and text).

IV. Other specific provisions

a. Time and place restrictions

The Bureau's NPR prohibits debt collectors from communicating or attempting to communicate with consumers at times or places that the collector "knows or should know" are inconvenient.[36] These time and place restrictions apply to all forms of communication—calls, messages, emails, and text messages. Debt collectors would be prohibited from communicating or attempting to communicate at a consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communications.

Communicating or attempting to communicate before 8:00 am or after 9:00 pm in the consumer's time zone is considered presumptively inconvenient.[37] However, as cell phone area codes do not always match a consumer's actual location, a debt collector may have conflicting or ambiguous information regarding a consumer's location. Accordingly, proposed comment 6(b)(1)(i)-2

[36] Proposed § 1006.6(b)(1).
[37] *Id*.

provides a safe harbor if the debt collector communicates at a time that would be convenient in all locations at which the debt collector's information indicates the consumer might be located. Requiring mortgage servicers to attempt to determine what time would be convenient in all locations at which the debt collector's information indicates the consumer might be located is overly restrictive. Mortgage servicers should be allowed to determine call times based on the single, established billing address.

Proposed comment 6(b)(1)-1 provides additional examples of when a debt collector knows or should know that a time or place is inconvenient, such as when a consumer uses the word "inconvenient" or the facts and circumstances of a particular situation otherwise indicate that it is inconvenient. The Bureau has placed the onus on the caller in this situation. The standard of "knows or should know" is too subjective. Attempting to interpret potentially ambiguous consumer statements and directions in order to determine permissible windows for communication would be difficult at best and place servicers under significant risk and potentially costly litigation. In an example within commentary, a consumer tells the collector not to communicate with them "at school." This example only serves to further confuse collectors. The example does not provide a time frame, nor does it consider that borrowers "at school" would have varying schedules that can fluctuate daily.

The Bureau should provide clearer direction in its examples. In another example, a customer tells the collector that they are "busy" and "cannot talk" on weekdays from 3:00 p.m. to 5:00 p.m. The commentary states that in this example collectors should not contact the consumer on weekdays during that time frame. The Bureau should clarify that a simple broad statement that an individual is "busy" or "cannot talk" that is provided on a weekday during that time frame is not an indication that weekday afternoons in whole are inconvenient. Rather, the statement "busy on weekdays from 3:00 p.m. to 5:00 p.m." should prevent further communication during the specified times. Additionally, given the ambiguities inherent in communication, the Bureau should provide clear examples of permissible call windows for situations in which a consumer requests not to be contacted "at this time."

The NPR also states that a collector should know that any previously identified inconvenient times or places made known to the creditor or a prior collector are inconvenient and are thus prohibited. This imposes a substantial information transfer requirement as a debt is assigned or otherwise transferred throughout the collections process and places heightened reliance upon the previous holder of the debt for details that can be excessively subjective.

The Bureau should clarify that emails are not subject to time restrictions. Emails are unobtrusive and consumers are capable of adjusting notification settings, filters, and auto-responses. Email also requires affirmative action by the consumer to open any particular email. The time restrictions should not contemplate mediums that are similar to standard mail.

b. Validation notice

Under the proposed rule, debt collectors must send a debt validation notice as the initial communication or within five days of an initial communication with a consumer or, in the alternative, provide debt validation information orally in the initial communication.[38] The NPR significantly expands the content required to be included in the debt validation notice and provides a new Model Form B-3, the use of which would provide a debt collector with a safe harbor.

The model form is formatted in a way to indicate a tear-off section, which implies a return envelope would be included. Return envelopes are not typically included in debt validation notices currently, and this would add significant expenses to the collection processes. The model form also instructs consumers that they can call to dispute the debt. However, debt collectors are only required to verify the debt and/or cease collection activities upon *written* notices of disputes.[39]

The notice must also include certain debt-specific information including the amount of debt as of a specific itemization date, the current amount of debt, and an itemization of the current debt in a tabular format reflecting interest, fees, payments, and credits since the last itemization date. With respect to residential mortgage debt, the commentary explains that the current amount of the debt would mean the total balance of the outstanding mortgage, including principal, interest, fees, and other charges.[40]

In total, the NPR requires substantial detail which is not conditioned upon availability of information. If a debt collector does not have a piece of information for a debt, the debt collector would be unable to comply with proposed section 1006.34(a)(1). This will present significant challenges in servicing transfers as transferee servicers may not have this information within the timeframe that they are required to provide the validation information. As discussed above, servicing transfer notices required under Regulation X should not be considered "attempts to communicate" or "communications" under proposed section 1006.2.[41] The NPR does create a limited exception from the requirement to itemize the debt for closed-end residential mortgages that are subject to Regulation Z's periodic statement requirements.[42] This limited exception should be expanded to open-end credit plans secured by a consumer's dwelling that are subject to the periodic statement requirements in Regulation Z.[43]

The validation notice must also include a section—separate from the validation information—with specific prompts for consumers to dispute the debt and/or obtain the name and address of the original creditor. The proposed rule defined "validation period" to start on the date the debt collector provides the validation information, ending thirty days after the consumer receives the information, which may be assumed at least five days after the collector provides it.[44]

The NPR also states that if a debt collector "knows or should know" that a consumer is deceased, the debt collector must provide the validation information to an individual that the debt collector

[38] Proposed § 1006.34.
[39] *See* 15 USC § 1692h.
[40] Proposed § 1006.34, comment 34(c)(2)(x)-1.
[41] *See* 12 CFR § 1024.33.
[42] Proposed § 1006.34(c)(5).
[43] *See* 12 CFR § 1026.7.
[44] Proposed § 1006.34(b)(5).

identifies by name who is authorized to act on behalf of the deceased consumer's estate.[45] Unlike the requirements in Regulation X, this would appear to create an affirmative obligation for mortgage servicers to track down information about a potential successor-in-interest. The Bureau should not extend this provision because it clouds the requirements under Regulation X. Further, as discussed below, it requires clarification on the ability to even contact a potential successor-in-interest.

During the validation period, consumers who submit a dispute in writing that is substantially similar to a previously submitted dispute within the same time period, after a collector satisfies requirements to respond, and does not include new and material information to support the dispute, will have submitted a "duplicative dispute."[46] This definition significantly narrows the window for what constitutes a duplicative dispute, implying that duplicate disputes submitted *after* the validation period must be responded to. Requiring a mortgage servicer to acknowledge and review an infinite number of debt disputes is significantly burdensome with little associated consumer benefits.

c. Time-barred debts

The NPR prohibits a debt collector from suing or threatening to sue to collect a debt that the debt collector knows or should know that the applicable statute of limitations has expired.[47] Despite the impression given in the preamble that determining the relevant statute of limitations is a relatively easy endeavor, it requires a state-by-state inquiry and is not always clear-cut when it comes to residential mortgage debt. Notably, a statute of limitations is meant to act as a defense to a claim, not a total bar on a claim. The Supreme Court has even clarified that filing a proof of claim that is beyond the applicable statute of limitations is not in violation of the FDCPA.[48] As stated earlier, "knows or should know" is too subjective of a standard to apply here. As the supplementary information has expressly noted, the use of disclosures for consumers when collecting time-barred debts would better serve both debtors and creditors than a prohibition.

d. Other Prohibited Practices § 1006.30

The NPR includes provisions that would hamper the ability to transfer defaulted mortgage loans to specialty servicers, thereby increasing the cost to service defaulted mortgage loans at the expense of consumers. Specifically, provisions cover prohibitions on reporting debts to credit reporting agencies ("CRAs") prior to initiating communication with the consumer[49] and selling/transferring/placing for collection a debt to another debt collect that the collector knows or

[45] Proposed § 1006.34(a)(1), comment 34(a)(1)-1.
[46] Proposed § 1006.38(a)(1).
[47] Proposed § 1006.26.
[48] *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407 (2017) "[W]e conclude that filing (in a Chapter 13 bankruptcy proceeding) a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act." 1415-1416.
[49] Proposed § 1006.30(a).

should know has been paid or settled, discharged in bankruptcy, or relates to a filed identity theft report.[50]

Residential mortgage loans must be treated differently for purposes of the bankruptcy discharge, as the Bankruptcy Code has recognized. It is necessary that a secured creditor be allowed to continue to manage/service secured collateral and a bankruptcy discharge scenario should not halt continued administration. A bankruptcy discharge typically does not impact a first mortgage lien on the debtors' home, and the mortgage loan continues to be serviced post-bankruptcy in an effort to avoid foreclosure.[51] Thus, despite a bankruptcy discharge, the relationship between a borrower and mortgage servicer continues to be an ongoing one—similar to that of non-discharged borrowers. Borrowers that sought relief through the bankruptcy process may benefit the most from a transfer to another servicer who may specialize in default assistance and the rule, as proposed, would deprive them of that assistance.

e. Record retention

The NPR requires debt collectors to retain evidence of compliance with the rule for three years from the later of the date of the collector's last debt collection communication or attempted communication or the date that the debt is settled, discharged, or transferred to the debt owner or another collector.[52] Records may be maintained electronically, as long as they can be reproduced accurately, or stored with a third party, as long as they can be accessed easily. Regulations X and Z already impose record retention requirements for mortgage servicers.[53] Those timing requirements would be frustrated by the provisions proposed under the NPR. Further, clarification is necessary for when the retention period begins for discharged debt and cured defaults. For example, does the retention period begin upon the discharge or a later terminal event? As discussed above, it is necessary for the Bureau to draw a bright line distinguishing the requirements of mortgage servicing and other forms of debt collection and provide clarifications where certain subjective terms are not clearly defined.

f. Decedent debt

The NPR expands FDCPA's definition of "consumer" to include "a deceased natural person who is obligated or allegedly obligated to pay a debt."[54] For purposes of communication restrictions, the term "consumer" would also include a confirmed successor in interest as well as the personal representative of a deceased consumer's estate.[55] Here, clarification is necessary on whether a debt collector can communicate or attempt to communicate with a confirmed successor in interest or representative of a deceased's estate in situations where a deceased consumer previously provided a written cease communication notice.

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[50] Proposed § 1006.30(b).
[51] *See* 11 USC § 524(j).
[52] Proposed § 1006.100.
[53] *See* 12 CFR § 1024.38; 12 CFR § 1026.25.
[54] Proposed § 1006.2(e).
[55] Proposed § 1006.6(a).

V. Conclusion

MBA appreciates the opportunity to comment on the Bureau's NPR regarding Regulation F. Should you have questions or wish to discuss this issue further, please contact Sara Singhas at 202-557-2826 or via email at ssinghas@mba.org.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy & Member Engagement