



August 19, 2019

Via Electronic Submission to: www.regulations.gov

Ms. Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G St. N.W.
Washington, DC 20552

Re: Debt Collection Practices (Regulation F) [Docket ID CFPB-2019-0022]

Comments of the Consumer Advocacy & Protection Society (CAPS) at University of California, Berkeley, School of Law

Dear Ms. Kraninger:

The Consumer Advocacy and Protection Society (CAPS),¹ a student-run organization dedicated to the promotion of consumer law and consumer protection at Berkeley Law, appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) proposal to amend Regulation F, 12 CFR part 1006, to prescribe Federal rules governing the activities of debt collectors under the Fair Debt Collection Practices Act (FDCPA). Many of us have also worked as clinical students or volunteers in the East Bay Community Law Center's Consumer Rights

¹ Consumer Advoc. & Protection Soc'y (CAPS), <https://consumer.berkeley.edu/> (last visited July 21, 2019).

Workshop² and/or Consumer Justice Clinic,³ which are legal clinics of the UC Berkeley School of Law that provide legal services to low-income consumers, including consumers who have received persistent communications from debt collectors. We believe our experience working directly with consumers and our research into the impact of debt collection communications can provide valuable insight into how the CFPB should revise its proposed regulations for how debt collectors interact with consumers under the FDCPA.

Introduction

We have serious concerns about the CFPB's proposed amendments to Regulation F and make three arguments that the proposed amendments are insufficient for protecting consumers. First, the proposed limited-content message guidelines provide scammers with a blueprint to further take advantage of consumers. Second, the default choice for consumers should be to opt-in to electronic messaging rather than to opt-out. Third, the proposed rule inadequately addresses the needs of low English proficiency consumers. Because these aspects of the CFPB's proposed rule puts consumers at a greater risk of harm, the CFPB should make further revisions to its proposed rule to address these shortcomings.

1. The proposed limited-content message guidelines provide scammers with a blueprint to further take advantage of consumers.

The CFPB's proposed rule seeks to promote consumer responsiveness to debt collectors while limiting unwieldy harassment; yet, the ill-conceived rule, which would put no limit on electronic messaging, further puts consumers at risk of harm. Email and text messaging scams

² *Consumer Rights Workshop*, Consumer Advoc. & Protection Soc'y (CAPS) – Berkeley L.'s Consumer Hub, <https://consumer.berkeley.edu/crw/> (last visited July 21, 2019).

³ *Consumer Justice & General Clinic*, E. Bay Cmty. L. Ctr., <https://ebclc.org/about/the-work/economic-security-opportunity/consumer-justice/>, (last visited July 21, 2019).

remain prevalent today, and the CFPB’s limited-content message guidelines will only encourage and embolden scammers and fraudsters to take advantage of consumers.⁴

Proposed section 1006.2(j)(1) outlines exactly what a debt collector must communicate via a limited-content message. Specifically, the proposed rules states that a limited-content message must include: “the consumer’s name, a request that the consumer reply to the message, the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector, a telephone number that the consumer can use to reply to the debt collector, and, if delivered electronically, a disclosure explaining how the consumer can stop receiving messages through that medium.”⁵

Furthermore, proposed section 1006.2(j)(2) details the optional content that a limited-content message may include: “a salutation, the date and time of the message, a generic statement that the message relates to an account, and suggested dates and times for the consumer to reply to the message.”⁶ Moreover, as an apparent safeguard, proposed section 1006.6(e) would require debt collectors who communicate or attempt to communicate electronically to include a “clear and conspicuous statement” detailing how the consumer can opt out of further communications.⁷

Although these proposals aim to help debt collectors avoid violating FD CPA sections 805(b) and 807(11), the fact is that these limited-content messages look no different from the type of generic spam messages that consumers regularly receive.⁸ A limited-content message might

⁴ See *Debt Collector or Scammer: How to Tell the Difference?*, Nolo, <https://www.nolo.com/legal-encyclopedia/debt-collector-scammer-how-tell-the-difference.html> (last visited July 21, 2019). See also *Scam Alert: Collection Call Con Takes New Twist*, Better Business Bureau (Apr. 7, 2017), <https://www.bbb.org/council/news-events/bbb-scam-alerts/2017/04/scam-alert-collection-call-con-takes-new-twist/>; *Debt Collection Scams*, AARP (Dec. 31, 2018), <https://www.aarp.org/money/scams-fraud/info-2019/debt-collector.html>.

⁵ Consumer Fin. Prot. Bureau, *Debt Collection Practices (Regulation F) 67-68* (2019), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

⁶ *Id.* at 69-70.

⁷ *Id.* at 68 n.183.

⁸ *How to Recognize and Avoid Phishing Scams*, Fed. Trade Comm’n Consumer Information (May 2019), <https://www.consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams>.

read: “Hi, this message is for [full name]. This is [name of texter] contacting you in regard to an account. Please give me a call at [phone number] on weekdays from 9 am to 5 pm Pacific. If you would like to opt-out of these messages, reply STOP.” Given the public nature of the limited-content message guidelines, spam messages may easily imitate this format. Similarly to how spam messages aim to induce a response, the proposed guidelines are designed to encourage consumer response to debt collector communications. However, the CFPB’s proposed rule to allow unlimited electronic communications over-relies on a nebulous opt-out concept that leaves consumers, already struggling to make payments on defaulted debt, all the more exposed to fraud.

Indeed, the Federal Trade Commission (“FTC”) has warned of phishing emails that trick consumers into responding and inadvertently divulging sensitive personal information that can be used for identity theft.⁹ Scammers send phishing emails that purport to be from an entity trusted by the consumer, such as their bank, credit card company, or social media platform.¹⁰ The message may ask for a response that induces the consumer to respond with some personal information.¹¹ Unfortunately, the identity theft that can result from divulging personal information can cause irreparable harm to consumers via their credit reports and impact various aspects of their lives. By some accounts, phishing emails represent the most widespread internet and email scam today.¹²

The FTC has further warned consumers about “smishing” or unsolicited text message scams that appear to be from legitimate institutions.¹³ Similarly to “phishing” scams, smishing scams target consumer mobile phones with text messages designed to elicit a response.¹⁴

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See, e.g., Paul Gil, *The Top 10 Internet and Email Scams*, Lifewire, <https://www.lifewire.com/top-internet-email-scams-2483614> (last update June 24, 2019).

¹³ Robert Longley, *Text Message Smishing Scams: Responding Can Expose You and Your Phone to Identity Theft*, ThoughtCo., <https://www.thoughtco.com/text-message-scams-dont-text-back-3974548> (last updated July 1, 2019).

¹⁴ *Text Message Spam*, Fed. Trade Comm’n Consumer Information (May 2013), <https://www.consumer.ftc.gov/articles/0350-text-message-spam>.

Responding to a smishing scam can result in malware being installed surreptitiously on a consumer's mobile device, allowing the scammer—unbeknownst to the consumer—to track personal information.¹⁵ If an unsuspecting consumer is targeted by a smishing scam and responds to the unsolicited text message, the consumer would be susceptible to potentially devastating harms. Information from an online banking or credit card management application could be used for identity theft or other wrongdoing, and the consumer could be responsible for unwanted charges on their cell phone bill for sending or receiving text messages.¹⁶ Remarkably, the FTC's advice to consumers is, "Just don't text back."¹⁷

Although the FTC's general advice to consumers primarily involves deleting and ignoring potential spam messages, the current construction of the CFPB's proposed rule on limited-content messaging provides a blueprint for scammers who prey on unsophisticated users of mobile technology for designing phishing and smishing scams. The limited-content messages are, by design, meant to be void of personally identifiable information but aim to induce a response from the consumer.¹⁸ Yet, most consumers prefer that a creditor or debt collector include their name and the purpose of the call (i.e., debt collection) in a voicemail or answering-machine message.¹⁹

By giving scammers a playbook for how to scam consumers with limited-content messages, the CFPB's proposed rule places consumers, both sophisticated and unsophisticated, at greater risk of becoming fraud victims. Unsophisticated consumers who are unaware of phishing and smishing scams are particularly vulnerable to scammers who may seek to take advantage of their lack of awareness. The proposed rule limits the content of messages that can be transmitted

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Longley, *supra* note 13.

¹⁸ Consumer Fin. Prot. Bureau, *supra* note 5, at 67-68.

¹⁹ *Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt*, Consumer Fin. Prot. Bureau 36-38 (Jan. 2017), available at https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

to consumers and further requires consumers to respond affirmatively in order to opt-out of future communications. Yet, the action of responding to opt-out in essence alerts a scammer as to the active nature of the account.²⁰ Paired with the malware of a smishing scam, a limited-content message from a scammer would leave even the most sophisticated consumer at risk of inadvertently exposing their personal information to a scammer.

Indeed, the Third Circuit noted that “[w]e use the ‘least sophisticated debtor’ standard in order to effectuate the basic purpose of the FDCPA: to protect all consumers, the gullible as well as the shrewd.”²¹ The CFPB should implement this standard here by devising a rule that protects consumers from undue harm and fraud. The potential for smishing and phishing scams is not protected by the opt-out mechanism of the proposed rule. If a consumer were to opt out legitimately from a debt collector’s communications, there is no guarantee that the request will be honored.

The proposed rule’s loose nature with regard to unlimited electronic messaging and limited-content messages is a boon to scammers and an unconscionable extension of the nightmarish fraud to which consumers have been exposed since electronic communications have become more prevalent in everyday use. For the foregoing reasons, the CFPB should revise its electronic messaging guidelines and protect consumers from smishing and phishing scams.

2. Consumers Should Be Required to Opt-in to Electronic Messaging Rather Than Opt-out.

The FDCPA is long overdue for an update since its enactment in the late 1970s. The technological advancements in electronic communication since the FDCPA’s enactment has drastically changed the way we communicate, and the FDCPA currently does not reflect these

²⁰ Alan Zeichick, *5 Things You Should Know About Email Unsubscribe Links Before You Click*, Naked Security by Sophos (Sept. 4, 2014), <https://nakedsecurity.sophos.com/2014/09/04/5-things-you-should-know-about-email-unsubscribe-links-before-clicking/>.

²¹ *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008).

changes. The FDCPA should be aware of the potential for abuse that these new regulations could create for consumers. Specifically, by requiring consumers to opt-out of electronic communication for each individual debt, consumers would be exposed to increasingly harassing texts, emails and alerts from debt collection agencies. Because a consumer may have multiple debts and each individual debt can be transferred and sold multiple times throughout the debt's life cycle, this new law could require debtors to opt-out of electronic messaging many times. Additionally, debt collection agencies would try to hide an individual's ability to opt-out in unnecessary verbiage and legalese because the proposed rule provides no disclosure requirements for the opt-out condition.

Instead the CFPB should modify the proposed updates to the FDCPA by allowing consumers to opt into electronic communication rather than opt-out. Debt collection agencies would still be incentivized to have debtors communicate electronically while alleviating debtors from harassing texts and emails unless they would prefer to communicate electronically as well. At the very least, the new rule should stipulate strict requirements for agencies to tell consumers that they can opt-out, and the rule should also explicitly state that the consumer needs only to opt-out once per debt, regardless of whether that debt has been sold or transferred to another agency. These changes to the updated rule would ensure consumers are properly protected from unfair collections practices intended to harm consumers.

Due to the lack of clarity in the current law, third-party debt collectors currently do not normally utilize text messaging or emailing to collect on a debt even though the FTC states that debt collectors can reach out to debtors via text messages.²² It is indisputable that the law needs an update so that debt collectors can utilize these forms of communication when they are appropriate.

²² See *Debt Collection FAQs*, Fed. Trade Comm'n Consumer Information (Mar. 2018), <https://www.consumer.ftc.gov/articles/debt-collection-faqs>; see also Aimee Picchi, "Text me \$\$\$": Debt Collectors May Soon Be Able to Text and Email Consumers, CBS News (Apr. 19, 2019, 10:16 AM), <https://www.cbsnews.com/news/text-me-debt-collectors-may-soon-be-able-to-text-and-email-consumers/>.

Yet, the proposed CFPB rule does not give consumers the opportunity to determine when text messaging is appropriate. Instead, it puts the impetus on debt collectors to determine when this form of messaging is appropriate. This rule opens the flood-gates for debt collectors to be able to utilize electronic messaging.

This is problematic for multiple reasons, but primarily because debt collectors would barrage consumers with unnecessary text messages and emails without the consumers' consent. It is widely accepted that a debt collector will attempt to maximize the amount of communication legally allowed in order to collect on their debt.²³ This proposed rule gives debt collectors the ability to spam consumers with texts and emails before they have the opportunity to allow these types of communications. There have already been issues of harassment over phone calls, where the consumers have the choice of picking up the phone call or not. In the case of emails and text messaging, the incoming message will always be delivered with no choice to “hang up” on the debt collector.

If the proposed rule would allow for consumers to opt-in instead of opting out, individuals would have the ability to choose which method of communication is appropriate for them. Additionally, this would minimally burden the debt collector since they would likely continue to utilize phone calls and could get consent from individuals during one of these first phone calls. It would also be much easier for debt collectors to reach multiple consumers in seconds. The use of technology like mail-merging would make it easy to send somewhat individualized messages at the click of a button.²⁴ The ability for collectors to be able to reach out to multiple people in an

²³ *Id.*

²⁴ *WordStar Training Guide*, MicroPro Int'l Corp. (Feb. 1983), available at http://www.bitsavers.org/pdf/microPro/Wordstar_3.3/Wordstar_Training_Guide_2ed_Feb83.pdf.

instant combined with the invasiveness of electronic communication alone should be reason to require consumers to opt-in rather than opt-out of electronic communication.²⁵

The problems associated with only being able to opt-out of, rather than opt-in to, electronic communication is exacerbated when the debts are sold and transferred. Companies often buy debt for pennies on the dollar and will transfer and assign them to other collection companies after they have exhausted their resources.²⁶ Based on the proposed rule, it is unclear whether or not the rule requires consumers to opt-out for each individual debt any time it is transferred to a new debt collection agency.²⁷ The CFPB should state that once a consumer opts out of electronic communication for an individual debt that person has opted out of electronic communication for that debt no matter who owns it. Again, this problem would not even exist if the proposed rule stated that consumers had to opt-in rather than opt-out. If debtors reached out via a phone call any time they were initiating a collection attempt, and asked the consumer to opt-in, this would prevent consumers from being barraged with unnecessary emails or texts.

At the very least, the CFPB needs to provide a specific procedure that debt collectors must follow to ensure that individuals are able to opt-out as easily as possible. Without any specific disclosure requirements, it is likely that debt collectors will attempt to bury the opt-out clause in legalese and small print. This is something that debt collectors have done in the past when attempting to skirt the rules of the FTC and CFPB. Furthermore, without any specific procedural requirements for allowing consumers to opt-out, debt collectors may be able to limit the window of time that individuals can opt-out and can make it extremely challenging, if not impossible, for

²⁵ Amy Loftsgordon, *Debt Buyers and How to Negotiate With Them*, Nolo, <https://www.nolo.com/legal-encyclopedia/debt-buyers-and-how-to-negotiate-with-them.html> (last visited July 21, 2019).

²⁶ *Id.*

²⁷ See Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2019* 10 (Mar. 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf [hereinafter 2019 FDCPA Annual Report].

individuals to be able to opt-out of electronic communication. If consumers were unaware of the ability to opt-out of e-messaging, then they could potentially be stuck receiving text messages and email communication from debt collection agencies for as long as the debt exists. For these reasons, the CFPB must elaborate on the procedural and disclosure requirements that debt collectors must follow in order to allow consumers to opt-out of electronic communication when they find it appropriate to do so. These procedures should include the requirement that every email or electronic communication contains a clear link, in at least the same font size as the rest of the text body, to allow consumers to opt-out of electronic communication.

These are not minute issues. In fact, one in three people with a credit record have experienced being contacted by a debt collector.²⁸ Therefore, the proposed rule need to be extremely careful about what methods of new communication they allows debt collectors to utilize. Although it is indisputable that the new rules need to be updated to reflect the changes in technology over the last 40 years, the new rules also need to be wary of the increased abuses these forms of communication can create. For these reasons, the CFPB should change the proposed rules to allow consumers to opt into electronic communication rather than forcing them to opt-out. At the very least, the CFPB needs to provide a specific procedure that debt collectors must follow to allow consumers to opt-out of electronic communication so that debt collectors cannot force individuals to be stuck with electronic communication for the entire life-cycle of a debt.

3. The Proposed Rules Inadequately Address the Needs of Low English Proficiency (LEP) Consumers

Rather than set forth any requirements for language-appropriate communications with LEP consumers, the proposed rules merely “allow” for validation notices to be provided in other

²⁸ Consumer Fin. Prot. Bureau, *supra* note 19, at 5.

languages and “allow” debt collectors to give recipients notice in Spanish that they can request a validation notice in Spanish.²⁹ Validation notices are required by section 1692(g) of the FDCPA.³⁰ They must include the amount of the debt, the name of the creditor to whom the debt is owed, and statements regarding the consumer’s right to dispute the validity of the debt and the process that would ensue.³¹ This information is critical in empowering consumers to understand their rights and take appropriate action if they believe that the alleged debt is invalid. While acknowledging that the mixed use of English and Spanish (or other languages) runs the risk of confusing both English-speaking and LEP consumers,³² we fear that the language of the proposed rules would encourage the sole use of English even to the disadvantage of LEP consumers.

According to a 2017 CFPB report, “[m]ore than 40 percent of non-white consumers reported having been contacted about a debt in collection, compared with 29 percent of white consumers.”³³ The report also found that “Hispanic consumers were more likely than non-Hispanic consumers to report having been contacted about a collection (39 percent and 31 percent, respectively).”³⁴ Of course, not all non-white and/or non-Hispanic consumers are LEP; however, these race and ethnicity statistics support the position that protecting consumers must mean recognizing and responding to consumer diversity, including language diversity.

LEP consumers face greater challenges navigating the debt-collection process and are less likely to challenge representations made by debt collectors.³⁵ LEP Latinos in particular are targeted

²⁹ Consumer Fin. Prot. Bureau, *supra* note 5, 279-80, 283-84. *See also* Jonathan L. Pompan & Alexandra Megaris, *CFPB Issues Proposed Debt Collection Rules*, Venable LLP (May 9, 2019), <https://www.venable.com/insights/publications/2019/05/cfpb-issues-proposed-debt-collection-rules>.

³⁰ Pompan & Megaris, *supra* note 28.

³¹ *See* 15 U.S.C. § 11692g (2019).

³² *See, e.g., Ehlich v. I.C. Sys., Inc.*, 681 F. Supp. 2d 265 (E.D.N.Y. 2010).

³³ Consumer Fin. Prot. Bureau, *supra* note 19, at 17.

³⁴ *Id.*

³⁵ Robert J. Hobbs et al., *Fair Debt Collection* § 1.3.1.8, National Consumer Law Center (9th ed. 2018), updated at www.nclc.org/library.

by abusive debt-collection practices.³⁶ In 2014 alone, the FTC “initiated or resolved three cases against abusive debt collection operations that targeted Spanish-speaking consumers.”³⁷ More broadly, according to a 2017 report, only 79% of consumers contacted about a debt in collection were communicated with in their preferred language.³⁸

Again, validation notice information is critical in empowering consumers to understand their rights and take appropriate action if they believe the alleged debt is invalid. Thus, rather than simply “allow” collectors to provide a validation notice (or validation notice request instructions) in Spanish and other languages, the CFPB should require collectors to provide a second copy of the validation notice (or validation notice request instructions) in Spanish, if not also other languages. Of course, collectors may not have the capacity to continue communication in the consumer’s primary language, but this should not prevent LEP consumers from being fully informed regarding their rights at the outset.

To ease the burden on collectors and address concerns about accuracy, the CFPB could provide templates with “blanks” that collectors could complete with the debt-specific information. This would help to ensure the accuracy of non-English validation notices/validation notice request instruction. The CFPB should prioritize Spanish-language templates, and then determine, based on the language demographics of consumers facing debt collection, which other languages warrant the provision of templates.

It is no secret that we live in a multilingual country; one simply has to hop on a bus or train in nearly any metropolitan area to see signs and hear announcements in a variety of languages. It

³⁶ See Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act*, CFPB Annual Report 2015 32-33, https://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf.

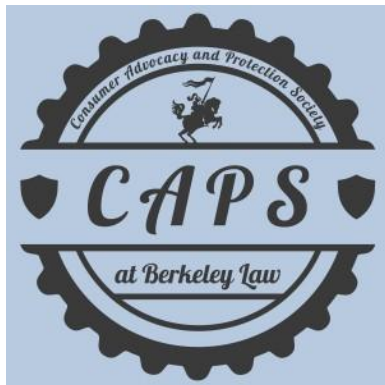
³⁷ *Id.* at 32.

³⁸ Consumer Fin. Prot. Bureau, *supra* note 19, at 6.

is only sensible that the CFPB take real steps to ensure that LEP consumers facing debt collection are granted the same courtesy when their rights are communicated to them.

Conclusion

In summary, we propose three modifications to the proposed rules to protect debtors from abuse. First, the rules need to be modified to protect consumers from phishing and smishing scams. Second, the rules should require individuals to consent before receiving electronic messaging from debt collectors. Third, the rules should take concrete steps to ensure that low English proficiency consumers are informed of their rights in a language-appropriate manner. These modifications would simultaneously protect debtors while facilitating better communication between debtors and creditors.



Sincerely,

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