

Before the

BUREAU OF CONSUMER FINANCIAL PROTECTION
1700 G Street NW, Washington, DC 20552

RE: DOCKET No. CFPB-2019-0022
Fair Debt Collection Practices: Regulation F

Comments of

KEEP ME POSTED NORTH AMERICA

Keep Me Posted North America (KMP) submits these Comments in response to the Bureau of Consumer Financial Protection's (the Bureau) Notice of Proposed Rulemaking (NPRM). KMP comments focus specifically on, and in opposition to, the Bureau's proposed "Electronic Disclosures and Communications" provisions for the delivery of critical Notice and vital Information to Consumers.

KMP is a pro-consumer campaign designed to provide educational and awareness programs so that consumers are empowered to choose the best delivery method for their social and economic needs. KMP aims to protect consumers' right to choose between

paper, digital and any other available delivery method, presenting independent research to quantify the negative impacts and penalties for consumers who are denied paper-based communications.

KMP is dedicated to ensuring that the transition to digital services and products is balanced, with ample and equal consideration of infrastructure, consumer skills, technology, online access and consumer choice. We are therefore astonished and alarmed that the Bureau is effectively trampling on consumer choice and longstanding expectations, promulgating weaker notice and communications practices by removing mailed paper documentation as a primary default method, and instead explicitly intends to “encourage debt collectors to communicate with consumers by email and text message more frequently” without even the proactive consent of the consumer.

KMP strenuously submits that the Bureau’s digital-first push is incredibly dangerous, runs counter to consensus research on consumer communications preferences, betrays the body of evidence assembled in this docket, oversteps clear judicial precedent, endangers consumer privacy, and ignores the extensive, unequivocal guidance from the Federal

Trade Commission (FTC) on digital hygiene and best practices in safeguarding consumer privacy and safety.

PREDICTABLE HARMS TO CONSUMERS AND BUSINESS:

The torrents of cascading harms that would predictably and inevitably befall citizens, consumers and businesses are grave in magnitude, and staggering in scope. By the very nature of the populations impacted by such radical communications upheaval of tradition, efficacy and overwhelming case law precedent involving meaningful notice, the entire American population of citizens and businesses would be rendered prime targets for an explosion of phishing attempts under the guise of debt collection emails and texts. Under current practice and common understanding of the Fair Debt Collection Practices Act (FDCPA), fake debt collection emails and texts as pretext, and their corresponding links to malware, would be generally met with suspicion since any such legitimate “Electronic Disclosures and Communications” have been rare, and neither blessed nor promoted by the Bureau.

That would change overnight with the Bureau’s proposed rule to allow and encourage email and text messaging with hyperlinks as primary, legally binding communications,

under a scheme where every consumer is proactively opted-in by default, without explicit prior consent. To be clear, the open season for phishing exploits under a newly legitimized guise of debt collection would extend exponentially beyond the 49 million consumers already contacted by debt collectors each year. Because anyone might just have a phantom debt lurking, and may also have work emails and mobile device numbers on file, the already known risks that the Bureau concedes ⁽¹⁾ would explode over the entire citizenry and across all businesses.

The temptation to click on seemingly suspicious links, against gut feel and FTC guidance, would be fueled by the fear that simply ignoring such under the Bureau's proposed "Electronic Disclosures and Communications" provisions, could now lead to a loss of rights, the ability to dispute debt claims, and ultimately lead to a default judgement and credit damage ⁽²⁾. As the Bureau anticipates, the barrage of "click here" prompts would

1 - See: NPRM at Footnote 579 -- "According to recent reports, some scams have used fake debt collection emails to lure consumers into clicking on hyperlinks." "See, e.g., Claer Barrett, Beware Fake Debt Collection Emails, Says Action Fraud, Fin. Times, Apr. 8, 2016, <https://www.ft.com/content/43fdbb30-fce4-11e5-b3f6-11d5706b613b>." KMP draws further attention to that fact that these alarm bells were already being rung over 3 years ago, without the CFPB blessing, endorsing and promoting the use of emails and texts, with hyperlinks, as legal communications to an unwitting population opted into such scheme without prior, proactive consent

2 - The Bureau is well aware that this is a significant concern, and a factor that could either encourage consumers to "take the bait" in a fishing attack, or otherwise in ignoring new prescribed means of digital communications, worsen the epidemic of undefended default judgements. See NPRM at Footnote 383 -- "See FTC Debt Buying Report, supra note 14, at 45 (observing that "90 percent or more of consumers sued in [debt collection actions] do not appear in court to defend," which "creates a risk that consumer will be subject to a default judgment on a time-barred debt"); Peter A. Holland, The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof

appear across the spectrum of personal and workplace devices, and the threats posed by malware include, but are not limited to, identity theft and ransomware. With the average worker now receiving 126 emails each day ⁽³⁾, in a predatory climate where an estimated 1 in 99 emails is a phishing attack ⁽⁴⁾, at this moment when the ransomware epidemic has exploded to cost businesses more than \$75 Billion a year ⁽⁵⁾, the proposed rules would invite certain catastrophe.

At the same time, the Bureau's proposed "Electronic Disclosures and Communications" provisions jeopardize the ability of the 49 million consumers currently in active debt collection to inform themselves of their rights, access full disclosure of alleged debt, and

...ctd: in Debt Buyer Cases, 6 J. Bus. & Tech. L. 259, 265 (2011) ("In the majority of debt buyer cases, the courts grant the debt buyer a default judgment because the consumer has failed to appear for trial. . . . Debtors who do receive notice usually appear without legal representation."); CFPB Debt Collection Operations Study, supra note 45, at 18 (observing that respondents reported obtaining default judgments in 60 to 90 percent of their filed suits); cf. Kimber, 668 F. Supp. at 1487 ("Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.")

3 - See: Radicati Email Statistics Report, 2015-2019: "In 2015, the number of business emails sent and received per user per day totals 122 emails per day. This figure continues to show growth and is expected to average 126 messages sent and received per business user by the end of 2019." <https://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf>

4 - See: "1 in 99 Emails is a Phishing Attack, What Can Your Business Do?", Jul 12, 2019 by Michael Guta In Technology Trends: <https://smallbiztrends.com/2019/07/phishing-statistics.html>

5 - See: "27 Terrifying Ransomware Statistics & Facts You Need To Read" -- phoenixNAP, Bojana Dobran, January 31, 2019: <https://phoenixnap.com/blog/ransomware-statistics-facts>

to dispute and defend against false or inaccurate claims. This is a Catch-22 proposition, entirely of the Bureau's making, and of which it is abundantly aware, in its own words: "However, because debt collectors and consumers typically lack a pre-existing relationship, delivering a required disclosure by hyperlink without first alerting the consumer by separate means may not be reasonably expected to provide actual notice. Federal agencies have advised consumers against clicking on hyperlinks provided by unfamiliar senders" ⁽⁶⁾ Moreover, the Bureau makes clear that it at least understands that in addition to promoting dangerous digital hygiene, the proposed provisions also breach longstanding consumer expectations, and that absent explicit prior consent to receive such electronic communications, such so-called "notice" could reasonably be considered worthless: "Consumers may be likely to follow safe browsing habits and not click on a hyperlink in an initial communication from an unfamiliar debt collector. Therefore, it may be unreasonable for a debt collector to expect that a consumer has actual notice of an electronic disclosure delivered by hyperlink if the consumer does not expect to receive a hyperlinked disclosure from that particular debt collector. ⁽⁷⁾

6 - See: NPRM at Footnote 578: "For example, the FTC advises consumers not to open links or attachments to emails they do not recognize, in order to prevent phishing and malware. See Fed. Trade Comm'n, Phishing (July 2017), <https://www.consumer.ftc.gov/articles/0003-phishing>; Fed. Trade Comm'n, Malware (Nov. 2015), <https://www.consumer.ftc.gov/articles/0011-malware>. The FDIC offers consumers similar guidance. See Fed. Deposit Ins. Comm'n, Beware of Malware: Think Before You Click, <https://www.fdic.gov/consumers/consumer/news/cnwin16/malware.html> (last updated Mar. 8, 2016)."

7 - Id @ Footnote 581

CONSENSUS RESEARCH ON CONSUMER COMMUNICATIONS PREFERENCES IS CLEAR:

In study after survey, after report, the overwhelming majority of consumers want options and controls over how they receive communications. In the realm of rights, disclosures and official notice of life impacting matters, choice is paramount and must be preserved. KMP submits that any contemplation of revisions to the FDCPA that would allow and promote electronic communications occur within a framework of explicit, proactive consent from consumers who expressly opt-in to whatever regime. As detailed above, merely giving “the ability to opt-out” of a broader scheme where one is a forced participant, and often unaware, is dangerous in practice and is a betrayal of legal and traditional expectations. The need for choice and consent was made clear in the legislative history of the FDCPA ⁽⁸⁾, and remain imperative in 2019.

According to the Bureau’s own research on consumer preferences, conducted in connection with the instant NPRM, nearly 9 out of 10 individuals would not prefer email as the

8 - See: H. Rept. No. 95-131, at 5 (1977): “The committee intends that in section [805] the ‘prior consent’ be meaningful, i.e., that any prior consent by a consumer is to be a voluntary consent and shall be expressed by the consumer directly to the debt collector.”

primary method of communications from a debt collector ⁽⁹⁾. In the same survey, nearly half of respondents would continue to chose paper communications delivered by mail, making that the top preference by a wide margin followed by phone conversation ⁽¹⁰⁾.

This is perfectly consistent with key findings in KMP’s database of consumer communications preferences as surveyed by academic institutions, business and consumer groups.

According to the latest FedEx Office Survey: “Nine in 10 of consumers and small business owners agreed that they “like to have the option to have printed materials” and preferred reading materials on paper – most notably official documents and contracts – versus on a digital screen.” ⁽¹¹⁾ And relating specifically to proposed “Electronic Disclosures and Communications” provisions, the Center for Responsible Lending finds that 7 out of 10 voters “are concerned that debt collectors will be allowed to send text messages to people without the person’s permission.” ⁽¹²⁾

9 - See: CFPB Debt Collection Consumer Survey, finding that only 11 percent of consumers chose email as the “most preferred” contact method for communications about a debt in collection.

10 - Id.

11 - See: FedEx Office Survey Reveals Enduring Preference for Printed Materials in Today’s Increasingly Digital Environment: “Nine in 10 of consumers and small business owners agreed that they “like to have the option to have printed materials” and preferred reading materials on paper – most notably official documents and contracts – versus on a digital screen.”

<https://about.van.fedex.com/newsroom/fedex-office-survey-reveals-enduring-preference-for-printed-materials-in-todays-increasingly-digital-environment/>

12 - See: CFPB’s Proposed Debt Collection Rule Faces Strong Bipartisan Opposition: <https://www.responsiblelending.org/media/cfpbs-proposed-debt-collection-rule-faces-strong-bipartisan-opposition>. See also: Paper Statements: An Important Consumer Protection: https://keepmepostedna.org/wp-content/uploads/2018/08/nclc_paper-statements-banking-protections.pdf

ENDANGERING CONSUMER PRIVACY:

As the Bureau correctly determines, most consumers are very concerned about the risks of third-party disclosure. However, in its assent of risk and contemplation of supporting evidence, it would appear that the NPRM limits imagination to only another human being in close proximity: “The risk of third-party disclosure may be different for electronic debt collection communications than for letters or telephone calls, although the Bureau is not aware of evidence that would indicate whether such risk is higher or lower. Bureau data suggests that almost two-thirds of consumers consider it very important that third parties do not hear or see a message from a creditor or debt collector.”

KMP implores the Bureau to more broadly consider the real world, digital Wild West of black box third-party disclosure. A substantial portion of the population that would begin receiving emails and text messages from debt collectors, and for that matter phishing attempts by fraudsters, use free email accounts for which the price paid for gratuitous service is their own personal data. ⁽¹³⁾ At the same time, most consumers would begin

13 - See: “Google still lets third-party apps scan your Gmail data,” by Kaya Yurieff, September 20, 2018: <https://money.cnn.com/2018/09/20/technology/google-gmail-scanning/index.html>

receiving and returning texts in a cellular phone marketplace dominated by four (soon to be three) companies that are under scrutiny for rampant abuse of consumer privacy. ⁽¹⁴⁾ Would, could or do the companies with access to the digital correspondence content, email addresses and cell numbers collect this data, share with third-party intermediaries and/or sell to third-party marketers or other entities? They have the motive, means, and under the proposed rules, a brand new opportunity.

IGNORING CLEAR JUDICIAL PRECEDENT:

The Bureau cites conflicting court decisions and resultant legal uncertainty as a primary reason for regulatory action: “The FDCPA established certain consumer protections, but interpretive questions have arisen since its passage. Some questions, including those related to communication technologies that did not exist at the time the FDCPA was enacted (such as mobile telephones, emails, and text messages), have been the subject of inconsistent court decisions, resulting in legal uncertainty and additional cost for industry and consumers.” ⁽¹⁵⁾

14 - See: “Despite promises to stop, US cell carriers are still selling your real-time phone location data,” Zack Whitaker, January 9, 2019: <https://techcrunch.com/2019/01/09/us-cell-carriers-still-selling-your-location-data/>

15 - See: NPRM

The NPRM, however, ignores the very latest Federal Ruling from just last month reaffirming established precedent that to provide notice, one must actually provide notice and not an obstacle course to arrive at such notice. Of critical and instant importance to this docket, *Lavallee v. Med-1 Solutions, LLC* focused squarely on the FDCPA, specifically the Act's definition of "communication." The 7th Circuit makes absolutely clear that a hyperlink to a disclosure, as the Bureau proposes, would not meet the legal obligations mandated by statute: "This appeal rests on Med-1's contention that its emails were initial communications that contained the required disclosures. But the emails do not qualify under the Act's definition of "communication" because they did not "convey[] ... information regarding a debt." 15 U.S.C. § 1692a(2). Nor did the emails "contain" the statutorily mandated disclosures. § 1692g(a). At most the emails provided a means to access the disclosures via a multistep online process. Because Med-1 violated § 1692g(a), the judge was right to enter judgment for *Lavallee*."

The Bureau cites numerous, consistent court rulings affirming the "least sophisticated consumer" standard as it relates in practice to baseline assumptions of comprehensibility

of communications and predatory conduct against the most vulnerable populations ⁽¹⁶⁾. These citations trigger a fundamental question about the plans to “op-in” the universe, by default, to a new realm of “Electronic Disclosures and Communications” to be conducted in the regulatory Wild West of digital communications: what about digital literacy? It is not a stretch to assume that the “least sophisticated consumer” is very likely also the “least digitally savvy consumer,” and as such should not be forced to take additional measures to “opt-out” of unsolicited correspondence, nor should they be subjected by default to hyper-linking to what may or may not be a phishing expedition by bad actors.

CONCLUSION AND FINAL RECOMMENDATIONS:

Keep Me Posted North America recommends more notice to consumers, not less. Robust and accurate disclosure of both debt and all corresponding rights should be mailed to all who request, if not by default or as an industry best-practice. We urge that any con-

16 - See: NPRM at Footnote 90: “See, e.g., *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008) (“We 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”) (internal quotation marks and citation omitted); *Clomon*, 988 F.2d at 1319 (“To serve the purposes of the consumer-protection laws, courts have attempted to articulate a standard for evaluating deceptiveness that does not rely on assumptions about the ‘average’ or ‘normal’ consumer. This effort is grounded, quite sensibly, in the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes. The least-sophisticated-consumer standard protects these consumers in a variety of ways.”).”

sideration of expanding the options for debt collectors to use digital technology for communicating with consumers be predicated on every individual's ability to freely chose to opt-in to such communications. Having poured over the NPRM, we are hard pressed to find any tangible benefit to consumers in the proposed "Electronic Disclosures and Communications" provisions, beyond the Bureau's speculations that new streams of emails and texts might just slow the heavy flow of phone calls. Furthermore, the only benefit KMP recognizes for any stakeholder in this scope of the rulemaking is some evasion of printing and postage from the debt collection industry, estimated between \$0.50 and \$0.80 per mailing. But that meager savings to a single industry comes at a much steeper cost to all businesses, inviting new themes in phishing exploits, at a time where the ransomware epidemic already costs businesses more than \$75 Billion a year.

KMP will take this final opportunity to remind all parties that if Consumer Protection is the mandate, and fully informing consumers the objective, the time-tested safety, security and reliability of paper notice and disclosure sent by US Mail remains the most preferred and trusted means by all measures. In conclusion, we furnish a final data point for the Bureau and all interested parties to reflect on: the typical American household receives 6.1 pieces of First Class Mail per week. ⁽¹⁷⁾ But before consumers come home to their trusted

17 - See: 2017 USPS Household Diary Study, Table 1.6: Pieces Received and Sent per Household, Pieces per Household per Week: First Class Mail = 6.1: https://www.prc.gov/docs/105/105134/USPS_HDS_FY17_Final%20Annual%20Report.pdf

and easily identifiable secure mailing, they are blitzed by an ever increasing amount of unwanted email, texts and robocalls across their personal and work devices. Is the shape of the wheel so old and tired that it should be reinvented? For the sake of consumers, and all citizens and businesses that would be ultimately impacted by the unintended consequences of these demonstrably problematic proposals, KMP implores the Bureau to neither reinvent the wheel, nor the safe and efficient role of paper based communications consumers want and trust.

Respectfully Submitted,

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