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WHY IS A DEBT COLLECTOR TEXTING ME? THE MODERNIZATION OF DEBT COLLECTION PRACTICES

Emily Schmidt

I. INTRODUCTION

Debt collection is a billion-dollar industry impacting millions of Americans each year,¹ with estimates that one in every three adults in the United States has a debt in collections.² As of November 2021, the Consumer Financial Protection Bureau (“Bureau” or “CFPB”) now permits debt collectors to contact over seventy million consumers³ with debts in collections through modern communication methods such as emails, text messages, and even private messages on social media platforms.⁴ This move to modernize the debt collection industry has garnered attention from debt collectors, consumers, consumer advocates, and government officials.⁵ While the notion of modernization is appealing to all parties, collection industry proponents often disagree with consumer advocates on how to best regulate modern communication methods.⁶

This Comment examines the modernization and offers suggestions on how to better protect consumers as debt collection methods evolve. Part II of this Comment provides background on federal consumer protection law, including the Fair Debt Collection Practices Act (“FDCPA”) and Bureau regulations, all of which currently govern and enforce debt collection practices in the United States. Part II also introduces an alternative framework to regulating electronic communications in debt collections, the Comprehensive Debt Collection Improvement Act (“CDCIA”). Lastly, Part III explores

1. See CFPB, Fair Debt Collection Pracs. Act 2020 Ann. Rep. 7 (2020), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf [<https://perma.cc/MJX8-5RKA>]; *Consumer Debt Collection Facts*, Nat’l Consumer L. Ctr. 1 (Feb. 2018), https://www.nclc.org/images/pdf/debt_collection/Debt-Collection-Facts-2016.pdf [<https://perma.cc/NV8S-UT5X>].

2. Hannah Hassani & Signe-Mary McKernan, *71 Million US Adults Have Debt in Collections*, URB. INST. (July 19, 2018), <https://www.urban.org/urban-wire/71-million-us-adults-have-debt-collections> [<https://perma.cc/R9J6-B9C9>]; Jeanne Sahadi, *1 in 3 U.S. Adults Have ‘Debt in Collections’*, CNN MONEY (Aug. 7, 2014), <https://money.cnn.com/2014/07/29/pf/debt-collections/> [<https://perma.cc/7C74-BSSV>].

3. See Hassani & McKernan, *supra* note 2.

4. See Fair Debt Collection Practices Act (Regulation F), 12 C.F.R. pt. 1006 (2021).

5. See Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006).

6. *Id.*

persisting concerns with the Bureau’s revised version of Regulation F, an agency regulation which implements the FDCPA. This Comment argues that the CDCIA provides a superior framework to modernizing debt collection practices by allowing electronic methods of communication to be implemented in a way that better responds to consumer needs.

II. BACKGROUND

The body of statutory and administrative law governing consumer finances and debt collection is extensive and complex. Understanding the current regulations surrounding debt collection requires a familiarity with the history of federal debt collection law and enforcement in the United States. First, Section A of this Part provides an overview of the FDCPA. Next, Section B discusses the historical and modern roles of federal agencies in enforcing the FDCPA, namely the Federal Trade Commission (“FTC”) and the Bureau. Section C introduces Regulation F, a federal regulation issued by the Bureau to implement the FDCPA. Lastly, Section D examines the CDCIA, a bill recently passed in the United States House of Representatives which presents an alternative framework for modernizing debt collection practices.

A. *Fair Debt Collection Practices Act*

President Jimmy Carter signed the FDCPA into law in 1977.⁷ For nearly fifty years, the FDCPA has governed debt collection practices in the United States, providing guidelines for debt collectors and defining consumer rights.⁸

Generally, debt collectors under the FDCPA are entities like collections agencies, collections law firms, or debt buyers.⁹ The FDCPA defines “debt collector” as any person “who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”¹⁰ Debt collectors work to collect

7. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692).

8. *Id.*

9. Kevin O’Flaherty, *When Does the FDCPA Apply? | What Types of Debt Are Subject to the FDCPA?*, O’FLAHERTY L. (Nov. 16, 2020), <https://www.oflaherty-law.com/learn-about-law/when-does-the-fdcpa-apply-what-types-of-debt-are-subject-to-the-fdcpa> [https://perma.cc/C94C-GHGD].

10. 15 U.S.C. § 1692a(6).

debt that another entity originated.¹¹ In other words, the FDCPA covers third-party debt collectors.¹²

Section 1692c of the FDCPA limits who debt collectors can speak to about a consumer's debt.¹³ Generally, a debt collector may only communicate with the consumer, the consumer's attorney, a consumer reporting agency, the creditor and their attorney, or the debt collector's attorney.¹⁴ Section 1692c specifically defines the term "consumer" to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator."¹⁵

Congress's primary intent in passing the FDCPA was to eliminate abusive, deceptive, and unfair debt collection practices.¹⁶ The legislation created parameters for how and when debt collectors may communicate with consumers.¹⁷ For example, one FDCPA provision prohibits debt collectors from communicating with consumers before 8:00 a.m. and after 9:00 p.m., unless the consumer gave prior permission for early-morning or late-night calls.¹⁸

Section 1692d of the FDCPA explicitly prohibits harassment and abuse in connection with debt collection.¹⁹ Instead of defining the terms "harassment," "oppression," or "abuse," the FDCPA provides a non-exhaustive list of what constitutes prohibited conduct.²⁰ The list explicitly prohibits the following conduct: (1) using or threatening violence or harm to a "physical person, reputation, or property"; (2)

11. *See id.*

12. Will Kenton, *Fair Debt Collection Practices Act (FDCPA)*, INVESTOPEDIA (Mar. 15, 2022), <https://www.investopedia.com/terms/f/fair-debt-collection-practices-act-fdcpa.asp> [<https://perma.cc/LA6N-EAPL>]. Typically, creditors collecting their own debts are exempt from the FDCPA. Christopher Koegel, *Think Your Company's Not Covered by the FDCPA? You May Want to Think Again*, FED. TRADE COMM'N (Dec. 8, 2015), <https://www.ftc.gov/business-guidance/blog/2015/12/think-your-companys-not-covered-fdcpa-you-may-want-think-again> [<https://perma.cc/FA6E-52XC>]. An exception to this general rule exists in 15 U.S.C. § 1692a(6), also known as the false-name exception. *See* 15 U.S.C. § 1692a(6) ("Notwithstanding the exclusion provided by [a(6)(F)] . . . , the term ['debt collector'] includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.").

13. 15 U.S.C. § 1692c(b).

14. *Id.*

15. *Id.* § 1692c(d). In contrast, the other provisions of the FDCPA define the term "consumer" to mean any natural person obligated or allegedly obligated to pay any debt. *Id.* § 1692a(3).

16. *See* 15 U.S.C. § 1692(a)–(e). "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e).

17. *See id.* § 1692c.

18. *See id.* § 1692c(a)(1).

19. 15 U.S.C. § 1692d.

20. *Id.*

using “obscene or profane language”; (3) publishing a public list of delinquent debtors; (4) advertising the sale of a debt “to coerce payment”; (5) continuously calling a consumer “with intent to annoy, abuse, or harass”; and (6) calling consumers without meaningfully disclosing the debt collector’s identity.²¹

The FDCPA also forbids debt collectors from making any false, deceptive, or misleading representations when collecting debts.²² In Section 1692e, the FDCPA provides a non-exhaustive list of sixteen categories of conduct that constitute false, deceptive, or misleading representations.²³ For example, Section 1692e(4) prohibits the “representation or implication that nonpayment of any debt will result in the arrest or imprisonment . . . or the seizure, garnishment, attachment, or sale of any property or wages of any person *unless* such action is lawful *and* the debt collector or creditor intends to take such action.”²⁴

Lastly, the legislation requires debt collectors to provide adequate validation of debt to consumers²⁵ and awards legal damages to consumers when a debt collector is found to have violated the FDCPA.²⁶

B. Enforcement of the FDCPA

1. The Federal Trade Commission

Though the FTC has never had authority to promulgate regulations regarding debt collection practices,²⁷ the FTC functioned as the primary enforcer of the FDCPA until 2011.²⁸ The FTC is a bipartisan

21. *Id.*

22. *Id.* § 1692e.

23. *Id.*

24. *Id.* § 1692e(4) (emphasis added).

25. *Id.* § 1692g(a). A debt collector must send a consumer written notice validating the consumer’s amount of debt and the name of the original creditor. *Id.* § 1692g(a)(1)–(2). If the consumer does not dispute the validity of debt within thirty days, the debt is assumed valid; if the consumer does dispute the validity within that window, the debt collector must mail the consumer documentation verifying the debt. *Id.* § 1692g(a)(3)–(4). Also within the thirty-day window, the consumer may demand for the debt collector to provide the name and address of the original creditor. *Id.* § 1692g(a)(5).

26. *Id.* § 1692k(a). Legal damages may include any actual damages, court costs and attorney’s fees, and up to \$1,000 of additional damages for each individual harmed by violations. *Id.*

27. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874, 882 § 814(d) (1977) (“Neither the [Federal Trade] Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title.”).

28. *Compare* Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874, 881 § 814(a)

federal agency tasked in part with protecting consumers by stopping unfair, deceptive, and fraudulent market practices.²⁹ The FTC derives its enforcement authority from the Federal Trade Commission Act of 1914³⁰ and other major antitrust legislation.³¹

The FTC focuses its efforts on investigating and acting against debt collectors who violate federal laws, like the FDCPA.³² Each year, the FTC publishes a report to describe how the agency interacted with the debt collection market.³³ According to one recent report, in 2020 the FTC obtained twenty-six million dollars in judgments against thirty-nine defendants charged with violating the FDCPA.³⁴ In addition, to “help law-abiding collection industry professionals avoid doing business with”³⁵ banned debt collectors and “to help state debt collection licensing officials and law enforcers better protect consumers,”³⁶ the FTC maintains a list of “Banned Debt Collectors” who have been permanently prohibited from participating in debt collections by federal court order.³⁷ At the time of this writing, the list includes 227 Banned Debt Collectors.³⁸

The FTC also participates in public outreach to educate consumers about their rights under the FDCPA and to educate debt collectors on

(1977) (“Compliance with this title [of the FDCPA] shall be enforced by the [Federal Trade] Commission, . . .”) with 15 U.S.C. § 1692l (“The Federal Trade Commission shall be authorized to enforce compliance with this subchapter [of the FDCPA], . . . , subject to [the powers of the Bureau outlined in 12 U.S.C. §§ 5511–5519.]”); see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, sec. 1089, 124 Stat. 2092–93 (2010) (codified as amended at 15 U.S.C. §§ 1692–1692p).

29. *Mission*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/mission> [https://perma.cc/7XWY-PXED].

30. 15 U.S.C. §§ 41–58.

31. *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> [https://perma.cc/5Y7T-DB8P] (last updated May 2021). See *Legal Library: Statutes*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/statutes> [https://perma.cc/XM6U-9UZZ], for a comprehensive listing of the laws under which the FTC has enforcement or administrative responsibilities.

32. Letter from April J. Tabor, Sec’y, FTC, to Hon. Dave Uejio, Acting Dir., CFPB 2 (Feb. 19, 2021), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-enforcement-fair-debt-collection-practices-act-calendar-year-2020-report/p064803_ftc_report_fdcpa_to_cfpb.pdf [https://perma.cc/QT6U-GGSD].

33. See, e.g., *id.*

34. *Id.* at 1.

35. CFPB, FAIR DEBT COLLECTION PRACS. ACT 2017 ANN. REP. 65 n.120 (2017), https://files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf [https://perma.cc/F8S4-KH7J].

36. *Id.*

37. *Banned Debt Collectors*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/banned-debt-collectors/list> [https://perma.cc/DG2X-DEGD].

38. *Id.*

how to comply with the FDCPA.³⁹ For example, in 2020, the FTC distributed nearly 16,000 copies of the *Cobradores De Deuda fotonovela* (Debt Collectors graphic novel) to raise awareness about scams targeting the Latino community, based on feedback from Spanish-speaking consumers.⁴⁰

2. The Consumer Financial Protection Bureau

Since 2011, the FTC has shared enforcement responsibility for the FDCPA with the Bureau under the direction of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).⁴¹ The Dodd-Frank Act created the Bureau and outlined the agency’s primary functions.⁴²

i. The Dodd-Frank Act

The Dodd-Frank Act, a landmark piece of legislation passed in the wake of the 2008 financial crisis,⁴³ provided sweeping reforms to American financial industries.⁴⁴ Of relevance to this Comment, Title X of the Dodd-Frank Act established the Consumer Financial Protection Bureau.⁴⁵ The Dodd-Frank Act consolidated many of the authorities previously shared by seven federal agencies into the Bureau.⁴⁶

39. Letter from April J. Tabor, *supra* note 32, at 6.

40. *Id.*

41. Codified as 12 U.S.C §§ 5481–5603. *See* 12 U.S.C. § 5495 (“The Bureau shall coordinate with . . . the Federal Trade Commission . . . as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.”).

42. *See* 12 U.S.C. § 5511.

43. *See* Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1247 (2011).

44. *See* David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARVARD L. SCH. F. CORP. GOV. (July 7, 2010), <https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/> [<https://perma.cc/Z89B-F3VJ>], for a discussion of the key provisions of the Dodd-Frank Act. In addition to creating the Bureau, the Dodd-Frank Act provided new regulations for credit rating agencies, private fund advisers, over-the-counter derivatives, banks and non-bank financial institutions, and more. *Id.*

45. *See* 12 U.S.C. § 5491(a).

46. *See* CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 6 (2014), <https://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf> [<https://perma.cc/GEJ4-R7P3>]. The seven agencies included the Board of Governors of the Federal Reserve System (Board of Governors), Federal Deposit Insurance Corporation (FDIC), Federal Trade Commission (FTC), National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), and the Department of Housing and Urban Development (HUD). *See* 12 U.S.C. § 5581(b).

Further, the Dodd-Frank Act established several offices underneath the umbrella of the Bureau to serve specific consumer needs, such as the Office of Fair Lending and Equal Opportunity,⁴⁷ the Office of Financial Education,⁴⁸ the Office of Service Member Affairs,⁴⁹ and the Office of Financial Protection for Older Americans.⁵⁰

ii. Functions of the Bureau

The Bureau began official operations on July 21, 2011.⁵¹ The Bureau has six primary functions: (1) conducting financial education programs; (2) collecting, investigating, and responding to consumer complaints; (3) providing up-to-date information on consumer financial products and services to identify risks to consumers; (4) addressing violations of federal consumer financial law; (5) issuing rules, orders, and guidance implementing federal consumer financial law; and (6) any additional support activities necessary or useful to facilitate other Bureau functions.⁵² The FDCPA is one of many pieces of federal consumer financial law that falls within the purview of the Bureau.⁵³

One of the most well-known functions of the Bureau is responding to consumer complaints.⁵⁴ The Bureau publishes every complaint in a publicly available Consumer Complaint Database.⁵⁵ After receiving a complaint, the Bureau forwards the grievance to the debt collection company, analyzes complaint data to guide new rules and regulations, and shares complaint data in reports to state agencies, federal agencies, and Congress.⁵⁶

47. 12 U.S.C. § 5493(c).

48. *Id.* § 5493(d).

49. *Id.* § 5493(e).

50. *Id.* § 5493(g).

51. Dave Uejio, *Celebrating 10 Years of Consumer Protection*, CONSUMER FIN. PROT. BUREAU (July 21, 2021), <https://www.consumerfinance.gov/about-us/blog/celebrating-10-years-consumer-protection/> [<https://perma.cc/RR88-5CST>].

52. *See* 12 U.S.C. § 5511(c).

53. *See id.* §§ 5481(12)(H), 5481(14).

54. *See id.* § 5493(b)(3).

55. *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/consumer-complaints/> [<https://perma.cc/VSU6-LFGR>].

56. *How We Share Complaint Data*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/complaint/data-use/> [<https://perma.cc/Y225-YUXG>].

Since 2013, consumers have filed over 445,000 complaints with the Bureau related to debt collection.⁵⁷ Although the Bureau does not verify all allegations contained within complaints, the database provides important insight into consumer experiences with debt collection efforts.⁵⁸ For example, the most common issues reported are collection attempts for debts that are not owed.⁵⁹ Other common grievances include failure to receive written notification about debt and complaints about communication tactics used by debt collectors.⁶⁰

Traditionally, debt collectors communicated with consumers by telephone or mail.⁶¹ However, as far back as 2015, consumers have begun to complain about problematic communication tactics from debt collectors using repeated text message communications.⁶² One complaint filed in 2017 read in part: “[T]hey were calling me and texting me over and over and over again about a debt I didn’t owe, . . . they are texting me when I didn’t ask or approve that.”⁶³ Debt collection regulations had not changed to reflect the rising popularity of new forms of communication.⁶⁴ Yet, some debt collectors communicated with consumers via text and other new platforms, albeit without any concrete rules from the federal government.⁶⁵

In addition to responding to consumer complaints, the Bureau creates rules to implement consumer financial law, like the FDCPA.⁶⁶

57. *Consumer Complaint Database*, *supra* note 55 (choose “Explore data and trends”; then filter results from 01/01/2013 through today’s date; then click “Debt collection” under “Product / sub-product”).

58. See CFPB, CFPB-2012-0023, FINAL POLICY STATEMENT ON DISCLOSURE OF CONSUMER COMPLAINT DATA 9 (Mar. 25, 2013), https://files.consumerfinance.gov/f/documents/201303_cfpb_Final-Policy-Statement-Disclosure-of-Consumer-Complaint-Data.pdf [<https://perma.cc/876S-ZCS3>].

59. CFPB, CONSUMER RESPONSE 2021 ANN. REP. 23 (2022), https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf [<https://perma.cc/G4ZY-RSMX>].

60. *Id.*

61. April Kuehnhoff & Margot Saunders, *Debt Collection Communications: Protecting Consumers in the Digital Age*, NAT’L CONSUMER L. CTR. (June 2015), https://www.nclc.org/images/pdf/debt_collection/21st-century-communications.pdf [<https://perma.cc/YRM3-NY6M>].

62. See, e.g., *Consumer Complaints with Consumer Complaint Narratives, Complaint ID 1331779*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/1331779> [<https://perma.cc/9T4C-EQ5U>]; *Consumer Complaints with Consumer Complaint Narratives, Complaint ID 1386590*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/1386590> [<https://perma.cc/M5DA-9FKW>].

63. *Consumer Complaints with Consumer Complaint Narratives, Complaint ID 2410080*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2410080> [<https://perma.cc/G8F5-RNLS>].

64. Kuehnhoff & Saunders, *supra* note 61.

65. See Aditi Jhaveri, *A Text Twist on Debt Collection*, FED. TRADE COMM’N (Sept. 25, 2013), <https://web.archive.org/web/20220307211210/https://www.consumer.ftc.gov/blog/2013/09/text-twist-debt-collection>.

66. See 12 U.S.C. § 5511(c)(5).

These rules are established through federal regulations, which—unlike federal statutory law—do not require congressional or presidential approval.⁶⁷ Instead, federal regulations are created after an agency submits a proposed rule to the Federal Register, allows a period of time for public commentary, and publishes a final rule based “on the rulemaking record, consisting of the comments, scientific data, expert opinions, and facts accumulated during the pre-rule and proposed rule stages.”⁶⁸ In May 2019, the Bureau proposed a revision of a federal regulation that would allow debt collectors to permissibly communicate with consumers via text message, email, or even via private message on social media platforms.⁶⁹

C. Modernizing Regulation F

The Dodd-Frank Act granted the Bureau power to issue rules, regulations, and guidance on federal consumer financial laws like the FDCPA.⁷⁰ Regulation F, drafted by the Bureau and published in the Federal Register as 12 CFR Part 1006, contains the Bureau’s rules and regulations for debt collection practices under the FDCPA.⁷¹

Regulation F first went into effect on December 16, 2011, five months after the Bureau opened its doors.⁷² Initially, Regulation F merely contained rules for states applying for certain exemptions under the FDCPA, but lacked any specific guidance for debt collectors.⁷³

In an effort to modernize debt collection regulations, the Bureau proposed a major revision of Regulation F in May 2019 to provide more comprehensive rules and official interpretations for twenty-first century FDCPA debt collectors.⁷⁴ The stated goals of the revised Regulation F include:

- (1) clarifying how the FDCPA’s communication restrictions apply to

67. *Laws and Regulations*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Laws_and_Regulations_vrd.htm [<https://perma.cc/RHW4-8LWC>].

68. *A Guide to the Rulemaking Process*, OFF. OF FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/ER4J-KPHF>].

69. Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

70. 12 U.S.C. §§ 5492(a)(10); 5512(b).

71. 12 C.F.R. §§ 1006.1(a)–(b) (2021).

72. *Interactive Bureau Regulations*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/rules-policy/regulations/1006/versions/1/> [<https://perma.cc/755B-BH7W>].

73. *Id.* (click “Dec. 16, 2011” to view the original Regulation F that went into effect on Dec. 16, 2011).

74. Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274.

technologies that have developed since the statute was passed, such as mobile telephones, email, text messaging, and social media; (2) enabling consumers who do not wish to engage in electronic communications to opt out of such communications easily; and (3) clarifying how debt collectors can engage in email or text message communications in a way that limits the risk of third-party disclosures.⁷⁵

Following a fifteen-month comment period—during which over 14,000 comments were submitted from consumers, consumer groups, members of Congress, other government agencies, creditors, debt collectors, industry trade associations, and others—the Bureau published the revised Regulation F in the Federal Register in January 2021.⁷⁶ This version of Regulation F became effective on November 30, 2021.⁷⁷

The revised Regulation F creates guidelines for debt collectors to contact consumers via electronic communication channels which did not exist when the FDCPA became law in 1977.⁷⁸ A previous Director of the Bureau claimed the new Regulation F would allow the agency to “finally leav[e] 1977 behind and develop[] a debt collection system that works for consumers and industry in the modern world.”⁷⁹

The following Subsection provides the new rules under the revised Regulation F for debt collectors relating to three permissible mediums of electronic communication: (i) emails, (ii) text messages, and (iii) social media messages. Then, Subsubsection 2 explains the opt-out notice requirements that apply to all forms of electronic communication. Finally, Subsubsection 3 introduces the concept of frequency limitations for electronic communications.

75. Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 76865 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006).

76. 12 C.F.R. pt. 1006.

77. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 19 (2021), https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2021.pdf [<https://perma.cc/GHK6-TRJM>].

78. Though the first email was sent in 1971, email technology was not generally available to consumers until the late 1980s and 1990s. See Sarah Left, *Email Timeline*, THE GUARDIAN (Mar. 13, 2002), <https://www.theguardian.com/technology/2002/mar/13/internetnews> [<https://perma.cc/RN9J-GD24>]. The first text message was transmitted in 1992. *The First Text Message Celebrates 25 Years*, NPR (Dec. 4, 2017), <https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years> [<https://perma.cc/BU7W-9HKB>]. Social media sites first garnered popularity in the late 1990s. See Alexandra Samur, *The History of Social Media: 29+ Key Moments*, HOOTSUITE (Nov. 22, 2018), <https://blog.hootsuite.com/history-social-media/> [<https://perma.cc/SY5W-9WL3>].

79. Kathleen L. Kraninger, *CFPB's Clear Rules of the Road for Debt Collector Communications Lead to Stronger Consumer Rights*, CONSUMER FIN. PROT. BUREAU (Oct. 30, 2020), <https://www.consumerfinance.gov/about-us/blog/cfpbs-clear-rules-road-debt-collector-communications-lead-stronger-consumer-rights/> [<https://perma.cc/2A9J-DP4J>].

1. New Allowable Forms of Communications and Requirements

The revised Regulation F provides debt collectors with guidance on how to communicate with consumers through new channels while remaining compliant with the FDCPA.⁸⁰

During the comment period for the proposed Regulation F, many debt collection industry professionals (collectively, “Pro-Industry Commenters”) expressed support for the use of electronic communications.⁸¹ Compared to traditional means of technology like mail and telephone calls, this group argued that electronic communications are:

[F]aster and more cost effective; enable debt collectors to reach consumers who do not answer the telephone or who change addresses frequently; provide consumers with more privacy and greater control over the time and place of engagement; and create a digital record of a consumer’s interactions with a debt collector.⁸²

In contrast, most individual consumers, consumer advocates, consumer attorneys, academics, and government commenters (collectively, “Pro-Consumer Commenters”) opposed electronic communications in debt collections as proposed by the revised Regulation F.⁸³ Nonetheless, the Bureau determined that the benefits of electronic communications outweighed the potential risks, citing benefits to both consumers and debt collectors.⁸⁴

i. Email Communications

Under the revised Regulation F, a debt collector may obtain a consumer’s email address in a number of different ways.⁸⁵ First, collectors may obtain emails directly from consumers.⁸⁶ If a consumer initiates an email to a debt collector, the debt collector may continue

80. 12 C.F.R. §§ 1006.6–1006.42.

81. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76755.

82. *Id.*

83. *Id.* at 76755–56. Most Pro-Consumer Commenters “raised concerns about the Bureau’s proposals and either opposed electronic communications in debt collection [entirely], or supported them only if the consumer had first explicitly consented, or opted in, to receiving them.” *Id.* at 76755.

84. *Id.* at 76755 (“Technologies such as email and text messaging allow consumers to exert greater control over the timing, frequency, and duration of communications with debt collectors, including by choosing when, where, and how much time to spend responding to a debt collector’s email or text message. For debt collectors, these technologies are a more effective and efficient means of communicating with some consumers.”).

85. 12 C.F.R. § 1006.6(d)(4).

86. *Id.* § 1006.6(d)(4)(i).

to communicate via email so long as the consumer has not opted out.⁸⁷ Second, the consumer may provide consent to email communications.⁸⁸ Consent must be provided after the debt collector clearly and conspicuously discloses the purpose of collecting the email address.⁸⁹

Next, collectors may obtain a consumer's email from a consumer's original creditor when the consumer's debt transfers from creditor to debt collector.⁹⁰ If the creditor had previously communicated with the consumer via email, the creditor may send notice to the consumer stating: (1) that their debt is being transferred to a debt collector; (2) that the debt collector "might use their email address to communicate"; and (3) that if other people have access to their email, then those people might see the emails from the debt collector.⁹¹ This notice must provide a thirty-five-day opt-out period for consumers.⁹² Additionally, the email address must have a publicly available domain name; e.g., email addresses ending in gmail.com or yahoo.com would be permissible, while email addresses ending in the domain name of a particular business or university would be impermissible.⁹³

Lastly, collectors may obtain consumers' email addresses from prior debt collectors if the prior collectors followed Regulation F procedures to obtain the email.⁹⁴ If a consumer's debt is resold multiple times, the email address can only be used if the immediate prior collector used the email to communicate with the consumer.⁹⁵

ii. Text Message Communications

A debt collector may only send a text message to a consumer under specified circumstances in accordance with revised Regulation F.⁹⁶ For example, if the consumer either provided consent to text message communication or sent the debt collector a text message within the past sixty days, the debt collector may send the consumer a text.⁹⁷ If the

87. *Id.* § 1006.6(d)(4)(i)(A).

88. *Id.* § 1006.6(d)(4)(i)(B).

89. *Id.* § 1006.6(d)(4)(ii)(C).

90. *Id.* § 1006.6(d)(4)(ii).

91. *Id.* §§ 1006.6(d)(4)(ii)(C)(1)–(3).

92. *Id.* § 1006.6(d)(4)(ii)(C)(5).

93. *See id.* § 1006.6(d)(4)(ii)(E).

94. *Id.* § 1006.6(d)(4)(iii).

95. *See id.* § 1006.6(d)(4)(iii)(B).

96. *Id.* § 1006.6(d)(5).

97. *Id.*

debt collector has not received a text message or consent from the consumer in over sixty days, but the consumer previously sent texts or consented to text messages, then the debt collector must use a complete and accurate database to confirm that the phone number still belongs to a consumer before sending the consumer a text.⁹⁸

iii. Social Media Communications

The revised Regulation F does not provide explicit procedures for obtaining a consumer's social media information, although it does make private social media messages from debt collectors permissible.⁹⁹ The text of Regulation F only mentions the phrase "social media" twice in Section 1006.22(f)(4), restricting debt collectors from communicating with consumers through social media platforms if the communication is viewable by the general public.¹⁰⁰ The Bureau's official interpretation of Section 1006.22(f)(4) provides more clarity by adding that the section "does not prohibit a debt collector from sending a message to a person if the message is not viewable by the general public or the person's social media contacts."¹⁰¹

The Bureau's official interpretations of the revised Regulation F supply added guidance on social media communications from debt collectors in a few additional provisions.¹⁰² For example, Section 1006.18(d) prohibits debt collectors from using false representations or deceptive means to collect information or any debt from a consumer.¹⁰³ The official interpretation then adds illustrations of how this rule applies in the social media context, for example:

Assume that a debt collector sends a private message, in connection with the collection of a debt, requesting to be added as one of the consumer's contacts on a social media platform marketed for social or professional

98. *Id.* See also 12 C.F.R. § 1006 app. supp. I cmt. 6(d)(5) ("[T]he database established by the FCC in *In re Advanced Methods to Target & Eliminate Unlawful Robocalls* . . . qualifies as a complete and accurate database, as does any commercially available database that is substantially similar" (citation omitted)).

99. See 12 C.F.R. § 1006.22(f)(4) (2021) ("A debt collector must not . . . [c]ommunicate or attempt to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.").

100. *Id.*

101. Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 76906 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006).

102. See, e.g., *id.*

103. 12 C.F.R. § 1006.18(d).

networking purposes. A debt collector makes a false representation or implication if the debt collector does not disclose his or her identity as a debt collector in the request.¹⁰⁴

Pro-Consumer Commenters to the revised Regulation F presented various concerns on the use of social media in debt collection—the risk of third-party disclosures, consumers’ ability to communicate effectively about debt over social media, the potential for deception, and the observation that some consumers may find private social media messages from debt collectors unwelcome or harassing—“particularly because consumers . . . generally are not accustomed to being contacted about financial matters in this way.”¹⁰⁵ In publishing the final rule, the Bureau noted that the agency “intends to monitor closely developments in this space” because “the use of social media by debt collectors is a relatively new practice.”¹⁰⁶

2. Regulation F Opt-Out Notice Requirements for Electronic Communications

Under the revised Regulation F, whenever an electronic communication from a debt collector is made “using a specific email address, telephone number for text messages, or other electronic-medium address,” the debt collector must provide an option for the consumer to opt out of further electronic communications.¹⁰⁷ The out-opt method must be clear, conspicuous, reasonable, and simple.¹⁰⁸ The Bureau’s official interpretation of this requirement outlines examples of permissible opt-out notices.¹⁰⁹ A text message could include an instruction like, “Reply STOP to stop texts to this telephone number.”¹¹⁰ Or, an email could include a hyperlink labeled, “Click here to opt out of further emails to this email address” or a textual instruction explaining that consumers can opt out by replying with the word “stop” in the email subject line.¹¹¹

Unless a consumer specifically requests the debt collector to cease all communications, a consumer must opt out of each form of

104. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76905.

105. *Id.* at 76838.

106. *Id.* at 76829.

107. 12 C.F.R. § 1006.6(e).

108. *Id.*

109. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76900.

110. *Id.*

111. *Id.*

electronic communication separately.¹¹² The Bureau has explained, “[A]bsent evidence to the contrary, a consumer’s request to opt out of electronic communications to a particular address or telephone number is *not* a request to . . . opt out of *all* electronic communications . . . altogether.”¹¹³

The Bureau’s decision to require opt-out notices instead of structuring electronic communication procedures to require opting in has been criticized by many consumer advocates and multiple government and academic commenters since the amended Regulation F’s proposal.¹¹⁴ “[C]ommenters argued that an opt-in system would enable consumers to weigh the costs of text messages before agreeing to receive them from a debt collector.”¹¹⁵ An attorney for the National Consumer Law Center remarked that the opt-out approach “is more likely to result in missed messages, i.e., if collectors use old contact information or communications are sent to spam. Privacy may also be violated if messages are viewed by others, including employers.”¹¹⁶

Additionally, consumers may be hesitant to click a hyperlink or reply to a text message from an unknown sender in order to exercise their opt-out rights.¹¹⁷ The Bureau recognized that “the FTC advises consumers *not* to click on links or attachments in unsolicited electronic communications from senders they do not recognize, in order to prevent phishing and malware”¹¹⁸ and “several Federal agencies advise consumers to delete suspicious emails and text messages.”¹¹⁹

Moreover, Pro-Consumer Commenters noted that Regulation F’s opt-out procedures could create additional barriers for “certain

112. 12 C.F.R. § 1006.6(e) (“A debt collector who communicates . . . electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication . . . a reasonable and simple method by which the consumer can opt out of further electronic communications . . . to that address or telephone number.” (emphasis added)).

113. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76795 (emphasis added).

114. See *id.* at 76755. See also, e.g., April Kuehnhoff, *Comprehensive New FDCPA Regulation F Takes Effect November 30*, NAT’L CONSUMER L. CTR. (Sept. 24, 2021), <https://library.nclc.org/comprehensive-new-fdcpa-regulation-f-takes-effect-november-30> [<https://perma.cc/3W3U-W6BT>].

115. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76756.

116. Kuehnhoff, *supra* note 114.

117. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76783.

118. *Id.* at 76853 n.580 (emphasis added) (citing *How to Recognize and Avoid Phishing Scams*, FED. TRADE COMM’N, <https://consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams> [<https://perma.cc/V57P-4FUM>]; *How to Recognize, Remove, and Avoid Malware*, FED. TRADE COMM’N, <https://consumer.ftc.gov/articles/how-recognize-remove-avoid-malware> [<https://perma.cc/5CXE-CE7Z>]).

119. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76748.

vulnerable populations, such as older consumers, [who] might have difficulty navigating even relatively simpl[e] opt-out procedures.”¹²⁰ Nevertheless, the revised Regulation F allows debt collectors to provide opt-out opportunities through hyperlinks or unsolicited electronic communications.¹²¹

3. Regulation F Frequency Requirements for Electronic Communications

The revised Regulation F imposes specific numeric limitations on telephone calls from debt collectors to consumers, restricting the frequency of phone calls to “[no m]ore than seven times within seven consecutive days,” nor within seven consecutive days after having had a phone conversation with a consumer in connection with debt collection.¹²²

Pro-Consumer Commenters expressed desire for the Bureau to apply a similar numeric limitation to electronic communications like emails, text messages, and social media messages.¹²³ Conversely, Pro-Industry Commenters opposed a numeric frequency limit.¹²⁴

After consideration, the Bureau decided not to impose any frequency limitation on electronic communications.¹²⁵ The Bureau reasoned that the agency lacked “sufficient information to warrant” a numeric limitation because “debt collectors do not presently engage in widespread use of electronic communications”¹²⁶ and the Bureau was “not aware of debt collectors sending electronic messages to consumers repeatedly or continuously with intent to harass them or to cause substantial injury.”¹²⁷ Further, other provisions of Regulation F were designed to prevent general abuse and harassment from debt collectors.¹²⁸ The Bureau rationalized that these provisions were adequate to protect consumers against repeated electronic communications.¹²⁹ However, the Bureau does intend to monitor and

120. *Id.* at 76793.

121. *See id.* at 76794.

122. 12 C.F.R. § 1006.14(b)(2)(i).

123. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76802–03.

124. *Id.* at 76803.

125. *Id.* at 76803–04.

126. *Id.*

127. *Id.* at 76803.

128. For example, 12 C.F.R. § 1006.14 prohibits harassing, oppressive, or abusive conduct, and § 1006.6(e) requires a clear and simple method for consumers to opt out of communications.

129. Debt Collection Practices (Regulation F), 85 Fed. Reg. at 76803–04.

gather information on electronic communications to determine whether a numeric limitation may be necessary in the future.¹³⁰

D. H.R. 2547: Comprehensive Debt Collection Improvement Act

In May 2021—after Regulation F was published in the Federal Register, but before it went into effect—the United States House of Representatives passed H.R. 2547, the Comprehensive Debt Collection Improvement Act (“CDCIA”) in a narrow 215 to 207 vote.¹³¹ The Senate has yet to vote on the bill as of October 2022.¹³²

Title V of the bill, titled the “Ending Debt Collection Harassment Act of 2021,”¹³³ provides an alternative structure for modernizing debt collection practices.¹³⁴ Like Regulation F, the CDCIA would permit debt collectors to communicate with consumers via digital communication methods such as text messaging, emails, and private messages on social media.¹³⁵ The text of the CDCIA does not reference Regulation F.¹³⁶ An accompanying report submitted with the legislation, however, does discuss Regulation F briefly, noting that “[c]onsumer groups have argued that the rule does not go far enough to protect consumers against predatory debt collection practices.”¹³⁷

The CDCIA would curtail the Bureau’s authority to issue rules about debt collection in two pertinent ways: (1) the Bureau could no longer issue a rule allowing a debt collector to send unlimited electronic communications to a consumer;¹³⁸ and (2) any Bureau rule with respect to debt collection would require debt collectors to obtain consent directly from consumers before contacting them using any

130. *Id.* at 76804.

131. Jan Kruse & April Kuehnhoff, *Advocates Cheer House Passage of Comprehensive Debt Collection Improvement Act*, NAT’L CONSUMER L. CTR. (May 13, 2021), <https://www.nclc.org/advocates-cheer-house-passage-of-comprehensive-debt-collection-improvement-act/> [https://perma.cc/C7Z6-NSYU].

132. *See H.R. 2547 - Comprehensive Debt Collection Improvement Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2547/committees>.

133. The Ending Debt Collection Harassment Act of 2021 was originally introduced as H.R. 1657 but later consolidated, along with several other consumer protection bills, into the CDCIA. *See* Ending Debt Collection Harassment Act of 2021, H.R. 1657, 117th Cong. (2021); Mike Bevel, *The Comprehensive Debt Collection Improvement Act: An Explainer*, INSIDEARM (May 13, 2021), <https://www.insidearm.com/news/00047358-comprehensive-debt-collection-improvement/> [https://perma.cc/8BJA-6K3W].

134. Comprehensive Debt Collection Improvement Act, H.R. 2547, 117th Cong. §§ 501–02 (2021).

135. *Id.* § 502.

136. *See* H.R. 2547.

137. H.R. REP. NO. 117-23, at 16 (2021).

138. *See* H.R. 2547 § 502(f)(1).

method other than telephone or mail.¹³⁹ If passed by the United States Senate and signed into law, the CDCIA would supersede any conflicting provisions in Regulation F.¹⁴⁰ The CDCIA modernizes debt collection by amending federal consumer financial laws including the Dodd-Frank Act and the FDCPA.¹⁴¹ Meanwhile, Regulation F is an agency regulation promulgated by the Bureau to implement the FDCPA under the authority of the Dodd-Frank Act.¹⁴² If Congress amends the FDCPA by passing the CDCIA, the Bureau must ensure that its regulations do not conflict with statutory law.

As of October 2022, the CDCIA awaits further action within the Senate Banking, Housing, and Urban Affairs Committee.¹⁴³ Though the Biden Administration supports the CDCIA,¹⁴⁴ its likelihood of passing in the Senate remains unclear.¹⁴⁵

Proponents of Regulation F oppose the CDCIA.¹⁴⁶ The U.S. Chamber of Commerce—the world’s largest business organization and powerful lobbyist¹⁴⁷—remarked that the legislation “would make

139. *Id.* § 502(f)(2).

140. *See* Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 76803–04, 76781 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006). Because Regulation F does not contain a severability clause, a court would likely have to determine whether the CDCIA invalidates the entire regulation or only invalidates the provisions in direct conflict with the CDCIA. For a more robust discussion on administrative severability clauses, see Charles W. Tyler & E. Donald Elliot, *Administrative Severability Clauses*, 124 YALE L.J. 2286 (2015).

141. *See* H.R. 2547 § 502.

142. *See* 12 U.S.C. § 5512(a); 12 C.F.R. § 1006.1(a).

143. *H.R. 2547 - Comprehensive Debt Collection Improvement Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2547/committees> (indicating the bill was referred to the Senate Banking, Housing, and Urban Affairs Committee on May 17, 2021).

144. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2547 – COMPREHENSIVE DEBT COLLECTION IMPROVEMENT ACT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/05/SAP-H.R.-2547.pdf> [<https://perma.cc/J2ZE-LYVL>].

145. *See What the House Passed by Approving the Comprehensive Debt Collection Improvement Act*, ACA INTERNATIONAL (May 13, 2021), <https://www.acainternational.org/news/us-house-representatives-approve-comprehensive-debt-collection-improvement-act-hr-2457-cfpb-fdcpa> [<https://perma.cc/A7VK-ULYS>] (“The bill is expected to face an uphill battle.”); Nathan R. Duvelius, *The Comprehensive Debt Collection Improvement Act and its Impacts on Debt Collectors* (June 4, 2021), <https://www.weltman.com/publication-the-comprehensive-debt-collection-improvement-act-and-its-impact-on-debt-collectors> [<https://perma.cc/Q9ZM-BWZJ>] (describing “the ultimate fate” of the CDCIA as “unpredictable”); *H.R. 2547: Comprehensive Debt Collection Improvement Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/117/hr2547> [<https://perma.cc/8JJU-ND88>] (estimating the CDCIA has a 2% chance of being enacted).

146. *See, e.g.*, Letter from Tom Quaadman, Exec. Vice President, U.S. Chamber Ctr. for Cap. Mkts. Competitiveness, to Members of the Senate Comm. on Banking, Hous., and Urb. Affs. (July 22, 2021).

147. *About Us*, U.S. CHAMBER OF COM., <https://www.uschamber.com/about> [<https://perma.cc/BLQ8-W99F>]; *Chamber of Commerce of the United States of America*, INFLUENCEWATCH, <https://www.influencewatch.org/non-profit/chamber-of-commerce-of-the-united-states-of-america/> [<https://perma.cc/9DVE-UQQN>].

sweeping and counterproductive changes to the already robust consumer protections that exist for debt collection.”¹⁴⁸ In particular, the Chamber of Commerce disagrees with the CDCIA’s proposed opt-in requirements and frequency limitations for electronic communications.¹⁴⁹

Firstly, unlike Regulation F,¹⁵⁰ the CDCIA would consider it a violation of the FDCPA for a debt collector to contact a consumer “electronically, including by email, text message, and direct message through social media, if . . . consent by the person to receive the communication was not provided directly to the debt collector.”¹⁵¹ Instead, the CDCIA requires consumers to directly opt into electronic communication methods from debt collectors by providing consent.¹⁵²

Secondly, the CDCIA amends a portion of the Dodd-Frank Act to add that the Director of the Bureau “may not issue any rule with respect to debt collection that does not prohibit a debt collector to send unlimited email, text messages, and direct messages through social media to a consumer.”¹⁵³ Put simply, if the CDCIA becomes law, the Bureau must issue limitations to make it clear to debt collectors that unlimited communications are prohibited.¹⁵⁴

While the Bureau and proponents of Regulation F argue that the current rules already indirectly prohibit unlimited electronic communications (because repetitive electronic communications likely constitute harassing or abusive conduct in violation of Section 1006.14),¹⁵⁵ the CDCIA clarifies expectations for consumers and collectors.¹⁵⁶

III. DISCUSSION

The Bureau received ample feedback from a myriad of interest groups before publishing the revised version of Regulation F in

148. Letter from Tom Quaadman, *supra* note 146, at 1.

149. *Id.* at 3. The Chamber of Commerce stated that opt-in requirements would “be extremely difficult to manage to companies adhering to the FDCPA” and that “limitations for electronic communication may force debt collectors to contact consumers via mail or phone, which is oftentimes not the consumer’s preference.” *Id.*

150. *See* discussion *supra* Section II.C.2.

151. H.R. 2547 § 502(c) (amending 15 U.S.C. 1692d).

152. *Id.*

153. *Id.* § 502(b).

154. *Id.*; *see also id.* § 502(f)(1).

155. Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 76803–04 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006). *See also* Bevel, *supra* note 133.

156. *See* H.R. 2547.

November 2021.¹⁵⁷ The final rule seems to align much more closely with the expressed interests of Pro-Industry Commenters rather than with the interests of Pro-Consumer Commenters.¹⁵⁸

The modernization of debt collection, a welcome wave of change for debt collectors,¹⁵⁹ leaves consumers with unanswered concerns.¹⁶⁰ In response to these concerns, the Bureau has noted that it will monitor the changing debt collection arena and provide more specific rules and regulations on the use of electronic communications if warranted.¹⁶¹ This reactive approach to new debt collection practices puts consumers at risk, especially vulnerable populations such as older adults.

Section A of this Part highlights a few of the lingering concerns that the Bureau failed to adequately address when revising Regulation F, including a lack of guidance for social media communications and the potential adverse impacts of Regulation F on older adults in the United States. Section B goes on to argue that the CDCIA provides a superior framework to modernizing debt collection practices.

A. Lingering Concerns with Regulation F

1. Lack of Guidance for Social Media Communication Methods

The revised Regulation F provided the least guidance for social media communications, in relation to other new forms such as text messages and emails.¹⁶² Unfortunately for consumers hoping to understand their rights and for debt collectors trying to comply with the FDCPA, there is no formal procedure for a debt collector to acquire a consumer's social media information, nor is the consumer required

157. See, e.g., *Browse All Comments: Debt Collection Practices (Regulation F)*, REGULATIONS.GOV, <https://www.regulations.gov/docket/CFPB-2019-0022/comments> (last visited Apr. 12, 2022) (database of over 14,000 comments submitted from the public to the Bureau regarding the proposed revisions of Regulation F).

158. See discussion *supra* Sections II.C.2–II.C.3.

159. See, e.g., E-mail from Ashley Singleton to Consumer Fin. Prot. Bureau, (July 30, 2019, 6:21 PM), https://downloads.regulations.gov/CFPB-2019-0022-3074/attachment_1.pdf.

160. See *CFPB Debt Collection Rule a Mixed Bag for Consumers*, NAT'L CONSUMER L. CTR. (Oct. 30, 2020), <https://www.nclc.org/cfpb-debt-collection-rule-a-mixed-bag-for-consumers/> [<https://perma.cc/5M7X-BMS3>].

161. See *Debt Collection Practices (Regulation F)*, 85 Fed. Reg. 76734, 76804 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006).

162. See 12 C.F.R. § 1006.6(d)(3)–(5). These provisions supply reasonable procedures for email and text message communications. Regulation F does not include a provision covering reasonable procedures for social media communications. *Id.*

to consent to social media contacts before the debt collector uses this method.¹⁶³

Regulation F does not define social media,¹⁶⁴ leaving debt collectors with dozens of platforms to choose from.¹⁶⁵ Unless a consumer explicitly requests that a debt collector cease all social media communications, a consumer may have to individually opt out of communications from multiple social media platforms to stop private messages from collectors.

Due to the lenient regulations imposed by Regulation F, bad actors are more likely to misuse social media to overwhelm consumers with unwanted and confusing communications related to real or fraudulent debts.¹⁶⁶ In response to numerous concerns about the potential harms associated with social media communications, the Bureau repeatedly pointed to provisions of the FDCPA and Regulation F that are “designed to empower consumers to communicate with debt collectors in the manner that they prefer (i.e., the time and place restrictions in FDCPA section 805(a) and Section 1006.6(b)(1), the opt-out instructions for electronic communications in Section 1006.6(e), and the limitations on use of certain communications media in Section 1006.14(h)).”¹⁶⁷

However, Regulation F does little to prevent harm from taking place, instead relying on “actively monitor[ing] the market and gather[ing] information on these electronic communications in general” to determine whether any future changes to the rules are needed.¹⁶⁸ While the Bureau waits to react to harmful debt collection practices conducted on social media, consumers are left with little

163. *Id.* See also 12 C.F.R. § 1006.6(e).

164. See 12 C.F.R. § 1006.2.

165. See, e.g., Jacinda Santora, *103+ Social Media Sites You Need to Know in 2022*, INFLUENCER MKTG. HUB (Nov. 30, 2021), <https://influencermarketinghub.com/social-media-sites/> [<https://perma.cc/L5J2-ES7C>].

166. Though the FDCPA generally prohibits harassing or abusive debt collection practices, a 2010 report from the U.S. Senate Committee on Banking, Housing, and Urban Affairs “conclude[d] that abusive debt collection practices . . . continued to proliferate.” See Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274, 23310 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006). When the Bureau proposed Regulation F, the agency stated consumers’ experiences with continuous phone calls “suggest a widespread consumer protection problem that has persisted for 40 years notwithstanding the FDCPA’s existing prohibitions and case-by-case enforcement by the FTC and the [Bureau] . . .” *Id.* The Bureau addressed this problem by implementing a frequency limitation on phone calls but failed to consider how these same issues may persist when social media debt collection communications become more widespread. See 12 C.F.R. § 1006.14(b)(2).

167. Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 76838 (Nov. 30, 2020) (codified at 12 C.F.R. pt. 1006).

168. *Id.* at 76803–04.

guidance to comprehend whether a private message from an unknown sender comes from a legitimate debt collector or a deceptive bad actor.

2. Potential Adverse Impacts on Older Adults

Due to the rising debt load, debt collectors are more likely to interact with older Americans.¹⁶⁹ The total debt burden for all Americans over age seventy increased 543% to \$1.1 trillion between 1999 and 2019.¹⁷⁰ The median elderly household debt more than quadrupled between 1989 and 2016, from \$7,463 to \$31,050 (in 2016 dollars).¹⁷¹ In 2018, 8.5% of Americans over age sixty-five had past due medical bills.¹⁷²

At the same time, older Americans also use new forms of technology such as texting, emailing, and social media at increasing rates each year.¹⁷³ From 2016 to 2021, adults over age sixty-five reported a 10% increase in social media use.¹⁷⁴ This group reported using social media platforms including: Facebook (50%), YouTube (49%), Pinterest (18%), Instagram (13%), LinkedIn (11%), WhatsApp (10%), Nextdoor (8%), Twitter (7%), TikTok (4%), Reddit (3%), and Snapchat (2%).¹⁷⁵ From 2014 to 2019, smartphone usage increased 31% for adults over age fifty.¹⁷⁶ Of those older adults who own

169. See Josh Richner, *How Can Older Americans Combat Debt Collection Trouble?*, NAT'L LEGAL CTR. (July 31, 2021), <https://nationallegal.com/how-can-older-americans-combat-debt-collection-trouble/> [<https://perma.cc/Y4B7-SLRN>].

170. Greg Iacurci, *Debt Among Oldest Americans Skyrockets 543% in Two Decades*, CNBC (Feb. 26, 2020), <https://www.cnbc.com/2020/02/26/debt-among-older-americans-increases-dramatically-in-past-two-decades.html> [<https://perma.cc/MB4J-AUNG>].

171. ZHE LI, CONG. RSCH. SERV., R45911, HOUSEHOLD DEBT AMONG OLDER AMERICANS, 1989-2016 1 (2019). The average debt during the same time increased from \$29,918 to \$86,797 (in 2016 dollars). *Id.* at 3.

172. *Medical Debt Among Older Adults Before the Pandemic*, CONSUMER FIN. PROT. BUREAU (Mar. 16, 2022), <https://www.consumerfinance.gov/consumer-tools/educator-tools/resources-for-older-adults/data-spotlight-medical-debt-among-older-adults-before-pandemic/> [<https://perma.cc/ZR36-XFDA>].

173. See, e.g., Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/?menuItem=c14683bc4f4-41d0-a635-52c4eeae0245> [<https://perma.cc/57FL-TNFQ>].

174. *Id.*

175. *Id.* See also *2020 Tech and the 50+ Survey*, AARP RSCH. 45 (Dec. 2019), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/technology/2019/2020-tech-trends-survey.doi.10.26419-2Fres.00329.001.pdf [<https://perma.cc/VE9V-E5WE>] [hereinafter *2020 Tech Survey*].

176. *2020 Tech Survey*, *supra* note 175, at 12.

smartphones, 83% use the devices to send or receive text messages or emails.¹⁷⁷

Throughout the digital age, the speed at which older Americans have adopted new technologies has contributed to a gap in technological skill and efficacy across age groups,¹⁷⁸ an important issue in discussions on digital inequality¹⁷⁹ and digital literacy.¹⁸⁰ Studies suggest that lower rates of digital literacy may contribute to older Americans being more likely to believe false or misleading content online.¹⁸¹ In 2011, a Bureau report noted that one out of every five Americans over age sixty-five had been victim to a financial scam.¹⁸²

Within this context, it is important for the entities modernizing debt collection practices to consider the digital literacy rates of older Americans, who are increasingly likely to use electronic mediums of communication, and increasingly likely to owe debt.¹⁸³ The key to improving digital literacy for older Americans is supplying accessible, up-to-date educational resources on the changing digital landscape.¹⁸⁴ Yet, there are currently few resources available to older Americans to inform consumers of the guidelines contained in the new Regulation F.¹⁸⁵ When consumers are unaware of the permissible methods of debt

177. *Id.* at 14.

178. Hsin-yi Sandy Tsai et al., *Social Support and “Playing Around”: An Examination of How Older Adults Acquire Digital Literacy with Tablet Computers*, 36 J. APPLIED GERONTOLOGY 29, 30 (2015).

179. Eszter Hargittai et al., *From Internet Access to Internet Skills: Digital Inequality Among Older Adults*, 18 UNIVERSAL ACCESS INFO. SOC’Y 881, 882 (2019) (“Digital inequality research has long suggested the importance of understanding differences among Internet users rather than simply whether certain groups are online or not. Issues of a ‘second-level digital divide,’ in which individuals are differentiated by their ability to use the Internet effectively and efficiently are particularly relevant to discussion of universal access and older adults.”).

180. Tsai et al., *supra* note 178, at 30–31 (“[D]igital literacy is the ability to use and understand information from various digital devices.”).

181. Andrew Guess et al., *Less Than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook*, 5 SCI. ADVANCES (2019) (finding Facebook users over age sixty-five shared nearly seven times as many articles from fake news domains in 2016 during the United States presidential campaign compared to youngest age group); Nadia M. Brashier & Daniel L. Schacter, *Aging in an Era of Fake News*, 29 CURR. DIRS. PSYCH. SCI. 316, 321 (2021).

182. Megan Slack, *By the Numbers: 1 in 5*, OBAMA WHITE HOUSE ARCHIVES (Dec. 9, 2011) (citing *Improving Americans’ Financial Security: The Importance of a CFPB Director* 9 (2011), <https://obamawhitehouse.archives.gov/blog/2011/12/09/numbers-1-5> [<https://perma.cc/UJN2-UZE4>]).

183. See Auxier & Anderson, *supra* note 173; Iacurci, *supra* note 170.

184. See *Digital Literacy and Inclusion for Older Adults*, STAN. CTR. ON LONGEVITY, <https://longevity.stanford.edu/digital-literacy-in-older-adults/> [<https://perma.cc/U46N-DJMY>].

185. See *Money Smart for Older Adults Resource Guide*, CFPB & FDIC (June 2021), <https://www.fdic.gov/resources/consumers/money-smart/teach-money-smart/money-smart-for-older-adults.html> [<https://perma.cc/8GZH-3TC6>] (discussing debt collection methods by phone, but not

collection, they are more likely to fall victim to unfair collection practices¹⁸⁶ and may be less likely to report violations of consumer financial law.

Moving forward under the revised Regulation F, the Bureau and its Office of Financial Protection for Older Americans should make targeted efforts to educate older Americans on the permissible ways in which a debt collector may contact them, and on consumers' rights to opt out of particular methods of communication. Now that debt collectors have explicit permission to use texts, emails, and social media private messages, older Americans must be equipped with the knowledge to meaningfully participate as consumers in the debt collection process. Additionally, the Bureau should closely monitor the content and format of electronic communications sent from debt collectors to older Americans to ensure that communications are not contributing to fraud or financial exploitation.

*B. The CDCIA Provides a Better Framework
for Modernizing Debt Collection Practices*

The structure of Title V of the CDCIA alleviates lingering concerns associated with the current framework of Regulation F, while accomplishing the same mission of modernizing debt collection. The CDCIA reflects the needs of American consumers—and rules from the Bureau should do the same. Organizations who support Title V of the CDCIA include Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Consumer Federation of

electronic communication methods); *Debt Collection Scams*, AARP, <https://www.aarp.org/money/scams-fraud/info-2019/debt-collector.html> [<https://perma.cc/X2JR-R3NG>] (discussing warning signs for debt collections scams, mentioning new electronic communication methods in two sentences).

186. See, e.g., *Consumer Complaints with Consumer Complaint Narratives, Complaint ID 4793107*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/4793107> [<https://perma.cc/472M-QABM>] (“I received a text message from National Recovery Agency saying I owe a debt. I do not. . . . I[’]ve never heard of a[] debt collection agency texting, however, I[’]ve never had to deal with debt collection.”); *Consumer Complaints with Consumer Complaint Narratives, Complaint ID 4489252*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/4489252> [<https://perma.cc/X6K5-9M4U>] (“Midland Credit Management has used scare tactics and left numerous phone messages and texts They have scared me thinking they are coming to my house to scare me or hurt me. I am in fear. I am a senior citizen . . . and have health problems and financial indigent [sic]. . . . Please Help Me!”); *Consumer Complaints with Consumer Complaint Narratives, Complaint ID 4186154*, CFPB, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/4186154> [<https://perma.cc/H639-RQCF>] (“I received an unsolicited text message on my cell phone from ‘Frost-Arnett’ noting it was an effort to collect a debt. . . . I have been very responsible with my finances and have been impacted by the coronavirus pandemic . . . and getting a debt collection text really shook me up.”).

America, Consumer Reports, National Association of Consumer Advocates, National Consumer Law Center, and the U.S. Public Interest Research Group.¹⁸⁷

First, the opt-in structure of the CDCIA provides more protections for both consumers and collectors. From a consumer perspective, the opt-in approach facilitates fairness and transparency by making the consumer an equal decisionmaker in choosing the best communication method. As Table 1 indicates below, most consumers are likely to prefer traditional communication methods (letter or phone call) over any form of electronic communication.¹⁸⁸

TABLE 1¹⁸⁹
CONSUMERS CONTACTED ABOUT A DEBT IN COLLECTION

| Contact Method | Most preferred (%): | Least preferred (%): |
|--------------------------------|---------------------|----------------------|
| Letter | 42 | 7 |
| Cell phone | 21 | 18 |
| Email | 11 | 6 |
| Home phone | 9 | 7 |
| Voicemail or answering machine | 3 | 5 |
| Phone (unspecified) | 2 | 11 |
| Work phone | 1 | 10 |
| Text message | 1 | 3 |
| Social media | <1 | 6 |
| In-person | <1 | 18 |

The Bureau surveyed consumers in 2014 and 2015 to collect information on consumer experiences with debt collection. This data results from the 2,132 survey responses received by the Bureau.¹⁹⁰

The opt-in approach resolves ambiguity surrounding social media regulations because it requires a consumer to consent to receive messages on a particular platform. Additionally, when a consumer opts in to receiving electronic communications from a debt collector, the consumer knows to expect a message, rather than trying to decipher between an authentic collection attempt and a financial scam. This

187. H.R. REP. NO. 117-23, at 16 (2021).

188. *Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt*, CONSUMER FIN. PROT. BUREAU 37 (Jan. 2017) [hereinafter *CFPB Survey of Consumer Views*], https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf [<https://perma.cc/Q7H2-45JR>].

189. *Id.*

190. *Id.* at 11.

especially benefits older Americans, who are increasingly likely to have debts, and are often targets for financial scams.¹⁹¹

From a debt collector's perspective, the opt-in approach simplifies FDCPA compliance by eliminating the need for a debt collector to seek out a consumer's personal email address, cell phone number, or social media profile.¹⁹² This lessens the likelihood of a debt collector making an accidental disclosure to a third-party about a consumer's debt by sending a message to the wrong person (a violation of the FDCPA)¹⁹³ because the consumer can provide current contact information when opting into electronic communications.

Second, the CDCIA's prohibition against unlimited electronic communications from debt collectors proactively protects consumers from harassment.¹⁹⁴ Although the Bureau intends to monitor the volume of electronic communications in the future to consider a frequency limitation, electronic communication patterns are likely to follow the same patterns as traditional telephone calls.¹⁹⁵ A 2017 Bureau survey resulted in findings that 95% of consumers felt that debt collectors contacted them too often—with 35% of consumers reporting four or more contacts from debt collectors per week.¹⁹⁶ While the CDCIA does not place a specific numeric limitation on electronic communications, it would require the Bureau to impose some limit. If electronic communications rise in popularity among debt collectors, then communication frequency is bound to become an issue, just as phone call frequency became an issue necessitating a numeric limitation in the revised Regulation F.¹⁹⁷ A limitation on the volume of electronic communications protects consumers from unwanted and abusive communications, while permitting debt collectors to continue communicating with consenting consumers.

Because the structure of the CDCIA provides greater protections for consumers and more concrete guidelines for debt collectors who wish to modernize their collection practices, the CDCIA is an improvement over the Bureau's revised Regulation F.

191. Slack, *supra* note 182.

192. See discussion *supra* Section II.C.1.

193. See 15 U.S.C. § 1692c(b).

194. See discussion *supra* Section II.A.

195. See *supra* note 166.

196. *CFPB Survey on Consumer Views*, *supra* note 188, at 44–45.

197. See 12 C.F.R. § 1006.14(b).

IV. CONCLUSION

The Dodd-Frank Act created the Bureau in 2010 for the purpose of ensuring that consumer financial product markets and services remain fair, transparent, and competitive.¹⁹⁸ Within the debt collection arena, the Bureau works toward this purpose by enforcing the FDCPA.¹⁹⁹ As the multibillion-dollar debt collection industry modernized to stay competitive,²⁰⁰ the Bureau necessarily responded by revising Regulation F to address modern forms of electronic communication methods like texting, emailing, or private messaging on social media.²⁰¹ However, consumer advocates fear the new Regulation F is not as fair to consumers, particularly in regard to the regulation's opt-out structure and failure to impose frequency limitations for electronic communications.²⁰² As stated above, the CDCIA provides a superior framework for the modernization of debt collection practices. The opt-in approach and embrace of frequency limitations within the CDCIA more closely align with the mission of the Bureau—to ensure that debt collection practices are fair and transparent while remaining competitive.²⁰³ Thus, the Senate must act to pass the CDCIA in order to update the statutory framework of the FDCPA and provide more clarity to the Bureau in its rulemaking capacity. As debt collection inevitably modernizes, responsive consumer protection must remain at the forefront of Bureau rulemaking. Consumers across age groups and across digital literacy levels must have equal opportunities to meaningfully participate in modern debt collection processes.

198. See 12 U.S.C. § 5511(a).

199. See 15 U.S.C. § 1692l.

200. John LaRosa, *U.S. Debt Collections Industry Worth \$15 Billion. Pandemic Did Not Hurt the Business*, MKT. RSCH. BLOG (Feb. 7, 2022), <https://blog.marketresearch.com/u.s.-debt-collections-industry-worth-15-billion.-pandemic-did-not-hurt-the-business> [<https://perma.cc/6AQT-X4CB>].

201. See 12 C.F.R. pt. 1006.

202. See *CFPB Debt Collection Rule a Mixed Bag for Consumers*, *supra* note 160.

203. See 12 U.S.C. § 5511(a).