nclej
National Center for Law and Economic Justice

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September 17, 2019

Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G St NW
Washington, DC 20552

RE: Comments on Docket No. CFPB-2019-0022

Dear Director Kraninger:

The National Center for Law and Economic Justice submits the following comments in response to the Bureau's proposed debt collection rule. NCLEJ advances the cause of economic justice for low-income families, individuals, and communities. Through impact litigation, policy advocacy, and support of grassroots organizing, NCLEJ fights discrimination against people of color, women, immigrants, and people with disabilities and works to build systems that provide economic security and full participation in society for all. NCLEJ has worked extensively with low-income people facing debt collection, particularly debt collection lawsuits. We represent low-income plaintiffs in class action lawsuits against debt collectors who systematically violate the Fair Debt Collection Practices Act, and we help supervise a legal clinic that provides free assistance to people defending themselves in debt collection lawsuits filed in the New York City Civil Court.

NCLEJ has serious concerns about several of the CFPB's proposals.

I. NCLEJ strongly opposes proposed § 1006.18(g), which would provide a safe harbor for debt collection attorneys who engage in deceptive practices

Most of the FDCPA violations we see—and we see many—result from debt collection attorneys suing people on invalid or inflated debts or collecting judgments in unfair, deceptive, or abusive ways (such as restraining bank accounts containing exempt funds). The people sued typically have low incomes and lack legal representation. Many are elderly, disabled, or have literacy or language barriers. While the lucky few who obtain legal representation typically prevail in their cases due to the debt collectors' inability to prove the debts, most people do not know how to defend themselves. Courts have become so overwhelmed and under-resourced that they cannot police debt collectors. A robust meaningful attorney review requirement is critical to preventing debt collectors from engaging in unfair and abusive litigation practices. Unfortunately, the CFPB's proposed safe harbor will exacerbate debt collection misconduct.

During the past fifteen years, debt collectors have filed more than one million lawsuits in New York. In 2008, annual consumer credit filings in the New York City Civil Court peaked at more than 300,000. The number of filings declined to a low of 45,000 in 2016; however, this trend reversed in 2017, when filings climbed to more than 75,000. The recent rise in New York filings corresponds with a sharp increase in filings nationwide. Yuka Hayashi, "Debt Collectors Wage Comeback," *The Wall Street Journal* (July 5, 2019). In New York and around the country, debt collection lawsuits are disproportionally concentrated in communities of color. Paul Kiel and Annie Waldman, "The Color of Debt: How Collection Lawsuits Squeeze Black Neighborhoods," *ProPublica* (Oct. 8, 2015); New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013).

Third-party debt buyers—companies that buy portfolios of old, defaulted debts from original creditors for pennies on the dollar—file many of these lawsuits. Debt buyers sell and re-sell accounts multiple times, with poor recordkeeping of payments, disputes, and account ownership. In 2013, the Federal Trade Commission released a report finding that debt buyers received very little documentation about the debts they purchased and only rarely received information concerning whether the alleged debtor had disputed the debt. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013). Debt buyers routinely had so little information about the debts they collected that, in 2014, the Office of the Comptroller of the Currency released guidance requiring supervisees to maintain quality control over sold accounts and provide debt buyers with access to account documentation. Office of the Comptroller of the Currency, *Consumer Debt Sales: Risk Management Guidance* (Aug. 2014).

Also in 2014, the New York State Office of Court Administration implemented new court rules to combat improper service, insufficient documentation, and the filing of time-barred claims. Under these rules, no debt buyer can obtain a default judgment without an affidavit from the original creditor vouching for the legitimacy of the debt. Despite these reforms, however, many problems with recordkeeping persist. Moreover, hundreds of thousands of accounts sold prior to 2014 remain in active collections today.

Debt collection lawsuits—particularly those on behalf of debt buyers—can violate the FDCPA in numerous ways. In a 2016 report, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, Human Rights Watch documented widespread abuses by debt collection attorneys in courts across the country, including cases brought beyond the statute of limitations and scores of cases where people never received notice of the suits, all of which resulted in wrongful judgments, often against the wrong people. The FTC documented similar problems in 2010. Federal Trade Commission, *Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010). In our experience, debt collectors sue on accounts that are past the statute of limitations, already paid or discharged in bankruptcy or the result of identity theft or mistaken identity. Even in cases where the person sued may owe some money, debt collectors often sue for grossly inflated amounts, padding the debts with unauthorized fees and interest.

Frequently, the people sued do not receive notice of the lawsuits against them. The New York State Office of the Attorney General documented systematic improper service of process and fraud that infected the judicial collection system from at least 2000 through 2012. Without notice, people do not appear in court, and debt buyers obtain "default" judgments against them, with devastating consequences. Debt buyers enforce judgments by freezing people's bank accounts and garnishing their wages, leaving them unable to pay for their basic needs, including housing, food, and medication. Judgments appear on credit reports, preventing people from obtaining jobs and housing.

Debt collection attorneys routinely violate the meaningful attorney review requirement. To provide just one example, NCLEJ, along with New Economy Project, Mobilization for Justice, and Emery Celli Brinckerhoff and Abady, represented the class in *Sykes v. Mel S. Harris and Associates.* The *Sykes* defendants had obtained hundreds of thousands of default judgments against unsuspecting people—mostly low-income people of color—by filing false affidavits with the court claiming to have personal knowledge that people owed a debt, when in fact the debt collectors did not and could not obtain underlying account documentation. Our named plaintiffs did not in fact owe the alleged debts, and neither did the class members with whom we had direct contact. The *Sykes* settlement returned tens of millions of dollars to our clients and resulted in the vacatur of 200,000 state court judgments. But the story doesn't end there.

Unfortunately, by the time of the settlement, the *Sykes* defendants had sold nearly 25,000 fraudulently-obtained judgments to other debt buyers. A local debt collection attorney, Todd Houslanger, represented most of the successor debt buyers and aggressively collected the *Sykes* judgments. We ultimately had to file separate litigation against Houslanger and his debt buyer clients in order to stop those collections; the court recently granted preliminary approval of a class action settlement that will do just that. A core claim in the litigation is that Houslanger failed to conduct a meaningful attorney review of the court files prior to enforcing the judgments.

The *Sykes* and *Houslanger* litigation demonstrate why the CFPB proposal to create a safe harbor for debt collection attorneys is such a terrible idea. Under proposed § 1006.18(g), an attorney complies with this requirement by reviewing unspecified "information" and determining "to the best of the attorney's knowledge, information, and belief" that "legal contentions are warranted by existing law" and "factual contentions have evidentiary support." The attorney defendants in *Sykes* and *Houslanger* would have met this standard based on their typical practice, which was to ensure that legal papers matched the "stream of data" on their computer screens. Though the data stream did not include account documentation of any kind, the *Sykes* and *Houslanger* defendants believed they were entitled to rely on it and that reviewing the stream of data adequately substituted for reviewing actual account documents. That cursory "review," which reveals no meaningful information about the alleged debt, falls within the scope of the proposed rule.

The CFPB's proposed standard is so toothless as to be meaningless, and therefore it encourages attorneys to file lawsuits without conducting any meaningful review whatsoever. Instead, the CFPB should require attorneys to review original, account-level documents prior to filing suit and determine, based on the evidence, that the lawsuit is against the right person, on the right account, and for the right amount of money.

II. Additional Comments

NCLEJ has signed on to and fully supports comments authored by the National Consumer Law Center, the National Health Law Program, and New Yorkers for Responsible Lending. In particular, we agree with these organizations that:

- The proposed regulation allows too many calls in too short a time span. People who owe medical or student loan debt, in particular, often have multiple debts placed with the same collector. The CFPB should limit calls to one conversation and three attempts per week.

- The proposals around electronic communications are deeply disturbing, particularly as applied to low-income people who do not have regular internet access or rely on pre-paid phone service for basic needs, such as communicating with their children while they are at work. Debt collectors should comply with the E-Sign Act in order to ensure that people actually have the ability to receive electronic communications. Debt collectors should have to pay the costs of sending people text messages and data instead of placing that burden on low-income people who pay per text, per megabyte, or per minute. Furthermore, the CFPB should provide more specificity in the opt-out requirements so that people have the opportunity to opt out of electronic communications easily (such as by texting STOP or sending a reply email).

- Allowing debt collectors to provide key disclosures by hyperlink is dangerous and unacceptable. As described by David Vladeck, former Director of the Federal Trade Commission's Bureau of Consumer Protection, this practice will expose people to hackers, spoofers, and identity thieves. In addition, many people who rely on smartphones for internet access will not actually be able to access the disclosures or save them to review later. The CFPB should scuttle this misguided proposal.

- The CFPB's proposals around language access for non-English speakers lag behind commonly-accepted standards. The CFPB should require debt collectors to communicate with people in the language of the original transaction.

- The CFPB should bar collection of time-barred debt under all circumstances. These debts are often unreliable anyway because of their age. Disclosures offer inadequate protection because they are so inherently confusing that the average person without legal training cannot understand them.

Thank you for your consideration.

Sincerely,

Claudia Wilner
Senior Attorney