Protecting Credit Since 1916
American Financial Services Association

September 18, 2019

Bureau of Consumer Financial Protection
Comment Intake – Debt Collection
Office of Regulations
1700 G Street, NW
Washington, DC 20552

Re: ***Debt Collection Practices (Regulation F)***
[Docket No. CFPB-2019-002 and RIN 3170-AA41]

Dear Director Kraninger:

The American Financial Services Association ("AFSA")[1] welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposed rule to amend Regulation F, 12 CFR part 1006, ("Proposed Rule") which implements the Fair Debt Collection Practices Act ("FDCPA").

Outline of AFSA's Comment Letter

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[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

I. Statement of Interest.

We are commenting on the Proposed Rule because AFSA and its members are extremely invested in the outcome of this rulemaking that will significantly affect not only consumers and debt collectors, but creditors as well. While the Proposed Rule focuses on debt collectors as defined in the FDCPA, it will directly affect creditors in two ways.

The first, and perhaps the most obvious, way in which the Proposed Rule would affect creditors is that creditors retain third-party debt collectors to collect on their behalf. As our vendors, any rulemaking that affects debt collectors will also affect the creditors whose debts are being collected by their vendors.

Second, the Final Rule will adversely affect creditors if the CFPB or others lump creditors and debt collectors together and treat them the same way, even though their businesses are very different, as recognized by Congress when it enacted the FDCPA. Creditors have a very short window in which to reach their customers who have missed a payment to help them avoid damaging consequences. Once a creditor reports negative information, which often happens as soon as 30-45 days past due (depending on the creditor), the customer's credit score is already at risk of being negatively affected.

II. Introduction.

We commend the CFPB for taking this opportunity to study the third-party debt collection market and issue the first-ever FDCPA regulations. We support the Bureau's decision to focus this rulemaking on third-party debt collectors, as intended by the FDCPA. As the FDCPA excludes creditors, it is right to promulgate separate rules for debt collectors and then, if appropriate, to issue rules for creditors using the Bureau's authority under a different statute. We strongly encourage the Bureau to continue making this important distinction between creditors and debt collectors and to maintain that separation in the Final Rule.

We also welcome the CFPB's proposal to modernize the FDCPA by expressly allowing debt collectors to contact consumers using current technology such as text messages, emails, and web portals, and by addressing areas of litigation and confusion through the use of limited-content messages.

Furthermore, we agree with the CFPB's rationale for issuing the Proposed Rule. While the FDCPA established certain consumer protections, questions of interpretation have arisen since its passage. Some questions, including those related to communication technologies that did not exist at the time the FDCPA was enacted, have been the subject of inconsistent court decisions, resulting in legal uncertainty, additional cost for creditors and debt collectors, and risks for consumers. AFSA therefore appreciates that the Bureau is proposing to clarify how debt collectors may employ such newer communication technologies in compliance with the FDCPA. Finally, we support the Bureau's proposal to interpret the FDCPA's consumer disclosure requirements to clarify how industry participants can comply with the law and assist consumers in making better-informed decisions about debt they owe.

While we support the CFPB's rationale for issuing the Proposed Rule and the CFPB's goal of bringing the FDCPA into the 21st century, we have three specific recommendations, as well as several comments and concerns about the Proposed Rule that we hope the Bureau will address in its Final Rule.

As we explain in our first recommendation (**Section III**), our overriding concern is that while the Proposed Rule applies only to debt collectors, promulgating the rulemaking under both the FDCPA and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") could encourage the CFPB itself, other regulators, or the courts to apply the rule to creditors—an outcome that was not intended by Congress and would have adverse consequences for consumers. AFSA asks that the CFPB remove any uncertainty around the Proposed Rule by stating more forcefully that the rule applies only to debt collectors under the FDCPA, not under Section 1031 of the Dodd-Frank Act, and not to creditors collecting their own debt.

In our second recommendation (**Section IV**), we explain that there are clear differences between third-party debt collectors and creditors collecting their own debt. We ask that the CFPB acknowledge and outline these differences in its rulemaking.

In our third recommendation (**Section V**), we implore the CFPB to expressly state that the call limitations in the Proposed Rule only apply to debt collectors and not to creditors, for reasons recognized within the rule.

Finally, in **Section VI**, we offer suggestions regarding other sections of the Proposed Rule. We appreciate this opportunity to comment on the Proposed Rule.

III. ***Recommendation #1*: The CFPB should promulgate the Final Rule only under the FDCPA, not the FDCPA and Section 1031(b) of the Dodd-Frank Act.**

Creditors have a valid ongoing business interest in having their customers treated fairly by other creditors and their vendors. If creditors believe they will be unable to recover the credit they extended because the Proposed Rule makes their debt collection vendors or their own efforts ineffective, they will be more restrictive as to who gets credit. Not only that, but if creditors are unable to reach their customers to discuss their accounts because the Proposed Rule is extended to creditors either directly, by interpretation, or by analogy, then those customers face a range of adverse consequences including late fees, assets being repossessed, potential negative credit reporting, and an increased risk of litigation. Communication between creditors and their customers is critical to help customers stay current or work with them if they face a hardship.

The effective, efficient, and fair collection of debts benefits consumers. Without the ability to enforce contracts, creditors making lending decisions would be forced to restrict access to credit, making it more costly for the vast majority of our customers who pay on time.

A leading economist put it this way in 2015:

> "The regulation of debt collection activities presents a challenge from an economic perspective. In theory, well-designed debt collection rules can aid both borrowers

> and lenders by increasing access to and reducing prices for consumer credit. But poorly designed rules can reduce the effectiveness of debt collection, which will increase losses and lead to higher prices and less access to credit for consumers, especially low-income and high-risk consumers. Rules intended to protect consumers from some credit collection practices could lead creditors to use alternatives that consumers prefer even less." [2]

The Proposed Rule "would amend Regulation F to prescribe Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA." Creditors rightly are not defined as debt collectors under the FDCPA, and the rule itself recognizes that as long as a creditor collects in its own name, it is not covered. We appreciate and support the CFPB's decision to focus the Proposed Rule on debt collectors.

However, we are concerned that promulgating the Final Rule under both the FDCPA and the Dodd-Frank Act could result in others (*e.g.,* courts, attorneys general, and regulatory examiners at both the state and federal levels) not recognizing that distinction, thus causing adverse consequences for both creditors and their customers. This is particularly true as some states apply FDCPA-like protections to creditors. Other states apply variations of the FDCPA directly to creditors. Absent a clear statement that the Proposed Rule does not apply to creditors, and in the face of amorphous "reasonable" standards, we suggest that courts, regulators, and others may decide it is easier to apply to creditors the same standards the CFPB sets for debt collectors. To extend the Proposed Rule in that way would have tremendous adverse consequences for both creditors and their customers.

To avoid these adverse consequences, the CFPB should issue the Final Rule *solely* pursuant to its authority under the FDCPA and, if necessary, Sections 1022(a) and (b)(1) of the Dodd-Frank Act. As amended by the Dodd-Frank Act, FDCPA Section 814(d) provides that the Bureau "may prescribe rules with respect to the collection of debts by debt collectors," as defined in the FDCPA. Section 1022(a) of the Dodd-Frank Act provides that "[t]he Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law." Section 1022(b)(1) of the Dodd-Frank Act provides that the CFPB director may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof. "Federal consumer financial law" includes title X of the Dodd-Frank Act and the FDCPA. The CFPB has ample authority under the FDCPA and Section 1022 of the Dodd-Frank Act to promulgate a rule that applies to third-party debt collectors.

The Bureau does have authority to promulgate rules under Section 1031(b) of the Dodd-Frank Act, which provides the CFPB with authority to prescribe rules to identify and prevent unfair, deceptive or abusive acts or practices ("UDAAP"). However, including a reference to the Bureau's authority to prescribe rules under Section 1031(b) in the proposed rulemaking introduces unnecessary and problematic uncertainty into the application of the Proposed Rule. If a practice is deemed unfair,

[2] Zywicki, Todd J., *The Law and Economics of Consumer Debt Collection and its Regulation*. George Mason University Legal Studies Research Paper Series LS 15-17. Sept. 2015. Available at https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf.

deceptive, or abusive for debt collectors, we are concerned that others would mistakenly believe that it would be *ipso facto,* unfair, deceptive, or abusive for creditors to follow that same practice, even though there are many good reasons to the contrary. In fact, many industry experts are already expounding this view. One example is as follows:

> "Finally, there is the potential for the rules, when finalized, to be applied directly to creditors and servicers. Although the proposed rules make occasional distinctions between creditor collections and those of third-party debt collectors, the main thrust of the proposed rules is to define unfair and deceptive practices with respect to debt collection by reference to principles like harassment and third-party disclosure. Although there are good reasons to treat creditor and servicer collections differently than third-party collections, the potential exists for some portions of the proposed rules to be applied to creditors by analogy under the CFPB's UDAAP authority, and indeed the Bureau released a Bulletin in 2013 stating that it would consider doing so with respect to certain provisions of the FDCPA.
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> "For example, there are a number of proposed approaches (*e.g.,* contact limitations, limited content messages, using text and email, etc.) that could have direct impacts on how collections are performed in the first-party environment. It is not much of a stretch to anticipate that the CFPB will seek to impart those expectations into first-party collections through examinations and enforcement using its UDAAP authority. Moreover, many states have debt collection statutes modeled after the FDCPA, but which also apply to creditors and servicers collecting debt. The state agencies responsible for enforcing these statutes (or even private litigants) could argue that the unfair or deceptive practices defined in the final CFPB rules are also prohibited by these state laws."[3]

Promulgating a final rulemaking only under the FDCPA and not Section 1031(b) will remove much of this uncertainty, ultimately benefitting consumers as described below.

Furthermore, in the FDCPA and Dodd-Frank Act Protections for Consumers' section of the Preamble of the Proposed Rule, the CFPB should clarify that while the Bureau has rulemaking authority under Section 1031 of the Dodd-Frank Act, this rulemaking is not based on that authority, but is based solely upon its authority to prescribe rules under the FDCPA. The Bureau should clarify that any application of UDAAP to creditors is expressly outside the scope of this rulemaking to avoid confusion and should reference CFPB Bulletin 2013-07 as reflecting the CFPB position with respect to application of UDAAP to creditor practices. In addition, in the Debt Collection Market Background section of the Preamble that describes the roles of various parties in the debt collection industry, including creditors, the Bureau should clarify that this rulemaking does not apply to creditors.

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[3] Jackman, Stefanie H. and Christopher J. Willis*, Why Creditors and Servicers Should Care About the CFPB's Proposed Debt Collection Rules*. insideARM. May 14, 2019. Available at: https://www.insidearm.com/news/00045033-why-creditors-and-servicers-should-care-a/.

IV. *Recommendation #2:* The CFPB should recognize and describe the clear differences between third-party debt collectors and creditors collecting their own debt.

Third-party debt collectors and debt buyers differ greatly from creditors collecting their own debt.[4] The two have completely different business models with very different incentives. Efficient, expeditious resolution by creditors benefits their customers.

Creditors benefit by ensuring the customer does not default, by collecting the debt without resorting to advanced collections (such as turning the account over to debt collectors or filing a lawsuit), and by increasing the likelihood of a future, mutually-beneficial relationship with the customer. Creditors have an incentive to maintain a relationship with their customers and they risk losing the relationship, in addition to the entire balance, when they cannot effectively communicate with their customers to collect amounts that have fallen delinquent.

Creditors and their customers contract with each other. Creditors generally collect before charge-off. They are trying to get the relationship back on track to avoid further harm such as late fees, repossessions, and increased delinquency. Creditors can offer solutions to their customers. Because they collect before charge-off, the amount of the payments required to bring the account current is more manageable. There is an important distinction between curing a default and settling payment of a charged-off debt.

In order to get a credit relationship back on track and offer solutions to customers, creditors need to be able to leave messages that include the creditor's name. While we address this point in Section VI below, we believe it is important to mention here as well because it illustrates the differences between third-party debt collectors and creditors collecting their own debt. We support the CFPB's limited-content message proposal for debt collectors, but ask that the CFPB specify the limited-content message requirements do not apply to creditors. The problem is that the information provided in the proposed limited-content message is unlikely to result in a return call because the caller is prohibited from leaving a name or disclosing the nature of the call. The reason that debt collectors are not permitted to leave a message with the company's name is because that message could reveal that the call is about a debt in collection. The same is not true for creditors. A creditor could be calling for a different reason, and so leaving the creditor's name does not remove any privacy protection.

In contrast to creditors, debt collectors frequently collect less than a hundred percent of the debt as part of their business model. Debt buyers typically purchase debt for a fraction of the debt actually owed. Neither debt collectors nor debt buyers have any prospect of having a future or ongoing relationship with the consumer and most do not make any attempt to salvage the consumers' credit score.

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[4] AFSA suggests that the CFPB use the New York Trial Court Rules definition of "original creditor" in its rulemaking. According to the court, "Original creditor means the financial institution that owned the consumer credit account at the time the account was charged off, even if that financial institution did not originate the account. Charged-off consumer debt means a consumer debt that has been removed from an original creditor's books as an asset and treated as a loss or expense." *See* Section 212.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the District Courts).

A. Congress and others have recognized the differences between creditors and debt collectors.

The policy distinction between creditors collecting their own debts and third-party collection agencies is no accident. When Congress passed the FDCPA in 1977, it recognized that the FDCPA should not apply to creditors because they are different and do not operate like debt collectors. While much has changed since 1977 in the credit industry, this essential fact remains the same.

Although consumers cannot choose their debt collectors, they usually make conscious decisions when selecting a creditor. The Senate Report on the FDCPA states, "Unlike creditors, who generally are restrained by the desire to protect their goodwill when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them."[5]

The FDCPA's Congressional findings and declaration of purpose found: "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."[6]

The Federal Trade Commission's ("FTC") Official Staff Commentary further amplified the FDCPA's creditor exemption.[7] In defining the term "debt collector," the Commentary set forth a number of exclusions stating that the term does not include, "Any person who collects debts (or attempts to do so) only in isolated instances, because the definition includes only those who 'regularly' collect debts." The commentary, at Section 803(6)(3), goes on to discuss the application of the definition to creditors using another name, noting: "Creditors are generally excluded from the definition of 'debt collector' to the extent that they collect their own debts in their own name." The Commentary then notes the term "debt collector" excludes "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor."

The Government Accountability Office reaffirmed Congress' important distinction between debt collectors and creditors when it stated, "Because first-party collectors use the issuers' name and are collecting from current customers, there is an emphasis on preserving the relationship with the consumer and mitigating the negative perception that consumers can have about their accounts being forwarded to collection."[8]

In his remarks in June of 2017, former CFPB Director Richard Cordray also recognized the importance of the distinction between creditors and debt collectors when he said, "Last summer,

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[5] S. Rep. 95-382, S. Rep. No. 382, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 1695, 1977 WL 16047 (Leg.Hist.).

[6] 15 U.S. Code § 1692(b).

[7] 53 Fed. Reg. 50097-50110. The Official Commentary also states the term "debt collector" does not include, "A credit card issuer that collects its cardholder's account, even when the account is based upon purchases from participating merchants, because the issuer is collecting its own debts, not those 'owed or due another.'"

[8] U.S. Gov't Accountability Office, *Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology,* GAO-09-748. Oct. 21, 2009. Available at http://www.gao.gov/assets/300/295588.pdf.

we outlined proposals under consideration that would apply to third-party debt collectors and debt buyers. We also announced our intention to move forward with separate rules for first-party creditors who collect on their own accounts."

Furthermore, the CFPB's own website encourages consumers to contact their creditors for help. The consumerfinance.gov site recommends that consumers immediately contact their creditor if they cannot pay a bill because, "many creditors may be willing to work with you to change your payment if you're facing a financial emergency."[9]

Based on the statements and interpretations cited, including positions previously taken by the CFPB itself, it is axiomatic that Congress has "directly spoken to the precise question at issue" regarding the difference between creditors and debt collectors. In doing so, and as provided by the Administrative Procedures Act ("APA"), any effort in the Final Rule to somehow classify creditors and debt collectors as being the same, or subject to the same restrictions without further study, would violate the APA's prohibition against acts deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10] Neither is creating the type of uncertainty addressed in this comment letter necessary to accomplish the goals of the Proposed Rule.

B. Unlike debt collectors, creditors have a business relationship with their customers.

Most AFSA members originate their own accounts or acquire accounts shortly after origination, before default. They service these accounts, accept agreed-upon payments, and provide customer service throughout the life of an obligation.

AFSA members compete against each other for customer relationships. Once a customer relationship is formed, creditors are motivated to maintain that relationship rather than lose it to an eager competitor. Creditors often look to expand their relationships with their customers by selling them additional products, opening deposit accounts, or simply looking for repeat business. Extending credit, however, comes with its own inherent risks. Accounts that go into default or do not pay timely ultimately affect a company's costs and risks. Therefore, creditors are additionally incentivized to maintain a customer in a "paying" relationship.

As a report from the Tower Group states, "The cost to replace one bank card customer ranges from $160 to over $200, and issuers that work with their customers through this difficult period will retain customers for life."[11] In other words, creditors are motivated to follow good debt collection practices as a customer retention strategy.

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[9] CFPB, *What Should I Do If I Can't Pay My Credit Card Bill.* July 12, 2017. Available at https://www.consumerfinance.gov/ask-cfpb/what-should-i-do-if-i-cant-pay-my-credit-card-bills-en-1697/.
[10] 5 U.S.C. § 706(2)(A); *see also, ACA International v. Federal Communications Commission, et al.*, 885 F.3d 687, 694 – 695 (D.C. Cir. 2018), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 – 843 (1984).
[11] Moroney, Dennis, *Revitalize the Credit Card Pre-Charge-off Collection Process and Improve the Bottom Line*. TowerGroup. April 2009. Quoted in "*Leveraging Collections as a Customer Retention Tool,*" by Julie Austin and Vytas Kisielius of Collections & Recovery, TSYS, Jan. 2010. Available at: http://www.ftc.gov/sites/default/files/documents/public_comments/ftc-workshop-debt-collection-2.0-protecting-consumers-technology-changes-project-no.p114802-00007%C2%A0/00007-58348.pdf.

Creditors can often provide workable alternative solutions to defaulting consumers and are motivated to use those solutions to preserve the relationship with the consumer. These solutions include, but are not limited to, extensions (modifying the payment schedule to allow the customer to defer a payment) and rewrites (modifying the contract to reduce the customer's payment amount). These solutions may not be present for debt collectors, who are collecting debt in the later stages of collections. Of course, providing these solutions is dependent on right-party contact.

Use of these solutions will typically allow a customer who is already delinquent and potentially in default, to bring her account current and avoid more late charges, potential negative credit reporting, charge-off, and even repossession or foreclosure. Another potential solution in the case of auto financing is to transfer the vehicle to another person if the customer can no longer make the payments and another party is willing to take them over. Finally, even if a vehicle has already been repossessed, creditors can work with the customer to reinstate the account, thereby allowing the customer to retain the ability to use the vehicle.

All of this means that creditors have substantial "skin in the game." They invest not only their money, but also their valuable customer relationships—relationships they very much want to keep. Debt collectors, however, do not have the same incentives. It is the absence of these incentives that accounts for many of the practices the FDCPA was designed to prevent. Debt collectors' primary business is the collection of defaulted loans or accounts from consumers with whom they have no prior or continuing relationship. Because Congress recognized that creditors have so much "skin in the game," Congress already decided that creditors should not be subject to the same restrictions as debt collectors.

V. *Recommendation #3*: The CFPB should not apply Section 1006.14(b)(ii) to creditors because the proposed call limitations would harm consumers.

The Bureau expressly stated in the Preamble that it has not determined in connection with this proposal whether telephone calls by creditors or others not covered by the FDCPA in excess of the limit in proposed Section 1006.14(b)(2)(ii) would constitute an unfair act or practice under the Dodd-Frank Act. The CFPB should make it clear in the Final Rule that telephone calls by creditors or others not covered by the FDCPA in excess of the limit in Section 1006.14(b)(2)(ii) are *not* subject to the Final Rule. To do so, we ask that the CFPB remove footnotes 313 and 331 and replace them with clear statements that the call limit restrictions only apply to third-party debt collectors.

It is apparent that the Bureau recognizes the differences between debt collectors and creditors because in footnote 313 the Proposed Rule states, "The Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(ii) by creditors and others not covered by the FDCPA would constitute an unfair act or practice under Dodd-Frank Act 1031(c) if engaged in by those persons, rather than by an FDCPA-covered debt collector."[12] To leave open the potential for creditors to be swept up in the rule, notwithstanding the acknowledged lack of information sufficient to determine the very fact at issue, subjecting essentially every grantor of credit, regardless of type, to the FDCPA call limitations, would constitute an arbitrary act in violation of the APA. Specifically, such an outcome would constitute

[12] 84 Fed. Reg. 23314 and 84 Fed. Reg. 23317.

"an unreasonable, and impermissible, interpretation of the statute's reach."[13] It is also unsupported by the CFPB's own findings as they relates to creditors.[14]

Footnote 313 as presently drafted in the Proposed Rule indicates that the Bureau is evaluating "whether consumers could reasonably avoid harm from creditor contacts or whether frequent creditor contacts provide greater benefits to consumers or competition."[15] We strongly believe that is an appropriate consideration and provide extensive explanation below for why the Bureau should conclude that contact by creditors is not only different than contact by debt collectors, but that in many cases creditor contact is to the benefit of the customer and desired or even expected by the customer.

Therefore, we ask that the Bureau remove footnote 313 and replace current footnote 331 with the following instead: "The Bureau expressly recognizes the important difference between collection activities by creditors and collection activities of debt collectors, and reserves for future rulemaking, if it determines such to be necessary, whether there should or should not be any limitations on contacts by creditors, and if so, what those limitations ought to be."

We support our rational for that request below by explaining that: creating a one-size-fits-all approach will not work for consumers; being able to reach their customers (especially in early-stage delinquency) is the only way that creditors can help them; imposing overly restrictive call limits on creditors will have a number of adverse consequences; data from creditors supports our conclusions; and overly restricting the number of calls creditors can make would be arbitrary. We also ask that the CFPB include commentary regarding "placing a telephone call" to Section 1006.14(b)(2).

A. The CFPB should not take a one-size-fits-all approach.

There are valid, understandable, and compelling reasons that creditors may need to contact, or attempt to contact, their customers with whom they have business relationships more often or more frequently than is considered acceptable for debt collectors (with whom the consumer has never had a business relationship). Most importantly, creditors have a very short window in which to reach their customers who have missed a payment to help them avoid the negative consequences outlined in Subsection C below. This is because once a creditor reports an account as past-due (which often happens at 30-45 days past due given the differences in reporting cycles) the customer's credit score is already at risk of being negatively affected. The customer's credit score risks being even more negatively affected at 60, and then at 90, days past due.

Creditors call their customers to keep their accounts current by reminding them to make payments, offer extensions, deferments, and loan modifications, or to suggest revised payment schedules. Creditors' incentives to recover the debt align with their customers' incentives to keep current and avoid potential negative credit consequences such as delinquencies, repossessions, or charge-offs that may negatively affect their credit ratings. The CFPB should not take a one-size-fits-all approach to calling because customers are different and collecting debts varies by industry.

[13] *ACA International, supra*, at 697.
[14] See footnote 19, infra.
[15] 84 Fed. Reg. 23314

While consumers who are interacting with debt collectors are quite similar in that their debts have been charged-off, not all customers of creditors are the same. Some customers require very little communication and would not be affected by a creditor adhering to the proposed call restrictions. Others, however, require significantly more effort on the part of the creditor to help keep their accounts on track. These customers rely on a higher-touch model. In fact, they expect and count upon frequent contact from their creditors. Without those reminders, certain customers are likely to stop paying.

Additionally, the delinquency stage a customer is in also effects the need for adjusted contact frequency. For example, contacting customers in the early stages of delinquency may involve a different strategy compared to contact attempts made in the late stages of delinquency. Creditors often adjust their collection approaches accordingly. These considerations do not apply to debt collectors. In fact, in its Consumer Credit Card Market Report, the CFPB found that credit card issuers' call intensity strategies depend on an account's stage of delinquency and risk level, among other factors.[16]

Applying a one-size-fits-all approach (recognizing that creditors take a different approach to call frequency based on the stage of delinquency and the preferences of the customer) that arbitrarily imposes call limitations will make it more challenging for creditors to work with delinquent customers and raise the cost of capital. Doing so in the absence of sufficient data to support such an approach to the contrary is not supported by the statute. As such, to do so would violate the APA's prohibition against arbitrary action and constitute an action unwarranted by the facts.[17]

Collecting debts also varies by industry. There may be different customer needs depending on the kind of debt being collected. For instance, collecting secured debt is different than unsecured. Collecting credit card debt is different than collecting on a mortgage, which is also different than collecting student loan debt. In its Consumer Credit Card Market Report, the CFPB found that calls made by credit card issuers to collect a debt average 1.42 to 3.50 per account, per day.[18] Many customers of AFSA's installment lenders pay in-person at a branch office. Some of these customers do not use email or smartphones. Many do not open or read notices sent in the mail. The only consistently reliable way to reach them is by calling.

B. Being able to reach their customers is the only way creditors can help them.

Creditors call their customers for a number of reasons, only one of which is the collection of an account. Creditors make many different types of calls to current and former customers involving financing offers and routine servicing calls. These routine servicing calls are related to the status of the account and include not only calls the customer requested, but also calls: alerting the customer to possible fraud, regarding extensions and modifications, regarding insurance or title matters, and calls responding to complaints. Other calls are made to inform the customer about failed payments (*i.e.,* returned due to insufficient funds), lost payments, impounds or

[16] Consumer Financial Protection Bureau, *The Consumer Credit Card Market.* August 2019. p. 141. Available at: https://files.consumerfinance.gov/f/documents/201908_cfpb_card-act-report.pdf.
[17] 5 USC 706(2)(A), (2)(F).
[18] *The Consumer Credit Card Market,* p. 141.

reinstatements, and vehicles that are located in shops for repairs. Making calls to customers is a routine part of a creditor's business. Not so for debt collectors. Creditors should not be restricted from making every effort to assist their customers, even if the calls are about a delinquent payment.

Creditors have solutions that are available to assist customers, particularly those customers who are experiencing financial difficulty. In order to offer these solutions, creditors must be able to reach their customers and reach them within a short timeframe. These solutions are beneficial to customers—they save them money, allow them to keep their vehicles or other property that secures their loan, and prevent further reporting of potentially negative events to credit bureaus. A rule that would restrict the ability of creditors to reach their customers within that short timeframe would be harmful to those very same customers because it limits the opportunity for creditors to provide solutions. We describe these solutions below.

1. *Extensions – present opportunity for a customer to defer a payment.*

Creditors almost always offer extensions when customers are delinquent on their accounts. Extensions provide an opportunity for the customer to bring the account current and avoid many adverse consequences. Extensions are a frequently used solution. One AFSA member with a large portfolio of retail auto contracts extends 1-2 percent of the portfolio each month in response to customer requests.

Because extended accounts are typically delinquent, they are already proceeding toward negative consequences that could include repossession. For extended accounts, one AFSA member's data shows that 12 months after the extension, 93.7 percent of customers who extended for 30 days were not in default, 88.5 percent of customers who extended for 60 days were not in default, and 84 percent of customers who extended for 90 days were not in default. This demonstrates that the earlier creditors can contact and work with their customers, the more likely there will be a positive outcome for the customer.

That same AFSA member typically repossesses vehicles when the account becomes 60-70 days delinquent, so accounts requiring a 60- or 90-day extension are at significant risk of being repossessed.

2. *Rewrites or Loan Modifications – present an opportunity for a customer to amend her financing obligation, typically to reduce the amount of the payment.*

Like an extension, creditors may offer a loan rewrite or loan modification when the customer is delinquent. These solutions provide an opportunity for the customer to bring the account current and avoid many adverse consequences.

One AFSA member that offers rewrites to assist customers who are struggling to make their monthly payments does not use them as frequently as extensions. That creditor places fairly stringent requirements for the rewrite to ensure that customers are likely to be able to meet the amended obligations for their accounts. Because those customers are already proceeding toward negative consequences that could include repossession, rewrites and loan modifications are typically provided for accounts that are delinquent.

3. *Reinstatement – typically in the vehicle finance context, this presents an opportunity for customers to regain possession of their vehicles after a repossession by paying the amounts necessary to bring their accounts current.*

Creditors frequently offer reinstatements to customers after they have experienced a repossession. Customers may have experienced a repossession because other solutions were unsuccessful. Communicating with customers is imperative to understand their situations, and if possible, to give the collateral back under mutually agreeable terms. Without the ability for the creditor to contact these customers by phone, customers may be deprived of beneficial opportunities to get back into their vehicles and begin to cure their defaults.

In addition to the solutions described above, creditors are also able to help their customers by simply contacting them regularly to remind them of upcoming or missed payments. Many customers have come to expect reminder calls from their creditors and, in fact, often complain if their creditors do not call to remind them to make payments. These customers also rely on the creditor to notify them if the creditor received a returned payment due to insufficient funds. In fact, customers who use postdated payments generally assume that the payments are successfully received if they are not called. If not for the creditor's call, the customers would never be aware that their payments did not process.

There are numerous other ways creditors help their customers by way of telephone contact. Customers may voice dissatisfaction if they have attempted to set up their accounts for online payments, did not successfully complete the process, and assume that payments are being made on their accounts. Without a call from the creditor, they may continue to assume their account is current and unintentionally fall further and further into delinquency. Customers may also complain when they are not contacted or advised about possible repossession or recovery of the vehicle. Customers with joint accounts are often unaware that the buyer or co-buyer is not taking care of payments on the account. Customers often want to be advised of the potential for the imposition of contractual late fees. These examples demonstrate the intricate relationships that creditors have with their customers. Debt collectors simply do not have those types of relationships with consumers.

C. Imposing overly restrictive call limits on creditors will have a number of adverse consequences.

If creditors had to follow the call limits outlined in the Proposed Rule, the customer harm would outweigh any benefit the customer might get from receiving fewer calls. In the Proposed Rule, the CFPB explains that it does not propose subjecting text messages or emails to the prohibitions on repeated contacts or to bright-line limits on the number of permissible contacts per week, primarily because the Bureau is not aware of evidence demonstrating that debt collectors commonly harass consumers through repeated contacts by communication media other than telephone calls. The same rationale applies here. The Bureau has not presented any evidence that the number of calls creditors place to their customers is harassing. We emphasize that the key to avoiding delinquency is more than the number of calls, but rather right-party contact. Achieving right-party contact, however, often requires continued call attempts. Below, we explain the adverse consequences that would result from overly restrictive call limits.

1. Increased repossessions and foreclosures.

If the customer is not paying, and the creditor cannot reach the customer in time to discuss solutions such as payment extensions and loan modifications, the creditor's options include repossession, foreclosure of the collateral, or filing a lawsuit to collect the debt. (As discussed below, another option is placing the debt with a third-party debt collector.) Unlike debt collectors who are collecting debt that may have been outstanding for a long time, creditors generally have 60 to 90 days to reach a customer and work out a solution before a vehicle is repossessed.

AFSA believes, and we think the CFPB would agree, that given the choice, it is far better for a customer to get additional phone calls than to have her car repossessed, be taken to court, or have her home foreclosed. And while many creditors will mail written notices to customers prior to repossession or foreclosure, those notices often go unread—or undelivered due to address changes that are not conveyed to the creditor—and simply do not have the same level of effectiveness that comes from speaking directly to a customer on the phone.

In fact, in the mortgage context, the CFPB has recognized the value of right-party contact. As a result, mortgage lenders are required to try to contact their customers by phone.[19] If the call limitations were applied to creditors, the end result could be that creditors are less able to accomplish the very goals the CFPB has recognized are critical in attempting to prevent foreclosures. The negative repercussions would be the same for other asset classes, to the detriment of consumers. Similarly, as evidenced by the CFPB's own position, such a limitation is unwarranted by the facts and unsupported by the evidence.

Creditors prefer to avoid repossession of collateral. In the case of vehicle-secured financing, for example (although the principles apply to any repossession), once a vehicle is repossessed, it becomes increasingly difficult for the creditor to be able to help get the customer back into the car. The costs of the repossession are added on top of the outstanding balance, increasing the customer's reinstatement amount and making it more financially difficult for the customer to get her vehicle back. These repossession costs can often be avoided if the creditor is able to contact the customer prior to the repossession and work out a solution.

Additionally, creditors are further motivated to avoid repossession because they lose several thousand dollars on each repossessed vehicle. Other items of collateral that could be repossessed also typically represent a loss to the creditor. This may result in additional collections, including collection lawsuits. Therefore, it is almost always in the creditor's interest to keep their customers in their cars. These considerations are not applicable to debt collectors who are only pursuing collection of a charged-off balance.

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[19] Mortgage Servicing Rules Under Real Estate Settlement Procedure Act (Regulation X), 78 Fed. Reg. 10696, 10788 (citing Goodman, Yang, Ashworth, & Landy, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, submitted to the Pew Charitable Trusts Conference on Strategies for Revitalizing the Housing Market. May 30, 2012).

2. Increased delinquencies and negative impacts on customers' credit reports.

If creditors cannot effectively communicate with their customers, and the customers do not pay, the customers' credit reports will be adversely affected as the accounts roll to higher delinquency levels. Negative credit history is shown to cause credit scores to decrease, and lower credit scores will limit a customer's access to credit in the future. If a customer is later approved for credit, the cost of that credit may be greatly increased because of the customer's prior payment history and credit report. This creation, or exacerbation, of the downward credit spiral would result in more harm to the very consumers the regulation was put in place to protect.

3. Increased late fees and additional interest.

Creditors generally assess late fees after a grace period that is often set by state law. Customer contact by creditors usually has the benefit of reducing late fees because the creditor can remind the customer to make a payment before a late fee is assessed, which is not a benefit that debt collectors can provide.

On various consumer credit arrangements, if a customer makes a late payment or misses a payment, finance charges will continue to accrue on the higher principal balance, thus altering the amortization schedule and creating what could be an unmanageable final payment due at maturity. As an industry, we often find that customers are surprised to learn that they still owe sizeable balances at maturity. This could be in part because of increased late charges when a customer continues to pay late without communicating with the creditor. While most customer contracts disclose this, a conversation explaining the impact of continued late payments is often more helpful to customers than reading the terms of the contracts they signed.

4. Increasing litigation.

If a creditor cannot reach a customer, the customer may ignore the debt, increasing the likelihood of debt collection litigation. Were call restrictions to apply to creditors, there is a substantial likelihood that a larger population of consumers will charge-off and ultimately be subject to litigation.

5. Limiting credit availability.

Studies have shown that restricting collection activities leads to a decrease in access to credit. In fact, the Federal Reserve Bank of New York wrote that, "We find consistent evidence that restricting collection activities leads to a decrease in access to credit and a deterioration in indicators of financial health."[20]

The Federal Reserve Bank of New York studied the effect of restrictive state-level legislation regarding debt collection practices. To do this, the Federal Reserve Bank of New York compared outcomes of consumers in states with statutes restricting contact with those of consumers in the remaining states. The Federal Reserve Bank of New York concluded, "Hence, our analysis

[20] Fonseca, Julia, Katherine Strair, and Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*. Federal Reserve Bank of New York Staff Reports No. 814. May 2017. Available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf?la=en.

suggests that restricting collection activities leads to a decrease in access to credit across the full spectrum of borrowers and to a deterioration in indicators of financial health. Moreover, we find that the deterioration in financial health outcomes is concentrated on individuals with the lowest credit scores (prior to the legislation changes)."[21]

In more detail, the report explained:

> "In this paper, we exploit time-series variation in the restrictiveness of debt collection legislation at the state level to estimate the impact of debt collection practices on access to consumer credit and on individual financial health in a differences-in-differences framework. Our analysis suggests that restricting collection activities leads to a decrease in access to credit and to a deterioration in indicators of financial health. Specifically, we find a sizable and significant reduction in auto loan balances, a significant decline in credit card and non-traditional finance balances, a significant decrease in auto and credit card originations, a sizable and significant increase in delinquent credit card balances and non-traditional finance balances, and a small but statistically significant reduction in credit scores."[22]

Credit availability could also be limited by a decrease in investor appetite in the secondary market. If the CFPB were to mandate major changes in collection practices, and the Proposed Rule applied to creditors' existing portfolios, all of the creditors' secondary market investors would be significantly affected due to the rising loss and delinquency rates. This increased risk would likely be priced going forward, but not for assets that are already in the market. However, even adjusted pricing would not alleviate all future concerns because historical data would now be unreliable. As a result, investors, the creditors' lenders, and ratings agencies would be unable to rely on historical data. This could cause a loss of investor interest in creditors' secondary market transactions. The costs would ultimately affect creditors in how they make credit available to customers and likely would restrict access to credit for consumers. The loss of investor appetite in late 2008 when the economy was declining resulted in a virtual cutoff of automobile credit, particularly for those at the lower end of the credit scale. However, the loss of investor appetite affected not only the consumers who most needed the help, but the economy as a whole.

6. Effect on business portfolios.

How creditors price their businesses is based on their cost of credit. A creditor's cost of credit is affected by a number of variables, including current call strategies. If creditors' call strategies have to change, and that change results in increased defaults for the reasons set forth above, creditors will have no choice but to adjust their pricing accordingly. Those price adjustments may come in the form of increased interest rates to consumers, increased costs to dealers to buy a contract, or a combination thereof. That will affect both the current portfolio and how the business structures its deals going forward. In other words, if creditors have a prescriptive call strategy with overly restrictive call limits, they will not be able to recover accounts already in existence. Going forward,

[21] *Ibid.*
[22] *Ibid.*

they will adjust their business strategies, *e.g.*, what credit they extend and to whom, based on what accounts they will be able to recover under the prescribed call limitations.

7. Increasing reliance on third-party debt collectors.

If creditors are limited in their ability to contact their customers, accounts are more likely to end up as charge-offs, which will, in turn, make them candidates for assignment to third-party debt collectors and/or sales to debt buyers. Thus, if the CFPB expands the calling restrictions to creditors, the new regulations may well have the counter-intuitive effect of encouraging earlier assignment of more accounts to the same third-party debt collectors that Congress sought to protect consumers from when the FDCPA was enacted.

Conversely, if creditors do not have the restrictions that third-party debt collectors have, they are more likely to keep collection efforts in-house, providing consumers all the benefits identified above.

The CFPB recognized this reality and wrote in the Proposed Rule: "When an account becomes delinquent, initial collection efforts often are undertaken by the original creditor or its servicer. The FDCPA typically does not cover these first-party recovery efforts. If these first-party recovery efforts result in resolution of the debt, whether through payment in full or another arrangement, the consumer typically will not interact with a third-party debt collector."[23]

* * *

As discussed above, creditors and their customers are generally aligned in the sense that neither wants the many negative consequences of non-payment, whether they be charge-offs, potential negative credit reporting, repossession, or foreclosure. It is for this reason that it should be made as clear as possible that this rule does not apply to creditors.

D. Data from creditors supports these conclusions.

While AFSA believes it is important to explain the effects that overly restrictive call limitations can have on our members' customers, we understand it is just as important to demonstrate our conclusions by providing data.

For example, two finance companies compared delinquencies in Massachusetts to delinquencies in all states. The data from one finance company, a card marketer and servicer with approximately two million accounts, found that the number of current account balances dropped by half a percent in Massachusetts after the Massachusetts Supreme Court interpreted the Massachusetts call cap to limit calls by creditors to two attempts per seven-day period. That half a percent equates to approximately one million dollars per month. Relatedly, after the Massachusetts Supreme Court interpretation, an auto finance company found that the number of accounts assigned out for repossession increased by 25 percent.

[23] 84 Fed. Reg. 23276.

Attached in Appendices I and II are exhibits from AFSA members explaining their experience with reduced calling. Appendix I is a case study by an auto finance company demonstrating that fewer call attempts have a direct correlation to increased delinquency, higher roll rates,[24] fewer pro-consumer resolutions such as extensions and modifications, increased interest and late fee costs, more negative credit reporting, and higher repossession and foreclosure rates, among other negative effects. Appendix II contains data from an auto finance company who studied the effect that a reduced call policy had on roll rates and repossessions.

In addition, AFSA has retained an outside firm to conduct a data analytic research project to study the impact of collection call restrictions on creditors who make consumer loans. The goal of this project is to examine the impact that lower call intensity has on instances of right-party contact, promises to pay, roll rates, charge-offs, and repossessions. This effect will be estimated through statistical analysis involving the following comparisons:

1. A relative measure of effectiveness of incremental call attempts can be calculated, where call intensity varies on similarly situated customers (once controlling for other factors, *e.g.* relative collection risk, product, and delinquency status) due to differences in collections practices for each participating member or across participating members.

2. In geographies where state or local limits on call attempts already exist, a comparison between roll rates in the restricted geographies and outside the restricted geographies, after accounting for other factors, a measure of the negative impact of these restrictions can be calculated.

Although AFSA began this project almost as soon as the Proposed Rule was released, this type of data-gathering and analysis takes time. Therefore, we asked for a 90-day comment period extension. Ultimately, the CFPB extended the comment period by 30 days. While we are grateful for the extension, the 30-day extension did not give us time to complete the analysis. We intend to submit our study as part of the *ex parte* notice process as soon as it is completed.

E. If applied to creditors, the call limitations in the Proposed Rule would be arbitrary and contrary to law.

The Proposed Rule prohibits placing a telephone call to a particular person in connection with the collection of a particular debt either: (1) more than seven times within seven consecutive days; or (2) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. Such a restrictive, one-size-fits-all approach, particularly if applied to creditors, is arbitrary and contrary to law. Selecting seven as the appropriate number of calls in a week, or one if the call is answered, is also arbitrary. It is also to the detriment of consumers, and thus not supported by the facts as accomplishing the stated goals of the Proposed Rule, as evidenced by the information set forth at Appendices I and II hereto.

[24] "Roll Rate" refers to the percentage of accounts or dollars "rolling" from one delinquency bucket to the next.

In addition to respecting the limitations on their statutory authority, agencies must also engage in reasoned decision-making.[25] The Proposed Rule fails this fundamental requirement. The Proposed Rule does not provide any explanation for why debt collectors should be limited to seven calls per week (or one if the call is answered) and certainly not with respect to creditors. If the Final Rule were applied to creditors, there is absolutely no basis for the proposed call restrictions to be applied equally to differently-situated customers. Frankly, the CFPB fails to provide any substantive explanation for its decision. The Bureau fails to consider circumstances that warrant different treatment for different parties by not studying the impact that limiting calls from creditors to their customers would have on not only those customers, but on the credit industry as a whole. To even suggest that the call limitations should or may apply to creditors is inappropriate.

As the Bureau explains, it may not declare an act or practice to be unlawful unless it: "'…has a reasonable basis' to conclude that: (A) The act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[26] The Bureau has not demonstrated that more than seven calls per week causes substantial harm to consumers that is not reasonably avoidable. On the contrary, any potential harm is avoidable by the consumer. Consumers can ask callers to stop calling (the FDCPA already includes a specific provision for this), and they can block numbers, silence ringers, or even initiate a conversation. Furthermore, there is a clear countervailing benefit to consumers, as outlined above. It is apparent that the CFPB has reached a conclusion that is not supported by the underlying record and contradicts the CFPB's own framework for evaluating consumer harm.

The Proposed Rule is also not supported by an adequate cost/benefit analysis. The Dodd-Frank Act permits the Bureau to issue regulations "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial protection laws, and to prevent evasions thereof."[27] As the Supreme Court held in *Michigan v. EPA*,[28] statutes that use the term "appropriate" impose an implicit requirement to assess a rule's costs and benefits.[29] The Dodd-Frank Act provides specific guidance regarding the kind of cost-benefit analysis that the Bureau must undertake. In particular, the Bureau "shall consider (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons ... and the impact on consumers in rural

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[25] *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."); *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43, 52.
[26] 84 Fed. Reg. 23284.
[27] 12 U.S.C. § 5512(b)(1).
[28] 135 S.Ct. 2699, 2706–07 (2015).
[29] Specifically, the Court held in Michigan that "'appropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors"—including whether a rule's costs are justified by its benefits. 135 S. Ct. at 2707 (quotation marks omitted). "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate," because "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." See also *State Farm*, 463 U.S. at 54 ("The agency was correct to look at the costs as well as the benefits" of its rule.).

areas."[30] The Proposed Rule is arbitrary and capricious because it does not articulate any data or analysis with respect to debt collection by creditors.

F. The Final Rule should apply commentary regarding "placing a telephone call" to Section 1006.14(b)(2).

Although call limitations are a major feature of the Proposed Rule, the rule does not define what "placing a telephone call" means. The proposed commentary that states: "For purposes of Section 1006.14(b)(1)(i) and (ii), placing a telephone call includes conveying a ringless voicemail but does not include sending an electronic message (*e.g*., a text message or an email) to a mobile telephone," is helpful. However, this proposed commentary does not expressly provide that it also applies to Section 1006.14(b)(2), which is the specific section that sets forth the call limitations. We suggest that the CFPB apply this reasonable commentary to both Section 1006.14(b)(1) as well as Section1006.14(b)(2).

Although the best and most reasonable interpretation is probably that the meaning set forth in the proposed commentary applies to Section 1006.14(b)(2), there is some potential ambiguity as it is currently written, and additional clarity would help resolve any possible future confusion. It would also be helpful to include in at least one of the examples in the commentary relating to Section 1006.14(b)(2) that neither a text message, email message, or app notification counts toward the call limitations.

In addition to clarifying what "placing a call" means, if the CFPB keeps the call limitations in a final rulemaking, the CFPB should maintain that the contact limitations are only for telephone calls and not for other mediums of communication, such as emails, texts, push notifications from phone apps (that the customer has elected to receive), and other forms of electronic communication.

VI. Section-by-section Analysis.

In the sections above, we outline our overarching recommendations for the debt collection rulemaking. Below, we offer our comments on specific sections of the Proposed Rule.

A. Section 1006.2(j) – Limited-content messages.

We appreciate that the CFPB has added this section that addresses the situation where a debt collectors calls a consumer, does not reach the consumer, and then does not leave a message due to privacy concerns. There has been much litigation in this area and so we welcome clarification. We do, though, have a few suggestions.

The Supplementary Information addressing private messages suggests that it is possible to have a limited-content message in that forum, while the main discussion of limited-content messaging provides only three channels: voicemail, text message, and oral messages. It would be helpful if

[30] 12 U.S.C. § 5512(b)(2)(A).

the CFPB clarified that private social media messages and other (perhaps not yet invented) technologies are accepted, so long as the definition of a limited-content message is met.

As noted in the Supplementary Information, email is excluded from the scope of limited-content messages. This exclusion seems arbitrary and contrary to the desire to establish right-party contact. AFSA asks that the CFPB issue an expanded limited-content message that debt collectors could use in an email or other similar medium. It is hard to see how an email could be harassing because the consumer can control whether and when to respond. It would be preferable for both consumers and debt collectors to have limited-content emails that steer the consumer towards a phone call that can lead to a more comprehensive discussion.

Furthermore, the CFPB should acknowledge that state laws that require different content in what otherwise would be a limited content message are inconsistent with—and therefore preempted by—the FDCPA. This is necessary because: (1) state laws that require different content effectively prohibit limited-content messages, and (2) state laws that expressly prohibit certain communications would effectively prohibit limited-content messages.

Lastly, while the limited-content message is a welcome development for debt collectors, we emphasize that it could be harmful if applied to creditors. The information provided in a limited-content message is, unfortunately, unlikely to result in a callback. In the proposed limited-content message, the caller is prohibited from disclosing either the caller's name or information about the account. Clearly, the reason debt collectors are not permitted to leave a message with the company's name is because that message could reveal that the call is about a debt in collection. That makes sense. The same reason, however, does not apply to messages from creditors. Creditors should be permitted to leave the name of the financial institution because the call may be about something other than debt collection. Thus, leaving the creditor's name would not violate any privacy protection. Moreover, due to the increasingly frequent use of caller identification, it is more likely than not that the caller's name has already been disclosed to the customer simply by placing the call.

B. Section 1006.6 – Communications in connection with a debt.

We appreciate that the CFPB is bringing the FDCPA into the 21st century with the inclusion of regulations for text messages and emails. As the Bureau acknowledges, consumers today may prefer to communicate with debt collectors using emails, text messages, or web portals because these technologies offer greater efficiency, convenience, and privacy.

These technologies also allow consumers to exert greater control over the timing, frequency, and duration of communications with debt collectors. We support the Bureau's proposal to refrain from placing a specific cap on the number of text messages or emails that debt collectors can send to consumers.

As the CFPB has explained in the Proposed Rule, it does not propose subjecting text messages or emails to the prohibitions on repeated contacts or to bright-line limits on the number of permissible contacts per week, primarily because the Bureau is not aware of evidence demonstrating that debt collectors commonly harass consumers through these methods. In addition, the Bureau proposes to require that a debt collector's emails and text messages include instructions for consumers to opt-out of receiving further emails or text messages. With this simple mechanism to make emails and text messages stop, there is no need for restrictions. Moreover, we agree with the feedback the Bureau received during the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process that many debt collectors would place fewer telephone calls if they were confident that sending emails or text messages for consumers would not expose them to risk of liability under the FDCPA.

C. Section 1006.6(b) and (c) – Inconvenient time or place.

The Proposed Rule would prohibit debt collectors from communicating or attempting to communicate with a consumer at a time or place that the collector knows or should know is "inconvenient" to the consumer. Consumers can also designate a particular medium, such as email, as one that cannot be used for debt collection communications. We appreciate that the CFPB is providing guidance in this area. We agree with the Bureau that the "time" refers to when the text message or email is sent, not when it is received.

However, this proposal raises numerous practical challenges to implementation, including: (1) how to identify, verify, and process relevant consumer communications; (2) how to track and comply with individual requests and follow-up communications from the collector; and (3) how to ensure continuing compliance as an account moves through the collection chain (*e.g.,* from the creditor to a collection agency and from agency to agency). Unfortunately, the lack of specificity in this section raises the potential of increased litigation, similar to that surrounding the issue of consumer consent and withdrawal of consent under the Telephone Consumer Protection Act.

Other practical questions that need to be answered include: (1) How should a collector determine what time might be "inconvenient" for a consumer? (2) Consumers often respond to calls in vague ways, such as, "I can't talk now." If a consumer says that in response to a call on a Tuesday at 3pm, does that mean that the caller can't call on a Tuesday? Or in the afternoon? Or just that moment is not a good time? (3) What if a consumer says, "Don't call me at school." Does that mean that the caller shouldn't call during school hours? (4) If a consumer says stop calling, does that mean stop calling forever? Or for a set amount of time? On that specific account? Or on all accounts? (5) The CFPB provides a safe harbor for one response, but does not define what the response is. Does the safe harbor cover any call, regardless of whether it is answered? and (6) In instances when a collector contacts a consumer and the consumer asks for the collector to call back the next day, how should the collector treat a situation where the consumer does not answer at the consented time? Does that preclude the collector from calling back within the seven-day window?

It is critical that the CFPB add clarity to this provision without adding extensive, unnecessary compliance burdens. We suggest that the CFPB consider including a reasonableness standard when considering the number of times a consumer may deem inconvenient. In the absence of such language, a consumer could essentially make it impossible for a collector to reach her by saying that she is only free for one hour a week. At a minimum, the collector should be able to ask a follow-up question, such as when a convenient time to call would be or what times are inconvenient. It would be better if the CFPB would clarify that a general, vague statement from a consumer, such as, "I can't talk right now," does not mean that the time, place, or medium is inconvenient. While it may be true that that particular moment was inconvenient for the customer, that response, without additional detail, should not create FDCPA liability.

Ideally, though, the CFPB would specify that this provision would only be triggered if the consumer specifies what time or place is inconvenient. In the alternative, the CFPB could provide a safe harbor for companies that follow certain procedures. The CFPB could institute a series of required responses similar to those questions and responses that are triggered when a consumer is asking a collector to communicate with an attorney. In that instance, if a consumer says she has an attorney, but then hangs up, the prohibition on contacting the consumer has not been triggered. Similarly, if the consumer says that now is not a convenient time to talk, that statement alone should not be enough to trigger this provision. The consumer would have to answer certain follow-up questions in order for the time to be properly deemed as inconvenient.

If there is doubt about whether the prohibition on calling at an inconvenient time or place has been triggered, there is a good chance that some creditors will stop calling. Not calling again could lead to the problems listed in Section V, Subsection C above such as increased fees, litigation, and repossession.

In addition to asking the CFPB to answer practical compliance questions like the ones above, AFSA asks that the CFPB recognize the difference between emails and phone calls or text messages. While it may be inconvenient for a consumer to get a phone call at 3 o'clock in the morning, the same inconvenience does not apply to emails. Therefore, we ask that the CFPB specify that inconvenient times should not apply to email messages.

Reviewing an email is generally a consumer choice, while receiving a notification of a text message or phone call may not be. Clearly, phone calls and text messages are sent directly to a customer's phone number, whereas emails are sent to email addresses. Email is more like paper mail. It does not demand an immediate response, like a phone call might. Consumers generally review email when they choose.

Another practical reason for not restricting when emails are sent is that companies (and the federal government in the case of certain emails, like the daily Federal Register notice) often send emails out in batches during times when the sender's system is not being used for something else. We note, though, that many companies do send emails during business hours as a customer convenience. Furthermore, emails are often sent with an unsubscribe feature, so if the time the customer is getting the email is inconvenient, the customer can unsubscribe.

Moreover, if the consumer provides an email address or a phone number, that address or number should be able to be used unless authorization to use it is withdrawn, regardless of whether it is a work email or phone number. Furthermore, consent given to the creditor should be passed on to a debt collector hired by that creditor. There is a distinction between using an email address or phone number that the consumer provided in connection with an account as opposed to a number the consumer used to call the collector or a number obtained by skip tracing. That distinction should be reflected in the rulemaking. Should the CFPB maintain its proposed prohibition on contacting a consumer at a work email address that the consumer did not use to contact the creditor or collector, it should clarify that certain email providers such as Gmail, Hotmail, and Yahoo are presumed to not be work email addresses.

Additionally, the CFPB should provide a minimum acceptable font size for email opt-outs or, at the very least, clarify that a font comparison to the rest of the message text should exclude graphics, logos, or other non-substantive content within the message.

Lastly, we reiterate that the CFPB should clearly state that this section does not apply to creditors, who have a different relationship with their customers.

D. Section 1006.14 Harassing, oppressive, or abusive conduct.

In Section V of this letter we discuss the effect the proposed call limitations could have on our members' customers, should creditors have to abide by those limitations. In this part of our letter, we discuss the effect that the proposed call limitations could have on debt collectors and their attempts to reach consumers. As we said, the Proposed Rule affects our members in two ways, both directly as it could be applied to creditors and indirectly through our vendors. Thus, we urge the Bureau to carefully consider the debt collectors' responses to the Proposed Rule. If the debt collectors demonstrate that the proposed call limitations will decrease direct contact between consumers and debt collectors, the result will be an increase in alternative contacts (such as letters, texts, and emails) and ultimately an increase in the costs and the length of time it takes to resolve a debt. We ask that the Bureau carefully consider these costs.

In the commentary to the Proposed Rule, the CFPB makes it clear that a call to a wrong number is not included in the frequency calculation, nor does dialing a number that does not connect. AFSA agrees and believes that the CFPB should keep these distinctions in place. The CFPB should also exclude calls that have technical difficulty, such as calls that: result in a busy signal, are to a fax machine, have no dial tone, do not have a ring back, and do not have SIT tone.

Furthermore, we note that discussing multiple debts on the same phone call will lead to operational challenges, such as keeping track of contacts by different debt or account types. This will, in turn, present compliance challenges with the proposed limit of one discussion per week on each debt or account. This matter will be further complicated if another debt or account is brought up by the customer, *i.e.* not by the debt collector in a planned manner. It would be helpful to include some exclusions, such as each contact counting as a contact only for the debt or account for which it was initiated.

E. Section 1006.22 – Unfair and unconscionable means.

The Bureau has recognized that consumers value the ability to interact with debt collectors via the use of newer technologies, including social media. AFSA appreciates that messages should not be able to be viewed by unauthorized third parties on social media, such as a posting on a consumer's public page. However, there is no way to ensure compliance with this section without more definitive protections for collectors. We recommend that CFPB create a safe harbor for communicating with a consumer by direct, private message within a social media platform if the social media account exists solely in the name of the consumer. If that is the case, one should be permitted to assume that only that consumer has access to the private messages on that account.

Before a creditor or a debt collector turns to social media to reach a consumer, the creditor or debt collector has tried to reach the consumer other ways, usually by calling. However, if the creditor or debt collector fails to reach the consumer, the creditor or debt collector should be able to send a message to the consumer through a private social medial channel. AFSA suggests that the Bureau permit the use of a limited-content message in these cases.

F. Section 1006.26 – Collection of time-barred debts.

The Bureau proposes to interpret FDCPA Section 807 to provide that a debt collector must not bring or threaten to bring legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred debt.

We urge the Bureau to tread carefully when effectively taking actions that would preempt state statutes of limitations—whether deliberately or inadvertently. Statutes of limitations relating to debt collection stem from Common Law and before.[31]

Nowhere does the statutory language of the FDCPA preempt substantive or procedural state law relating to debt collection, access to courts to prosecute collections or obtain judgements, or interpose a federal role in determining state law defenses.[32] AFSA believes this particular provision exceeds the Bureau's authority and is contrary to law.

Elected state legislatures have enacted a wide variety of laws relating to collection activities after a statute of limitations has expired;[33] mandatory notices to debtors;[34] and specific requirements for debt buyers.[35] Additionally, state regulations and court rules also cover this subject.[36]

AFSA appreciates that the standard is what debt collectors know or should know. As the Bureau has recognized, the area of time-barred debt is not black and white. Different states deal with time-barred debt in different ways and recognizing which state law applies can be challenging. For example, a consumer who lives in Maryland could have opened a credit card when he lived in Virginia, but have a card agreement with a company headquartered in Delaware stating that New Hampshire law applies to the agreement. In the instance of dealing with a time-barred debt, it may be unclear whether Maryland's, Virginia's, Delaware's, or New Hampshire's law applies. Thus, flexibility in the CFPB's Proposed Rule is important.

However, a "know or should know" standard is subjective, so additional clarification is necessary. Perhaps the Bureau could advance a standard of reasonable inquiry. The Bureau could also specify

[31] Deuteronomy 15:1-2; 31:10.
[32] The only federal role is found in 15 U.S.C. § 1692i relating to proper venue.
[33] *See*, for example, Cal. Civ. Code §§ 1788.50, *et seq.*
[34] *See*, for example: New Mexico Admin. Code § 12.2.12.9(b)
[35] *See*, for example: Cal. Civ. Code §§ 1788.50, *et seq.*
[36] *See*, for example: 23 N.Y. Comp. Codes & Regs. § 1.3 (2014).

that a debt collector could meet that standard if it has reasonable procedures for calculating the statute of limitations.

The Proposed Rule states that the Bureau will likely require a disclosure to be made when collecting time-barred debt, but that it is reserving a decision on the issue until it receives additional feedback regarding the need for and content of such a disclosure. AFSA asks that if the Bureau does proceed, it carefully examine state law before issuing such a disclosure. A CFPB disclosure that conflicts with state law would lead to unnecessary and frequent litigation. Determining the statute of limitations and identifying when accounts switch from valid to expired debt is operationally complex.

G. Section 1006.30(b) – Prohibition on the sale, transfer, or placement of certain debts.

The limitation on transferring, placing, or selling debt where an identity theft report has been filed should be clarified to prevent giving consumers a loophole to avoid paying their debts. Our understanding is that, unfortunately, some consumers falsely report identity theft for this very reason. This provision in the Proposed Rule should be triggered by a valid finding after investigation, not by the filing of a report by a consumer. More specifically, this provision should only be triggered after a consumer has filed a police report and submitted that report to the creditor or debt collector.

In addition, the CFPB should clearly exclude certain debts from the prohibitions in this section, especially: (1) settled or discharged debts, and (2) bankruptcy accounts when such accounts are secured by collateral and creditor has a lien on such collateral. The CFPB should clarify that creditors can still enforce a lien on an account where the debt has been discharged in bankruptcy but a lien still exists. Also, the transferring of debt restriction should only occur when an account has such a condition at the time of transfer, not post-transfer.

H. Section 1006.30(c) – Multiple Debts.

This section of the Proposed Rule should be clarified to reflect that payments may be applied to the undisputed portion of debt or as requested by the customer.

I. Section 1006.34 – Notice for validation of debts.

AFSA appreciates the work that the Bureau has done in testing the validation notice. We agree that it is important for consumers to have information about a debt and an opportunity to resolve the debt with the debt collector by either paying or disputing it. To that end, we have some suggestions for the proposed validation notice.

The proposed validation notice includes the specific amount the consumer was charged in interest and the amount the consumer was charged in fees. We agree that advising the consumer of the amount of interest and fees due at the time of the validation notice is important. However, a date range provides little value to the consumer, as the lump sum is lacking in detail. The beginning of the range may be at the beginning of the contract or it may not. In addition, it may be difficult, if not impossible, for the exact amount of fees and interest charged to be disclosed in the form. A late fee, for instance, could be assessed between when the form was mailed and when the consumer received it. Interest may still accrue after the form is sent.

We suggest that the Final Rule require that the fees and interest listed are the amounts due as of a date within 30 days of the validation notice. This allows a creditor to place a debt for collection with a debt collector and the debt collector to do whatever meaningful review the debt collector must do. If the Bureau believes a start date is necessary, we suggest that instead of "Between January 2, 2017 and today" the Bureau include a date, such as, "Between January 2, 2017 and January 2, 2019."

We appreciate that in the notice the Bureau is trying to make the distinction between a debt collector and a creditor. We think that the distinction could be made clearer by changing the language at the top of the form slightly. For example, instead of stating, "North South Group is a debt collector. We are trying to collect a debt that you owe to Bank of Rockville," the notice could state, "North South Group is a debt collector, not a creditor. We are trying to collect a debt that you owe to Bank of Rockville."

The notice includes a number of options for how the consumer can respond: disputing the debt, asking for the name and address of the original creditor, enclosing a payment, or requesting the form in Spanish. There may be other ways that the consumer would like to respond. For example, the consumer may want to contact a credit bureau or have a question about the debt that is not a dispute. We recommend that the Bureau add another box instructing the consumer to contact the creditor.

AFSA asks that the Bureau provide some clarification as to the definition of "original creditor." For example, in a retail installment sales contract, the original creditor is the retail seller, not the entity that buys the contract, but the seller's name may not be readily available to the debt collector, nor would that information be helpful to the consumer. Even if the debt collector had the seller's name in a file, it may be hard to get into the programming for the notice.

In another example, servicers that acquire debts in default will have to send validation notices. Those servicers may not have the name of the original creditor. We suggest that the CFPB use the New York Trial Court Rules definition, which is: "Original creditor means the financial institution that owned the consumer credit account at the time the account was charged off, even if that financial institution did not originate the account. Charged-off consumer debt means a consumer debt that has been removed from an original creditor's books as an asset and treated as a loss or expense."[37]

The Proposed Rule would establish that, for debts subject to Regulation Z, 12 CFR 1026.41, a debt collector need not provide the validation information described in Section 1006.34(c)(2)(vii) through (ix) if the debt collector provides the consumer, at the same time as the validation notice, a copy of the most recent periodic statement provided to the consumer under 12 CFR 1026.41(b), and refers to that periodic statement in the validation notice. AFSA agrees with the Bureau that

[37] Section 212.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the District Courts).

these periodic statement disclosures may be functionally equivalent to, and as useful for the consumer, as the information described in proposed Section 1006.34(c)(2)(vii) through (ix). Because that is the case, the Bureau should allow a periodic statement to be included for additional debts, specifically for home equity lines of credit and credit cards, in addition to residential mortgage loan debts.

We appreciate that the Bureau accounted for the lag in mail delivery times for validation notices. We believe a longer time would better accommodate delays in the mail and suggest that the Bureau use seven days. We also believe that the CFPB should provide an exception to allow the validation notice to be sent to "Estate of" or not be sent at all if an individual authorized to act on behalf of the estate cannot be located. Neither Regulation Z nor Regulation X include a duty to affirmatively identify a responsible party for the estate.

Lastly, we have two comments on the inclusion of a tear-off slip at the bottom of the initial validation letters. First, we suspect that it will lead to a higher volume of accounts that must be researched and reported as "disputed" to the credit bureaus. This would create additional efforts to validate the debt, such as supplying statements, account agreements, applications, and other documentation establishing that the debt is owed. Second, we ask that the Bureau provide clarity on expectations around the tear-off response form. The Proposed Rule makes the assumption that the validation notice is sent with a response envelope so consumers can easily return the tear-off response form. Many AFSA members do not currently send a return envelope and we do not believe that our vendors do either, as this is expensive and time-consuming. The CFPB should specify that there is no expectation for debt collectors or creditors to include return envelopes and incur the additional, and significant, expenses of doing so.

VII. Conclusion.

We appreciate that the CFPB has taken this opportunity to study the third-party debt collection market and issue the first-ever FDCPA regulations. This rulemaking brings a 1970's era statute into the 21st century. We commend the Bureau for its decision to focus this rulemaking on third-party debt collectors. As we have demonstrated, it is appropriate to promulgate separate rules for debt collectors, and then, if appropriate, to issue rules for creditors.

We believe that the Bureau can improve the Proposed Rule and ensure that the debt collection market works for consumers, debt collectors, and creditors. Most importantly, the CFPB should promulgate the Final Rule only under the FDCPA, not the FDCPA and Section 1031(b) of the Dodd-Frank Act. The CFPB should also recognize and describe in the Final Rule the clear differences between third-party debt collectors and creditors collecting their own debt. Finally, the CFPB should clearly state that the call limitation restrictions in the Proposed Rule only apply to third-party debt collectors. Failing to do so would lead to a number of adverse consequences for consumers.

If you have any questions, please do not hesitate to contact me by phone at 202-466-8616 or email at bhimpler@afsamail.org.

Sincerely,

Bill Himpler
President & CEO
American Financial Services Association

APPENDIX I

Creditors collecting their own debts have a shared interest with their customers. For customers, paying in a timely manner means paying less in interest and late fees—often significantly less. For creditors, paying in a timely manner means less costs they have to expend to collect payments. Customers are also motivated to maintain their accounts in good standing in order to positively affect their credit scores. Most creditors report to the national credit reporting bureaus. Positive consumer behavior results in better credit scores, whereas negative behavior results in a lower credit scores. Likewise, most creditors also consider credit scores and reported consumer behavior when determining whether, and on what condition, to grant credit. Consumers with high credit scores will, on average, pay lower rates of interest. Conversely, consumers with low credit scores will, on average, pay higher rates of interest. These differences can be significant. So while attempts by creditors to help their customers make their payments on time are certainly in the creditors' interest to help them achieve their profit objectives, it is also in the customers' interest because customers who pay on time will have better credit scores, pay less in interest and fees, and obtain future loans on more favorable terms than they would otherwise.

While AFSA members' collection practices vary in detail, they generally follow a similar pattern. Creditors build strategies around customers to help increase the probability of receiving timely payment. When a customer first becomes delinquent, creditors usually begin calling. They typically manage collections in delinquency "buckets," each of which is afforded a different treatment. For example, an early stage delinquency bucket might be a customer who is between 1 and 15 days delinquent. Similarly, mid- and late-stage delinquency buckets might be between 15-30 days delinquent and 31+ days delinquent, respectively. It is important to note that the creditors' behavior in these examples is aligned with the interests of their customers. Getting a customer to pay before they hit the late stage "bucket" will not only decrease the interest and fees customers pay on their loans, but will also avoid having them reported as being 31+ days past due to the national credit reporting bureaus. Creditors recognize the negative impact of passing from one delinquency bucket to the next, and typically monitor and manage "roll rates," trying to keep the roll rate percentage as low as possible. ("Roll Rate" refers to the percentage of accounts or dollars "rolling" from one delinquency bucket to the next.) It is in the best interests of both the creditors and customers to keep these roll rates low.

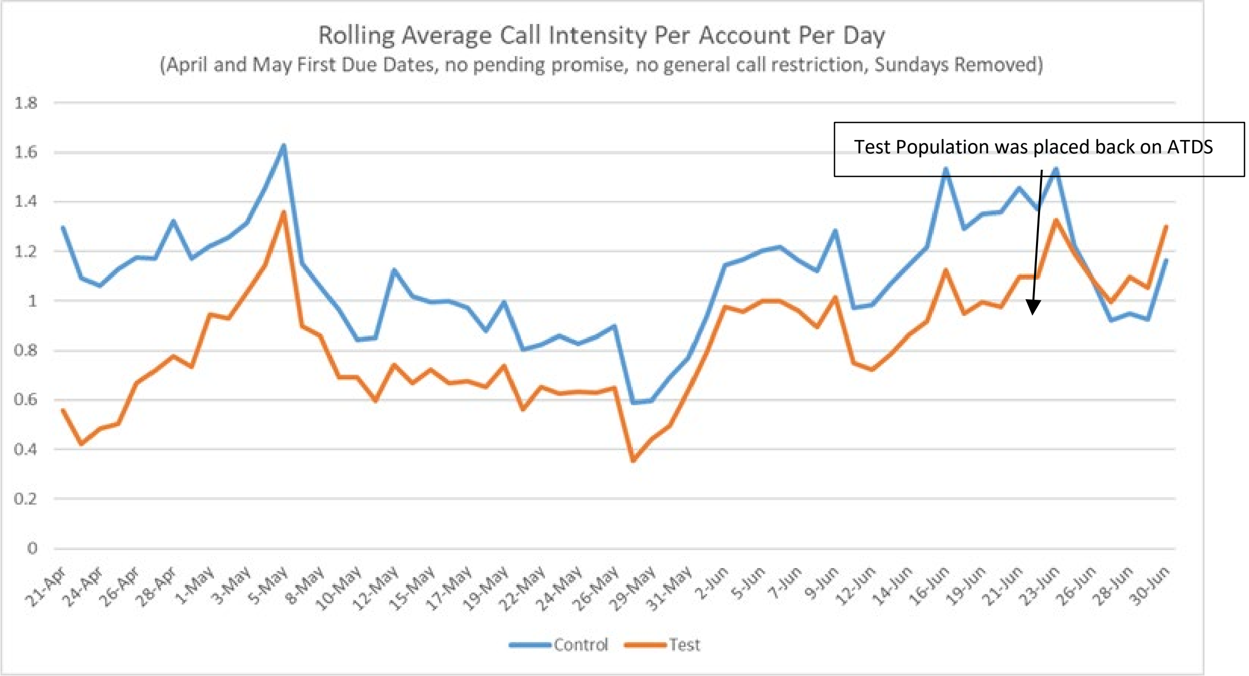
Creditors often contact customers by phone. Although e-mail and text messaging are also used, calls are generally believed to be the best way to work with a customer to actually resolve problems—particularly serious delinquency problems where customers may be in need of a change to their payment due date, an extension or modification to their obligations, or an opportunity to explain exigent circumstances to the creditor. These communications are always not conducive to text messages and emails.[38] Since even small creditors may have hundreds of thousands of accounts, calling customers manually is often not efficient. Inefficiencies from manually-dialed calls include not only the time to dial the call, but also the time waiting while the phone rings and determining if the customer answers. With hundreds of thousands of accounts, this approach is not workable. As a result, most creditors use automatic telephone dialing systems ("ATDS"), taking

[38] Text message and email communications are often impersonal and present their own limitations such as limited characters in a text message. In addition, difficulties in ensuring compliance with the TCPA is also a significant risk that inhibits some creditors from sending text messages.

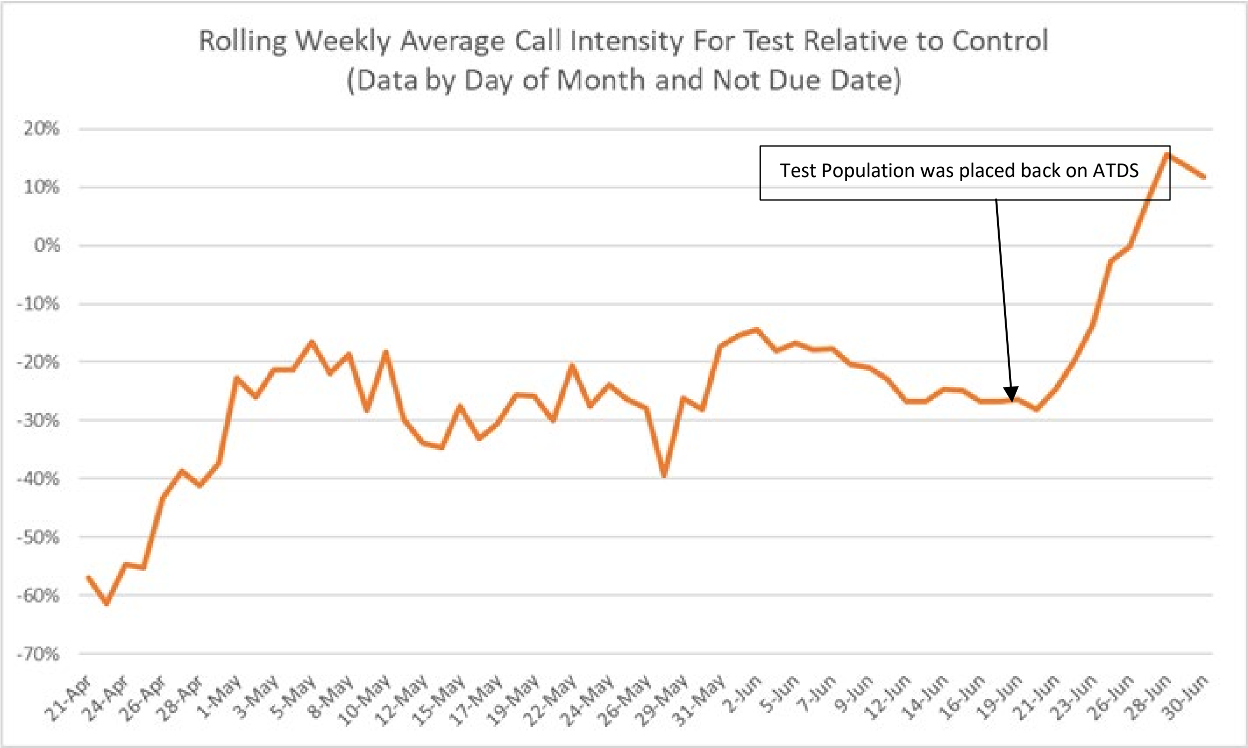
advantage of the ATDS technology to do the dialing and waiting for a human (or voicemail) to answer. By using an ATDS, creditors are able to be more efficient with their servicing teams' time when calling customers. Instead of having their employees spend time manually dialing telephone numbers, the ATDS will dial the number and only connect the call attempt to a representative when the call is answered by a person or a voice message. This increased efficiency helps to keep creditor costs down, resulting in lower costs to customers.

As described above, AFSA will provide the results of a statistical study it commissioned which we believe will demonstrate that fewer or limited call attempts have a direct correlation to increased consumer delinquency, higher roll rates, fewer pro-consumer resolutions (such as extensions and loan modifications), increased interest and late fee costs, more negative credit reporting, and higher repossession and foreclosure rates.

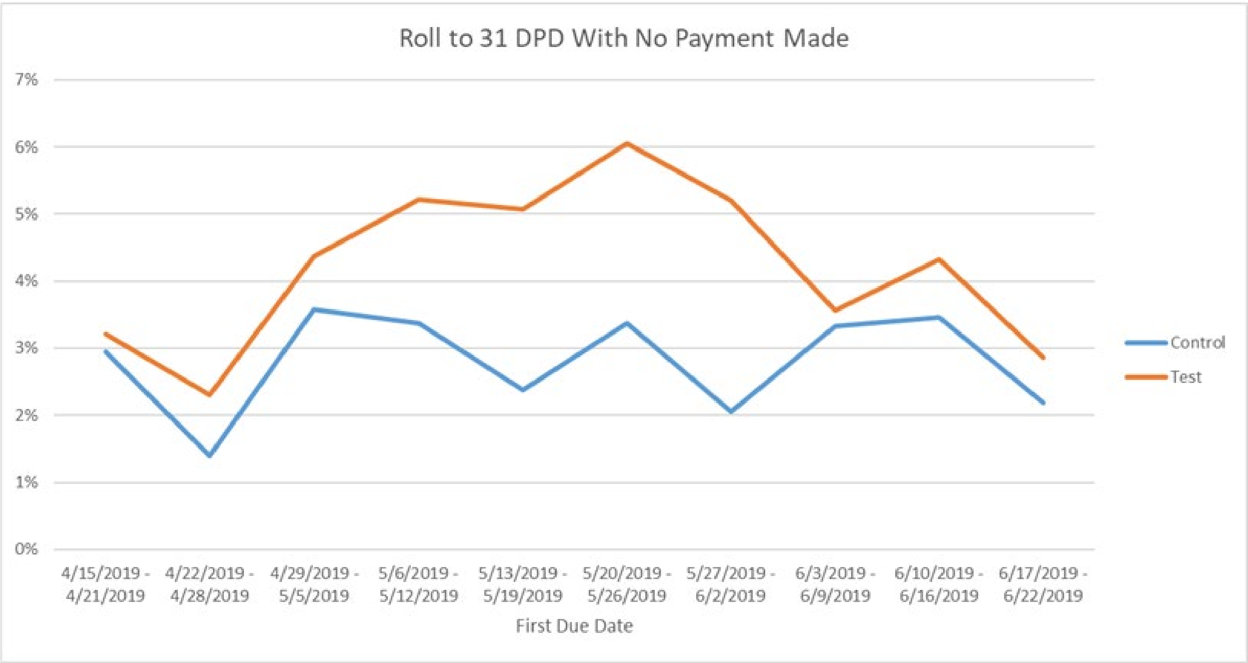
In addition to statistical studies, however, the real-world experience of our members proves this relationship. As a case in point, one of our members, an auto finance company, recently excluded approximately 50% of its newly originated accounts from its ATDS for all new originations booked from mid-April 2019 to mid-June 2019 (the "Test Population"). The other half of newly originated accounts booked during this time period remained on its ATDS and was provided servicing according to this creditor's standard practices (the "Control Population"). As a result of the Test Population not being on the ATDS, our member had to manually dial these customers, which meant that fewer call attempts per customer occurred. During this time period, the Control Population received an average of 1.06 call attempts per customer per day. In contrast, the Test Population received an average of only 0.76 call attempts per customer per day—or 28% fewer calls. The chart below shows the average call intensity per account per day during the test period, calculated on a 6-day rolling average. The blue line represents the Control Population and the orange line represents the Test Population. As shown, there was a noticeable difference in call attempts between the two groups until the Test Population was returned to the ATDS.



While the difference between the two populations may not seem that large, it is important to remember that these numbers are averages. When viewing the daily attempts of the Test Population against the Control Population on a day-to-day basis, the differences are more pronounced. The chart below shows how the average call intensity of the Test Population compared as a percentage to the average call intensity of the Control Population during the test period. The orange line indicates the percentage of dials received by the Test Population relative to the Control Population on a daily basis. As can be seen from the chart below, the Test Population had a call attempt rate that averaged 28% fewer call attempts per customer per day compared to the Control Population during the test period. The chart shows that this number peaked with as many as 60% fewer call attempts and did not start to level out until the Test Population was placed back on the ATDS.

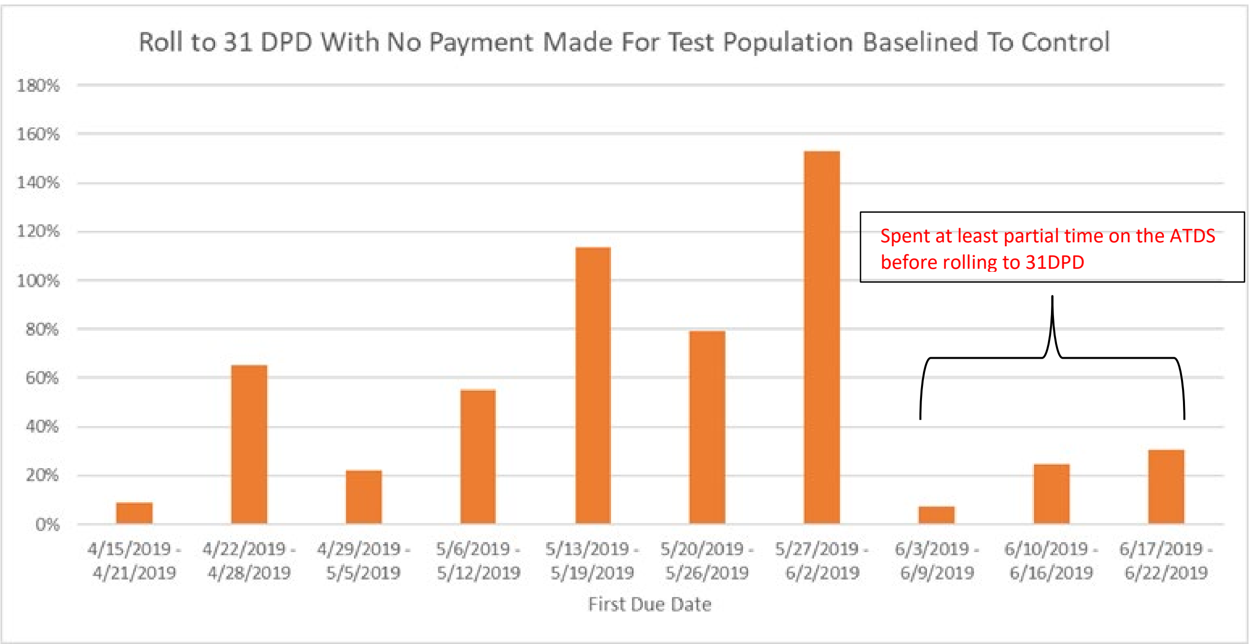


The negative effect of making fewer call attempts to the Test Population was immediately felt by this AFSA member. Despite the fact that both populations were new accounts which were recently underwritten and believed to be creditworthy, our member immediately saw a significant spike in first payment defaults[39] when compared to the Control Population. The chart below shows the percentage of each population which had a first payment default and became 31 days or more past due. The percentages on the chart are measured in groups based upon the scheduled first payment due date of each contract. This means that a contract with a due date of May 21, 2019, would not roll into the 31+ days-past-due ("DPD") bucket until at least June 22, 2019. The blue line represents the Control Population while the orange line represents the Test Population. As shown on the chart, the Test Population had a first payment default rate that was consistently higher throughout the entire test period. Contracts with a scheduled first payment due date in June would have been returned to the ATDS by approximately June 19, 2019, and therefore had some time in the standard servicing treatment before rolling to 31+DPD. This is reflected on the chart below as the orange line begins to come down closer to the Control Population around mid-June.



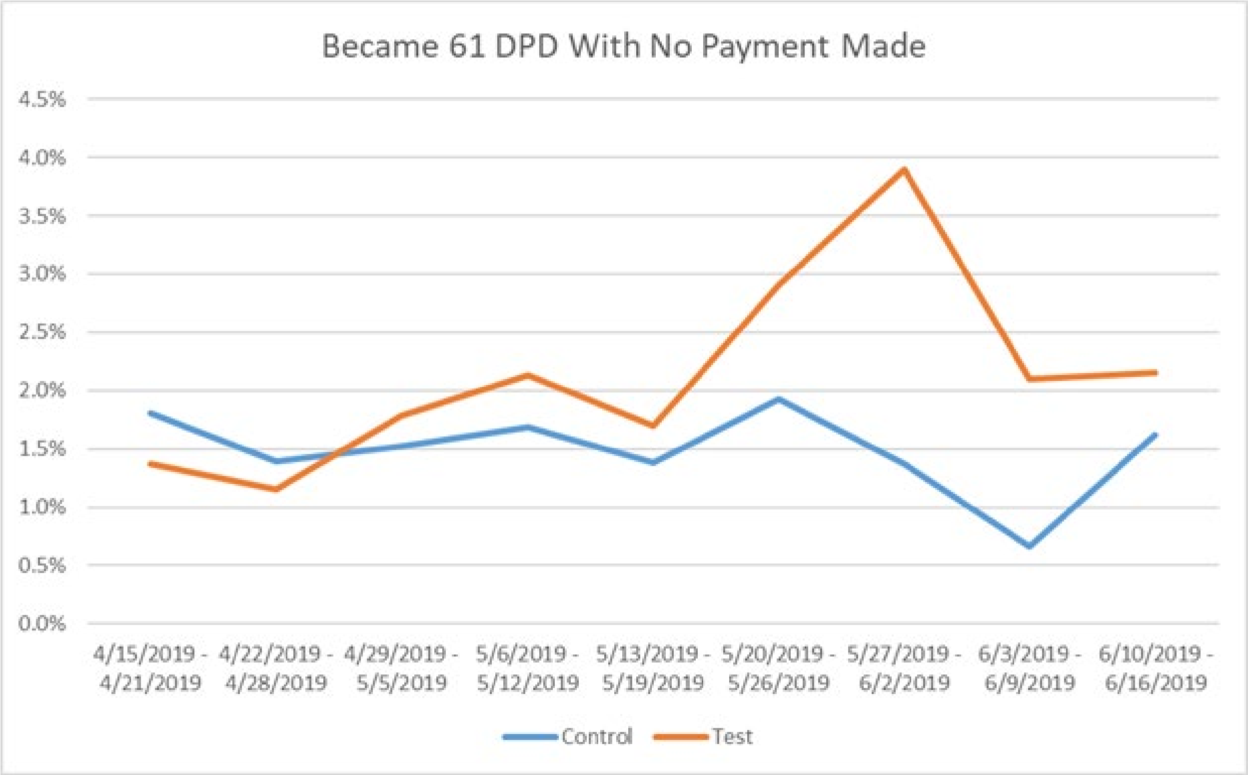
[39] "First payment default" in this context is defined as any customer who failed to make his first installment payment on the date it was due.

Limited call attempts by our member to the Test Population also caused a material increase in roll rates for that population. The chart below shows how the roll rates of the Test Population compared as a percentage to the Control Population, using the roll rates of the Control Population as the baseline, breaking up the population based upon the scheduled first payment due date. For example, the chart below shows that for contracts with a scheduled first payment due date between May 13, 2019 and May 19, 2019, the roll rates of the Test Population was more than 100% higher than that of the Control Population. As shown below, the Test Population experienced higher roll rates than the Control Population for each group of scheduled first payment due date contracts during the test period, with five groups showing rates at least 50% higher and two groups with rates that were more than 100% higher than the Control Population.

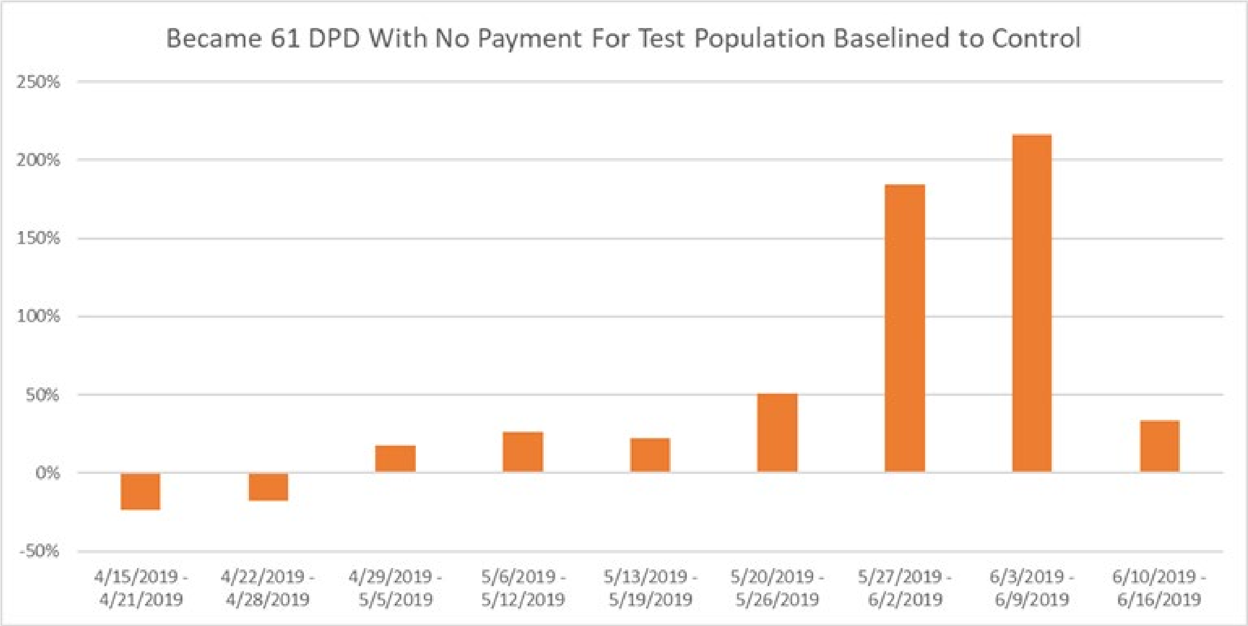


To further illustrate the importance of call attempts, once the member put the Test Population back onto the ATDS, and the call attempts between the Test and Control Population became equal, the AFSA member immediately experienced a drop in the Test Population's delinquency rates. As the average call attempts increased, the Test Population quickly normalized and leveled out with the Control Population. The member moved most of the Test Population back onto its ATDS on June 17, 2019. This meant that accounts with a scheduled first payment due date in June would have returned to the ATDS for at least a portion of time, in most cases after their due date but before rolling into the 31+ DPD bucket. As shown on the chart above, the roll rates dropped considerably in June once this adjustment was made.

As mentioned previously, creditors aim to prevent delinquency early for many reasons, but one reason in particular is to prevent the rolling delinquency trend that often follows. Once a customer rolls into the 31+DPD bucket, creditors will often increase their efforts to prevent the customer from rolling into the next 61+DPD bucket. For many customers, however, once they become delinquent, especially on a first payment, it becomes increasingly difficult to catch up. The chart below shows how the Test Population compared to the Control Population with regard to rolling into the 61+DPD bucket, meaning that these customers failed to make their first and second scheduled payments on their account. The chart reflects the 61+DPD percentage by groups based upon the scheduled first payment due date. The orange line represents the Test Population and the blue line represents the Control Group. As illustrated in the chart below, the Test Group saw a higher percentage of accounts roll into the 61+DPD bucket.



When viewed as a percentage compared to the Control Population as the baseline, one can really see the significant impact in roll rates to the Test Population. Accounts with scheduled first payment due dates in late May and early June saw roll rates into the 61+DPD bucket that were over 150% higher than the Control Population.



This case study demonstrates why AFSA is recommending that the CFPB specifically state that the call limitations do not apply to creditors.

APPENDIX II

Executive Summary

Beginning in May 2016, testing was put in place at an auto finance company to reduce the daily dialer call volume for customers in Early, Late, Bilingual and High-Risk collections. The Control strategy established a daily cap of three calls per phone number. Phase 1 began in May 2016 with a daily cap of three calls per customer. Phase 2 began in March 2017 with a daily cap of two calls per customer. Moving from Control to Phase 1 reduced the maximum number of calls customers could receive in a month with limited impact to delinquency rates. During early testing, Phase 2 appeared to achieve even lower intensity with little to no impact on delinquency rates. However, in subsequent months, Phase 2 performance worsened and became consistently 5-6% worse in 91+ delinquency rates than Phase 1.

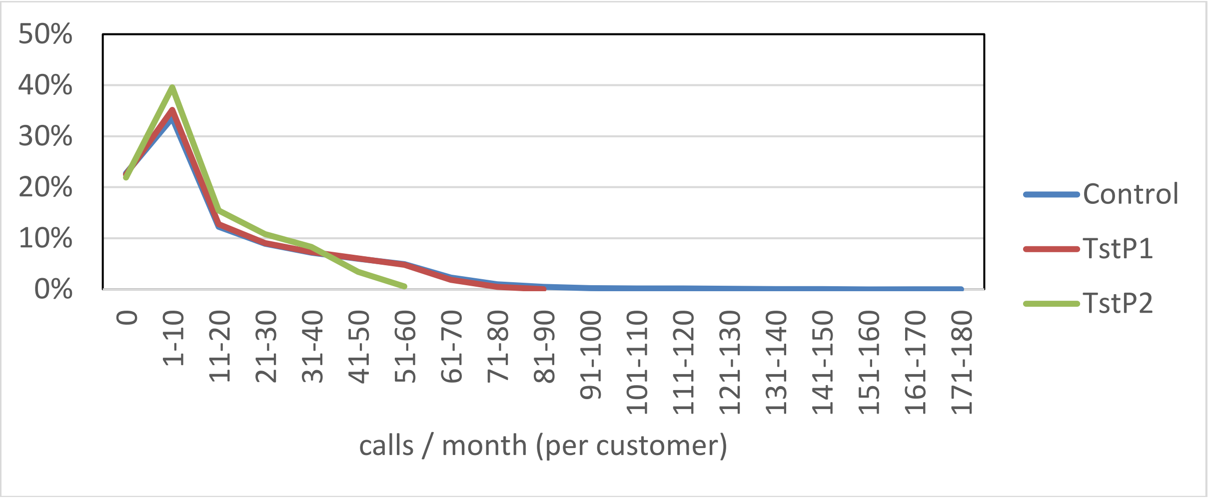
Supporting Evidence and Analytics

Beginning in May 2016, testing was put in place to reduce the daily dialer call volume for customers in Early, Late, Bilingual and High-Risk collections. Phase 1 reduced call intensity from three calls per number per day to three calls per customer per day and was tested on 20% of accounts from May 2016 to March 2017. Phase 1 achieved lower maximum intensity on customers with multiple numbers. The impact of Phase 1 was 1-2% increase in 90+ DPD delinquency performance.

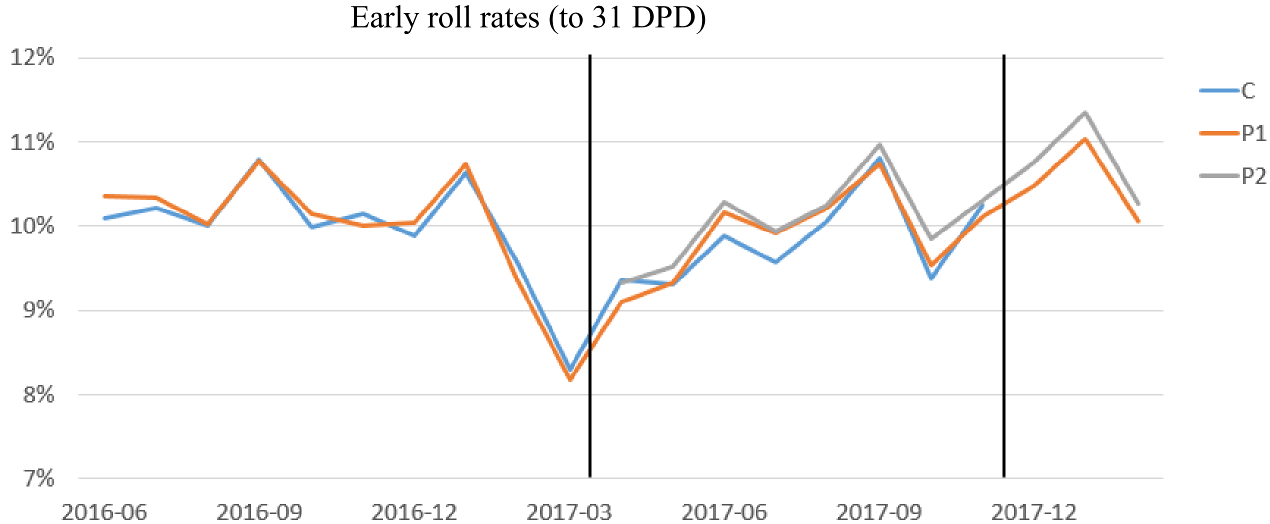
In March 2017, Phase 1 was expanded to 60% and Phase 2 was introduced on 20% with a cap of two calls per customer per day. During the test phase (March 2017 – September 2017), Phase 2 appeared to provide increased roll rates from Early and Late collections, but the High-Risk department subsequently made up the difference. Based on these results, Control was removed and Phase 2 increased to 40% in November 2017.

After the expansion of Phase 2, High-Risk performance deteriorated, resulting in 5-6% worse 91+ delinquency rate in Phase 2 (versus Phase 1) from December through February (driven by worsening in High-Risk roll rates).

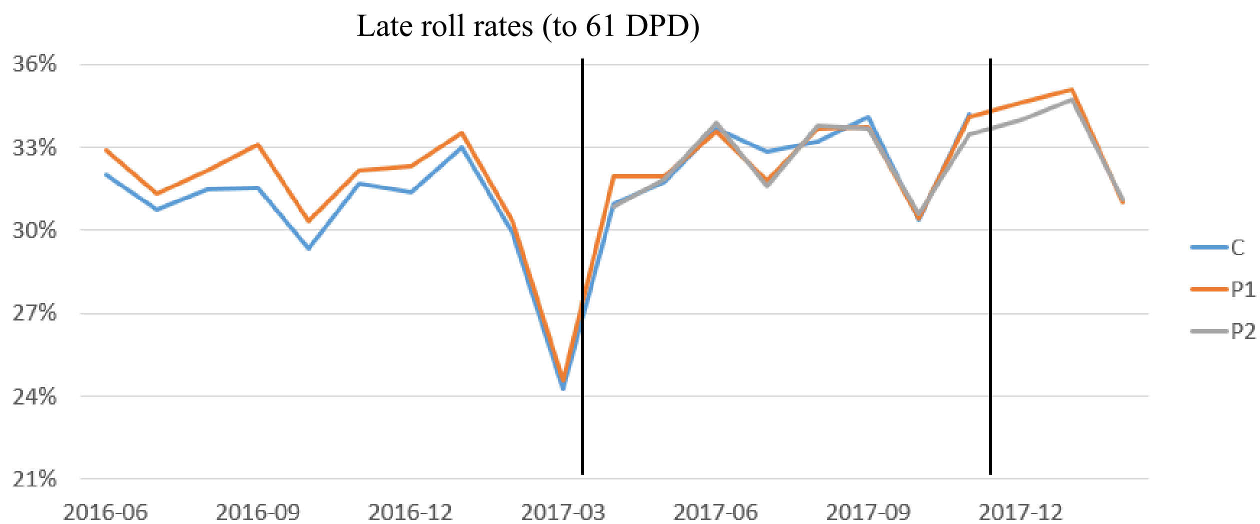
The graph below shows how the three strategies shift the distribution of calls per month per customer.



The graphs below show roll rates by department by month throughout the testing history.

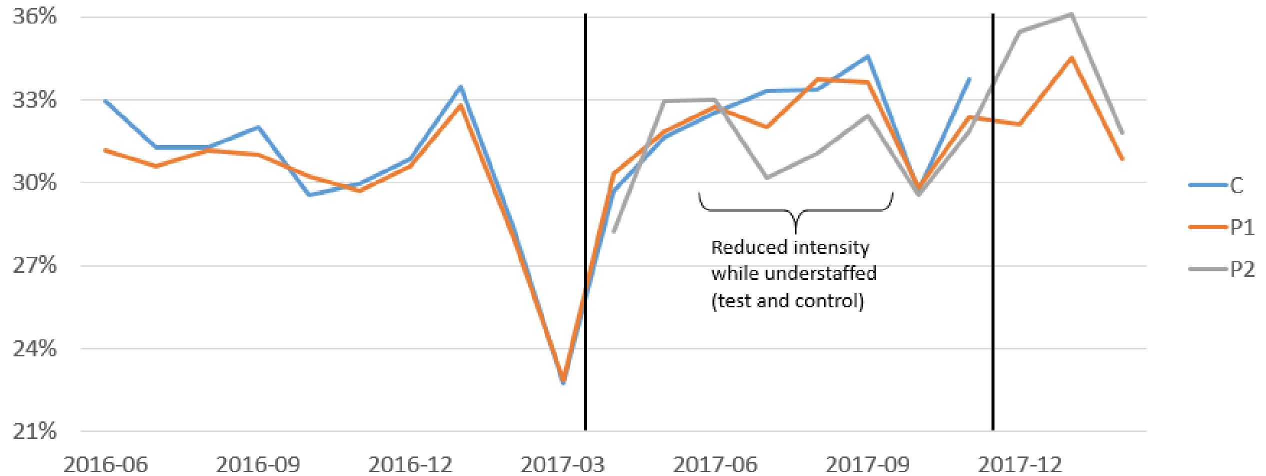


P1 v C	P-value	0.93 0.77 0.53 0.47 0.81 0.20 0.83 0.72 0.10 0.20	0.06 0.54 0.95 0.98 0.83 0.34 0.83 0.22	
	Roll Rate	9.99% v 9.96%	9.90% v 9.83%	
	P-value	0.70	0.86	
	Worsening	0.28%	0.64%	
P2 v P1	P-value		0.92 0.88 0.77 0.51 0.55 0.90 0.97 0.87	0.98 0.99 0.96
	Roll Rate		10.06% v 9.90%	10.80% v 10.52%
	P-value		1.00	1.00
	Worsening		1.65%	2.61%



P1 v C	P-value	0.86 0.80 0.82 0.99 0.92 0.73 0.90 0.78 0.74 0.67	0.89 0.60 0.44 0.08 0.72 0.30 0.53 0.43	
	Roll Rate	31.2% v 30.5%	32.6% v 32.7%	
	P-value	1.00	0.47	
	Worsening	2.47%	-0.07%	
P2 v P1	P-value		0.10 0.45 0.65 0.39 0.58 0.49 0.57 0.21	0.13 0.26 0.56
	Roll Rate		32.5% v 32.6%	33.2% v 33.5%
	P-value		0.28	0.17
	Worsening		-0.46%	-0.90%

High Risk roll rates (to 85 DPD)



P1 v C	P-value	0.13 0.31 0.47 0.23 0.70 0.42 0.43 0.31 0.38 0.54	0.66 0.55 0.56 0.16 0.60 0.24 0.53 0.15	
	Roll Rate	29.7% v 30.1%	32.1% v 32.4%	
	P-value	0.18	0.25	
	Worsening	-1.26%	-0.97%	
P2 v P1	P-value		0.08 0.77 0.58 0.08 0.02 0.17 0.42 0.33	1.00 0.94 0.86
	Roll Rate		31.1% v 32.1%	34.4% v 32.5%
	P-value		0.02	1.00
	Worsening		-2.88%	5.75%