November 23, 2021

Councilmember Phil Mendelson
Chairman, District of Columbia Council
1350 Pennsylvania Avenue, NW
Suite 504
Washington, DC 20004

Re: District of Columbia B24-0357

Dear Chairman Mendelson:

We, the undersigned trade associations, write on behalf of our respective members to express our serious concerns with Permanent Bill B24-0357, which would amend the District's laws to place significant new restrictions on debt collection. While our members are committed to working with borrowers to provide assistance where possible and share your goal of protecting consumers from abusive collection practices, the proposed far-reaching, and sometimes vague, restrictions will create compliance challenges for creditors, harm consumers whose accounts are delinquent and likely limit the availability of credit for borrowers in the District.

The Bill Should Reflect the Differences Between Original Creditors and Debt Buyers and Debt Collectors.

In the bill, the term "creditor" is vaguely defined as "a claimant or other person holding or alleging to hold a claim," and "claim" is defined as "any obligation or alleged obligation, arising from a consumer debt." With few exceptions, the legislation applies to creditors,[1] debt buyers and debt collectors. However, original creditors do not operate like debt buyers or third-party debt collectors, with most creditors originating their own accounts or acquiring accounts shortly after origination and well before default. In contrast to third-party debt collectors or debt buyers that usually collect only mature, static, full-account balances from consumers with whom they have no prior or ongoing relationship, creditors usually collect delinquent installments from consumers with whom they have a long-term and continuous relationship and who (absent acceleration) may carry other (current) balances with the creditor. Unlike creditors, debt buyers and third-party debt collectors may operate with very limited information regarding the consumer or the account involved. Creditors continue to service an account when the consumer is past due, while debt buyers and third-party debt collectors solely engage in debt collection activities and are more likely to collect much older charged-off or time-barred debts.

Congress recognized in establishing the federal Fair Debt Collection Practices Act ("FDCPA"), that creditors "generally are restrained by the desire to protect their good will when collecting past due

[1]The term "creditor" as used in this letter means entities who either originate their own obligations or take assignment of current obligations (generally shortly after origination), including by acquiring entire portfolios of accounts from other creditors. Most of these entities go on to service and collect these obligations and those of affiliated entities, and the collection of debt is not their principal business.

accounts," which distinguishes them from debt collectors who are "likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." As such, it is inappropriate and unnecessarily burdensome to lump in creditors with debt buyers and third-party debt collectors, as this legislation would do. Accordingly, we request that the Council carefully consider these differences when assessing whether the bill's proposed restrictions on debt collectors and debt buyers should apply to creditors.

To provide clarity, we also request that the Council amend the bill to define the term "original creditor" as "the creditor that owned the account at the time the account was charged off," which is the point at which a creditor stops extending credit and writes the account off as a loss. Certain provisions of the proposed law specifically reference "original creditors" separately from other creditors and debt collectors.[2] However, the lack of a clear definition will create uncertainty that will discourage lending activity in the District. This clarification benefits consumers because it: (1) provides them with the most relevant and least confusing information about their debt, which is accelerated at charge off; and (2) still requires chain-of-title information for consumers whose accounts have been sold to true debt buyers or assigned to true debt collectors, neither of which the consumer had a relationship with while the account was open and active. Finally, adopting this definition would further recognize the important distinction between creditors like banks, which transfer entire portfolios of accounts between one another to extend credit to consumers, and debt collectors and debt buyers, who only wish to collect on credit extended in the past.

Indirect Vehicle Finance and Leasing Should Be Excluded.

Subsection (a) of Section 28-3814 would apply the bill's debt collection restrictions to all consumer debt except loans directly secured on real estate or direct motor vehicle installment loans covered by Chapter 36 of Title 28. We appreciate these clear exceptions given that original creditors regularly communicate with their customers and maintain relationships throughout the lengthy term of the loan; however, with regard to financing for motor vehicles, this exception overlooks consumer leases and indirect vehicle finance through retail installment contracts. Indirect vehicle finance is the process through which a retailer (*i.e.*, an auto dealer) arranges financing for the consumer to purchase a vehicle at the time of the sale, rather than the consumer coming to the retailer with a preferred finance source. Retail installment contracts—which finance the purchase of a vehicle and are subsequently assigned by the retailer (*i.e.*, the auto dealer) to a sales finance company—are regulated under Chapter 6 of Title 50 and represent a significant portion of the automobile credit market. Consumer leases are regulated under Article 2A of the Uniform Commercial Code, as well as the federal Consumer Leasing Act, and provide an option for consumers not seeking to purchase a vehicle.

By leaving certain segments of the market subject to significant restrictions, this bill would create an uneven playing field with the rest of the market. These restrictions would limit competition in the District by raising compliance costs for certain companies and leave consumers with fewer choices and worse off as a result. The restrictions could also result in negative underwriting and credit worthiness determinations for District customers as creditors' ability to communicate and engage in loss mitigation options becomes more difficult with the restrictions. Once the contract is

[2] For example, in new subsection (bb)(1), "original creditors," but apparently not other creditors, are excluded from the communication moratorium during a public health emergency.

signed, there is no meaningful difference for the consumer between indirect and direct vehicle finance, but the different treatment in the law could prove confusing for consumers who purchase vehicles using different sources of financing. For these reasons, we respectfully request that the amendment to Subsection (a) of Section 28-3814 be changed to read:

> (a) This section applies to conduct and practices in connection with collection of obligations arising from any consumer debt (other than a loan directly secured on real estate, ~~or~~ a ~~direct~~ motor vehicle installment loan covered by Chapter 36 of Title 28<u>, a retail installment contract covered by Chapter 6 of Title 50, or a consumer lease covered by Article 2A of Subtitle 1 of Title 28</u>).

We believe this change will ensure that leasing, indirect and direct vehicle finance are treated equally under the law.

Disclosure of Disputed or False Information is Already Prohibited by Federal Consumer Protection Laws.

The bill would also add two new paragraphs under subsection (c) that prohibit disclosure of information concerning the existence of a debt known to be disputed by the consumer without disclosing the fact that the debt is disputed by the consumer and information affecting the consumer's reputation for credit worthiness with knowledge or reason to know that the information is false. However, this vague prohibition appears to address conduct already covered by several federal consumer protection laws.

Specifically, the federal Fair Credit Reporting Act creates requirements for the accurate reporting of and correction of inaccurate credit information applicable to any furnisher of information, including creditors, debt buyers and debt collectors. Existing Metro 2 credit reporting guidelines implemented industry standards for information disputed by the consumer and the use of certain dispute codes. In the debt collection context, under the FDCPA, when a debt collector knows or should know the consumer disputes a debt, and the collector communicates about the debt to a third party, then the communication must include an indication that the consumer disputes the debt. Finally, creditors also protect consumer information consistent with existing privacy laws, like the federal Gramm-Leach-Bliley Act.

Because the proposed restrictions seem to vaguely cover activities already prohibited under federal law, we recommend removing them from the bill or, alternatively, revising them to be more specific regarding the activities prohibited, including specifying whether the prohibitions are coextensive with federal consumer protection laws.

The Proposed Call Restrictions are Unduly Restrictive and Will Result in Consumer Harm.

Paragraph 4 of subsection (d) would limit calls to all phone numbers on all accounts for a consumer to a maximum of three calls in any 7-day period. Direct phone calls to a borrower are a crucial tool for helping a consumer get back on track with a delinquent account and to avoid the consequences of further delinquency. In emergency situations, like the current pandemic, the quickest way for creditors to provide relief to borrowers who need it may be to proactively reach out to share information on available relief programs or other options for keeping their accounts current. This proposed restriction would further limit creditors from being able to successfully contact consumers to discuss their accounts because it can be extremely difficult to reach a borrower in three attempted phone calls over a 7-day period.

In finalizing Regulation F, the Consumer Financial Protection Bureau (CFPB) declined to implement a call frequency limit for creditors in recognition that successful communication with consumers can be beneficial to assisting consumers with keeping their accounts current or addressing delinquencies. Under the final rule, for debt collectors, there is a presumption of compliance when a debt collector places no more than seven calls within a seven-day period. *See* 12 C.F.R. § 1006.14(b)(2).

Moreover, the limit proposed by the bill is particularly onerous in that it applies across all accounts, so creditors who have customers with multiple accounts (*e.g.,* a credit card and a vehicle loan, or a customer who cosigns a loan with a family member) would be limited to fewer than three calls per account, making it even more difficult to reach them. This will result in the consumer falling further behind on the credit obligation and make it more likely that the consumer's delinquency will worsen, triggering additional negative credit reporting and the need for the creditor to exercise other remedies available to recover the amounts due. This is also inconsistent with the CFPB's approach in Regulation F, which excludes creditors and applies the seven-call limit *per debt*, rather than per consumer. *See* 12 C.F.R. § 1006.14(b)(2). For these reasons, we propose that the bill be amended to adopt Regulation F's approach to call frequency limitations.

The bill would also amend paragraph 3 of subsection (d) by adding the word "or" between the expense clause and the concealment clause. The new language would prohibit causing expense (by any means) OR concealing the true purpose of the communication. Creditors most likely do not have knowledge that a consumer is incurring an expense (e.g. by sending a text message or calling a customer in a way that triggers the customer's service provider to charge them a fee). This provision could deem communications from a creditor to be in violation of the law, without any ability for the creditor to know when a violation may occur. We propose that the bill be amended to delete the word "or," or add provisions that would only prohibit knowingly causing expense to a consumer.

Requiring the Disclosure of a Company Email Address Creates Unnecessary and Unavoidable Security Risks and Compliance Challenges.

An amendment to Paragraph 4 of subsection (f) would require clear disclosure of the e-mail address of the person to whom the claim is owed. Companies collecting debt pursuant to the act may not use email in the course of collection because using email requires appropriate levels of security to maintain the confidentiality of the communication, validation of the person sending the e-mail, procedures to ensure that all required disclosures are included in any email sent, and a general preparedness to communicate electronically. Many consumers use free, widely available email providers that lack robust security measures that are available on secure message systems and platforms. Requiring a creditor or debt collector to include an email address in communications with the consumer could invite the consumer to respond directly via email and put sensitive personal information in email messages that could be intercepted or accessed by criminals seeking to commit fraud or identity theft. It also would create compliance challenges for companies that do not typically use email for collection purposes. Accordingly, we request that the email address requirement only apply if the company regularly uses email for collection purposes.

The Prohibition Against Collecting Exempt Funds Should be Limited to the Knowing Garnishment or Attachment of Exempt Funds.

New paragraph 11 of subsection (f) would prohibit collecting or seeking to collect funds that are known or that should be known to be exempt from garnishment/attachment. Therefore, as currently written, the provisions would prevent customers from voluntarily using exempt funds to pay their debts if the creditor knew or should have known the source of income. Denying customers the ability to voluntarily pay using exempt funds could result in further harm if they default on their payments (e.g., repossession, foreclosure, charge off, collection litigation). In addition, declining to accept a voluntary payment could expose a creditor to litigation and reputational risk.

This issue is exacerbated by the fact that the federal Equal Credit Opportunity Act *prohibits* a creditor from discriminating against an applicant because some or all of the applicant's income derives from public assistance programs. So, while these individuals are *protected* under federal law to get access to credit, the proposed provision related to exempt funds would harm them by making it illegal for creditors to accept their payments.

Moreover, the "known" or "should be known" standard is particularly onerous because creditors typically do not know the source of the applicant's income, nor the source of any funds from which the customer may make a payment. They are not in a position to know whether any particular payment from a consumer may come from exempt funds or not. But the vague "should be known" standard in the proposed law creates the risk that a creditor may be deemed "on notice" of this issue for some unknown reason, creating uncertainty for the creditor that will compound the customer's inability to make a payment on a delinquent account from exempt funds, if the customer chooses to do so.

For these reasons, we propose the provision be amended to prohibit only the knowing garnishment or attachment of exempt funds. As part of the garnishment process, the obligation to determine whether income is exempt is placed on the garnishee, who is in the best position to determine the ultimate source of funds and whether they are protected. Moreover, garnishment and attachment are *involuntary* processes, in contrast to the *voluntary* process of debt collection in a non-legal context.

The Provision Regarding Debts Owed by a Deceased Consumer is Vague.

New paragraph 6 of subsection (g) would prohibit attempting to collect debts owed by a deceased consumer from a person with no legal obligation to pay the amounts alleged to be owed. As drafted, this new provision would potentially prohibit a creditor or a debt collector from contacting an executor or administrator of a deceased consumer's estate to informally resolve the decedent's debt.

We agree that a consumer should not be subject to collection efforts for a debt the consumer is not legally obligated to pay; however, we believe the Council should consider clarifying this prohibition to ensure a creditor or debt collector may identify and communicate with a person authorized to act on behalf of the deceased consumer's estate, which is liable for the debt. As recognized by the CFPB in finalizing Regulation F, the ability to informally resolve decedent debt outside of the probate process benefits consumers. Without this process, creditors and debt collectors will have no other recourse than opening probate and subjecting estates to lengthy and costly court processes. Such communications could be accompanied by a disclosure that the creditor or debt collector is only seeking payment from the assets in the decedent's estate and that persons authorized to act on behalf of deceased consumers' estates are not required to use their own or jointly owned assets to pay decedent debt.

The Validation Requirement Serves No Rational Purpose when Applied to Creditors and is Vague.

New subsection (m) would prohibit a debt collector from collecting or attempting to collect a debt without complete and authenticated documentation that the person attempting collection is the owner of the consumer debt and subsequently require a debt collector to provide this documentation to the borrower in five days. Laws imposing debt validation requirements on creditors create an unnecessary burden in exchange for little or no increased protections for consumers. In the context of a creditor collecting an account it originated or obtained immediately after origination, validation—the collection of certain information about the debt prior to initiating collection efforts—serves no rational purpose that justifies the additional cost and risk in the creditor context. The United States Court of Appeals for the Fourth Circuit established[3] that "…verification [of debt] is only intended to 'eliminate the problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'" Neither of these "problems" is common enough in the context of creditors to justify the considerable expense of notice and document production, although they can arise with regard to traditional debt buyers and third-party debt collectors. Therefore, we request that, at minimum, creditors be excluded from this section.

Finally, the phrase "authenticated documentation" in new subsection (m)(1) is vague, which may create consumer confusion and create unintended compliance challenges. In subsequent new subsection (r), the bill indicates that "authenticated business records" must be filed with the court prior to the entry of a default or summary judgment. In the litigation context, one may assume that the term "authenticated" refers to applicable rules of evidence. By contrast, subsection (m)(1) contains no such context, and it is unclear what "authenticated" means. For these reasons, we recommend that "authenticated" be more clearly defined wherever it is used in the bill to avoid incorrect assumptions and to remove any doubt regarding what documentation is required.

Requirements to File Documentation of the Debt and Assignment Prior to Entry of a Default Judgment or Summary Judgment Should Not Apply to Original Creditors.

Subsections (r) and (s) require documentation of the amount of the debt and each assignment. Because of the differences between original creditors and debt collectors and debt buyers outlined above, we request that these documentation requirements specifically apply only in instances where the plaintiff is not the original creditor.

[3] Chaudhry v. Gallerizzo, 174 F.3d 394, 405-07 (4th Cir. 1999).

Mandatory Dismissal of a Collection Lawsuit with Prejudice for Failure to Comply is an Unreasonably Harsh Sanction

Subsection (t) would require a court to dismiss an action with prejudice if the action does not fully comply with all of the specific elements required under the section. Court rules already provide for appropriate remedies if statutory requirements are not addressed. While creditors seek to fully comply with the law, a creditor may make a mistake or not file the exact document the court prefers to see in debt collection actions. Dismissal of such an action with prejudice would be unnecessarily punitive on creditors. An error in the documents filed does not mean the consumer does not owe the debt and should not relieve the consumer of legal obligations. The costs associated with this punitive requirement could be thousands of dollars for any given account, raising the cost of providing credit in the District. These added costs will in turn likely mean higher costs and limited credit availability for District borrowers. Accordingly, we request the bill be amended to allow a court the option to dismiss with prejudice, but not require it.

The Private Right of Action Should be Limited to Knowing or Willful Violations and/or Include a Bona Fide Error Defense.

Subsection (u) would provide a standard for liability and punitive damages and allow for a private right of action. As currently written, consumers would be able to exercise a private right of action for violations of the statute even if the violation is not intentional. Creditors and debt collectors should have policies and procedures to ensure compliance with the requirements of the law. However, they should not be subject to a lawsuit because of an unintended mistake. The FDCPA and many state debt collection laws provide a bona fide error defense for companies that can show that a violation was not intentional, and occurred despite the existence of policies, procedures and efforts to comply with the law. The bill should be amended to clarify that a private right of action should be limited to knowing or willful violations and/or include a bona fide error defense similar to the defense available under the FDCPA.

The Proposed Repossession Moratorium Fundamentally Compromises and Disrupts the Vehicle Finance Market with the Likely Effect of Limiting Credit Availability.

Financial institutions seek to avoid repossessing their collateral whenever possible, using it only as a last resort. It is an unfortunate outcome that neither borrowers nor financial institutions want. Financial institutions nearly always lose money in the repossession process due to the costly act of physical repossession and the replacement of loan contracts with depreciating assets in the form of vehicles. For these reasons, financial institutions put a considerable amount of time and effort into proactively reaching out to their customers experiencing financial difficulty to work with them to resolve account issues and avoid repossession whenever possible. However, vehicle sales finance contracts are based on the premise that they are secured by collateral.

The bill’s proposed repossession moratorium in subsection (aa)(2)(C)—even limited to times of public health emergency—would fundamentally compromise financial institutions’ vehicle finance contracts by effectively severing the contract from the secured collateral for an indefinite period of time. These restrictions could also result in negative underwriting and credit worthiness determinations for District customers as creditors' ability to communicate and engage in loss mitigation options becomes more difficult with the restrictions. These loans carry short terms of no more than a few years, and an extended repossession moratorium could cover a significant portion of the contract term. For example, on a loan with a typical five-year term, a public health emergency of just four months, plus the additional 60 days past the emergency declaration, would trigger a repossession moratorium in effect for 10 percent of the original contract term.

Motor vehicle prices are determined by the market and depreciate in value over time, meaning collateral prices will continue to drop throughout a lengthy repossession moratorium. For a depreciating asset, this extended period of time without payment or repossession is likely to unfortunately leave borrowers responsible for covering any resulting higher deficiency balances. The best way to prevent such a market disruption is to allow creditors to work directly with borrowers based on individual assessments of borrowers' needs.

Additionally, while the proposed moratorium does include an exception for voluntary surrenders of a vehicle, it is not clear that creditors may recover vehicles at risk due to mechanics' liens, fraud, vehicles in impound lots in jeopardy of being sold, abandoned vehicles, seized vehicles, or in other instances where the collateral may be in jeopardy. Leaving creditors without the clear ability to recover their collateral in instances where it may be at risk for reasons other than the public health emergency could cause additional disruption in the vehicle finance market, with implications for larger financial markets due to securitizations and existing master credit agreements. For these reasons, we request that the bill be amended to exclude the proposed repossession moratorium.

We urge you to consider the effects these restrictions have on the District's credit markets and not move forward with the legislation as drafted. Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact Danielle Fagre Arlowe at AFSA (dfagre@afsamail.org) or Toni Bellissimo at the Card Coalition (toni@cardcoalition.org).

Sincerely,

American Financial Services Association

Card Coalition

cc: Members of the District of Columbia Council