April X, 2012

Representative Barney Frank
Ranking Member
Financial Service Committee
U.S. House of Representatives

Re: H.R. 4101, the Fair Debt Collection Practices Clarification Act

Dear Ranking Member Frank:

We write to express our serious concern with the recently introduced Fair Debt Collection Practices Clarification Act, HR 4101. We understand that your purpose in amending the Fair Debt Collection Practices Act ("FDCPA") is to permit debt collectors to leave voice mail messages. However, we are alarmed that the bill also proposes to replace the current strict liability for collectors who violate the FDCPA with the looser "good faith standard." This change will require that consumers prove that debt collectors had bad faith when the consumers are asserting their rights under the FDCPA.

Every year, consumers file more complaints about abusive and illegal debt collection practices with the Federal Trade Commission than about any other industry.[1] Abusive and illegal debt collection practices "cause substantial consumer injury."[2] The standards need to be strengthened to reign in abusive debt collection. Unfortunately Section 2 of HR 4101 would weaken the standards governing collection abuses and hurt consumers.

We are pleased to see that Section 3 of the bill would add a requirement for collectors leaving voicemail to notify consumers that they have the right to tell collectors to cease further communication. This notice will provide important information to consumers, empowering them to protect themselves from harrassing collection activities. We thank you for this. We also appreciate Section 4's prohibition against binding consumers to mandatory arbitration.

However, even with the addition of the notice of the right to cease communication and the limitation on binding mandatory arbitration, the liability exemptions in Section 2 would be a serious setback in the policing of illegal debt collection activities.

If the purpose of the liability exemption in Section 2 is to ensure that collectors can rely on agencies' interpretations of the FDCPA, it is unnecessary. The Chevron doctrine,[3] providing that courts must defer to an agency's interpretation of statutes, is well recognized. The problem is that the language in Section 2 goes much further. It would circumvent strong Supreme Court Precedent which prevents debt collectors from claiming "mistake of law"

[1] *See* FEDERAL TRADE COMMISSION, Consumer Sentinel Data Book 2011 at 4 (Feb. 2012).
[2] See FEDERAL TRADE COMMISSION, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT at 1 (Mar. 14, 2011).
[3] See *Chevron v. Natural Resources Defense Council* 467 U.S. 837 (1984).

every time they are sued.[4] The FDCPA includes a "bona fide error" defense, which provides that a debt collector may not be held liable in an FDCPA action if the collector shows that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692k(c). In *Jerman v. Carlisle*, 130 S.Ct. 1605 (2010), the United States Supreme Court held that the "bona fide error" defense does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. If Section 2 of your bill stands, this important precedent would be reversed; and, through the new good faith exemption created, debt collectors would be able to claim "mistake of law" every time they violate the FDCPA.

We are concerned that Section 2 would impose a significant burden on consumers asserting their rights under the FDCPA, as debt collectors could simply claim some "good faith exception" to every violation. The burden would be on the consumer to prove a negative – that the collector had not acted in good faith. This would discourage consumers from enforcing their claims challenging abusive collection activities.

We appreciate the positive measures helping consumers that are included in the Fair Debt Collection Practices Clarification Act of 2012. Unfortunately, even with these beneficial proposals, the potential harm from Section 2 outweighs the potential good in the bill. We urge you to remove Section 2 from the bill, so that our organizations can support the bill as an even-handed update of the FDCPA that furthers the interests of both consumers and the industry.

Thank you very much for your consideration. For further information please contact Delicia Reynolds at the National Association of Consumer Advocates, 202 452-1989, extension 103, Delicia@naca.net or Margot Saunders at the National Consumer Law Center, 202 452-6252, extension 104, msaunders@nclc.org.

Respectfully,

Center for Responsible Lending

Consumer Action

Consumer Federation of America

Consumers Union

National Association of Consumer Advocates

National Consumer Law Center

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[4] See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (U.S. 2010)

The Institute for College Access & Success and its Project on Student Debt.

U.S. PIRG