CONSUMER RELATIONS CONSORTIUM

March 6, 2017

Via E-mail

Consumer Financial Protection Bureau

Attn: Richard Cordray, Director
1700 G Street NW
Washington, DC 20002

Re: Disclosures Regarding Tax Consequences in Debt Collection Communications

Dear Director Cordray:

This letter is sent on behalf of the Consumer Relations Consortium ("CRC"), a coalition of thirty (30) larger market participants in the debt collection industry. You may recall that you met members of our group at your offices on January 11, 2017.

The CRC's purpose is to engage proactively with regulators and consumer advocacy groups to bridge the gap of understanding and expectations often present between consumers.

I write today with respect to the issue of disclosure of potential tax consequence to consumers in settlement letters. The July 22, 2015 Consent Order between the Consumer Financial Protection Bureau ("CFPB") and Discover Bank (the "Discover Consent Order") addressed providing <u>required</u> notices of tax benefits to student loan borrowers and the IRS. *July 22, 2015 Discover Consent Order,* ¶¶ *14-29.* Some creditors and debt collectors have read the Discover Consent Order to mandate that all potential tax consequences should be disclosed by debt collectors working accounts for credit grantors. This has created an untenable situation for both debt collectors and consumers.

Debt collectors have no access to details about how or whether a creditor client will issue a 1099C and in many instances have no access to information about all the accounts a customer may have with the same creditor that could involve a forgiveness of principal in a given year. Moreover, as the CFPB is well aware, a collection agency may not know the breakdown of principal and interest and therefore may not know if $600 or more of the forgiveness would be accounted for as a forgiveness of principal by the creditor who owns the account.

This illustrates a dichotomy created when, from a creditor's perspective, a particular notice requirement may be logical because the creditor has familiarity with its own 1099C practices; but, the disclosure is unreliable at best and completely illogical at worst in the relationship between a customer and collection agency where the debt collector neither controls nor has a line of sight into a creditor's actual practices.

In the debt collection context, a disclosure would discuss the potential reporting of the discharge of indebtedness to the IRS and the consumer on a form 1099C. The CRC finds such a disclosure very concerning, as there have been inconsistent court interpretations regarding these tax disclosures and any such disclosure has the potential to lead to significant consumer confusion.

The CRC asks that the CFPB study this issue and work with the Department of Treasury and the Internal Revenue Service to adopt a joint position statement that no such disclosure is required **by a creditor's collection agent**.

The tax ramifications of any settlement are complicated and beyond the scope of a simple disclosure. As noted above, most debt collectors have no access to or control over the choices creditors make when issuing 1099C forms. Debt collectors never issue form 1099Cs. The Tax Code and the related regulations set forth numerous exceptions to the basic rule that a creditor must send a 1099C for a forgiveness of debt of $600.00 or more. Even determining whether there is an identifiable event leading to forgiveness of debt is a complicated process requiring close reading of tax regulations.

Any simple disclosure of tax consequences not setting forth all of the various definitions and exceptions could easily be deemed misleading, confusing, and possibly even coercive to the least sophisticated consumer. In this vein, the Eastern District of Pennsylvania considered purely factual tax disclosure language relating to issuance of a 1099C and found that,

> **<u>Drawing all reasonable inferences in favor of the non-moving party, the Court can properly infer that the statement [regarding tax consequences] is a "collection ploy."</u>** Compl. ¶ 26. Specifically, "the least sophisticated consumer may reasonably believe that in order not to be reported to the IRS, he or she must pay enough on the alleged debt so that a balance of less than $600.00 remains regardless of whether the event is reportable, or any exception applies." Resp. Opp'n Mot. Dismiss 17. Or, the debtor might believe that, in light of the reporting requirement, Defendant would refuse to forgive a debt greater than $600. **<u>In other words, there is a risk that the statement improperly increases collections by falsely representing the law</u>** in violation of 15 U.S.C. § 1692e and e(10). Again, drawing all reasonable inferences in favor of Plaintiffs, the statement is deceptive and misleading. (emphasis added).

Good v. Nationwide Credit, Inc. 55 F.Supp.3d 742 (2014). *See also Wagner v. Client Services, Inc.*, 2009 WL 839073 (E.D. Pa. 2009) (stating "[a]lthough that amount [the difference between the balance and the settlement amount] is clearly in excess of the statutory floor, Defendant has failed to demonstrate that the amount, or parts thereof, are not subject to a §1.6050P-1(d) exception.")

As these cases demonstrate, it is likely impossible for a debt collector to communicate clearly and effectively the tax implications of settlement pursuant to the "least sophisticated consumer" standard by which debt collection letters are measured under the Fair Debt Collection Practices Act ("FDCPA"). The Tax Code and regulations surrounding this issue are complex and are neither subject to meaningful simplification nor easily understood by the least sophisticated consumer (or, possibly, almost *any* consumer who does not have a legal or accounting background). The Tax Code applies to activities and accounting practices of creditors not their debt collection agencies.

Instead, the disclosure would contribute to consumer confusion and, possibly, the sense of coercion to settle the account for an amount that might not trigger the reporting requirements because any simplified disclosure does not provide enough information for the consumer to assess accurately the potential tax ramifications.

Further, any disclosure requirement is contrary to established law on the topic. Courts considering this issue have held routinely that a debt collector is *not* required to disclose potential tax consequences of settling an account. For example, the District of Massachusetts wrote:

> Northland and ARM had no affirmative duty to advise Schaefer of potential tax consequences if he accepted their settlement offers. **The language of the FDCPA does not require a debt collector to make any affirmative disclosures of potential tax consequences when collecting a debt.** See *Landes v. Cavalry Portfolio Servs., LLC*, 2011 WL 1206157, at *2-3 (finding no FDCPA violation where collection letter mentioned "tax season savings" but did not indicate specific tax consequences of accepting a debt discount). Schaefer cites no authority that imposes such a requirement and **requiring, as a matter of law, debt collectors to inform a debtor of such a potential collateral consequence of settling a pre-existing debt seems far afield from even the broad mandate of FDCPA to protect debtors from abusive debt collection practices**. (emphasis added).

Schaefer v. ARM Receivable Management, Inc., 2011 WL 2847768 (D. Mass.) *See also Altman v. J.C. Christensen*, 786 F.3d 191 (2015) (stating "We agree with the district court below that *Ellis* is unpersuasive. The Letter at issue here plainly states that the percentage saved is "on your outstanding account balance." **The fact that a debtor may then have to pay tax on the amount saved is simply not deceptive in the context of what the savings are on a debtor's "outstanding account balance."**(emphasis added)).

Finally, even if disclosure language could be developed to be understood by the least sophisticated consumer, debt collectors disclosing potential tax consequences to consumers will not be beneficial to consumers. In a recent case from U.S. District Court for the Southern District of Indiana, *Everett v. Financial Recovery Services, Inc.* (United States District Court, S.D. Indiana, Case No. 16-01806) the court considered the following simple statement in a letter to a consumer:

"This settlement may have tax consequences. Please consult your tax advisor."

While the court in *Everett* determined that this statement was not misleading to the least sophisticated consumer, CRC would suggest that even this statement could lead to confusion for a consumer. Often, after receipt of a letter from a debt collector the consumer will call the collector. If that consumer calls the debt collector to ask about "tax consequences" debt collector staff are not trained tax professionals and should not be put in the position where they opine on what, if any potential "tax consequences" could exist for the consumer.

The CRC respectfully requests that the CFPB, Treasury Department and Internal Revenue Service work together to confirm existing law and affirmatively advise debt collectors that no type of tax disclosure is required or should be sent in relation to settlement offers made by creditors or debt collectors. If, however, the CFPB, Treasury Department and IRS determines that tax disclosures are required, then the CRC requests "safe harbor" language that debt collectors can use to meaningfully disclose potential tax consequences to consumers without running afoul of the FDCPA's prohibition on deceptive and misleading representations.

We greatly appreciate your assistance in resolving this conundrum to the benefit of all stakeholders. The CRC is available to provide further information or assistance at your request.

Very truly yours,

Timothy J Bauer

Tim Bauer
Co-Executive Director
Consumer Relations Consortium

Cc: John McNamara, Assistant Director, Consumer Lending, Reporting, and Collections Markets