Consumer Federation of America

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Comments Submitted to the Consumer Financial Protection Bureau on Debt Collection Practices (Regulation F) Supplemental Proposal on Time-Barred Debt, Docket No. CFPB-2020-0010, RIN 3170-AA41

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Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA appreciates the opportunity to submit comments in response to the Consumer Financial Protection Bureau's second proposal to amend Regulation F, 12 C.F.R. part 1006, which implements the Fair Debt Collection Practices Act (FDCPA).[1]

The Consumer Financial Protection Bureau's (CFPB) proposed mandatory disclosures when collecting time-barred debt will not adequately protect consumers. This proposed rule will serve as legal cover for debt collectors who engage in the inherently unfair, deceptive and abusive practice of collecting time-barred debt which, at its core, is an aggressive effort to pursue the collection of legally unenforceable debt. Instead of finalizing this rule, we urge the CFPB to prohibit all collection of time-barred debt.

However, if the CFPB does not adopt a necessary ban, and instead retains disclosures, the CFPB must improve those disclosures to protect consumers. The disclosures currently proposed by the CFPB are inadequate as they will not protect consumers who are being contacted about time-barred debt for which they no longer have liability. At a minimum, the CFPB should undertake further study in the key areas outlined below. Furthermore, the Bureau should ensure that its rule applies a strict liability standard. Otherwise, as it stands, the CFPB's rule will mandate disclosures that only minimally protect consumers, leaving open space for collectors to continue the aggressive debt collection practices that are pervasive in the industry. Indeed, at a fundamental level, these arguments should be moot; debt collectors should not be able to continue collecting debts that are legally unenforceable.

I. The Bureau Should Prohibit Collection of All Time-Barred Debt

Time-barred debt disclosures give consumers two contradictory messages: that they must pay an existing debt; and that nothing will happen to them if they do not repay the debt. Consumers will not understand that they are being contacted and pursued for debt that collectors are unable to pursue legally. However, when a consumer makes a payment on a time-barred debt, the consumer increases their responsibility to the creditor because the payment gives the creditor renewed ability to sue them. Aggressive debt

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[1] Debt Collection Practices (Regulation F), 85 Fed. Reg. 12672 (May 5, 2020) (to be codified at 12 C.F.R. 1006.26) [hereinafter Second Proposed Rule]; Fair Debt Collection Practices Act, 15 U.S.C. 1292e–f (LexisNexis 2020).

collectors will see these disclosures as legal cover to use high pressure collection tactics to revive the statute of limitations on a debt.

In order to protect consumers from the unfair, deceptive, and abusive practice of collection of time-barred debt, the CFPB should abandon this proposal and instead, prohibit all collection of time-barred debt in and out of court.

II. The Bureau's February 2020 Study on Time-Barred Debts Shows that its Proposed Disclosures will not Adequately Protect Consumers

In the absence of a complete ban, the Bureau must improve the disclosures as the proposed disclosures do not adequately protect vulnerable consumers. Consumers often pay debts or prioritize time-barred debts under the misunderstanding that they will be sued if they do not pay. By prioritizing time-barred debts, consumers may not be able to pay debts that are legally enforceable, nor afford basic expenses such as household bills. Consumers' misunderstanding about time-barred debts may often be based on the reasonable assumption that debt collectors would not attempt to collect a debt that is legally unenforceable.

The Bureau's February 2020 study highlights the vulnerability of consumers contacted about time-barred debts.[2] Close to 15% of consumer respondents in that study incorrectly believed that debt collectors could sue consumers on a time-barred debt if the consumer ignores a notice, even after reading a disclosure explaining that they could not be sued.[3] In addition, 18% to 22% of respondents did not fully understand the implications of a time-debt on a potential suit.[4] These statistics, which apply to the most successful disclosures tested by the Bureau, and upon which the proposed disclosures are based, indicate that the CFPB's model disclosures will still leave large numbers of consumers likely to pay debts that they would not pay otherwise or would be financially better off not paying.

The CFPB's study also shows how inherently confusing consumers find the revival of time-barred debts. Disclosures explaining that specific consumer actions may revive the statute of limitations on time-barred debts are theoretically effective: over 71% of respondents who viewed such revival disclosures understood that partial payment on the debt would revive the statute.[5] However, consumers still found the concept confusing when applied to specific consumer actions. Approximately 29% of respondents who read the tested revival notice in the context of a hypothetical payment on the debt did not think or did not know if this would revive the statute.[6] Similarly, over 40% of respondents did not understand that a hypothetical written acknowledgment of a debt would revive the statute.[7] Further, 73% did not understand

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[2] Consumer Fin. Prot. Bureau, Disclosure of Time-Barred Debt and Revival (2020).
[3] Id. at 17; 68, T.8. Although the percentage of incorrect responses was far higher (about 65%) among respondents who viewed a disclosure that did not explain that time-barred debts, this does not mean that the proposed disclosures are effective enough to protect consumers. Id.
[4] About 18% of respondents who viewed a time-barred debt said they were "Not Sure" or "It Depends" in response to the prompted question, and a little under 22% of respondents who viewed a time-barred debt that included a revival notice demonstrated the same lack of understanding. Id. These figures account for respondents who answered 'Not Sure' or that 'It Depends' – such responses demonstrate a lack of proper understanding, even if the CFPB did not address this in their own analysis of the data. *See e.g.* id at 17.
[5] Id. at 69, T.9.
[6] Id.
[7] Id. at 70, T.10. Again, this includes respondents who responded "Not Sure" and "It Depends," as well as incorrectly responding "No" to the question.

that a hypothetical oral (as opposed to written) acknowledgment would not revive the statute.[8] The CFPB's findings therefore reveal how confusing consumers find both time-barred debts in general and the revival of time-barred debts as applied to tested situations.

III. THE BUREAU SHOULD STUDY IMPORTANT QUESTIONS THAT ITS FEBRUARY 2020 STUDY DID NOT EXAMINE TO ENSURE PROTECTION OF VULNERABLE CONSUMERS

If the Bureau does not adopt the necessary ban, the Bureau must conduct more thorough testing to improve disclosure language such that it ensures understanding by vulnerable consumers. The CFPB's study was conducted in a controlled environment and bears the strengths and weaknesses of such a methodology. One major weakness is that, unlike the Bureau's testing conditions, the real-life debt collection process may include numerous communications in different forms over many months and regarding multiple debts. Indeed, the Bureau had to remind research participants to read carefully the single disclosures they gave each participant before answering questions in the study. This abstraction from the real world presents four problems and four corresponding areas that the CFPB should study further.

First, real-world debt collections often involve multiple communications, not just one. The Bureau should therefore study whether receiving multiple communications from a collector makes consumers even more confused or helps to cement their understanding that a debt is time-barred.

Second, the Bureau should study the impact of a protracted communication period on consumer behavior and should require a time-barred debt disclosure in every communication between collectors and debtors. Debtors often receive multiple communications over an extended period. Over time, consumers may forget what they learned about time-barred debts from the initial disclosure. This is particularly true given that legal concepts are complex, and people often retain knowledge after learning something multiple times over.

Third, since consumers may have multiple debts in collection, the CFPB should study the impact of this on consumers' understanding of time-barred debts and their revival. At the least, the Bureau should require collectors to specify in their disclosures which debts are time-barred and which are not. Otherwise, the confusion that consumers face regarding time-barred debts will only be compounded by having to differentiate among multiple debts with different statutes of limitation.

Finally, while we urge the CFPB to ban time-barred debt, if the Bureau continues to allow it, it should no longer allow for oral disclosures. The Bureau should prohibit the use of oral collections of time-barred debt and require written disclosure. This will also help ensure that consumers retain long-term access to the disclosures.

Furthermore, the Bureau should supplement these areas of additional research by gathering real-world data on collection rates before and after debt collectors have been required by Federal Trade Commission and CFPB consent orders to include specified disclosures in communications with consumers. The Bureau should also strengthen its research by evaluating the differing impact of state-required disclosures on consumers' understanding of time-barred debts.

IV. THE CFPB SHOULD ADOPT A STRICT LIABILITY STANDARD IN ITS PROVISIONS GOVERNING COLLECTIONS OF TIME-BARRED DEBTS

[8] Id. at 70, T.11. This includes "Not Sure" and "It Depends" responses.

Finally, the CFPB should adopt a strict liability standard instead of the "know or should know" standard it is proposing. The Bureau notes that debt collectors "often will know, or can readily determine, whether the statute of limitations has expired."[9] However, since there may be "some instances" in which collectors are unclear as to the applicable statute of limitations, even after reasonable investigation, the Bureau did not adopt a strict liability standard in its proposed rule. This approach is flawed.

First, as an implementing regulation of the FDCPA, the regulation should stay true to the FDCPA's strict liability standard, rather than diverging from a key dimension of that statute.[10] Congress intended the FDCPA to have "broad remedial scope,"[11] and the CFPB should follow the example of our courts in construing the FDCPA "broadly and in favor of the consumer."[12] A strict liability standard stays true to these principles far more than the proposed standard does. Second, debt collectors should be responsible for knowing the applicable statute of limitations on the debts they seek to recoup. Legal enforceability is a key feature of a debt, and knowledge of that enforceability is a cost of business that should be borne by debt collectors rather than consumers. Such a cost is no different to requiring debt collectors to know other legal aspects of the loans they collect under the FDCPA, including: when collectors are misrepresenting the legal status of a debt[13]; when collectors are threatening to take action that cannot legally be taken[14]; when property is exempt from dispossession or disablement[15]; or when any given action falls within the definition of 'deception.'[16] Third, debt collectors already do a statute of limitations analysis to ensure compliance with the FDCPA, so compliance costs will be minimal. Finally, if there are only "some instances" in which debt collectors are uncertain as to the applicable limitation period, as the Bureau states, retaining the "know or should know" standard would effectively protect a small portion of debt collectors at the direct expense of consumers.[17]

The strict liability standard is also crucial to compensate for other structural flaws in the consumer protection framework. For example, consumers often incur default judgments after failing to appear at court hearings due to difficulty accessing time off work and affording childcare and transportation to the courthouse.[18] If the CFPB adopts only a "know or should know" standard, it will be heaping an additional burden upon vulnerable consumers who already face profound obstacles to asserting their legal rights and defending themselves in court. The CFPB should not set out mandatory disclosures only to undercut those

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[9] First Proposed Rule, at 23,329.

[10] 15 U.S.C. § 1692k. Circuit courts have reaffirmed the strict liability standard in the FDCPA. *See* Arias v. Gutman, 875 F.3d 128, 134, 140 f.5 (2nd Cir. 2017); Riccio v. Sentry Credit, Inc., 954 F.3d 582, 594 f.1 (3rd Cir. 2020); McLean v. Ray, 488 Fed. Appx. 677, 682, 685 f.3 (4th Cir. 2012); Newman v. Ormond, 396 F. App'x 636, 638 (11th Cir. 2010); Stratton v. Portfolio Recovery Assocs., LLC, 770 F.3d 443, 449 (6th Cir. 2014); Ruth v. Triumph P'Ships, 577 F.3d 790, 805 (7th Cir. 2009). *See also* Hackler v. Tolteca Enters., No. SA-18-CV-00911-XR, 2019 U.S. Dist. LEXIS 213219, *at 5 (W.D. Tex. Dec. 11, 2019); Gonzales v. Arrow Fin. Servs., LLC, 660 F.3d 1055, 1061 (9th Cir. 2011).

[11] *See* Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507, 511 (5th Cir. 2016).

[12] Id.

[13] 15 U.S.C. § 1692e(2)(A).

[14] 15 U.S.C. § 1692e(5).

[15] 15 U.S.C. § 1692f(6)(C).

[16] 15 U.S.C. § 1692e(10).

[17] Second Proposed Rule, at 12,676.

[18] *See* CHRISTOPHER L. PETERSON & DAVID MCNEILL, UNWARRANTED: SMALL CLAIMS COURT ARREST WARRANTS IN PAYDAY LOAN DEBT COLLECTION 3–4, 29–30 (2019), https://consumerfed.org/wp-content/uploads/2020/02/Payday-Lending-in-Small-Claims-Court.pdf
; Anjali Tsui, *They Loan You Money. Then They Get a Warrant for Your Arrest*, PROPUBLICA (Dec. 3, 2019), https://www.propublica.org/article/they-loan-you-money-then-they-get-a-warrant-for-your-arrest.

protections with a loose and forgiving standard that deprives consumers of their ability to effectively counteract unfair, deceptive and abusive debt collection practices.

V. CONCLUSION

Many aspects of the CFPB'S proposed rule are not supported by the Bureau's research that supposedly validates it. As the Bureau's study shows, many consumers lack real understanding of time-barred debts, particularly the revival of those debts. The study does support, however that the collection of time-barred debt should be prohibited. Despite this, the CFPB is making consumers even more vulnerable by adopting a "know or should know standard" that is far weaker than the more protective strict liability standard. By doing so, the Bureau is making it even harder for consumers to defend themselves against the very practices it purportedly seeks to prevent. Therefore, we urge the CFPB to prohibit all collection of time-barred debt instead of moving forward with this proposed rule.